No. _____

In the Supreme Court of the United States

FAIRFIELD SENTRY LTD. (IN LIQUIDATION); FAIRFIELD SIGMA LTD. (IN LIQUIDATION); FAIRFIELD LAMBDA LTD. (IN LIQUIDATION); KENNETH M. KRYS; AND GREIG MITCHELL,

Petitioners,

v.

CITIBANK NA LONDON, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

APPENDIX
Volume II of II

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March 13, 2026

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Appendix G

UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

Adv. Proc. No. 10-03496
(Administratively Consolidated)

FAIRFIELD SENTRY LIMITED (IN LIQUIDATION), et al.,
Plaintiffs,
v.
THEODOOR GGC AMSTERDAM, et al.,
Defendants.

Filed: Dec. 14, 2020

MEMORANDUM DECISION GRANTING IN PART AND DENYING IN PART DEFENDANTS' RENEWED MOTION TO DISMISS

STUART M. BERNSTEIN[1]

United States Bankruptcy Judge

This litigation arises from the Ponzi scheme perpetrated by Bernard L. Madoff through the

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[1] This motion is made by 365 Defendants listed on Appendix A to the *Consolidated Memorandum of Law in Support of Defendants' Renewed Motion to Dismiss Pursuant to 11 U.S.C. §§ 561(d), 546(e), and 546(g) and for Insufficient Service of Process Under the Hague Service Convention*, dated Mar. 16, 2020 ("*Defendants Brief*") (ECF Doc. # 2903). Cleary Gottlieb represents a subset of the Defendants but has served as

investment advisory division of Bernard L. Madoff Investment Securities LLC ("BLMIS"). The Plaintiffs, Kenneth M. Krys and Greig Mitchell (together, the "Liquidators"),[2] sue in their capacities as liquidators and foreign representatives of Fairfield Sentry Limited ("Sentry"), Fairfield Sigma Limited ("Sigma"), and Fairfield Lambda Limited ("Lambda," and collectively with Sentry and Sigma, the "Funds"), foreign feeder funds that invested with BLMIS. In *Fairfield Sentry Ltd. v. Theodoor GGC Amsterdam* (*In re Fairfield Sentry Ltd.*), 596 B.R. 275 (Bankr. S.D.N.Y. 2018) ("*Fairfield II*"), *appeal docketed*, No. 1:19-cv-03911-VSB (S.D.N.Y. May 1, 2019), the

Court dismissed all of the Liquidators' claims except for avoidance claims under British Virgin Islands ("BVI") law to recover "unfair preferences" and "undervalue transactions" (together, the "BVI Avoidance Claims") and constructive trust claims against the so-called Knowledge Defendants (the

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coordinating counsel to all Defendants. A list of the other defense counsel can be found in Appendix H to the *Defendants Brief*.

The Liquidators' actions to recover redemptions paid by the Funds were administratively consolidated for pretrial purposes. (*Amended Order Authorizing the Consolidation of Redeemer Actions Pursuant to Federal Rule of Bankruptcy Procedure 7042*, dated Nov. 17, 2010 (ECF Doc. # 25).) Unless otherwise specified, references to docket entries refer to the electronic docket of the consolidated proceeding, *Fairfield Sentry Limited (In Liquidation) v. Theodoor GGC Amsterdam*, Adv. Proc. No. 10-03496 (SMB).

[2] Different individuals have served as Liquidators of the Funds. When used in this memorandum decision, the term refers to the individuals serving in that position during the referenced time period.

"Constructive Trust Claims"). According to the Liquidators, the Knowledge Defendants knew when they redeemed their interests in the Funds that the redemption prices were inflated because they were based on Sentry's fictitious BLMIS account statements listing securities that did not exist.

The Defendants have now renewed their motion to dismiss (the "Motion") arguing that the remaining claims are barred by 11 U.S.C. § 546(e) (the "Safe Harbor") and service of process was insufficient.[3] The Liquidators oppose the Motion.[4] For the reasons stated, the BVI Avoidance Claims are dismissed, the Constructive Trust Claims are not dismissed and the motion to dismiss for insufficient service of process is denied.

BACKGROUND

Unless otherwise indicated, the background information is taken from the well-pleaded factual allegations of the *Third Amended Complaint*, dated Jan. 9, 2020 ("*Citibank Complaint*") (ECF Adv. Proc. No. 10-03622 Doc. # 79) in *Fairfield Sentry Limited v. Citibank NA London*, Adv. Proc. No. 10-03622 (SMB) ("Citibank Action")[5] and other information the Court

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[3] *See Defendants Brief*; *see also Consolidated Reply Memorandum of Law in Further Support of Defendants' Renewed Motion to Dismiss*, dated June 19, 2020 ("*Defendants Reply*") (ECF Doc. # 3036).

[4] *See Memorandum of Law in Opposition to Defendants' Renewed Motion to Dismiss*, dated May 29, 2020 ("*Liquidators Brief*") (ECF Doc. # 3033).

[5] The Liquidators have served approximately 300 complaints. To facilitate consideration of the Safe Harbor defense on an omnibus basis, and following consultation with the parties, the

may consider on a motion to dismiss for failure to state a claim. The Court will also describe the procedural history that is relevant to the instant Motion.

A. The Funds' Investments With BLMIS

The Funds were organized under BVI law. (¶¶ 18, 26.) Sentry sold shares to foreign investors and invested 95% of the proceeds with BLMIS. (¶¶ 2, 33, 35.) Sigma and Lambda were "funds of funds"—they sold shares to investors and invested those proceeds with Sentry, which, in turn, invested those funds with BLMIS. (¶¶ 2, 33.) Hence, the Funds invested virtually all of their assets directly or indirectly with BLMIS. (¶¶ 4, 34.)

In December 2008, Madoff admitted to operating the investment advisory business of BLMIS as a Ponzi scheme, and BLMIS was placed into liquidation pursuant to section 78eee of the Securities Investor Protection Act, 15 U.S.C. §§ 78aaa, *et seq*, ("SIPA"). (¶¶ 17, 84-88.) The Funds ceased making redemption payments after Madoff's arrest. (¶ 89.) Shortly after the collapse of BLMIS, certain of the Funds' creditors and shareholders commenced insolvency proceedings against the Funds in the Commercial Division of the Eastern Caribbean High Court of Justice, British Virgin Islands ("BVI Court"). (¶¶ 90-93.) The BVI Court appointed the Liquidators, and they commenced

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Court designated the *Citibank Complaint* as the representative complaint on certain issues pertaining to the Safe Harbor. (*See Scheduling Order*, dated Apr. 14, 2020 ("*Scheduling Order*") at ¶ 1(a) (ECF Doc. # 3028).) "(¶ _)" refers to paragraphs in the *Citibank Complaint*. The extensive history of the Liquidators' actions against former investors of the Funds is discussed at length in *Fairfield II*.

ancillary proceedings in this Court under chapter 15 of the Bankruptcy Code to obtain recognition of the BVI liquidation proceedings as "foreign main proceedings." (¶¶ 27, 28, 94.) The Court granted the Liquidators' recognition applications on July 22, 2010. (¶ 28.)

While the Funds were operational, the shares in the Funds were redeemable at a price equal to the respective Fund's net asset value ("NAV") per share calculated by dividing the value of the Fund's assets by the number of outstanding shares, net of certain expenses. (¶¶ 4, 35.) Each Fund's Articles of Association ("Articles") specified that the Fund would issue certificates with respect to the NAV, and "[a]ny certificate as to the Net Asset Value per Share or as to the Subscription Price or the Redemption Price therefor *given in good faith by or behalf of the Directors shall be binding* on the parties." *Fairfield II*, 596 B.R. at 283. The Funds' Directors retained Citco Group Limited ("Citco Group") and its affiliates (collectively, "Citco") to perform administrative and custodial functions for the Funds. (¶ 45.) Citco Fund Services (Europe) B.V. ("Citco Administrator") and its delegate Citco (Canada) Inc. served as the Funds' administrators (together, the "Administrators") with responsibility for calculating the NAV and issuing corresponding certificates to investors. (¶¶ 45, 72, 73.) In calculating the NAV of the Funds, the Administrators typically relied on the pricing information supplied by BLMIS. (¶ 69.) Citco Bank Nederland N.V. Dublin Branch ("Citco Bank") and Citco Global Custody served as the Funds' custodians

(together, the "Custodians").[6] However, the Custodians did not actually hold the assets; BLMIS served as its own custodian, and the custody statements issued by the Custodians merely copied information from Sentry's BLMIS account statements. (¶¶ 49, 69.)

B. Allegations of Knowledge and Bad Faith

The preparation of the certificates setting forth the NAV per share was delegated to Citco. The *Citibank Complaint* alleges that Citco did not issue the certificates in good faith because it knew or willfully blinded itself to the fact that the Funds' BLMIS investments were worthless or virtually worthless. As a result of Citco's bad faith, the Funds were not bound by Citco's certifications regarding the NAV. (¶¶ 45-74.) The Defendants do not challenge the sufficiency of the allegations of Citco's bad faith at this time and I assume the sufficiency of the allegations of bad faith for now.[7]

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[6] The Liquidators allege that the Administrators and the Custodians worked with multiple other Citco affiliates to provide services to the Funds. All Citco entities worked under the direction and control of Citco Group. (¶¶ 72-73.)

[7] The *Citibank Complaint* alleges that the Funds were innocent dupes unaware that BLMIS was a Ponzi scheme and the NAVs were inflated. (¶ 38 ("The Funds believed that the amounts provided in connection with such withdrawals represented the proceeds arising from the profitability of or to continue investment in BLMIS."); *see* ¶ 39 ("[T]he money paid by the Funds (directly in the case of Sentry and indirectly in the cases of Sigma and Lambda) to BLMIS on account of Sentry was, at all relevant times and unknown to the Funds, misused and misappropriated by Madoff as part of his Ponzi scheme.").) In *Fairfield II*, the Court noted that if the Director were not aware

The *Citibank Complaint* also alleges that Citibank NA London ("Citibank") knew or should have known that the redemption payments were inflated due to Madoff's fraud. (¶¶ 75-83.) Again, the Defendants do not challenge the legal sufficiency of these allegations at this time. I assume, therefore, for the purpose of the Motion that the Liquidators have adequately alleged Citco's bad faith and the Knowledge Defendants' actual or constructive knowledge that the NAVs per share and, hence, the redemption prices were inflated.

C. The Transfers

In the Citibank Action, the Liquidators seek to recover redemption payments Sentry made to Citibank totaling $58,484,257.49 between May 17, 2004 and November 19, 2008. (¶¶ 40-42; *see Citibank Complaint*, Ex. A.) The Liquidators allege that Sentry had insufficient assets and was unable to pay its debts as they fell due at the time the redemption payments were made, Sentry received no consideration or significantly less consideration from Citibank in exchange for the payments, and the payments were in excess of the amounts previously paid by Citibank to purchase the shares. (¶¶ 43-44.) The Constructive

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of Citco's bad faith certifications, they, and hence the Funds, mistakenly relied on Citco, a variation of the mistake claims rejected by the Privy Council in *Fairfield Sentry Ltd.* (*In Liquidation*) *v. Migani*, [2014] UKPC 9 ("*Migani* "). *Fairfield II*, 596 B.R. at 300. In any event, the pertinent inquiry is what the Knowledge Defendants knew at the time of the redemptions, not what Citco knew. Even if Citco acted in good faith, the Knowledge Defendants cannot escape the consequences resulting from their knowledge that the redemption prices were based on fictitious assets.

Trust Claim seeks to recover all redemption payments from Citibank and certain unnamed beneficial shareholders on whose behalf Citibank may have invested in Sentry, (¶¶ 14, 96-103), and the BVI Avoidance Claims seek recovery of the payments made within two years of the appointment of the Liquidators in Sentry's BVI liquidation proceeding. (¶¶ 104-35.)

D. The Safe Harbor and the Renewed Motion to Dismiss

In their prior dismissal motion, the Defendants contended that the Liquidators' claims were barred by application of the Safe Harbor, 11 U.S.C. § 546(e). The Court agreed that Bankruptcy Code § 561(d) extends the Safe Harbor to the BVI Avoidance Claims, *Fairfield II*, 596 B.R. at 306-14, but declined to rule on the merits because the Supreme Court had issued *Merit Mgmt. Grp. LP v. FTI Consulting, Inc.*, 138 S. Ct. 883 (2018) shortly after the parties' submissions. In *Merit*, the Supreme Court concluded that "the relevant transfer for purposes of the § 546(e) safe-harbor inquiry is the overarching transfer that the trustee seeks to avoid under one of the substantive avoidance provisions." *Id.* at 893; *accord In re Tribune Co. Fraudulent Conveyance Litig.*, 946 F.3d 66, 75, 77 (2d Cir. 2019), *petition for cert. filed*, No. 20-8, 2020 WL 3891501 (U.S. July 6, 2020); *In re Nine West Sec. Litig.*, 20 MD. 2941 (JSR), 2020 WL 5049621, at *14 (S.D.N.Y. Aug. 27, 2020), *appeal docketed*, No. 20-3941 (2d Cir. Nov. 23, 2020). A court must focus on the transferor and transferee of the overarching transfer, and where a qualifying participant such as a financial institution serves as a mere conduit or intermediary in connection with the overarching transaction

between non-qualifying participants, the Safe Harbor does not apply. *See Merit*, 138 S. Ct. at 892, 897; *Tribune*, 946 F.3d at 75.

Merit abrogated the then-existing Second Circuit precedent applying the Safe Harbor even when a qualifying entity acted as a mere conduit or intermediary. *See Official Comm. of Unsecured Creditors of Quebecor World (USA) Inc. v. Am. United Life Ins. Co.* (*In re Quebecor World (USA) Inc.*), 719 F.3d 94, 99 (2d Cir. 2013). The change in the law prompted a flurry of letters from the Liquidators and the Defendants making substantive arguments. Rather than consider the arguments made through the numerous letters, the Court denied the Defendants' motion without prejudice to renewal.

The Defendants now make their renewed Motion seeking dismissal on two grounds with broad applicability across over 300 adversary proceedings commenced by the Liquidators to recover redemptions (the "U.S. Redeemer Actions"). As before, the Defendants contend that the BVI Avoidance Claims are barred by the Safe Harbor. According to the Defendants, the redemptions were made by a "financial institution" within the meaning of 11 U.S.C. § 101(22) because the Funds were customers of Citco Bank which acted as the Funds' agent with respect to the redemptions. (*Defendants Brief* at 12-15.) Redemptions paid by Sentry and Sigma are also safe harbored because those entities were "financial participants" within the meaning of 11 U.S.C. § 101(22A) when the redemptions were made. (*Id.* at 15-23.) Finally, redemptions from Sigma and Lambda are safe harbored for the additional reason that they

were made for the benefit of Sentry—a "financial institution" and "financial participant." (*Id*. at 23-24.)[8] Furthermore, the Defendants contend that the Safe Harbor extends to bar the Constructive Trust Claims because they seek the same relief as the BVI Avoidance Claims. (*Id*. at 29-31.)

The Liquidators oppose the application of the Safe Harbor on several grounds. First, they contend that the Safe Harbor does not apply to the BVI Avoidance Claims because they seek to avoid intentionally fraudulent transfers which are carved out of the Safe Harbor. The Liquidators reach this conclusion by imputing the bad faith of Citco Administrator to the Funds—a result which they claim was uncertain until the Court's ruling in *Fairfield II*. (*Liquidators Brief* at 9-13.) Second, the Safe Harbor does not apply to the Constructive Trust Claims because (i) the Safe Harbor's plain language does not bar the claims, (ii) the precedent extending the Safe Harbor to state common law claims relied on the Supremacy Clause which does not apply to foreign law claims, (iii) prescriptive comity considerations limit the reach of section 546(e), and (iv) the Safe

Harbor does not extend to common law claims concerning intentionally fraudulent transfers. (*Id*. at 13-19.) Third, the Liquidators contest the assertion

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[8] The resolution of these matters is immaterial to the Citibank Action because the parties have stipulated that Citibank, as transferee, is a "financial institution" as defined in 11 U.S.C. § 101(22). (*Scheduling Order* at 2.) Nevertheless, the determination of whether the Funds were covered entities under section 546(e) applies generally to all of the U.S. Redeemer Actions.

that the redemptions were made by a financial institution because the pleadings do not establish that Citco Bank was an agent of the Funds. (*Id*. at 19-21.) Fourth, the redemptions were not made by a financial participant because 11 U.S.C. § 101(22A) precludes a debtor from being a financial participant. (*Id*. at 21-23.)

The Defendants also seek dismissal of the U.S. Redeemer Actions for insufficient service of process pursuant to Rule 12(b)(5) of the Federal Rules of Civil Procedure, made applicable to these adversary proceedings by Rule 7012(b) of the Federal Rules of Bankruptcy Procedure. They assert that the Liquidators were required to serve the Defendants in accordance with the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents ("Hague Service Convention"), and the Liquidators' service of the initial complaints via international mail failed to satisfy its requirements. (*Defendants Brief* at 32-39.) The Liquidators do not deny that mail service failed to meet the strictures of the Hague Service Convention specifically in an adversary proceeding against HSBC Private Bank (Suisse) SA ("HSBC Suisse"), discussed below. Rather, they ask the Court to retroactively approve mail service to HSBC Suisse's U.S. counsel - Cleary Gottlieb - as an alternative means of service to a foreign party pursuant to Federal Civil Rule 4(f)(3). (*Liquidators Brief* at 23-34.) In the event the Court denies their request, the Liquidators ask that the Court exercise its discretion to allow them to re-effect service. (*Id*. at 34-36.)[9]

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[9] After the parties' submissions, the Liquidators wrote the Court seeking leave to submit a five-page sur-reply in response

DISCUSSION

A. Motion to Dismiss For Failure to State a Claim

1. Standards Governing the Motion

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *accord Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678; *accord Twombly*, 550 U.S. at 556. Determining whether a complaint states a plausible claim is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 556 U.S. at 679. Where the burden of pleading rests on the defendant, the Court may stilly dismiss a claim pursuant to Federal Civil Rule 12(b)(6) if the defense

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to three purportedly new arguments raised in the *Defendants Reply*. (*See Letter of David Elsberg*, dated July 3, 2020 ("*Liquidators Letter*") (ECF Doc. # 3038).) Courts generally do not consider arguments raised for the first time in a reply brief, *In re Avaya Inc.*, 573 B.R. 93, 103 (Bankr. S.D.N.Y. 2017) (citing authorities), but can allow the filing of a sur-reply if it chooses to consider the new arguments. Here, the *Liquidators Letter* did not identify arguments made for the first time in the *Defendants Reply*. Rather, it addressed Defendants' arguments previously raised in the *Defendants Brief* (*e.g.*, all of the Liquidators' claims are subject to the Safe Harbor) or Defendants' replies to arguments in the *Liquidators Brief* (*e.g.*, responding to argument that Citco's intent is imputable to the Funds). Therefore, the request to file a sur-reply is denied.

is apparent on the face of the complaint. *Official Comm. of Unsecured Creditors of Color Tile, Inc. v. Coopers & Lybrand, LLP*, 322 F.3d 147, 158 (2d Cir. 2003); *accord Spinelli v. Nat'l Football League*, 903 F.3d 185, 199 (2d Cir. 2018).

In deciding the motion, "courts must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.,* 551 U.S. 308, 322 (2007). In addition, the Court may consider judicial admissions, including those made in briefs. *Scott v. City of White Plains*, No. 10 Civ. 1887 (KBF), 2012 WL 1267873, at *8 n. 7 (S.D.N.Y. Apr. 10, 2012); *Staff Mgmt. Sols., LLC v. Feltman* (*In re Corp. Res. Servs., Inc.*), Adv. Proc. No. 19-01371 (MG), 2020 WL 2278416, at *10 (Bankr. S.D.N.Y. May 6, 2020); *see Purgess v. Sharrock*, 33 F.3d, 134, 144 (2d Cir. 1994) ("A court can appropriately treat statements in briefs as binding judicial admissions of fact.").

2. Safe Harbor

The Safe Harbor, 11 U.S.C. § 546(e), is an affirmative defense for which the Defendants bear the burden of proof. *Fairfield II*, 596 B.R. at 307 (citing precedent). Nevertheless, "[t]he application of Section 546(e) presents a straightforward question of statutory interpretation of the type that is appropriately resolved on the pleadings." *In re Tribune Co. Fraudulent Conveyance Litig.*, No. 11MD2296 (DLC), 2019 WL 1771786, at *7 (S.D.N.Y.

Apr. 23, 2019). Section 546(e) of the Bankruptcy Code provides in pertinent part:

> Notwithstanding sections 544, 545, 547, 548(a)(1)(B), and 548(b) of this title, the trustee may not avoid a transfer that is a ... settlement payment, as defined in section 101 or 741 of this title, made by or to (or for the benefit of) a ... financial institution [or] financial participant . . ., or that is a transfer made by or to (or for the benefit of) a ... financial institution [or] financial participant ... in connection with a securities contract, as defined in section 741(7) . . ., that is made before the commencement of the case, except under section 548(a)(1)(A) of this title.

11 U.S.C. § 546(e). "Put simply, the safe harbor applies where two requirements are met: (1) there is a *qualifying transaction* (i.e., there is a 'settlement payment' or a 'transfer payment ... made in connection with a securities contract) and (2) there is a *qualifying participant* (i.e., the transfer was 'made by or to (or for the benefit of) a ... financial institution')." *Nine West,* 2020 WL 5049621, at *6 (emphasis in original).

Section 561(d), in turn, makes the Safe Harbor applicable in a chapter 15 case to "limit avoidance powers to the same extent as in a proceeding under chapter 7 or 11" of the Bankruptcy Code. As explained in *Fairfield II*, "section 561(d) is necessarily referring to avoidance powers available under non-U.S. law" because a chapter 15 foreign representative cannot exercise the avoidance powers available to a trustee in a chapter 7 or chapter 11 case. 596 B.R. at 310; *see* 11 U.S.C. § 1521(a)(7). Thus, the Safe Harbor bars the

Liquidators' BVI Avoidance Claims to the extent they are analogous to preference claims, state law fraudulent transfer claims or constructive fraudulent transfer claims under Bankruptcy Code § 548(a)(1)(B). In *Fairfield II*, the Court reviewed the elements of the Liquidators' BVI Avoidance Claims. It concluded that unfair preference claims under BVI Insolvency Act § 245 resemble preference claims under 11 U.S.C. § 547(b) and the undervalue transaction claims under BVI Insolvency Act § 246 are similar to constructive fraudulent transfer claims under state and federal law. *Fairfield II*, 596 B.R. at 302, 314. The Liquidators do not argue otherwise, and accordingly, the BVI Avoidance Claims will be barred by the Safe Harbor if they meet its strictures.

a. The Transfers Were Settlement Payments Made "in Connection with" a "Securities Contract"

As the Court previously noted, *see id.* at 314-15, the parties do not dispute that the redemptions at issue were settlement payments made in connection with securities contracts. (*See* ¶ 35 ("In accordance with the Funds' Subscription Agreements, Articles of Association, offering materials and/or other relevant documents ... the Funds paid to shareholders, for each Share tendered for redemption, an amount that was based on each of the respective Funds' purported Net Asset Value, as it was then calculated.")); *cf. Picard v. Ida Fishman Revocable Tr.* (*In re BLMIS*), 773 F.3d 411, 422-23 (2d Cir. 2014) (payments to BLMIS investors were settlement payments on account of securities contracts), *cert. denied*, 576 U.S. 1044 (2015). Therefore, except for the Liquidators'

argument that the BVI Avoidance Claims are subject to the carveout for intentional fraudulent transfer claims, addressed separately below, the remaining issue on the applicability of the Safe Harbor to the BVI Avoidance Claims is whether the redemptions were made by, to, or for the benefit of a qualifying entity such as a "financial institution" of a type identified in the statute.

b. The Transfers Were Made by a Financial Institution as Agent for Its Customer

i. Citco Bank Is a Financial Institution

The Bankruptcy Code defines the term "financial institution" to include:

> a Federal reserve bank, or an entity that is a commercial or savings bank, industrial savings bank, savings and loan association, trust company, federally-insured credit union, or receiver, liquidating agent, or conservator for such entity *and, when any such* Federal reserve bank, receiver, liquidating agent, conservator or *entity is acting as agent* or custodian *for a customer* (whether or not a "customer", as defined in section 741) *in connection with a securities contract* (as defined in section 741) *such customer ...* .

11 U.S.C. § 101(22)(A) (emphasis added).

All of the redemption payments were made by the Dublin Branch of Citco Bank where the Funds maintained accounts. (*Foreign Representatives'*

Memorandum of Law in Opposition to Defendants' Consolidated Memorandum of Law and in Further Support of Foreign Representatives' Motion for Leave to Amend Complaints, dated Mar. 31, 2017 ("*Liquidators 2017 Brief*") at 67 & n. 89 (ECF Doc. # 1336);[10] *accord* Transcript of 3/27/20 Hr'g at 15:13-15 ("MR. ELSBERG: ... Your question earlier about the flow of payments through Citco -- we agreed that it did go through Citco and so I think all that remains is to identify a complaint.") (ECF Doc. # 3061).) Citco Bank qualifies as a "financial institution" because it has been a bank regulated by the De Nederlandsche Bank ("DNB") (the central bank of the Netherlands) since December 31, 1985.[11] The Court may take judicial notice of bank registration information provided by DNB's website as its accuracy cannot reasonably be questioned. Fed. R. Evid. 201(b)(2) ("The court may judicially notice a fact that is not subject to reasonable dispute because it can be accurately and readily

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[10] The Liquidators did not dispute or object to the Court's consideration of this admission after the Defendants identified the admission in their moving brief. (*See Defendants Brief* at 13.)

[11] *See* De Nederlandsche Bank, *Information Detail: Citco Bank Nederland N.V.*, https://www.dnb.nl/en/supervision/publicregister/WFTKF/detail.jsp?id=26bbcae35848e311b55a005056b672cf# (last visited Nov. 28, 2020). In addition, Citco Bank's Dublin branch, the paying bank, is registered with the Central Bank of Ireland as a "credit institution" defined as "(a) an undertaking whose business is to receive deposits or other repayable funds from the public and to grant credits for its own account, or (b) an electronic money institution." *See* Central Bank of Ireland, *Financial Service Provider Profile: Citco Bank Nederland NV Dublin Branch*, http://registers.centralbank.ie/FirmDataPage.aspx?firmReferenceNumber=C27278 (last visited Nov. 28, 2020).

determined from sources whose accuracy cannot reasonably be questioned."); *see Enron Corp. v. Bear, Stearns Int'l Ltd.* (*In re Enron Corp.*), 323 B.R. 857, 869 (Bankr. S.D.N.Y. 2005) (taking judicial notice of various public and quasi-public bodies including the United Kingdom Financial Services Authority in determining that an entity was covered by the Safe Harbor); *cf. Tribune*, 946 F.3d at 78 (Computershare was a "financial institution" for the purposes of Section 546(e) because it is a trust company and a bank based on Office of the Comptroller of the Currency records); *Holliday v. K Rd. Power Mgmt., LLC* (*In re Boston Generating LLC*), 617 B.R. 442, 489 (Bankr. S.D.N.Y. 2020) (finding that the Bank of New York is a "financial institution" for the purposes of Section 546(e) because it is a bank pursuant to the Office of the Comptroller website).

ii. The Funds, as Customers of Citco Bank, Were Also Financial Institutions

Under the definition of "financial institution," quoted *supra*, a *customer* of a financial institution such as a bank is also deemed to be a financial institution if the bank acts as the customer's agent in connection with a securities contract. Bankruptcy Code § 741(2) defines the term "customer" for use in stockbroker liquidations under subchapter III of chapter 7, but Bankruptcy Code § 101(22)(A) specifies that the term "customer" is not limited to section 741(2)'s definition when determining whether an entity is a financial institution. The ordinary meaning of customer is "someone who buys goods or services." *Tribune*, 946 F.3d at 79 (quoting *UBS Fin. Servs., Inc.*

v. W. Virginia Univ. Hosps., Inc., 660 F.3d 643, 650 (2d Cir. 2011)); *accord Customer*, BLACK'S LAW DICTIONARY (11th ed. 2019) (a "customer" includes "[a] buyer or purchaser of goods or services").

The *Citibank Complaint* does not spell out the relationship between Sentry or the other Funds on the one hand and Citco Bank on the other, or Citco Bank's role in connection with the securities contracts pursuant to which the Funds paid the redemptions. However, as noted, the Liquidators admitted in the *Liquidators 2017 Brief* filed in connection with the previous motion to dismiss, and reiterated earlier this year during a conference, that the redemption payments were made from the Funds' Citco Bank account in Ireland.

Thus, the Funds held accounts with Citco Bank from which the redemptions were paid. An account holder is a "customer" of the bank under U.S. law. *See* N.Y. U.C.C. § 4- 104(1)(e) (defining "customer" as "any person having an account with a bank or for whom a bank has agreed to collect items and includes a bank carrying an account with another bank."). While U.S. law is not controlling, it is nevertheless persuasive on this point. Further, the Liquidators have not challenged the Defendants' contention that the Funds were customers of Citco Bank, (*see Defendants Brief* at 11-14), but to the extent they do, that argument is deemed abandoned. *Purdie v. Brown*, No. 14 Civ. 8490(NSR), 2015 WL 6741875, at *8 (S.D.N.Y. Nov. 3, 2015) (plaintiff's failure to respond to contentions raised in a motion to dismiss constitutes an abandonment of those claims) (citing authorities).

Next, Citco Bank acted as the Funds' agent in connection with the securities contract underlying the redemptions. In *Tribune Co. Fraudulent Conveyance Litig.*, the Second Circuit applied the common-law standard for establishing an agency relationship which requires: (1) the principal's manifestation of intent to grant authority to the agent, (2) agreement by the agent, and (3) the principal's maintenance of control over key aspects of the undertaking. 946 F.3d at 79 (citing *Commercial Union Ins. Co. v. Alitalia Airlines, S.p.A.*, 347 F.3d 448, 462 (2d Cir. 2003)); *accord Nine West*, 2020 WL 5049621, at *8.

Once again, the Liquidators' admission that redemptions were paid by Citco Bank establishes the necessary agency. It is implausible to infer that Citco Bank made the redemption payments to specific redeemers in specific amounts absent the Funds' directions to do so. Moreover, Citco Bank accepted those directions by executing the redemption payments.

Based on the foregoing, the Funds were customers of Citco Bank who acted as their agents in connection with the securities contracts pursuant to which the redemption payments were made, and the Funds were, therefore "financial institutions" within the meaning of 11 U.S.C. § 546(e).[12] Accordingly, the BVI Avoidance Claims alleged in the *Citibank Complaint* are barred by 11 U.S.C. § 561(d).

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[12] Because the Court finds that the Funds were "financial institutions," it does not address the Defendants' alternative arguments that Sentry and Sigma were "financial participants" or that redemptions paid by Sigma and Lambda were for the benefit of Sentry.

c. Applicability of the Exception Under Section 548(a)(1)(A)

The Safe Harbor does not shield claims to avoid intentional fraudulent transfers under 11 U.S.C. § 548(a)(1)(A).[13] *See* 11 U.S.C. § 546(e) (protecting certain transfers from avoidance "except under section 548(a)(1)(A) of this title") (hereinafter, the "Intentional Fraud Exception"). The Liquidators have not asserted claims under section 548(a)(1)(A) nor could they absent the commencement of a case under chapter 7 or 11. *See* 11 U.S.C. § 1521(a)(7) (permitting a court to grant certain relief to a chapter 15 foreign representative "except for relief available under sections ... 544 [and] 548 ... ."). The two BVI Avoidance Claims (*see* ¶¶ 104-20, 125-31) resemble preference claims under section 547(b) of the Bankruptcy Code and constructive fraudulent transfer claims under federal and state law, s*ee Fairfield II*, 596 B.R. at 302, which would be barred by the Safe Harbor.

Nevertheless, the Liquidators assert that the Intentional Fraud Exception is not limited to claims brought under section 548(a)(1)(A), and applies to claims under BVI law to avoid transfers made with the intent to defraud creditors irrespective of the label attached to a claim. (*Liquidators Brief* at 10-11.) They further argue that the BVI Avoidance Claims fall within the Intentional Fraud Exception because Citco Administrator's knowledge is imputable to the Funds, and the *Citibank Complaint* alleges conscious

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[13] Section 548(a)(1)(A) allows the trustee to avoid a transfer made within two years of the bankruptcy filing if the debtor "made such transfer ... with actual intent to hinder, delay, or defraud" creditors.

misbehavior or recklessness by Citco Administrator as well as a motive and opportunity to commit fraud in connection with the redemptions. (*Liquidators Brief* at 10-12.)

The Liquidators' argument lacks merit. First, the Intentional Fraud Exception only applies to intentional fraudulent transfer claims under Bankruptcy Code § 548(a)(1)(A); the Safe Harbor still bars state law intentional fraudulent transfer claims that a U.S. bankruptcy trustee could assert through 11 U.S.C. § 544(b)(1). The Liquidators, as foreign representatives under chapter 15, cannot assert a claim under Bankruptcy Code § 548(a)(1)(A). Instead, they assume that their BVI intentional fraudulent transfer claim is sufficiently analogous to a bankruptcy fraudulent transfer claim for purposes of 11 U.S.C. § 561(d) and therefore comes within the Intentional Fraud Exception. If true, it is also sufficiently analogous to a state law fraudulent transfer claim that is barred. The Liquidators fail to articulate any rationale for equating their BVI intentional fraudulent transfer claim to a U.S. bankruptcy law claim rather than a state law fraudulent transfer claim.

Second, they fail to identify the source of such an intentional fraudulent transfer claim under BVI law.[14] Since the Safe Harbor only prohibits avoidance claims and does not apply to non-avoidance claims absent preemption, discussed below, I limit my consideration to the avoidance provisions under the BVI Insolvency

[14] The Liquidators have not submitted an affidavit by an expert on BVI law to support the existence or elements of such a claim.

Act. The BVI Insolvency Act recognizes four types of voidable transactions. BVI Insolvency Act § 244(1) ("'voidable transaction' means (a) an unfair preference; (b) an undervalue transaction; (c) a floating charge that is voidable under section 247; and (d) an extortionate credit transaction."). The Court has already concluded that the unfair preference and undervalue transaction claims under sections 245 and 246 of the BVI Insolvency Act, respectively, are barred by the Safe Harbor through the operation of 11 U.S.C. § 561(d). The two other avoidance claims concern voidable floating charges under BVI Insolvency Act

§ 247[15] and extortionate credit transactions under BVI Insolvency Act § 248.[16]

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[15] BVI Insolvency Act § 247 states in pertinent part:

(1) Subject to subsection (2), a floating charge created by a company is voidable if

(a) it is created within the vulnerability period; and

(b) it is an insolvency transaction.

(2) A floating charge is not voidable to the extent that it secures

(a) money advanced or paid to the company, or at its direction, at the same time as, or after, the creation of the charge;

(b) the amount of any liability of the company discharged or reduced at the same time as, or after, the creation of the charge;

(c) the value of assets sold or supplied, or services supplied, to the company at the same time as, or after, the creation of the charge; and

(d) the interest, if any, payable on the amount referred to in paragraphs (a) to (c) pursuant to any agreement under which the money was advanced or paid, the liability was discharged or reduced, the assets were sold or supplied or the services were supplied.

. . . .

(4) For the purposes of subsection (2)(c), the value of assets or services sold or supplied is the amount in money which, at the time they were sold or supplied, could reasonably have been expected to be obtained for the sale or supply of the goods or services in the ordinary course of business and on the same terms, apart from the consideration, as those on which the assets or services were sold or supplied to the company.

[16] BVI Insolvency Act § 248 states:

A transaction entered into by the company within the vulnerability period for, or involving the provision of, credit to the company is an extortionate credit transaction if, having regard to the risk accepted by the person providing the credit

As to the former, the BVI Insolvency Act defines a "floating charge" as a "charge created by a company or a foreign company which is, or as created was, a floating charge whether crystallised or not." BVI Insolvency Act § 2(1). The definition is not helpful, but a floating charge sounds like a security interest. *See id.* § 92(1) ("The Court may, on the application of the administrator, make an order authorizing the administrator to dispose of (a) assets of the company that are subject to a security interest that is not a floating charge."). The *Citibank Complaint* does not allege that the transfers to Citibank involved "floating charges." As to the latter, the extortionate credit transaction applies by its terms to "credit transactions," and appears to focus on unconscionable and usurious credit transactions. The transfers to *Citibank* did not concern credit transactions. Finally, neither avoidance claim requires proof of an intent to "hinder, delay or defraud," the critical element of an intentional fraud claim. *See* 11 U.S.C. § 548(a)(1)(A).

Third, as noted, the *Citibank Complaint* alleges that the Funds were duped, believing that their BLMIS investments were worth what the BLMIS monthly statements showed. The Funds were the transferors and if they were duped, they could not have intended to "hinder, delay or defraud" the Funds'

(a) the terms of the transaction are or were such as to require grossly exorbitant payments to be made (whether unconditionally or in certain contingencies) in respect of the provision of credit; or

(b) the transaction otherwise grossly contravenes ordinary principles of fair trading.

other creditors by redeeming investments at prices they believed to be accurate.[17]

3. The Constructive Trust Claims

Under the Supremacy Clause of the United States Constitution, federal law "shall be the supreme Law of the Land ... any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. "In the absence of express congressional command, state law is pre-empted if that law actually conflicts with federal law ... or if federal law so thoroughly occupies a legislative field as to make reasonable the inference that Congress left no room for the States to supplement it." *AP Servs. LLP v. Silva*, 483 B.R. 63, 71 (S.D.N.Y. 2012) (quoting *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 516 (1992)). Several courts have ruled that state law claims that seek to recover transfers shielded by the Safe Harbor are impliedly preempted by 11 U.S.C. § 546(e). *See, e.g.*, *Contemporary Indus. Corp. v. Frost*, 564 F.3d 981, 988 (8th Cir. 2009) (dismissing unjust enrichment and illegal and/or excessive shareholder distribution claims), *abrogated on other grounds by Merit Mgmt. Grp., LP v. FTI Consulting*, 138 S. Ct. 883 (2018); *Nine West*, 2020 WL 5049621, at *15 (dismissing unjust enrichment claims); *AP Servs.*, 483

[17] The Liquidators contend that Citco's bad faith is imputed to the Funds. This is inconsistent with the notion that the Funds were duped. Furthermore, the Court stated in *Fairfield II* that if the Funds knew the NAVs were inflated, either directly or through imputation of Citco's knowledge, "but nonetheless breached their fiduciary duties to the other shareholders by authorizing the payment of inflated redemption prices, the Funds cannot rely on their own misconduct to recover the inflated redemption payments." 596 B.R. at 299.

B.R. at 71 (same); *cf. Hosking v. TPG Capital, L.P.* (*In re Hellas Telecomms. (Lux.) II SCA*), 526 B.R. 499, 510 (Bankr. S.D.N.Y. 2015) (denying dismissal of unjust enrichment claim which alleged facts "substantially identical to an *actual* fraudulent conveyance claim under section 548(a)(1)(A)") (emphasis in original); *Lehman Bros. Holdings Inc. v. JPMorgan Chase Bank, N.A.* (*In re Lehman Bros. Holdings Inc.*), 469 B.R. 415, 451 (Bankr. S.D.N.Y. 2012) (same). Allowing a plaintiff to recover a safe harbored transfer by attaching a different label to the claim would frustrate the purpose of section 546(e). *AP Servs.*, 483 B.R. at 71; *accord Contemporary Indus.*, 564 F.3d at 988; *Official Comm. of Unsecured Creditors of Hechinger Inv. Co. of Del. v. Fleet Retail Fin. Grp.* (*In re Hechinger Inv. Co. of Del.*). 274 B.R. 71, 96 (D. Del. 2002). Relying on these and similar authorities, Defendants contend that the Constructive Trust Claims should be dismissed because they seek to unwind safe harbored redemption payments. (*Defendants Brief* at 29-31.)

I disagree. The Liquidators correctly point out, (*see Liquidators Brief* at 14-16), that the "Supremacy Clause applies to states and is inapplicable to considerations of federal law versus foreign law." *Al-Kurdi v. United States*, 25 Cl. Ct. 599, 601 n. 3 (Cl. Ct. 1992). Courts do not assume that otherwise applicable foreign law is preempted absent express statutory language to that effect. *See LaSala v. Bordier et Cie*, 519 F.3d 121, 138-39 (3d Cir.) (rejecting argument that Congress impliedly preempted Swiss law claims through the enactment of Securities Litigation Uniform Standards Act (SLUSA)), *cert. dismissed*, 555 U.S. 1028 (2008); *In re Petrobras Sec. Litig.*, 169 F.

Supp. 3d 547, 551-52 (S.D.N.Y. 2016) (plain language of SLUSA does not bar Brazilian law claims "[d]espite how well a ban on foreign law claims might fit within the larger statutory scheme"); *Comrie v. IPSCO Inc.*, No. 08-cv-03060, 2008 WL 5220301, at *4-5 (N.D. Ill. Dec. 10, 2008) (rejecting argument that Canadian law claims were preempted by the Employee Retirement Income Security Act (ERISA): "The statutory text of ERISA does not clearly preempt foreign law, only state law. ... Thus, it must be presumed that Congress did not intend ERISA to preempt foreign law.").

Here, the Constructive Trust Claims are based on BVI law and the Defendants have not identified any statutory language that purports to *expressly* preempt the Constructive Trust Claims. Consequently, the Motion to dismiss the Constructive Trust Claims on the ground that they seek to recover safe harbored transfers is denied.

B. Motion to Dismiss for Insufficient Service of Process

When the Liquidators commenced the U.S. Redeemer Actions, the Liquidators served the Defendants, including the foreign Defendants, by mail. For example, the Liquidators served the summons and initial complaint in *Fairfield Sentry Ltd. v. HSBC Private Bank Suisse SA*, Adv. Proc. No. 10-03633 (SMB) (the "HSBC Action")[18] on HSBC Suisse by international registered mail to HSBC

[18] Again, following consultation with the parties, the Court designated the HSBC Action as the representative action with respect to the Defendants' arguments seeking dismissal for insufficient service of process. (*See Scheduling Order* at ¶ 1(a).)

Suisse's address in Switzerland listed on the Funds' records. (*See Declaration of David J. Molton in Support of Liquidators' Memorandum of Law in Opposition to Defendants' Renewed Motion to Dismiss*, dated May 29, 2020 ("*Molton Declaration*") at ¶ 2 (ECF Doc. # 3034).) The Liquidators also served the complaint by mail on HSBC Suisse's U.S. counsel, Cleary Gottlieb Steen & Hamilton LLP ("Cleary Gottlieb"), at its New York office. (*Id*.)

The Defendants seek dismissal of the U.S. Redeemer Actions for insufficient service of process under Federal Civil Rule 12(b)(5). Using the summons and complaint in the HSBC Action as the test case, they argue that the Liquidators were required to effectuate service pursuant to the Hague Service Convention, mail service is not permitted where the member country has objected to that method of service, Switzerland has expressly objected to mail service, and therefore, the Liquidators' 2010 service on HSBC Suisse via international mail was ineffective. (*Defendants Brief* at 32-37.)

The Liquidators do not dispute that mail service on HSBC Suisse failed to satisfy the requirements of the Hague Service Convention. Instead, they seek retroactive approval of their 2010 mail service on HSBC Suisse's U.S. counsel, Cleary Gottlieb, as a form of alternative service pursuant to Federal Civil Rule 4(f)(3).

1. Rule 4(f)(3)

A foreign corporation may be served abroad "in any manner prescribed by Rule 4(f) for serving an individual, except personal delivery under (f)(2)(C)(i)."

Fed. R. Civ. P. 4(h)(2). Rule 4(f), in turn, states in pertinent part:

> **Serving an Individual in a Foreign Country.** Unless federal law provides otherwise, an individual ... may be served at a place not within any judicial district of the United States:
>
> > (1) by any internationally agreed means of service that is reasonably calculated to give notice, such as those authorized by the [Hague Service Convention];
> >
> > . . . or
> >
> > (3) by any means not prohibited by international agreement, as the court orders.

Fed. R. Civ. P. 4(f).

"Courts have repeatedly recognized that there is no hierarchy among the subsections in Rule 4(f)." *Wash. State Inv. Bd. v. Odebrecht S.A.*, 17 Civ. 8118 (PGG), 2018 WL 6253877, at *3 (S.D.N.Y. Sept. 21, 2018); *accord In re GLG Life Tech Corp. Sec. Litig.*, 287 F.R.D. 262, 265 (S.D.N.Y. 2012); *Advanced Aerofoil Techs., AG v. Todaro*, No. 11 Civ. 9505(ALC), 2012 WL 299959, at *1 (S.D.N.Y. Jan. 31, 2012). Hence, "court-directed service under Rule 4(f)(3) is as favored as service under Rule 4(f)(1)," *GLG Life Tech*, 287 F.R.D. at 265 (quoting *Rio Props., Inc. v. Rio Int'l Interlink*, 284 F.3d 1007, 1015 (9th Cir. 2002)), and "[a] plaintiff is *not* required to attempt service through the other provisions of Rule 4(f) before the Court may order service pursuant to Rule 4(f)(3)." *S.E.C. v. Anticevic*, No. 05 CV 6991(KMW), 2009 WL 361739, at *3

(S.D.N.Y. Feb. 13, 2009) (emphasis in original); *see also Madu, Edozie & Madu, P.C. v. Socketworks Ltd. Nigeria*, 265 F.R.D. 106, 115 (S.D.N.Y. 2010) ("Service of process under Rule 4(f)(3) is neither a last resort nor extraordinary relief.") (citation omitted).

An alternative method of service under Rule 4(f)(3) is proper so long as it (1) is not prohibited by international agreement, and (2) comports with constitutional notions of due process. *Odebrecht*, 2018 WL 6253877, at *4; *accord Stream SICAV v. Wang*, 989 F. Supp. 2d 264, 278 (S.D.N.Y. 2013). The decision to approve an alternative method of service is committed to the court's sound discretion. *S.E.C. v. China Ne. Petroleum Holdings Ltd.*, 27 F. Supp. 3d 379, 397 (S.D.N.Y. 2014); *In re S. African Apartheid Litig.*, 643 F. Supp. 2d 423, 433 (S.D.N.Y. 2009). In exercising this discretion, courts in this District routinely require "(1) a showing that the plaintiff has reasonably attempted to effectuate service on the defendant, and (2) a showing that the circumstances are such that the court's intervention is necessary." *Odebrecht*, 2018 WL 6253877, at *6; *accord Peifa Xu v. Gridsum Holding Inc.*, 18 Civ. 3655 (ER), 2020 WL 1508748, at *14 (S.D.N.Y. Mar. 30, 2020). "But nothing in Rule 4(f) itself or controlling case law suggests that a court must always require a litigant to first exhaust the potential for service under the Hague Convention before granting an order permitting alternative service under Rule 4(f)(3)." *GLG Life Tech*, 287 F.R.D. at 266.

2. Service on U.S.-Based Counsel

Initially, the Defendants contend that service on a foreign corporation's U.S. counsel cannot be a proper

method of service under Rule 4(f)(3). (*Defendants Reply* at 17; *Letter of Marc J. Gottridge*, dated July 27, 2020 (ECF Doc. # 3044).) Specifically, Rule 4(f) sets forth the methods in which an individual "may be served at a place *not within any judicial district of the United States*." Fed. R. Civ. P. (4)(f) (emphasis added); *see also* Fed. R. Civ. P. 4(h)(2) (a foreign corporation must be served "at a place not within any judicial district of the United States, in any manner prescribed by Rule 4(f) ....").

Courts are split on the issue of whether domestic service on a foreign defendant's U.S. counsel can constitute service "at a place not within" the U.S. under Rule 4(f)(3), but the majority view service on U.S.-based counsel a permissible method under Rule 4(f)(3). *See, e.g.*, *Zanghi v. Ritella*, 19 Civ. 5830 (NRB), 2020 WL 589409, at *7 (S.D.N.Y. Feb. 5, 2020); *Odebrecht*, 2018 WL 6253877, at *4; *NYKCool A.B. v. Pac. Int'l Servs., Inc.*, No. 12-cv-5754 (LAK), 2015 WL 998455, at *4-5 (S.D.N.Y. Mar. 5, 2015); *Atlantica Holdings, Inc. v. BTA Bank JSC*, 13 Civ. 5790 (JMF), 2014 WL 12778844, at *3 (S.D.N.Y. Mar. 31, 2014); *Jian Zhang v. Baidu.com Inc.*, 293 F.R.D. 508, 515 (S.D.N.Y. 2013); *GLG Life Tech*, 287 F.R.D. at 267; *Arista Records LLC v. Media Servs. LLC*, No. 06 Civ. 15319(NRB), 2008 WL 563470, at *2 (S.D.N.Y. Feb. 25, 2008); *RSM Prod. Corp. v. Fridman*, No. 06 Civ. 11512(DLC), 2007 WL 2295907, at *6 (S.D.N.Y. Aug. 10, 2007); *Enrenfeld v. Salim a Bin Mahfouz*, No. 04 Civ. 9641(RCC), 2005 WL 696769, at *3 (S.D.N.Y. Mar. 23, 2005); *contra Convergen Energy LLC v. Brooks*, 20- cv-3746 (LJL), 2020 WL 4038353, at *7 (S.D.N.Y. July 17, 2020) (service on domestic counsel is not permissible under Rule 4(f) because the "place"

of service is within the U.S.). In *Odebrecht*, District Judge Gardephe observed that alternative service to a U.S. attorney is permissible "because such service requires transmission of service papers to a foreign defendant via a domestic conduit like a law firm or agent - ultimately, the foreign individual is served and thereby provided notice outside a United States judicial district, in accordance with Rule 4's plain language." 2018 WL 6253877, at *4 (quoting *In re Cathode Ray Tube (CRT) Antitrust Litig.*, 27 F. Supp. 3d 1002, 1010 (N.D. Cal. 2014)) (alteration omitted); *accord RMS Prod. Corp.*, 2007 WL 2295907, at *6 ("Courtordered service on counsel made under Rule 4(f)(3) serves as effective authorization 'by law' for counsel to receive service."); *see Freedom Watch, Inc. v. Org. of the Petroleum Exporting Countries (OPEC)*, 766 F.3d 74, 84 (D.C. Cir. 2014) ("[W]hile Rule 4(f)(3) addresses service only 'at a place not within any judicial district of the United States,' Fed.R.Civ.P. 4(f), arguably, when a court orders service on a foreign entity through its counsel in the United States, the attorney functions as a mechanism to transmit the service to its intended recipient abroad."). Hence, the "relevant circumstance is where the defendant is, and not the location of the intermediary." *Odebrecht*, 2018 WL 6253877, at *4; *accord Bazarian Int'l Fin. Assocs., L.L.C. v. Desarrollos Aerohotelco, C.A.*, 168 F. Supp. 3d 1, 14 (D. D.C. 2016) (criticizing a narrow interpretation of Rule 4(f) because it "assumes, without explanation, that 'service' is complete when the foreign defendant's United States counsel physically receives the summons"). The Court agrees with *Odebrecht* and the other cases ruling that service

to a foreign defendant via a domestic conduit is permissible under Rule 4(f)(3).

When seeking approval of alternative service through counsel, the movant must show adequate communication between the counsel and the party to be served. *GLG Life Tech*, 287 F.R.D. at 267. Here, HSBC Suisse has undoubtedly been in regular contact with Cleary Gottlieb and has actively participated in the HSBC Action since at least September 2010 (*see Motion of Moving Defendants to Withdraw the Reference of the Above-Captioned Adversary Proceedings to the Bankruptcy Court*, dated Sept. 20, 2010 (filed by Cleary Gottlieb attorney Evan A. Davis, Esq. on behalf of HSBC Suisse *et al*.) (ECF Adv. Proc. No. 10-03633 Doc. # 2)) and thereafter. *See Baidu.com Inc.*, 293 F.R.D. at 515 ("service on Baidu's counsel would satisfy the requirements of due process, as Baidu has actual notice of this lawsuit and there is evidence of adequate communication between Baidu and counsel") (citation and internal quotation marks omitted).

3. Not Prohibited by International Agreement

Under Rule 4(f)(3), the proposed method of service must not be prohibited by international agreement, and the Defendants contend that mail service to Cleary Gottlieb runs afoul of the Hague Service Convention. (*Defendants Reply* at 17-18.) This argument lacks merit. When service is made on domestic counsel, the Hague Service Convention is not implicated because no documents are transmitted abroad. *Baidu.com Inc.*, 293 F.R.D. 515; *GLG Life Tech*, 287 F.R.D. at 267; *cf. Volkswagenwerk*

Aktiengesellschaft v. Schlunk, 486 U.S. 694, 707 (1988) ("Where service on a domestic agent is valid and complete under both state law and the Due Process Clause, our inquiry ends and the [Hague Service Convention] has no further implications."). Here, Cleary Gottlieb was served domestically, and the Hague Service Convention is therefore inapplicable.

4. Prior Attempt at Service and Other Considerations

As stated, the Court in the exercise of its discretion may consider whether the plaintiff has reasonably attempted service on the defendant as well as other surrounding circumstances. In addition to serving Cleary Gottlieb by mail, the Liquidators served the summons and initial complaint on HSBC Suisse in Switzerland by international mail in 2010. (*Molton Declaration* at ¶ 2.) In serving HSBC Suisse by mail, the Liquidators relied on a provision in subscription agreements with Sentry under which HSBC Suisse consented to the jurisdiction of New York courts and service by mail for "any suit, action or proceeding with respect to [the subscription agreement] and the Fund." (*See Declaration of David J. Molton in Further Support of Motion for Leave to Amend and in Opposition to Defendants' Motion to Dismiss*, dated Mar. 31, 2017, Ex. A at ¶ 19 (emphasis added) (ECF Doc. # 1337).)

The Court concluded in connection with the prior motion to dismiss that the U.S. Redeemer Actions were not proceedings with respect to the subscription agreements. *Fairfield Sentry Ltd. v. Theodoor GGC Amsterdam* (*In re Fairfield Sentry Ltd.*), No. 10- 13164 (SMB), 2018 WL 3756343, at *10-12 (Bankr. S.D.N.Y.

Aug. 6, 2018) ("*Fairfield I*"). Until the Court issued *Fairfield I* in August 2018, the Liquidators had a reasonable basis to believe that they had properly served HSBC Suisse by mail in accordance with the subscription agreements. After the Court issued *Fairfield I* and *Fairfield II*, the parties entered into detailed stipulations in 2019 resolving the prior motion to dismiss and identifying the issues to be raised in the instant Motion to dismiss including "whether service was properly effected." (*See Stipulated Order Granting in Part and Denying in Part Moving Defendants' Motions to Dismiss and Plaintiffs' Motion for Leave to Amend*, so-ordered on Apr. 15, 2019 at § II.A (ECF Adv. Proc. No. 10-3633 Doc. # 81).)[19]

Other factors also militate in favor of allowing mail service on Cleary Gottlieb, specifically cost and delay. According to an estimate the Liquidators provided, the cost associated with re-serving HSBC Suisse and the other Swiss Defendants would total $272,441 (*Motion Declaration* at ¶¶ 4-12; Ex. 3), and the process would take four months or more. (*Liquidators Brief* at 32-33.) Courts often consider the cost and delay associated with service under the Hague Service Convention or other treaties when approving alternative service under Rule 4(f)(3). *Odebrecht*, 2018 WL 6253877, at *8-9; *GLG Life Tech*, 287 F.R.D. at 266-67.

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[19] Because the parties specifically contemplated that the issue of proper service would be litigated through the current Motion, the Defendants' argument that the Liquidators have ignored the Court's ruling in *Fairfield I* (*see Defendants Reply* at 18-19) is without merit.

The issue of cost is particularly compelling in this case. The *Citibank Complaint* alleges that the Funds were insolvent or rendered insolvent by the transfers, (¶¶ 7, 13, 39), and their financial situation is not much better today. After the chapter 15 cases were filed, the Liquidators and the BLMIS SIPA trustee entered into a settlement pursuant to which the latter entered judgments in this Court in the amount of $3,054,000,000 against Sentry, $752,300,000 against Sigma and $52,900,000 against Lambda. (¶ 13.) Among other things, Sentry, the BLMIS customer, received an allowed $230 million claim in the BLMIS SIPA proceeding. *In re Fairfield Sentry Ltd.,* 539 B.R. 658, 662 (Bankr. S.D.N.Y. 2015), *aff'd,* 690 F. App'x 761 (2d Cir.) (summary order), *cert. denied*, 138 S. Ct. 285 (2017). Suffice it to say that the judgments dwarf the BLMIS claim and the Funds appear to still be insolvent. Forcing the Liquidators to expend significant sums to effect service under the Hague Service Convention when cheaper and equally effective alternatives exist will adversely affect the amount available for ratable distribution to the Funds' creditors and shareholders. Moreover, HSBC Suisse has had actual notice of the HSBC Action, has actively litigated for a decade through capable counsel, "and, thus, as a practical matter, the purpose of the service requirement has already been accomplished." *Arista Records*, 2008 WL 563470, at *2; *accord Atlantica Holdings*, 2014 WL 12778844, at *3.

5. Retroactive Approval

The stumbling block, however, is retroactive approval. As the Defendants argue, retroactive approval of a method of service pursuant to Rule

4(f)(3) is impermissible. (*Defendants Reply* at 16.) Rule 4(f)(3) permits service "by other means not prohibited by international agreement, *as the court orders*." (Emphasis added). The emphasized portion denotes that the party must receive court approval prior to service. *Fed. Trade Comm'n v. Pecon Software Ltd.*, No. 12 Civ. 7186(PAE), 2013 WL 4016272, at *9 (S.D.N.Y. Aug. 7, 2013); *United States v. Machat*, No. 08 Civ. 7936(JGK), 2009 WL 3029303, at *4 (S.D.N.Y. Sept. 21, 2009); 1 Moore's Federal Practice § 4.52 (3d ed. 2020) ("The language of Rule 4(f)(3) permitting service 'as the court orders' requires *prior* approval of the service method by court order before it is used.") (emphasis in original).[20]

Nonetheless, the Liquidators request alternative relief in the form of additional time to re-effect service on HSBC Suisse (*Liquidators Brief* at 34-35)—an issue to which I now turn.

6. Additional Time to Effect Service

The Defendants seek dismissal for failure to make timely service. (*Defendants Brief* at 38-39; *Defendants Reply* at 20.) The general rule under Federal Civil Rule 4(m) that service must be made on a defendant

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[20] The District Court in *Exp.-Imp. Bank of the United States v. Asia Pulp & Paper Co., Ltd.*, No. 03Civ.8554(LTS)(JCF), 2005 WL 1123755 (S.D.N.Y. 2005) retroactively approved a method of service under Rule 4(f)(3) where such service had proved effective in providing notice to the defendant. *Id.* at *5. However, "defective service cannot be ignored on the mere assertion that defendant had 'actual notice.'" *Pecon Software*, 2013 WL 4016272, at *9 (quoting *Weston Funding, LLC v. Consorcio G Grupo Dina, S.A. de C.V.*, 451 F. Supp. 2d 585, 589 (S.D.N.Y. 2006)).

within 120 days of the time the case was commenced (the limit has since been reduced to 90 days) "does not apply to service in a foreign country under Rule 4(f) [or] 4(h)(2)," FED. R. CIV. P. 4(m), so long as the plaintiff attempts to begin service on a foreign defendant within that timeframe. *USHA (India) Ltd. v. Honeywell Int'l, Inc.*, 421 F.3d 129, 133-34 (2d Cir. 2005); *Trilliant Funding, Inc. v. Marengere* (*In re Bozel S.A.*), 1:16-cv-3739 (ALC), 2017 WL 3175606, at *2 (S.D.N.Y. July 25, 2017). Under the foreign country exception, the court applies a "flexible due diligence standard to determine whether service of process was timely," *Burda Media, Inc. v. Blumenberg*, No. 97 Civ.7167(RWS), 2004 WL 1110419, at *5 (S.D.N.Y. May 18, 2004) (citation omitted), and "assesses the reasonableness of the plaintiff's efforts and the prejudice to the defendant from the delay." *Bozel*, 2017 WL 3175606, at *2.[21]

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[21] Neither party addressed the issue of whether the foreign service exception to Rule 4(m) applies when the plaintiff is seeking to serve a domestic conduit under Rule 4(f)(3). Rather, both sides relied on precedent applying the flexible due diligence standard for determining timeliness of service on a foreign defendant. (S*ee Liquidators Brief* at 35; *Defendants Reply* at 20 (arguing that the Liquidators have failed to show diligence).) The Court will, therefore, apply this standard. In any event, even if the exception did not apply, the service deadline must be extended pursuant to Rule 4(m) upon a showing of "good cause" which balances the "plaintiff's reasonable efforts to effect service" against the "prejudice to the defendant from delay," *Savage & Assocs., P.C. v. Williams Commc'ns*, (*In re Teligent Servs., Inc.*), 324 B.R. 467, 472 (Bankr. S.D.N.Y. 2005) (citation omitted), *aff'd*, 372 B.R. 594 (S.D.N.Y. 2007)—a comparable analysis to that required under the flexible due diligence standard.

Here, as stated above, the Liquidators exercised due diligence. They attempted service on HSBC Suisse in a timely manner consistent with the subscription agreements. The Liquidators had a reasonable basis to believe that they had properly served HSBC Suisse, and not attempt further service, until the issuance of *Fairfield I* in 2018. The service issue nonetheless remained a live dispute, and the parties stipulated to litigating the issue of service of process in connection with the current Motion. The decision to litigate the propriety of past service or seek a different and less costly method of new service, rather than proceed with the costly and time-consuming process of serving the Defendants under the Hague Service Convention, does not signify a lack of due diligence.

Nor have the Defendants identified any prejudice they have suffered as a result of the passage of time. Despite the service issue, they have been actively litigating numerous issues in this Court since 2010, including the dismissal of all of the Liquidators' claims which culminated in this decision, and these threshold issues had to be decided before the litigations could advance.

Accordingly, the Liquidators request to effect service on HSBC Suisse's U.S. counsel, Cleary Gottlieb, is granted. The parties should, in the first instance, meet and confer in an attempt to forego another round of service failing which the Liquidators must serve Clearly Gottlieb by first class mail within sixty days of the date of this memorandum decision. The parties must submit a joint letter to the Court within thirty days of this memorandum decision on the status of their meet and confer.

The Court has considered the parties' other arguments and to the extent not addressed herein, concludes that they lack merit or are mooted by the Court's rulings. Settle orders in each affected adversary proceeding on notice or submit consensual orders.

Dated: New York, New York
December 14, 2021

/s/Stuart M. Bernstein
STUART M. BERNSTEIN
United States Bankruptcy Judge

Appendix H

UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

Adv. Proc. No. 10-03496
(Administratively Consolidated)

FAIRFIELD SENTRY LIMITED (IN LIQUIDATION), et al.,
Plaintiffs,
v.
THEODOOR GGC AMSTERDAM, et al.,
Defendants.

Filed: Dec. 6, 2018

MEMORANDUM DECISION GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTIONS TO DISMISS AND PLAINTIFFS' MOTIONS FOR LEAVE TO AMEND

STUART M. BERNSTEIN[1]
United States Bankruptcy Judge

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[1] The listed attorneys for the Defendants participated at the oral argument; additional defense counsel are set forth in Appendix E to the *Consolidated Memorandum of Law in Opposition to Plaintiffs' Motion for Leave to Amend and in Support of Defendants' Motion to Dismiss*, dated Jan. 13, 2017 ("*Defendants Motion*") (ECF Doc. # 960).

Plaintiffs Kenneth M. Krys and Charlotte Caulfield (together, the "Liquidators"),[2] in their capacities as foreign representatives of Fairfield Sentry Limited ("Sentry"), Fairfield Sigma Limited ("Sigma"), and Fairfield Lambda Limited ("Lambda," and collectively, the "Funds") seek leave to amend their complaints, (*see Memorandum Of Law in Support of Motion for Leave to Amend*, dated Oct. 21, 2016 ("*Liquidators Motion*") (ECF Doc. # 923)), in 305 adversary proceedings pending in this Court in which the Liquidators seek to recover redemptions paid by the Funds to the defendants (collectively, the "U.S. Redeemer Actions").[3] The defendants in the U.S. Redeemer Actions (collectively, the "Defendants") oppose the amendments and seek dismissal of the U.S. Redeemer Actions on various grounds discussed below.

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[2] Different individuals have served as Liquidators of the Funds. When used in this memorandum decision, the term refers to the individuals serving in that position during the referenced time-period.

[3] A list of all U.S. Redeemer Actions is attached as Appendix D to the *Foreign Representatives' Memorandum of Law in Opposition to Defendants' Consolidated Memorandum of Law and in Further Support of Foreign Representatives' Motion for Leave to Amend Complaints*, dated Mar. 31, 2017 ("*Liquidators Reply*") (ECF Doc. # 1336). The U.S. Redeemer Actions were administratively consolidated for pretrial purposes. (*See Amended Order Authorizing the Consolidation of Redeemer Actions Pursuant to Federal Rule of Bankruptcy Procedure 7042*, signed Nov. 17, 2010 (ECF Doc. # 25).) Unless otherwise specified, references to docket entries are to documents filed on the electronic docket of the consolidated proceeding, *Fairfield Sentry Limited* (*In Liquidation*) *v. Theodoor GGC Amsterdam*, Adv. Proc. No. 10- 03496 (SMB).

In a prior decision, the Court concluded that it had subject matter jurisdiction over the U.S. Redeemer Actions, and that the execution of certain Subscription Agreements, without more, did not subject the Defendants to the personal jurisdiction of the Court. *Fairfield Sentry Ltd.* (*In Liquidation*) *v. Theodoor GGC Amsterdam* (*In re Fairfield Sentry Ltd.*), Adv. Proc. No. 10-03496 (SMB), 2018 WL 3756343 (Bankr. S.D.N.Y. Aug. 6, 2018) ("*Prior Decision*"). The Court refrained from addressing the parties' merit-based contentions because the *Prior Decision* did not completely resolve the motions to dismiss for lack of personal jurisdiction. *Id.* at *12. The parties subsequently stipulated to be bound by the merit-based determinations of the motions without prejudice to their jurisdictional objections or the right to seek reconsideration or to appeal. (*Order and Stipulation Between the Liquidators and the Defendants Listed on Appendix A*, "so-ordered" on Sept. 20, 2018 (ECF Doc. # 1735).)

For the reasons set forth below, the Liquidators' motions to amend are denied and the Defendants' motions to dismiss are granted with respect to the Contract and Common Law Claims described below except to the extent the pleading or proposed amendment adequately alleges that a particular Defendant knew that the net asset value ("NAV") as calculated at the time of the redemption payment was mistaken because the Funds' investments with Bernard L. Madoff Investment Securities LLC ("BLMIS") were worthless or nearly worthless. In that situation, the Liquidators may assert a claim to impose a constructive trust on the Defendant. Separately, the motions to dismiss the BVI Avoidance

Claims, also described below, are denied without prejudice to renewal on the basis that the BVI Avoidance Claims (and, possibly, all claims) are barred under 11 U.S.C. §§ 546(e) and 561(d).

BACKGROUND

The background is set forth in the *Prior Decision* and will be repeated or amplified only to the extent necessary to explain this decision.

The Funds were organized under the laws of the British Virgin Islands ("BVI"). Sentry sold shares to foreign investors and invested 95% of the proceeds with BLMIS. Sigma and Lambda were "funds of funds." They also sold shares to investors, but invested the proceeds with Sentry which, in turn, invested those funds with BLMIS. Thus, each of the Funds invested virtually all of their assets with BLMIS directly or indirectly, and the value of their assets derived from the value of their BLMIS investments.

The Funds were governed by their respective Articles of Association ("Articles," and each provision within the Articles, an "Article").[4] The Directors of each Fund (referred to in the Articles as the "Company") were vested with the authority to manage the Fund. (Article 52.) Article 9 described the process

[4] A copy of Sentry's Articles is attached as Exhibit F to the *Declaration of William Hare in Support of Motion for Leave to Amend*, signed Oct. 21, 2016 ("*Hare Declaration*") (ECF Doc. # 925). The Articles for Sigma and Lambda are identical in all material respects to Sentry's and are attached as Exhibits D and E, respectively, to the *Attorney Declaration of Thomas J. Moloney in Opposition to Plaintiffs' Motion for Leave to Amend and in Support of Defendants' Motion to Dismiss*, signed Jan. 13, 2017 ("*Moloney Declaration*") (ECF Doc. # 961).

for the subscription of shares and Article 10 addressed the redemption of shares. With certain exceptions and conditions that are not relevant, Article 10(1) provided that upon written request specifying the number and class of Shares to be redeemed, "the Company ... shall redeem or purchase all or any portion of the Shares registered in the Applicant's name." The redemption payment was due on the Dealing Day which was generally thirty days after the receipt of the redemption request. (Article 10(1)(c).)

The redemption price was determined in accordance with Article 11 as of the Dealing Day. (Article 10(2).) The subscription price for investors buying into the Fund was also determined under Article 11. (Article 9(2).) Under Article 11, the Directors determined the NAV per share by dividing the value of the Fund's net assets by the number of outstanding shares. (Article 11(1)(a), (b).)[5] "Any certificate as to the Net Asset Value per Share or as to the Subscription Price or the Redemption Price therefor *given in good faith by or on behalf of the Directors shall be binding* on the parties." (Article 11(1)(c) (emphasis added).) The Funds delegated the duty to compute the NAV to Citco Fund Services (Europe) BV ("Citco") pursuant to a separate

[5] The three subparagraphs that comprise Article 11(1) are not numbered or lettered. For ease of reference, I have assigned letters to each subparagraph. Article 11(1)(a) refers to the first subparagraph, Article 11(1)(b) to the second and Article 11(1)(c) to the third.

agreement. *See Fairfield Sentry Ltd.* (*In Liquidation*) *v. Migani*, [2014] UKPC 9 ("*Migani*"), ¶ 14.[6]

Prior to December 2008, the Directors certified the NAV for each subscription and redemption in the belief that Sentry's investment with BLMIS had substantial value. In December 2008, however, Madoff admitted to operating the investment advisory business of BLMIS as a Ponzi scheme, and BLMIS was placed into a liquidation proceeding pursuant to section 78eee of the Securities Investor Protection Act, 15 U.S.C. §§ 78aaa, *et seq*. In hindsight, the Funds had overpaid the earlier redemptions based on an erroneous view of the value of Sentry's BLMIS investments. Shortly after Madoff's arrest and the collapse of BLMIS, the Funds became the subjects of liquidation proceedings in the BVI. The British Virgin Island Court ("BVI Court") appointed the Liquidators, the Liquidators commenced ancillary proceedings in this Court under Chapter 15 of the Bankruptcy Code to obtain recognition of the BVI liquidation proceedings as "foreign main proceedings," and the Court granted the Liquidators' applications on July 22, 2010.

A. BVI Redeemer Actions

In or about March 2010, the Liquidators commenced proceedings in the BVI (the "BVI Redeemer Actions") in the name of Sentry to recover redemption payments made in 2004. (*See Statement of*

[6] A copy of the *Migani* decision is attached as Exhibit Q to the *Hare Declaration*. An electronic version of the opinion without paragraph numbers can be found on the Westlaw database at 2014 WL 1219748.

Claim in *Fairfield Sentry Ltd.* (*In Liquidation*) *v. Bank Julius Baer & Co. Ltd.,* dated Mar. 12, 2010 ("*Statement of Claim*").)[7] Sentry's theory was straightforward. It invested 95% of its assets with BLMIS, (*Statement of Claim* ¶ 4), the BVI defendants (the "Redeemers") requested redemptions in March 2004, (*id.* ¶ 6), and Sentry computed the NAV in accordance with the Articles in the aggregate amount of $135,405,694.70. (*Id.* ¶¶ 7, 8.) Because BLMIS operated as a Ponzi scheme and Sentry's investments were worthless, the actual NAV was nil or nominal at the time of the redemptions. (*Id.* ¶¶ 9, 10.) Accordingly, the NAV was calculated under a mistake of fact by Sentry (unilateral mistake), and the Redeemers were unjustly enriched and liable to make restitution in the full amount or the difference between the redemption price and the actual, nominal amount of the redeemed shares. (*Id.* ¶¶ 9, 11.) Alternatively, Sentry was entitled to set aside the redemptions on the ground of mutual mistake. (*Id.* ¶ 12.)

1. The Preliminary Issues Proceeding

In early 2011, certain Redeemers filed applications requesting that the BVI Court hold a trial to determine "preliminary issues." (*See Hare Declaration*, Ex. C.) A preliminary issues trial is a mechanism for deciding specific issues that are likely to resolve the case. (*Hare Declaration* ¶ 23; *Declaration of Phillip Kite in Opposition to Plaintiffs' Motion for Leave to Amend and in Support of*

[7] A copy of the *Statement of Claim* is attached as Exhibit A to the *Hare Declaration.*

Defendants' Motion to Dismiss, signed Jan. 12, 2017 ("*Kite Declaration*"), at ¶ 9 (ECF Doc. # 963).) The Redeemers identified two preliminary issues; the first concerned the calculation of the NAV (the "Certification Issue"). They argued that if the NAV was calculated in accordance with Article 11(1) and "certified," Sentry could not recalculate the NAV after redemption. (*Hare Declaration,* Ex. G, ¶¶ 17-19.) Referring to Article 11(1)(c), (*id.* ¶ 16), the Redeemers further argued that Sentry's good faith was irrelevant on the Certification Issue. Even if the certificates were issue in bad faith, Sentry could not rely on its own bad faith to defeat the binding nature of the certificates. (*Id.* ¶¶ 21(1), 22.)

The second, proposed preliminary issue addressed the consideration given by the Redeemers for the redemption payments (the "Good Consideration Issue"). They maintained that regardless of the NAV per share, they gave good consideration by surrendering their shares, and this provided a complete defense to Sentry's clawback claims. (*Id.* ¶ 29.)

Sentry opposed the preliminary issues application. It argued that discovery was necessary on the Certification Issue, (*id.*, Ex. H, ¶¶ 8-12), but conceded that the Good Consideration Issue was purely legal though difficult. (*Id.* ¶¶ 13, 14, 17.) Sentry did not contend that a factual issue existed as to whether the NAVs were calculated in bad faith, but did maintain that it could not say if a factual dispute existed on the "Binding NAV Issues" without disclosure as it did not yet have Citco's documents. (*Id.* ¶ 16.)

On April 20, 2011, Judge Bannister of the BVI Court issued a decision and separate order granting the Redeemers' motion, and ordered a trial on the two categories of preliminary issues (hereinafter, the "Preliminary Issues"). (*Id.*, Ex. N.) He subdivided the Certification Issue into three separate questions which were thereafter referred to as Preliminary Issues Nos. 1 through 3:

> (1) Whether [a specific document] is a certificate within the meaning of Article 11(1) of the Articles of Association of the Claimant...;
>
> (2) if the answer to (1) is yes, whether any... of the documents is
>
> > (a) a certificate as to the Net Asset Value per share ("NAV") or
> >
> > (b) a certificate as to Redemption Price within the meaning of the Articles;
>
> (3) if the answer to (2)(a) or (b) is yes, whether the publication or delivery by the Claimant
>
> > (a) as a matter of information only, or
> >
> > (b) in connection with a redemption request
>
> of a document containing substantially the same items of information as a document identified as falling within (2)(a) or (b) above to a redeeming or redeemed Member of the Claimant precludes the Claimant from asserting that money paid to that redeeming or redeemed Member on redemption exceeded the true Redemption Price and as such is

> recoverable as to the excess from such redeeming Member.

(*Id.*, Ex. N, at ECF pp. 9 of 18.)[8]

Judge Bannister framed the Good Consideration Issue, now Preliminary Issue No. 4 (containing two subparts), as follows:

> Whether a redeeming Member of the Claimant in surrendering its shares gave good consideration for the payment by the Claimant of the Redemption Price and, if so, whether that precludes the Claimant from asserting that the money paid to that Member on redemption exceeded the true Redemption Price and as such is recoverable as to the excess from such redeeming Member.

(*Id.*)

Acknowledging Sentry's concerns regarding the need for discovery, Judge Bannister included the following proviso that applied to the Certification Issue but not to the Good Consideration Issue:

> Determination against the Claimant of any of the questions falling to be determined in issue (1) above [Preliminary Issues Nos. 1, 2 and 3] shall not debar the Claimant from subsequently asserting on the basis of a fact or facts not actually known to the Liquidators of the Claimant at the time of the hearing of issue (1) that notwithstanding the

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[8] "ECF pp." refers to the pagination printed by the Court's CM/ECF system at the top of each page of a filed document.

> determination of that question a particular defendant is liable to repay to the Claimant all or some part of any redemption monies paid to that defendant.

(*Id.*, Ex. N, at ECF pp. 9-10 of 18.)

The Preliminary Issues proceeded to trial. Prior to trial, the Redeemers submitted their *Skeleton Argument of the Defendants on the Preliminary Issues*, (*Kite Declaration*, Ex. A), in which they repeated their argument that whether the certificates were issued in good faith was irrelevant for two reasons. First, Sentry could not rely on its own bad faith to defeat the binding nature of a certificate. Second, the requirement of good faith was intended to protect the subscribers and redeemers, but was not intended to protect Sentry "by enabling Sentry to escape from the consequences of understating the values in relation to subscriptions, or of overstating the values in relation to redemptions, in circumstances where its Directors have acted in bad faith." (*Id.*, Ex. A, at ECF pp. 21 of 31.)

Judge Bannister rendered his decision on the Preliminary Issues on September 16, 2011. *See Fairfield Sentry Ltd.* (*In Liquidation*) *v. Bank Julius Baer & Co. Ltd.*, Nos. BVIHC (COM) 30-2010, *et al.* ("*BVI Court PI Decision*").[9] He concluded that the various communications sent to investors by or on behalf of the Directors were not certificates within the meaning of Articles. *Id.* ¶¶ 30-33. Accordingly, he answered Preliminary Issues Nos. 1 and 2 in the

[9] A copy of the *BVI Court PI Decision* is attached as Exhibit B to the *Kite Declaration*.

negative, and those answers rendered Preliminary Issue No. 3 moot. (*Kite Declaration*, Ex. C, at ECF pp. 16-17 of 212.)

However, he further concluded that the Redeemers gave good consideration for the redemptions by surrendering their shares. He reasoned:

> Left to myself I would have held that the redemption of shares in this case amounted to a bargain and sale for which the consideration received by Sentry was the surrender of the rights of the redeeming shareholder. ... I further fail to understand how Sentry can recover the redemption price in circumstances in which *restitutio in integrum* is no longer possible.[10]

BVI Court PI Decision ¶ 34.

Judge Bannister concluded:

> In my judgment, therefore, it is not open to Sentry now to seek to recover the price which it paid for the purchase of the shares of redeeming investors simply because it calculated the NAV upon information which has subsequently proved unreliable for reasons unconnected with any of the redeemers.

Id. at ¶ 36. Accordingly, he answered Preliminary Issue No. 4 in the affirmative. (*Kite Declaration*, Ex.

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[10] *Restitutio in integrum* means "[r]estoration to the previous condition or status quo." Bryan A. Garner, Black's Law Dictionary 1507 (10th ed. 2014).

C, at 17 of 212.) Judge Bannister directed one of the Redeemers to promptly move for summary judgment. (*Id.*)

Per the direction, one of the Redeemers filed a motion for summary judgment, (*Hare Declaration*, Ex. E), and Judge Bannister granted the motion on October 10, 2011. (*Id.*, Ex. P.) Initially, the Good Consideration Issue was directed at the cause of action based on Sentry's unilateral mistake alleged in paragraphs 9 and 10 of the *Statement of Claim*, (*id.*, Ex. P, at ¶ 4), and the Preliminary Issues trial did not decide the claim based on mutual mistake. (*Id.*, Ex. P, at ¶¶ 5, 10.) Nevertheless, the Redeemers were entitled to summary judgment on the mutual mistake claim. First, equity would not permit a party to rescind a contract binding in law on grounds of common mistake. (*Id.*, Ex. P, at ¶ 18.) Second, rescission was not available where, as in the case before him, *restitutio in integrum* was impossible. (*Id.*)

In reaching his decision, Judge Bannister rejected Sentry's request for an adjournment based on pleadings recently provided by the trustee of BLMIS and the need for more time to obtain evidence showing that the Redeemers received the redemptions with knowledge that BLMIS was a fraud. While acknowledging the general rule that it may be unconscionable for a party to retain the benefit of a transaction when it knows that the counterparty is acting under a mistake, Judge Bannister did not see how that principle could be applied where the parties could not be restored to their previous positions. (*Id.*, Ex. P, at ¶ 20.) Furthermore, Sentry offered nothing specific to indicate the Redeemers' bad faith, and the

possibility that "something may turn up" did not provide a reason to deny a summary judgment motion. (*Id.*, Ex. P, at ¶ 22.)

2. The ECCA Appeal

Both sides appealed to the Eastern Caribbean Court of Appeal ("ECCA"), the Redeemers on the Certification Issue and Sentry on the Good Consideration Issue and the subsequent dismissal of its claims pursuant to summary judgment. On June 13, 2012, the ECCA affirmed on both Preliminary Issues and the grant of summary judgment, and dismissed the appeals. *See Quilvest Fin. Ltd. v. Fairfield Sentry Ltd.* (*In Liquidation*), Nos. HCVAP 2011/041, *et al.* ("*ECCA Decision*").[11] Writing for the ECCA on the Good Consideration Issue, Justice Pereira began with the principle that in a two-party situation where one party pays money to another party to discharge a contractual obligation, the payor cannot argue that the payee was unjustly enriched, *id.* ¶ 66 (quoting Goff & Jones, The Law of Unjust Enrichment ¶ 29-19 (8th ed., Sweet & Maxwell 2011)), although the defense may fail where the payee was aware of the payor's mistake and did not receive the money in good faith. *Id.* ¶ 69. However, Sentry did not allege that the Redeemers had received the redemption payments in bad faith. *Id.*

The ECCA further stated that upon receipt of a redemption request, Sentry was obligated to redeem the shares based on the redemption price computed by Sentry (not by the shareholder), and notwithstanding

[11] A copy of the *ECCA Decision* is attached as Ex. G to the *Kite Declaration*.

any mistake on Sentry's part. *Id.* ¶¶ 78-79, 81. The shareholders paid the initial consideration based on Sentry's determination of the NAV, Sentry issued the shares in exchange for that consideration, and when it paid the redemption price it got precisely what it bargained for. *Id.* ¶ 81. Furthermore, predictability is critical in commercial transactions, a contract reflects the parties' allocation of risks, and restitutionary remedies such as unjust enrichment necessarily yield to contractual obligations.[12] *Id.* ¶¶ 83, 85-86. In her conclusion, Justice Pereira ruled:

> I agree with the ultimate conclusion arrived at by the learned trial judge that the P I Respondents gave good consideration for the surrender of their shares and Sentry's restitutionary claim would be defeated. It is simply not open to Sentry to recover the redemption prices which it paid for the purchase of the redeemed shares because it has now been discovered that it determined its NAV on unreliable or erroneous information from BLMIS which had nothing to do whatsoever with any of Sentry's shareholders. The shareholders fully performed all their obligations under the contract. Sentry, in paying the redemption price, did so in the discharge of its debt

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[12] Justice Pereira noted that the Private Placement Memorandum disclosed the risk that Sentry would invest the subscriber's money and not retain custody of the investment, and "there is always the risk that the personnel of any entity with which the Fund invests could misappropriate the securities or funds (or both) of the Fund." *ECCA Decision* ¶ 76.

> obligations to the redeeming shareholders pursuant to Sentry's Articles which remained perfectly valid and in force. Accordingly, I would dismiss Sentry's appeal on this issue.

Id. ¶ 87.

3. Migani

The parties appealed to the Privy Council, which rendered the *Migani* decision on April 16, 2014. Writing for the Privy Council, Lord Sumption opined that, whereas the lower courts had reviewed the Certification Issue and the Good Consideration Issue separately, the issues "are closely related and have to be considered together." *Migani* at ¶ 6. In rejecting Sentry's arguments relating to the Certification Issue, the Privy Council considered the provisions of Articles 9, 10 and 11, and concluded that the NAV had to be definitively determined *at the time of* the subscription or redemption; otherwise, the scheme was "unworkable." *Id.* ¶ 21; *accord* ¶ 24 ("If, as the articles clearly envisage, the Subscription Price and the Redemption Price are to be definitively ascertained at the time of the subscription or redemption, then the NAV per share on which those prices are based must be the one determined by the Directors at the time, whether or not the determination was correctly carried out in accordance with Articles 11(2) and (3)."). Interpreting the Articles to permit Sentry to recalculate the NAV at a future date based on new information

> would not only expose Members who had redeemed their shares to an open-ended liability to repay part of the price received if it subsequently appeared that the assets were

> worth less than was thought at the time. It would confer on them an open-ended right to recover more (at the expense of other Members) if it later appeared that they were worth more. Corresponding problems would arise out of the retrospective variation of the Subscription Price long after the shares had been allotted. Indeed, it is difficult to see how the Directors could perform their duty under Article 9(1)(b) not to allot or issue a share at less than the Subscription Price if the latter might depend on information coming to light after the allotment had been made.

Id. ¶ 23.

Having concluded that the documents at issue were "certificates" establishing the NAV per share at the time of the subject redemptions, it followed that the redemption payments were not subject to restitution. The payee is not unjustly enriched if he is entitled to receive the sums he was paid, even if the amount paid was mistaken. *Id.* ¶ 18. Sentry was obligated to pay the sum computed as the NAV per share at the time of the redemption rather than in light of subsequent information. The payment of that sum discharged Sentry's obligation under the Articles and "the shares having been surrendered in exchange for the amount properly due under the Articles, the redemption payments are irrecoverable." *Id.* ¶ 19.

Accordingly, the Privy Council reversed the lower courts' on the Certification Issue, and dismissed the appeal of the Good Consideration Issue. The dismissal of the appeal from the Good Consideration Issue "must be taken to have confirmed the conclusion of the courts

below that a redeeming member by surrendering its shares gave good consideration for the payment by Sentry of the redemption price." *See ABN AMRO Fund Servs.* (*Isle of Man*) *24 Nominees Ltd. v. Krys,* Nos. BVIHCMAP: 11-16, 23-28 of 2016, at ¶ 5 (ECCA Nov. 20, 2017) (Pereira, J.) ("*ECCA 273 Decision*")[13]; *Skandinaviska Enskilda Banken AB (PUBL) v. Conway* (*In re Weavering Macro Fixed Income Fund Ltd.*), [2016] CICA No. 2 of 2016 ("*Weavering*"), at ¶ 26 (stating that the Privy Council determined the Good Consideration Issue in the Redeemers' favor).[14] However, it is "arguable" that the Good Consideration Issue, affirmed by *Migani*, did not address the possible effect of Citco's alleged bad faith, a question that was not raised or presented. *ECCA 273 Decision* ¶ 61(iii).

B. U.S. Redeemer Actions

Citco's alleged bad faith is the principal issue on the motions before the Court in the 305 U.S. Redeemer Actions. The Liquidators have filed substantially similar adversary proceedings against the Defendants, and have also amended certain of the complaints in the U.S. Redeemer Actions to assert avoidance claims under sections 245 and 246 of the BVI INSOLVENCY ACT of 2003 ("Insolvency Act") to claw back redemptions paid with inflated prices as "unfair preferences" and/or "undervalue transactions."

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[13] A copy of the *ECCA 273 Decision* is attached to the *Letter of David J. Molton, Esq.* dated Nov. 22, 2017 (ECF Doc. # 1603).

[14] A copy of the *Weavering* decision is attached as Exhibit 79 to the *Declaration of Gabriel Moss QC in Further Support of Motion for Leave to Amend and in Opposition to Defendants' Motion to Dismiss*, signed Mar. 30, 2017 ("*Moss II Declaration*") (ECF Doc. # 1338).

The proposed amended complaint in *Fairfield Sentry Ltd. v. Citigroup Global Mkts. Ltd.*, Adv. Proc. No. 11-02770 (SMB) ("*Proposed Citigroup Complaint*") is typical.[15] The Liquidators' theory remains unchanged from the BVI Redeemer Actions: the redemption payments were based on inflated NAVs per share resulting from an erroneous belief as to the value of the Funds' investments with BLMIS. (*Id.* at ¶¶ 7, 10, 33-35, 93.) The key difference is that the Liquidators now contend that Citco certified the NAV in bad faith at the time of redemption, and accordingly, the certificates fixing the NAV per share issued pursuant to Article 11(1) were not binding under Article 11(1)(c). (*Id.* at ¶¶ 41, 70.) The Liquidators seek the return of the redemption overpayments from the Defendants as the registered owners of the shares and/or the Defendants' unknown clients as beneficial owners, based on (i) unjust enrichment (*id.*, First and Second Claims), money had and received (*id.*, Third and Fourth Claims), mistaken payment (*id.*, Fifth and Sixth Claims) and constructive trust (*id.*, Seventh Claim) (collectively, the "Common Law Claims"), (ii) unfair preferences

[15] A redacted version of the *Proposed Citigroup Complaint* is attached as Exhibit C to the *Declaration of David J. Molton in Support of Motion for Leave to Amend*, signed Oct. 21, 2016 (ECF Doc. # 924), and the redactions were authorized pursuant to Court order. (*See Order Authorizing the Foreign Representatives to File Proposed Amended Complaints in Partially Redacted Form and Unredacted Proposed Amended Complaints Under Seal*, dated Sept. 6, 2016 (ECF Doc. # 909).) The redactions relate to the allegations of Citco's bad faith. The Court has not ruled on whether the information is confidential, but the specific allegations do not need to be unsealed for purposes of this omnibus proceeding.

under the Insolvency Act § 245 (*id.*, Eighth and Ninth Claims), and undervalue transactions under the Insolvency Act § 246 (*id.*, Tenth and Eleventh Claims) (collectively, the "BVI Avoidance Claims") and (iii) breach of contract (*id.*, Twelfth Claim) and breach of the implied covenant of good faith and fair dealing (*id.*, Thirteenth Claim) (collectively, the "Contract Claims").[16] The Defendants seek the dismissal of the Common Law Claims and the Contract Claims primarily arguing that the Claims are barred by the Privy Council's decision in *Migani*.

DISCUSSION

On these motions to dismiss for failure to state a claim and motions for leave to amend, the threshold issue is whether *Migani* renders Citco's bad faith irrelevant with respect to the Common Law Claims and the Contract Claims. These claims are governed by BVI law, and the support for the parties' respective positions is based on the lengthy declarations by their experts in BVI law. The declarations of Gabriel Moss QC and William Hare,[17] on behalf of the Liquidators,

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[16] The *Proposed Citigroup Complaint* also includes a Fourteenth Claim for a declaratory judgment under 28 U.S.C. § 2201. Since all of the issues raised by the Fourteenth Claim are subsumed by the other claims that seek monetary relief, the separate consideration of the declaratory judgment claim would serve no useful purpose. Accordingly, I decline in the exercise of discretion to consider it and dismiss the Fourteenth Claim. *See Broadview Chem. Corp. v. Loctite Corp.*, 417 F.2d 998, 1000-01 (2d Cir. 1969), *cert. denied*, 397 U.S. 1064 (1970).

[17] *See Declaration of Gabriel Moss QC in Support of Motion for Leave to Amend*, signed Oct. 20, 2016 ("*Moss I Declaration*") (ECF Doc. # 926); *Moss II Declaration*; *Hare Declaration*.

and Simon Mortimore QC and Phillip Kite,[18] on behalf of the Defendants, span a combined 411 pages (with an additional 7,591 pages of exhibits) and each expert disagrees with the other on numerous areas of BVI and English law.[19]

These declarations are informative and helpful, but the "[d]etermination of a foreign country's law is an issue of law." *Itar-Tass Russian News Agency v. Russian Kurier, Inc.,* 153 F.3d 82, 92 (2d Cir. 1998). While, 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," Fed. R. Civ. P. 44.1, it is free to conduct "[its] own research and interpretation," *Ackermann v. Levine,* 788 F.2d 830, 838 n. 7 (2d Cir. 1986), and "[u]ltimately, the responsibility for correctly identifying and applying foreign law rests with the court." *Rationis Enters. Inc. of Pan. v. Hyundai Mipo Dockyard Co., Ltd.,* 426 F.3d 580, 586 (2d Cir. 2005), *cert. denied*, 549 U.S. 946 (2006).

A. Preclusion Doctrines

The Defendants raise several preclusion doctrines which, they assert, foreclose any further Common Law

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[18] *See Declaration of Simon Mortimore, QC in Opposition to Plaintiffs' Motion for Leave to Amend and in Support of the Defendants' Motion to Dismiss*, signed Jan. 13, 2017 ("*Mortimore I Declaration*") (ECF Doc. # 962); *Second Declaration of Simon Mortimore, QC in Further Support of the Defendants' Motion to Dismiss*, signed May 26, 2017 ("*Mortimore II Declaration*") (ECF Doc. # 1456); *Kite Declaration*.

[19] The BVI is an autonomous British territory. Although the BVI has its own legislation, its legal system is based on English law. (*Mortimore I Declaration* ¶ 12.)

and Contract Claims. In substance, they contend that *Migani* precludes reliance on Citco's alleged bad faith or challenge to the conclusion that the Defendants gave good consideration when they redeemed their shares. (*Defendants Motion* at 44-51.)

1. Choice of Law

Initially, the parties disagree about whether U.S. or BVI law determines the preclusive effect of *Migani*. The authorities are split. *Compare Simmtech Co., Ltd. v. Citibank, N.A.*, No. 13-cv-6768 (KBF), 2016 WL 4184296, at *8 (S.D.N.Y. Aug. 3, 2016) ("[T]he prevailing practice appears to be 'follow[ing] domestic rules of preclusion, whether they apply those of the applicable federal or state court.'") (quoting *Hurst v. Socialist People's Libyan Arab Jamahiriya*, 474 F. Supp. 2d 19, 32 (D.D.C. 2007)), *aff'd* 697 F. App'x 35 (2d Cir. 2017) (summary order), *cert. denied*, 138 S. Ct. 748 (2018); *Alfadda v. Fenn*, 966 F. Supp. 1317, 1329 (S.D.N.Y. 1997) ("[A] federal court should normally apply either federal or state law, depending on the nature of the claim to determine the preclusive effect of a foreign country judgment.") (footnote omitted), *aff'd on other grounds*, 159 F.3d 41 (2d Cir. 1998); *with Kim v. Co-Operative Centrale Raiffeisen-Boerenleenbank B.A.*, 364 F. Supp. 2d 346, 349 (S.D.N.Y. 2005) (a New York court would look to the law of Singapore to determine the preclusive effect of a Singaporean judgment); *Weiss v. La Suisse, Société d' Assurances Sue La Vie*, 293 F. Supp. 2d 397, 404-05 (S.D.N.Y. 2003) ("Generally, New York courts will give a foreign court decision no more preclusive effect than it would be accorded by courts of the jurisdiction that rendered it.") (citations omitted). The Defendants

argue that the Court must apply U.S. preclusion law; the Liquidators assert that BVI preclusion law governs.[20] The Court need not decide which jurisdiction's preclusion law applies because both lead to the same conclusion.

2. *Res Judicata*/Claim Preclusion

Under the U.S. doctrine of *res judicata*, "a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Allen v. McCurry*, 449 U.S. 90, 94 (1980) (citation omitted); *Burgos v. Hopkins*, 14 F.3d 787, 789 (2d Cir. 1994). "Whether or not the first judgment will have preclusive effect depends in part on whether the same transaction or series of transactions is at issue, whether the same evidence is needed to support both claims, and whether the facts essential to the second were present in the first." *NLRB v. United Techs. Corp.*, 706 F.2d 1254, 1260 (2d Cir. 1983) (citations omitted). The party asserting *res judicata* must show that "(1) the previous action involved an adjudication on the merits; (2) the previous action involved the plaintiffs or those in privity with them; (3) the claims asserted in the subsequent action were, or could have been, raised in the prior action." *Monahan v. N.Y. City Dep't of Corr.*, 214 F.3d 275, 285 (2d. Cir.), *cert. denied*, 531 U.S. 1035 (2000).

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[20] The Defendants alluded to both federal and New York preclusion law in their moving brief, (*see Defendants Motion* at 44), but clarified in their *Consolidated Reply Memorandum of Law in Further Support of Defendants' Motion to Dismiss*, dated May 26, 2017 ("*Defendants Reply*") (ECF Doc. # 1457) that they are relying on federal preclusion law. (*Defendants Reply* at 22.)

The English form of claim preclusion is similar. It provides that "once a cause of action has been held to exist or not to exist, that outcome may not be challenged by either party in subsequent proceedings." *Virgin Atl. Airways Ltd. v. Zodiac Seats UK Ltd.,* [2013] UKSC 46, ¶ 17.[21] It also bars "the raising in subsequent proceedings of points essential to the existence or non-existence of a cause of action which were not decided because they were not raised in the earlier proceedings, if they could with reasonable diligence and should in all the circumstances have been raised." *Id.* ¶ 22.

Both the U.S. and English iterations of the doctrine preclude the relitigation of the same claim.

The parties concede that the claims asserted in the U.S. Redeemer Actions are not the same claims that were asserted in *Migani*. (*See Defendants Motion* at 8 (The Liquidators claims in the U.S. Redeemer Actions "concerned different time periods than those in the [BVI Redeemer Actions]"); *Liquidators Reply* at 43 (same).) The BVI Redeemer Actions involved March 2004 redemptions. The U.S. Redeemer Actions involve later redemptions. (*E.g., Proposed Citigroup Complaint* ¶ 9 ("During the period from and after October 14, 2005 through November 19, 2008, following the receipt by Sentry of notices of redemption, Sentry made Redemption Payments to accounts held in the name of Defendant Citigroup Global Markets Limited ("CGML") aggregating USD $130,000,000.").)

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[21] A copy of *Virgin Atl. Airways v. Zodiac Seats UK Ltd.* is annexed to the *Moss II Declaration* as Exhibit 92.

Furthermore, the different transfers may involve different evidence relating to Citco's bad faith because Citco's knowledge and conduct must be viewed as of the time that it certified the NAV per share. Citco may have been acting in good faith in 2004, because it learned only after March 2004 that BLMIS was not actually trading securities. Conversely, it may have strongly suspected in March 2004 that the BLMIS investments were worthless, conducted due diligence as a result and determined in good faith that the BLMIS investments were worth what BLMIS said they were worth. Accordingly, neither the U.S. nor the BVI doctrines of claim preclusion prevent the Liquidators from arguing that Citco's bad faith allows them to recover the inflated redemption payments.

3. Collateral Estoppel/Issue Preclusion

"Under federal law, collateral estoppel applies when '(1) the identical issue was raised in a previous proceeding; (2) the issue was actually litigated and decided in the previous proceeding; (3) the party had a full and fair opportunity to litigate the issue; and (4) the resolution of the issue was necessary to support a valid and final judgment on the merits.'" *Purdy v. Zeldes*, 337 F.3d 253, 258 (2d Cir. 2003) (footnotes omitted) (quoting *Interoceanica Corp. v. Sound Pilots, Inc.,* 107 F.3d 86, 91 (2d Cir.1997)). Mutuality of the parties is not necessary where collateral estoppel is asserted defensively. *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 329 (1979); *Wilder v. Thomas,* 854 F.2d 605, 621 (2d Cir. 1988), *cert. denied*, 489 U.S. 1053 (1989).

Under BVI law, issue estoppel is more restrictive because it requires mutuality—either the same parties or their privies:

> In order for there to be an issue estoppel there must be (i) a final and conclusive judgment on the merits by a court of competent jurisdiction; (ii) between the same parties or their privies; and (iii) the issue decided in the former case on which the estoppel is sought to be founded must be the same as the issue in the later case and must have been necessary for the earlier decision.

OJSC Oil Co. Yugraneft v. Abramovich, [2008] EWHC 2613 (Comm), ¶ 396.[22] Despite this difference, both U.S. and BVI law require that the issue was litigated and decided.

The Liquidators argue that *Migani* did not consider the question of Citco's bad faith, and hence, the decision does not preclude the Liquidators from arguing in these adversary proceedings that Citco's bad faith certifications allow them to recover the redemptions. It is true that bad faith was on everyone's mind during the BVI Redeemer Actions. The Liquidators had already alleged in another adversary proceeding that the Funds' managers and controlling partners were grossly negligent and reckless in failing to supervise Citco and independently verify the NAVs. (*See Verified Complaint* in *Fairfield Sentry Ltd. v. Fairfield Greenwich Grp.*, dated May 29, 2009, at ¶¶ 79-99

[22] A copy of *OJSC Oil Co. Yugraneft v. Abramovich* is annexed as Exhibit 40 to the *Mortimore I Declaration*.

(ECF Adv. Proc. No. 10-03800 Doc. # 1-5).)[23] Under BVI law, lack of good faith, *i.e.* bad faith, includes wrongdoing by one who acts recklessly as well as one who acts with actual knowledge that he is acting wrongfully or willfully blinds himself to that fact. (*Moss I Declaration* ¶¶ 40-41.) In addition, the BVI Redeemers had argued in connection with the Preliminary Issues litigation that the Funds' good faith was irrelevant. Nevertheless, neither the BVI Court, the ECCA nor the Privy Council mentioned the good faith issue, and the issue was not actually decided.[24] Accordingly, the doctrine of issue preclusion

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[23] The Defendants also point to the *Anwar* class action—a case to which the Liquidators were not parties—in which shareholders of the Funds sued former Fund managers, executives and service providers, including Citco, asserting various securities law, tort, and breach of contract claims. *Anwar v. Fairfield Greenwich Ltd.*, 728 F. Supp. 2d 372, 387 (S.D.N.Y. 2010). The shareholders alleged that Citco failed to perform adequate due diligence with respect to the Funds' BLMIS investment, knew that the Funds' risk controls were deficient, and did not inform investors of the deficiencies. *Id.* at 394. The Defendants argue that the Liquidators were monitoring the *Anwar* action, and were aware of the allegations regarding Citco's bad faith. (*Defendants Motion* at 50-51.)

[24] The Liquidators imply that the BVI Court's proviso to Preliminary Issues Nos. 1, 2 and 3 allows them in these adversary proceedings to rely on newly discovered evidence to show that the certified NAV was incorrect and issued in bad faith. Notably, the BVI Court subsequently denied Sentry's request for an adjournment and granted summary judgment to the BVI Redeemers, meaning Sentry had not identified any factual issues in connection with its claims of mistake to warrant revisiting the Certification Issue. Furthermore, *Migani* reversed on Preliminary Issues Nos. 1, 2 and 3 in 2014 without mentioning the separate proviso. In any event, if the Liquidators conclude that newly discovered evidence allows them to reopen the

under both U.S. and BVI law does not prevent the Liquidators from arguing that a bad faith certificate permits them to recover the corresponding redemption.

4. *Henderson v. Henderson*

The English doctrine of *Henderson v. Henderson*[25] precludes a party from "raising in subsequent proceedings matters which were not, but could and should have been raised in the earlier ones." *Virgin Atl.* ¶ 17. Unlike the claim and issue preclusion, the *Henderson* doctrine may apply where "the parties to the two actions were different, and neither issue estoppel nor cause of action estoppel could therefore run." *Id.* ¶ 25. Although the *Henderson* doctrine and claim estoppel share common characteristics, the parties agree that the *Henderson* doctrine is procedural rather than substantive, (*Mortimore II Declaration* ¶ 54; *Moss II Declaration* ¶ 38), and is concerned with abuse of process. *Virgin Atl.* ¶ 24; *Johnson v. Gore Wood & Co.*, [2001] B.C.C. 820, 834.[26] In *Michael Wilson & Partners Ltd. v. Sinclair*, [2017] EWCA (Civ) 3, the Court surveyed the law and summarized the principles of the *Henderson* doctrine:

> (1) In cases where there is no *res judicata* or issue estoppel, the power to strike out a claim for abuse of process is founded on two

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Certification Issue under the BVI Court's order, they must return to the BVI Court.

[25] The *Henderson* doctrine was first set forth in *Henderson v. Henderson*, (1843) 3 Hare 100, 115.

[26] A copy of *Johnson v. Gore Wood & Co.* is annexed to the *Moss II Declaration* as Exhibit 42.

interests: the private interest of a party not to be vexed twice for the same reason and the public interest of the state in not having issues repeatedly litigated. ... These interests reflect unfairness to a party on the one hand, and the risk of the administration of public justice being brought into disrepute on the other.... Both or either interest may be engaged.

(2) An abuse may occur where it is sought to bring new proceedings in relation to issues that have been decided in prior proceedings. However, there is no prima facie assumption that such proceedings amount to an abuse, ... and the court's power is only used where justice and public policy demand it....

(3) To determine whether proceedings are abusive the Court must engage in a close 'merits based' analysis of the facts. This will take into account the private and public interests involved, and will focus on the crucial question: whether in all the circumstances a party is abusing or misusing the court's process....

(4) In carrying out this analysis, it will be necessary to have in mind that: (a) the fact that the parties may not have been the same in the two proceedings is not dispositive, since the circumstances may be such as to bring the case within 'the spirit of the rules' ... ; thus (b) it may be an abuse of process, where the parties in the later civil proceedings were neither parties nor their privies in the earlier

> proceedings, if it would be manifestly unfair to a party in the later proceedings that the same issues should be relitigated, ... or, ... if there is an element of vexation in the use of litigation for an improper purpose.
>
> (5) It will be a rare case where the litigation of an issue which has not previously been decided between the same parties or their privies will amount to an abuse of process....

Id. ¶ 48 (citations omitted).[27]

I conclude that the *Henderson* doctrine does not preclude the Liquidators' claims. First, the doctrine is conceded by all to be procedural rather than substantive. "In actions where the rights of the parties are grounded upon the law of jurisdictions other than the forum, it is a well-settled conflict-of-laws rule that the forum will apply the foreign substantive law, but will follow its own rules of procedure." *Bournias v. Atl. Mar. Co., Ltd.*, 220 F.2d 152, 154 (2d Cir. 1955); *accord Bakalar v. Vavra*, 550 F. Supp. 2d 548, 551 (S.D.N.Y. 2008); *Hosking v. TPG Capital Mgmt., L.P.* (*In re Hellas Telecomms. (Lux.) II SCA*), 535 B.R. 543, 566 (Bankr. S.D.N.Y. 2015); *see* Restatement (Second) of Conflict of Laws § 122 (1971) ("A court usually applies its own local law rules prescribing how litigation shall be conducted even when it applies the local law rules of another state to resolve other issues in the case."). If the Liquidators have abused the process of *this* Court, this Court can deal with those abuses under its own rules (Fed. R. Bankr. P. 9011), federal law (28

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[27] A copy of *Michael Wilson & Partners Ltd. v. Sinclair* is annexed to the *Moss II Declaration* as Exhibit 50.

U.S.C. § 1927) or its inherent authority. *See Chambers v. Nasco, Inc.*, 501 U.S. 32, 43 (1991)

Second, the issue of Citco's bad faith was never litigated or decided in connection with the BVI Redeemer Actions, and this is not one of those "rare cases" where "the litigation of an issue which has not previously been decided between the same parties or their privies will amount to an abuse of process." *Michael Wilson & Partners Ltd. v. Sinclair* ¶ 48. The Defendants contend that even if the Liquidators did not know the facts necessary to allege Citco's bad faith, they had already alleged the same recklessness against the Fairfield defendants that they now level against Citco. Hence, the Liquidators could have argued that the certificates at issue in the BVI Redeemer Actions were not binding because of Fairfield's bad faith but chose not to raise the issue. "It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive." *Johnson v. Gore Wood & Co.*, [2001] B.C.C. at 834. The allegations against the Fairfield defendants were not directed at any specific redemptions, and whether a particular certificate was issued in bad faith is a factual issue that must be determined on a case by case basis.

B. The Common Law Claims

Although the Liquidators are not precluded from raising Citco's bad faith, the persuasive authority of *Migani*, its progeny and the common law principles that informed those decisions requires the Court to reject the Liquidators' argument that Citco's bad faith, which I assume for the purposes of analysis, allows

them to recover the redemption payments. The only exception is where a Defendant knew the NAV was inflated at the time of redemption (hereinafter, a "Knowledge Defendant").

Migani's emphasis on finality, certainty and workability has been successfully raised to prevent liquidators from recovering excess redemption payments even where the NAV was the product of fraud or the redemption payment was illegal. Once the redemption price has been paid based on the certified NAV, "the tree must lie as it falls." *Pearson v. Primeo Fund*, [2017] UKPC 19, [2017] B.C.C. 552, ¶ 20. Neither fraud nor illegality nor breach of trust allows either side to revisit the redemption payment in the absence of bad faith by the redeeming shareholder. For example, in *Weavering*, the defendant ("SEB") redeemed its investment in a fund at a price believed at the time to reflect the NAV per share. *Weavering* ¶¶ 8-11. The value of the fund's investments depended on the value of certain swaps to which it was a party. *Id.* ¶¶ 5-7. The fund's Article 34 provided that "[a]ny valuations made pursuant to these Articles shall be binding on all persons." *Id.* ¶ 21.

The swaps that formed the basis of the NAV were the product of the fraud of the controlling director and were worthless. As a result, the NAV per share used to calculate the redemption payments was inflated. Once the directors discovered the fraud, they suspended further redemption payments, put the company into liquidation, and the liquidator commenced a preference action against SEB. *Id.* ¶¶ 1-4, 15. Among other things, the liquidators had to prove that the fund was unable to pay its debts.

SEB came up with a novel argument. It submitted that the NAVs were the product of fraud, the fund did not have to pay any redemptions based on the mistaken NAVs, and accordingly, there were no debts that the fund was unable to pay. *Id.* ¶¶ 18-19. SEB volunteered that the liquidator *might* have been able to recover the redemption payments based on a mistaken NAV, presumably under the common law, but that claim was time-barred. *Id.* ¶ 20. The Liquidators have referred to this unlitigated concession as authority for the proposition that they can recover redemption payments based on mistaken NAVs. (*Moss II Declaration* ¶ 67(b).)

The *Weavering* court rejected SEB's argument and hence the principle it purported to concede. Relying on *Migani*, it concluded that given the related interests of finality, certainty and workability, the subsequently discovered fraud did not vitiate the legitimacy of an obligation to pay the NAV computed at the time of the redemption:

> [T]he practical reasons that underlie the decision in *Fairfield Sentry* apply equally to a situation in which the NAV is affected by fraud. *It is essential to the operation of an investment vehicle such as the Company that permits investment through the acquisition and redemption of shares that there should be certainty on a day-to day basis as to the price at which shares are to be purchased or redeemed*. It may be that, as in the present case, the subscription price and the redemption price are largely or entirely artificial, but it is nevertheless important

> that they are calculated on a consistent basis. That is the purpose of article 34, which is to be construed as referring to a valuation purportedly made in compliance with the articles. Otherwise, the problems identified in paragraph (23) of the judgment in *Fairfield Sentry* [the open-ended right to recover excessive redemption payments] will arise.

Weavering ¶ 29 (emphasis added); *accord Pearson v. Primeo Fund* ¶¶ 20-21 (shareholder in Madoff feeder fund (Herald) that had redeemed before Madoff's fraud was discovered but had not yet received the redemption payment when Herald began winding-up proceedings was entitled to prove its debt against Herald based on the fraudulently inflated price at which it had redeemed).

DD Growth Premium 2X Fund v. RMF Mkt. Neutral Strategies (Master) Ltd., [2017] UKPC 36 ("*DD Growth*"),[28] a decision by the Privy Council, is also instructive. DD Growth was a feeder fund that had invested in a Master Fund that, in turn, had invested in correlated stocks. *Id.* ¶ 9. Pursuant to the relevant governing document, the subscription and redemption prices for DD Growth's shares were computed, in the usual manner, by determining the NAV per share. *Id.* RMF was a substantial investor in DD Growth. *Id.* ¶ 14.

The collapse of Lehman Brothers in 2008 resulted in severe losses to the Master Fund, and hence, to the value of DD Growth's assets. *Id.* ¶ 15. However, the

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[28] A copy of *DD Growth* is attached to the *Letter of Thomas J. Moloney*, dated Dec. 22, 2017 (ECF Doc. # 1608).

investment manager for both DD Growth and the Master Fund concealed the losses by purchasing worthless bonds and attributing fictitious values to the bonds sufficient to cover the actual losses. *Id.* ¶ 16. Meanwhile, RMF and other shareholders gave notices of redemption, and based on the false information provided by the Master Fund, the NAV per share was calculated at an erroneous, inflated number. *Id.* ¶¶ 17-18. DD Growth paid RMF approximately $23 million, representing less than 40% of the amount due, before suspending redemptions. *Id.* ¶¶ 18-19. After DD Growth was placed in liquidation, the liquidators sued to recover the payments based on unjust enrichment and/or constructive trust. *Id.* ¶¶ 20, 22.

Initially, the Privy Council, per Lord Sumption (the author of *Migani*) and Lord Briggs, concluded that the redemptions were valid, the redeeming shareholders became creditors, and although the NAV had been calculated based on false information, it was valid for fixing the amount of the redeeming shareholders' debt. *Id.* ¶ 28 (citing *Migani*). The Privy Council then concluded that the redemption payments were unlawful because they were capital payments made by an insolvent company. *Id.* ¶ 57. In addition, it was a breach of trust by the directors to authorize the redemption payments if the company was insolvent. *Id.* ¶ 59.

It did not follow, however, that the inflated, illegal redemption payments could be recovered. The redemption itself was lawful and effective, and the resulting debt was incurred in consideration of the surrender of the shares and the cancellation of the debt. *Id.* The redemption payment, although itself

unlawful, discharged a lawful debt owed to the redeeming shareholders that arose at the time of the redemption. *Id.* ¶ 61. Consequently, for the reasons stated in *Migani* and other cases, the payees were not unjustly enriched. *Id.* ¶ 62. Carving out an exception where the payee was aware of the directors' breach of trust, the Privy Council summarized its holding in the following manner:

> The Board concludes that the company is not entitled to recover the payments at common law on the ground of unjust enrichment. The reality of the present case is that a payment has been received from a company for lawful consideration but it has been authorised by its directors in breach of their duties to the company. This is the proper domain of the law of constructive trusts. Not even in return for good consideration can a person retain assets which he knows to have been paid to him in breach of the statutory duties of the directors.

Id. ¶ 64.

The same principles require the dismissal of the Liquidators' Common Law Claims with the one exception noted by *DD Growth*. A contract arose at the time that the Defendants served their notices of redemption. At that moment, they were entitled to be paid the NAV per share computed in accordance with Article 11(1) in exchange for their shares. If the certificates were issued in bad faith, the redeemers were free to contest the redemption price and insist on more. But once the Funds discharged their debts by making the redemption payments and the Defendants discharged their obligations by surrendering their

shares, neither side could revisit the NAV based on hindsight. To allow otherwise would create the unworkable situation identified by *Migani*, *Weavering* and *DD Growth*. The only exception allows the Liquidators to impose a constructive trust as to any Defendant who received a redemption payment and knew that the Fund's BLMIS investments were worthless or nearly worthless.

Separately, the Defendants contend that the doctrine *ex turpi causa non oritur actio* ("*ex turpi*") bars the Liquidators' claims. Over 200 years ago, Lord Mansfield wrote that "[n]o court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act." *Holman v. Johnson*, (1775) 1 Cowp 341, 343.[29] *Ex turpi* expresses Lord Mansfield's maxim that, in modern terms, "precludes a party to a contract tainted by illegality from recovering money paid under the contract from the other party under the law of unjust enrichment." *Patel v. Mirza*, [2016] UKSC 42, ¶ 9.[30] According to the Defendants, the success of the Liquidators' claims depends on Citco's dishonest and, possibly, criminal conduct which is attributed to the Funds. (*Mortimore I Declaration* ¶¶ 95, 97.) The Liquidators respond that there is nothing illegal or immoral in paying a redemption request or seeking to recover it based on the facts alleged regarding Citco's bad faith. (*Moss II Declaration* ¶¶ 95, 96, 99(a).) Furthermore, even if the doctrine *ex turpi* applied,

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[29] A copy of *Holman v. Johnson* is annexed as Exhibit 36 to the *Moss II Declaration*.

[30] A copy of *Patel v. Mirza* is annexed as Exhibit 41 of the *Mortimore I Declaration* and as Exhibit 57 to the *Moss II Declaration*.

Citco's bad faith would not be attributable to the Funds. (*Id.* ¶ 97(a).) The primary victims of Citco's bad faith were the Funds and the remaining shareholders; the Defendants actually benefitted from Citco's bad faith. (*Id.* ¶ 99(b).)

Ex turpi is a flexible doctrine. The party seeking relief must initially show that it is entitled to restitution because the defendant has been unjustly enriched. *Patel* ¶ 116. *Ex turpi* does not itself create a right to restitution. *DD Growth* ¶ 63. If the plaintiff establishes its *prima facie* case, the Defendant may then assert the doctrine *ex turpi* to bar recovery, and the Court must consider several factors in determining whether public interest would be harmed by allowing the claim to proceed:

> In assessing whether the public interest would be harmed in that way, it is necessary a) to consider the underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by denial of the claim, b) to consider any other relevant public policy on which the denial of the claim may have an impact and c) to consider whether denial of the claim would be a proportionate response to the illegality, bearing in mind that punishment is a matter for the criminal courts.

Patel ¶ 120; *accord id.* ¶ 107 ("I would not attempt to lay down a prescriptive or definitive list because of the infinite possible variety of cases. Potentially relevant factors include the seriousness of the conduct, its centrality to the contract, whether it was intentional

and whether there was marked disparity in the parties' respective culpability.").

Ex turpi does not bar the Liquidators' claims. The Defendants were not unjustly enriched for the reasons already stated, but even if they had been, the Liquidators do not plead illegal or immoral conduct sufficient to trigger the doctrine. Clearly, the contract to redeem under the Articles was not illegal. Furthermore, although the Directors were prohibited from paying redemptions out of capital or in breach of trust, the redemption payments themselves were lawful and discharged the Funds' valid obligations.[31] *DD Growth* ¶¶ 58, 61. That the redemption prices were based on bad faith certificates did not render the payments unlawful any more than did the fraud and illegality described in *DD Growth*.

Furthermore, the Liquidators' assertion of Citco's bad faith as a reason to recover the inflated redemption payments is self-defeating. The Articles state that for purposes of fixing the subscription and redemption prices, the NAV "*shall be determined by the Directors* ...." (Article 11(1)(a) (emphasis added).) The Funds delegated this task to Citco, who served as the Funds' administrator "under the overall direction of the Directors," (*Migani* ¶ 14 (quoting Sentry's Private Placement Memorandum)), but the Directors, not Citco, bore the responsibility for calculating the NAV per share. Accordingly, in considering whether

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[31] In a footnote, the Defendants assert that the allegations of Citco's bad faith describe illegal conduct under two BVI criminal statutes and one UK criminal statute. (*See Mortimore I Declaration* ¶ 95 n. 100). They have failed to explain how Citco's alleged bad faith satisfied the elements of these statutes.

the certificates were issued in good faith "by or on behalf of the Directors," and therefore binding, (Article 11(1)(c)), it is the Directors' good faith, not Citco's, that is relevant. Moreover, Citco's knowledge and conduct will be imputed to its principal, *i.e.*, the Funds, and the Funds are bound by its acts even if Citco acted fraudulently or in its own interests. *Bilta (UK) Ltd. v. Nazir*, [2016] AC 1, ¶ 181 ("In most circumstances the acts and state of mind of its directors and agents can be attributed to a company by applying the rules of the law of agency.") (Lords Toulson and Hodge, concurring)[32]; (*Mortimore I Declaration* ¶¶ 76-77 & n. 81 ("An act of an agent within the scope of his apparent authority does not cease to bind his principal merely because the agent was acting fraudulently and in furtherance of his own interests.") (quoting Bowstead and Reynolds on Agency § 8-062 (20th ed. 2016)); *Moss I Declaration* ¶ 43 ("Knowledge gained by an employee or other agent while acting in the course of his employment for his principal will ordinarily be attributed to his principal.") (citing Bowstead and Reynolds on Agency ¶ 8-207 (20th ed.)).)

If the Directors knew the NAVs were inflated based on BLMIS' fraud, either directly or through the imputation of Citco's knowledge, but nonetheless breached their fiduciary duties to the other shareholders by authorizing the payment of inflated redemption prices, the Funds cannot rely on their own misconduct to recover the inflated redemption

[32] A copy of *Bilta v. Nazir* is annexed to the *Mortimore I Declaration* as Exhibit 8 and the *Moss II Declaration* as Exhibit 16.

payments.[33] *Weavering* ¶ 29; *Kingate Global Fund Ltd. v. Kingate Mgmt. Ltd.,* [2015] SC (Bda) 65 Com ("*Kingate*") ¶ 157 (discussing the general principle "that a party will not generally be entitled to take advantage of his own breach of contract as against the other party.")[34]; *accord Moss II Declaration* ¶ 81 ("It is a principle of English/BVI law that a contract will generally be construed in such a way as to prevent a party from taking advantage of its own wrong.").[35]

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[33] The Liquidators allege that the Funds were unaware of the Madoff fraud and inflated NAV at the time of the redemptions. (*Proposed Citigroup Complaint* ¶¶ 35, 128, 137.) If the Funds gave the certificates in good faith, the Liquidators cannot argue that they were given in bad faith.

[34] A copy of *Kingate* is annexed to the *Mortimore I Declaration* as Exhibit 31 and the *Moss II Declaration* as Exhibit 44.

[35] *Lipkin Gorman v Karpnale*, [1991] 2 AC 548, (a copy of which is annexed to the *Moss II Declaration* as Exhibit 47) which the Liquidators cite for the proposition that the dishonest agent's knowledge is not imputed to defeat a restitution claim, (*see Moss II Declaration* ¶ 89(b)), is wholly inapposite. There, a partner in a law firm stole the firm's client funds and lost most of what he stole gambling at a London club. The firm sued the club to recover the stolen funds. In ruling for the firm, the House of Lords concluded that the partner was a thief, the gambling contract by which the club acquired the money was void under English law and the club gave no consideration for the stolen funds. It stood in the shoes of an innocent donee that received a contribution consisting of stolen property and had to return the stolen funds less the winnings paid to the partner. The imputation or attribution of the partner's dishonesty to the law firm was not an issue in the case, and no one suggested that the theft of client funds was an act within the scope of the partner's agency.

In contrast, the contract that required the Funds to redeem the shares at the NAV was a lawful contract. Furthermore, the computation of the NAV, though erroneous in hindsight, was an

If, on the other hand, Citco's bad faith is not imputed to the Directors or the Funds, the Liquidators are still not entitled to recover the redemption payments. In that event, the Directors would have been duped by Citco and BLMIS when they authorized the excessive redemption payments. This scenario is merely a variation of the "mistake" claims rejected by the *Migani* courts. *See Kingate* ¶¶ 153-54 (If the Administrator of BLMIS feeder funds rather than the funds mistakenly calculated the NAV, "the Funds mistake was to believe the information supplied by BLMIS was correct.").

Kingate, on which the Liquidators rely, (*see Moss II Declaration* ¶ 69), does not support the proposition that Citco's bad faith allows them to recover the redemption payments through the Common Law Claims. In *Kingate*, the liquidators of two BLMIS feeder funds (the "Kingate Funds") sued their manager (KML) and others to recover excessive management fees. The management fees were determined by the Kingate Funds' Administrator, a different entity, based on the NAV computed at the time. As with the Fairfield Funds, the NAV did not reflect the "true" value which only became apparent after the revelation of BLMIS' fraud.

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authorized act, and the Liquidators cannot dispute the validity and genuineness of the certificate. *See* BVI Business Companies Act, 2004 § 31. Moreover, the payment of the redemption as computed by the erroneous NAV was an authorized and contractually required act, and the Defendants gave good consideration for their redemptions. Finally, the Liquidators cannot restore the Defendants to the status quo.

The relevant agreements provided that the valuations made pursuant to the articles were binding on all persons in the absence of "bad faith or manifest error." *See Kingate* ¶ 42. The case proceeded on the trial of seven inter-related preliminary issues. In each instance, the defendants *conceded* that the Liquidators were entitled to recover the excess payments if the NAVs were tainted by bad faith or manifest error. *Id.* ¶ 75 ("The Defendants submit that ... absent bad faith or manifest error KML was entitled to be paid 1.5% of the NAV as determined at the time by the Administrator."); *id.* ¶ 108 (Mr. Boyle, one of the counsel for other defendants, submitted that bad faith or manifest error were the only circumstances in which valuations would not be binding); *id.* ¶ 120 (accepting the submission of Mr. Lowe, counsel for other defendants, "that absent bad faith or manifest error the Court should not look behind the ostensible NAV determination to enquire whether that determination was actual or merely purported."). The issue was not litigated and the *Kingate* Court declared, adopting the parties' positions, that "the Administrator's determinations of the NAV were binding on the Funds for the purpose of calculating the fees due to KML pursuant to the Manager Agreements in force between the Funds and KML, in the absence of bad faith or manifest error." *Id.* ¶ 116.

The *Kingate* Court did not rule that bad faith or manifestly erroneous valuations allowed the liquidators to recover the management fees; instead, the defendants conceded the point, at least for the purposes of the preliminary issues. Furthermore, the *Kingate* Court did not consider whether the

Administrator's manifest error (the liquidators did not plead bad faith) would be imputed, and if so, what that meant.

Each of the Common Law Claims alleging unjust enrichment, money had and received and mistaken payment (First through Sixth Claims) asserts that because the Funds overpaid the redemption prices considering the "true facts," the Defendants did not give "valuable consideration." (*Proposed Citigroup Complaint* ¶¶ 96, 103, 109, 118, 129, 138).) This assumption is wrong. The Defendants gave the consideration required by their contracts with the Funds when they surrendered their shares in exchange for the Funds' discharge of their contractual redemption obligations.[36] Moreover, finality and certainty are necessary to make the redemption scheme "workable," and accordingly, if a valuation is "purportedly made" in compliance with the redemption scheme and the transaction is consummated, the valuation cannot be attacked at a future date based on the subsequent discovery of additional facts. *See Weavering* ¶ 29 ("That is the purpose of article 34, which is to be construed as referring to a valuation purportedly made in compliance with the articles. Otherwise, the problems identified in paragraph (23) of the judgment in *Fairfield Sentry* will arise."). The suggestion that the subsequent disclosure of facts indicating that the valuation was made in bad faith vitiates the contract and requires restitution lacks support. The only

[36] In addition, the Defendants gave "valuable consideration" when they purchased their shares at inflated subscription prices because of the same BLMIS Ponzi scheme.

exception concerns the Knowledge Defendants that received redemption payments with the knowledge that the NAV was wrong. In those circumstances, the Liquidators may seek to impose a constructive trust. *DD Growth* ¶ 64.

C. The Contract Claims

The Articles do not state that the Funds can recover inflated redemption payments. Instead, the Liquidators argue that the term must be implied. The Twelfth Claim alleges that at any time prior to the issuance of a good faith certificate, the redemption price is subject to adjustment, and the Articles contained an implied term permitting the Fund to recover any overpayments based, *inter alia*, on obviousness, business efficiency and the reasonable expectation of the parties. (*Proposed Citigroup Complaint* ¶ 193.) The Thirteenth Claim, based on breach of the implied covenant of good faith and fair dealing, alleges that the Defendant denied the Fund the benefit of its bargain by retaining the inflated redemption payment. (*Id.* ¶ 203.)

In *Attorney General of Belize v. Belize Telecom Ltd.*, [2009] 1 WLR 1988, Lord Hoffman summarized the principles that govern the implication of terms in a contract:

> The question of implication arises when the instrument does not expressly provide for what is to happen when some event occurs. The most usual inference in such a case is that nothing is to happen. If the parties had intended something to happen, the instrument would have said so. Otherwise, the express provisions of the instrument are

> to continue to operate undisturbed. If the event has caused loss to one or other of the parties, the loss lies where it falls.
>
> In some cases, however, the reasonable addressee would understand the instrument to mean something else. He would consider that the only meaning consistent with the other provisions of the instrument, read against the relevant background, is that something is to happen. The event in question is to affect the rights of the parties. The instrument may not have expressly said so, but this is what it must mean. In such a case, it is said that the court implies a term as to what will happen if the event in question occurs. But the implication of the term is not an addition to the instrument. It only spells out what the instrument means.
>
> ....
>
> It follows that in every case in which it is said that some provision ought to be implied in an instrument, the question for the court is whether such a provision would spell out in express words what the instrument, read against the relevant background, would reasonably be understood to mean....

Id. ¶ 17, 18, 21.

Given the interests identified in *Migani*, it is neither obvious nor efficient nor consistent with the parties' expectations to imply that subscribers, redeemers or the Funds agreed to open-ended liability based on hindsight for incorrectly stated NAVs. The Funds computed the NAV and paid the redemption

price, and the Defendants surrendered their shares. Each party discharged its contractual obligations under the Articles, the transaction was consummated and there is no return to the status quo. The Liquidators seek to imply a term that would, in *Migani*'s words, render the scheme unworkable. *See Weavering* ¶ 23 ("The argument advanced by SEB was equivalent to an argument rejected in *Fairfield Sentry* as 'impossible.' Properly construed, the articles required the published NAV to be binding in respect of both acquisition and redemption of shares: they could not be construed as conferring on the Company an ability to adjust the NAV from time to time in the light of new information. Such an approach to the articles would render the rights of shareholders entirely uncertain."). Similarly, there is no basis to imply a term that requires a Defendant to return an overpayment where the very principles of unjust enrichment invoked by the Liquidators allow it to keep that payment. Accordingly, the Contract Claims are dismissed.

D. The BVI Avoidance Claims

The Liquidators assert claims under sections 245 and 246 of the Insolvency Act.[37] Section 245 resembles Bankruptcy Code § 547(b) and allows a liquidator to set aside an unfair preference. *See* Insolvency Act § 245 (authorizing avoidance of a transfer made (i) when the debtor was insolvent or rendered insolvent, (ii) during the "vulnerability period,"[38] (iii) that put

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[37] The pertinent provisions of the Insolvency Act are attached as Exhibit 97 to the *Moss II Declaration*.

[38] The "vulnerability period" or length of the reach back period depends on whether the transferee is a "connected person," *i.e.*,

the creditor in a better position than if the transfer had not been made and the company was liquidated). Section 246 allows a liquidator to avoid an undervalue transaction, which is similar to a constructive fraudulent transfer under state and federal law. *See* Insolvency Act § 246 (authorizing avoidance of a transfer made (i) when the debtor was insolvent or rendered insolvent, (ii) during the "vulnerability period," (iii) for which the debtor received no consideration or consideration worth significantly less in value than it provided). If the transaction is voidable, the Court "may make an order setting aside the transaction in whole or in part," Insolvency Act § 249(1)(a), and "require any person to pay, in respect of benefits received by him from the company, such sums to the liquidator as the Court may direct." Insolvency Act § 249(2)(d).

The Defendants raise several objections to the BVI Avoidance Claims, but only the objection under the Bankruptcy Code requires an extended discussion.

1. The Court Lacks the Power to Grant Relief

The Defendants contend that this Court cannot grant the statutory remedies available under the Insolvency Act. (*Defendants Motion* at 69-70.) This argument was expressly rejected by the ECCA. *ECCA 273 Decision* ¶¶ 80-81.

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an insider. Unless the transferee is a "connected person," the "vulnerability period" is six months "prior to the onset of insolvency and ending on the appointment of the administrator or, if the company is in liquidation, the liquidator." Insolvency Act § 244(1).

2. The Defendants Were Not Creditors

The Defendants argue that the Funds could not have preferred them as creditors under section 245 because they were members rather than creditors when the Funds became obligated to pay them. In addition, the BVI liquidation rules subordinated the members to the creditors. (*Defendants Motion* at 62-63 & n. 43.) As discussed earlier, the Defendants became creditors when they requested redemptions. In addition, the Funds were not in liquidation when they paid the redemptions, and the liquidation priorities are irrelevant.

3. The Defendants Gave Sufficient Consideration

An undervalue transaction requires the plaintiff to plead and ultimately prove, *inter alia*, that the transferor received nothing or "significantly less" in exchange for the value it transferred. INSOLVENCY ACT § 246(1)(b). Relying on a market value approach, the Defendants contend that the redemption prices they received reflected the value of the shares they surrendered. (*Defendants Motion* at 64.) The NAV per share, as calculated at the time, reflected the price that a well-informed purchaser of shares or redeemer of shares would accept to purchase or redeem. Thus, the NAV per share as calculated at the time represented the open market value of the shares. The Liquidators respond, *inter alia*, that the true value of the Funds' assets and the shares were nil, and the Court can look to subsequent information to determine the true value of the consideration the Funds received in exchange for the redemption payments. (*Liquidators Reply* at 27-30.) The parties'

dispute turns on whether value can be determined based on hindsight in connection with the determination of an avoidance claim.

Phillips v. Brewin Dolphin Bell Lawrie, [2001] BCC 864 provides a qualified, affirmative answer.[39] There, the debtor sold its business to the defendant. For tax reasons, the price was structured in two parts. First, the defendant assumed certain obligations of the debtor. Second, the defendant's parent agreed to rent the debtor's leased computers and pay four annual installments of rent. The rental payments formed most of the purchase price.

At the time of the transaction, the value of the stream of rental payments was uncertain because the master computer leases absolutely prohibited the debtor from subleasing the computer equipment. *Id.* ¶ 22. After the transaction closed, the master lessors terminated the computer leases based on the unauthorized transfers, and the defendant's parent refused to make the rental payments.

The debtor went into liquidation, and the liquidator sued the defendant, challenging the transfer of the debtor's business as an undervalue transaction pursuant to section 238 of the U.K. Insolvency Act. The House of Lords, per Lord Scott, initially concluded that the purchase price for the debtor's assets included the obligations assumed by the defendant and the lease payments the defendant's parent agreed to make. *Id.* ¶ 20. One of the questions

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[39] A copy of *Phillips v. Brewin Dolphin Bell Lawrie Limited* is annexed as Exhibit 43 to the *Mortimore I Declaration* and Exhibit 59 to the *Moss II Declaration*.

was what value to place on the parent's covenant to make the lease payments which became worthless when the master lessors repossessed the computers after the sale transaction had closed.

Lord Scott ruled that under the circumstances of the case, he could consider events that occurred after the closing which shed light on the value of the consideration given at the time of the closing. The survival of the sublease covenant was uncertain at the time it was given because the sublease violated the master lease. Where the contingency that rendered value uncertain actually occurs, it is "unsatisfactory and unnecessary for the court to wear blinkers and pretend that it does not know what has happened." *Id.* ¶ 26. Thus, when considering "the valuation of the consideration for which a company has entered into a transaction, reality should, in my opinion, be given precedence over speculation. I would hold, taking into account of the events that took place [after the closing] that the value of [the] ... covenant in the sublease ... was nil." *Id.*; *cf. Adelphia Recovery Tr. v. FPL Grp., Inc.* (*In re Adelphia Commc'ns Corp.*), 512 B.R. 447, 495 (Bankr. S.D.N.Y. 2014) ("Though courts must determine solvency free of impermissible hindsight, courts may consider information originating subsequent to the transfer date if it tends to shed light on a fair and accurate assessment of the asset or liability as of the pertinent date, which assures that the valuation is based in reality. Subsequent discovery of fraud is appropriately considered when determining the real financial condition of the company at the time of the transfer.") (footnotes, internal quotation marks and citations omitted), *aff'd*, Civil Case No. 14-CV-5532 (VEC), 2015

WL 1208588 (S.D.N.Y. Mar. 17, 2015), *aff'd*, 652 F. App'x 19 (2d Cir. 2016); *Mishkin v. Ensminger* (*In re Adler Coleman Clearing Corp.*), 247 B.R. 51, 111 (Bankr. S.D.N.Y. 1999) ("We may consider evidence uncovered after the advent of bankruptcy to determine the value of the debtor's assets at the time the alleged insolvency occurred."), *aff'd*, 263 B.R. 406 (S.D.N.Y. 2001).

The *Phillips* case is not directly on point. It dealt with a situation where the value of the covenant to lease computer equipment was uncertain at the time it was given, and a post transaction event resolved the uncertainty and rendered the covenant worthless. It did not establish a general rule that a court may value an asset with the benefit of hindsight. *See Joiner v. George*, [2003] BCC 298, ¶ 71.[40] The Liquidators' case does not deal with a post-transaction event that fixed the actual value of consideration that was uncertain at the time it was given. According to the Liquidators, the Defendants' shares were always worthless. Instead, it concerns a pre-existing state of facts that was not discovered until after the redemption transaction was completed.

Nevertheless, *Phillips* implies that when the value of consideration is uncertain at the time it is given, and a subsequent event eliminates the uncertainty and fixes the actual value, the Court may consider the value of the consideration with the benefit of that hindsight in deciding an undervalue avoidance claim. In addition, the uncertainty must be

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[40] *Joiner v. George* is annexed as Exhibit 29 to the *Mortimore I Declaration* and Exhibit 43 to the *Moss II Declaration*.

within the knowledge of the party giving the consideration, although *Phillips* does not make clear whether the knowledge must be objective or subjective. At one point, the Court implied that the obligors were aware of the uncertain value of the future lease payments, *id.* ¶ 22, but at other points, the Court seemed to suggest that objective uncertainty was sufficient. *See id.* ¶¶ 25, 26. Accordingly, to take advantage of the rule laid down in *Phillips*, the Liquidators must plead, at a minimum, that at the time of a redemption, a Defendant had reason to believe that the NAVs were inflated and the Defendant's shares were worthless. The Liquidators contend that the Knowledge Defendants knew or should have known that the NAVs were inflated because of Madoff's fraud, (*see Proposed Citigroup Complaint* ¶¶ 71-81), and if this turns out to be the case,[41] the Court should not wear "blinkers" and attribute a value that these Defendants thought was precarious.[42]

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[41] The Court is not passing on the legal sufficiency of these allegations.

[42] It is important to distinguish between the value of consideration when dealing with the Contract and Common Law Claims on the one hand, and the BVI Avoidance Claims on the other. The Defendants gave sufficient consideration for contract purposes when they surrendered their shares and gave up their rights as shareholders in the Funds at the time of the redemptions. The consideration they surrendered may still be "significantly less" and support an undervalue avoidance claim under Insolvency Act § 246. *Cf. In re Asia Global Crossing, Ltd.*, 344 B.R. 247, 253 (Bankr. S.D.N.Y. 2006) (comparing consideration that will support a contract and "fair consideration" under New York's fraudulent conveyance law and concluding that the constructively fraudulent nature of an

4. The Redemptions Did Not Injure the Funds

The Defendants also contend that the redemptions did not injure the Funds. They argue that the value of their BLMIS portfolio and the subscription and redemption prices were inflated to the same degree as a result of Madoff's fraud. Thus, as long as the BLMIS fraud was ongoing, the Funds could raise more money through equally inflated subscription payments. (*Defendants Motion* at 58-61.) Arguably, Sentry could also redeem all or part of its investment in its BLMIS account and use those withdrawals to satisfy its own investors' redemption requests, including redemptions by Lambda and Sigma.

The argument is unpersuasive. Although the Funds themselves were not operated as Ponzi schemes, the withdrawal of money based on inflated NAVs had the same effect. Each redemption at an inflated price drove the Funds deeper into insolvency and caused harm to the Funds and the remaining investors that did not redeem their investments.

5. The Funds Were Not Insolvent

Both BVI Avoidance Claims require the Liquidators to prove that each redemption was made when the Fund was insolvent or was rendered insolvent. Section 244(3) of the Insolvency Act incorporates the definition of "insolvent" contained in Insolvency Act § 8(1), excluding paragraph (c)(i) of that section. For present purposes, "insolvent" means

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obligation does not render it unenforceable under non-bankruptcy law).

"the company is unable to pay its debts as they fall due." Insolvency Act § 8(1)(c)(ii). "Liabilities" include future, certain, contingent, fixed or liquidated liabilities, but do not include illegal or unenforceable liabilities. Insolvency Act § 10(2), (3). The excluded subparagraph refers to balance sheet insolvency ("the value company's liabilities exceeds its assets"). The Defendants argue that the Funds have alleged that they were able to pay their liabilities as they came due, (*Proposed Citigroup Complaint* ¶ 164), and hence, have pled themselves out of their claims. (*Defendants Motion* at 65-66.)

The Defendants mischaracterize the Liquidators' pleadings. In fact, the Liquidators allege that the Funds were unable to pay their debts as they fell or would fall due. (*Proposed Citigroup Complaint* ¶¶ 11, 39.) The Defendants ignore these allegations, and quote the portion of the Liquidators' pleading alleging that the Funds "were only able to pay debts falling due" because they could redeem their investments in the BLMIS Ponzi scheme or use incoming subscriptions. (*Id.* ¶ 164.) Liabilities include future and contingent debts, including redemption debts (no one invests forever), and once the BLMIS Ponzi scheme collapsed, as it did, the Funds had few if any assets to pay any liabilities. In the end, insolvency is a question of fact.

6. The Liquidators' Plead Complete Defenses

a. Ordinary Course of Business

"[A] complaint can be dismissed for failure to state a claim pursuant to a Rule 12(b)(6) motion raising an affirmative defense if the defense appears on the face

of the complaint." *Official Comm. of Unsecured Creditors of Color Tile, Inc. v. Coopers & Lybrand, LLP*, 322 F.3d 147, 158 (2d Cir. 2003) (internal quotation marks and citation omitted). A transaction is not an unfair preference if it took place in the ordinary course of business. Insolvency Act § 245(2). The Defendants contend that the redemption of shares and the payment of the redemption price is an ordinary business transaction. (*Defendants Motion* at 66-67.)

While the Funds may have redeemed shares in the ordinary course of the Funds' business, it does not follow that they made the redemptions at issue in the ordinary course of business. In fact, the Liquidators allege that the Funds made the redemptions based on bad faith and erroneous valuations. At bottom, whether each redemption payment was made in the ordinary course of business is a factual question that cannot be resolved in the context of motions to dismiss.

b. Good Faith

A company does not enter into an undervalue transaction if enters into the transaction in good faith, and at the time, there were reasonable grounds to believe that the transaction would benefit the company. Insolvency Act § 246(2). The Defendants maintain that the Liquidators' pleadings establish this defense. The Liquidators plead that the Funds were victims of the BLMIS fraud, and redeeming shares was part of the Funds' essential business and basic contractual obligations. (*Defendants Motion* at 66- 69.) Having concluded that Citco's bad faith is imputed to the Funds, the Court cannot conclude that the redemption of shares at inflated NAVs was made

in good faith or that it was reasonable to believe at the time of the redemption payments that they would benefit the Funds. At best, this argument is premature.

D. Sections 546(e) and 561(d) of the Bankruptcy Code

1. Introduction

The Defendants contend that the safe harbor provision under 11 U.S.C. § 546(e)[43] is a complete defense to the claims asserted against them in the U.S. Redeemer Actions. Section 546(e) of the Bankruptcy Code operates as an exception to the bankruptcy trustee's avoidance powers. *Merit Mgmt. Grp., LP v. FTI Consulting, Inc.*, 138 S. Ct. 883, 893-94 (2018) ("*Merit*"). The safe harbor prevents a trustee from avoiding, *inter alia*, a pre-petition transfer (i) that is a "settlement payment" made by, to or for the benefit of a financial institution[44] or financial

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[43] Section 546(e) of the Bankruptcy Code provides in pertinent part:

> Notwithstanding sections 544, 545, 547, 548(a)(1)(B), and 548(b) of this title, the trustee may not avoid a transfer that is a ... settlement payment, as defined in section 101 or 741 of this title, made by or to (or for the benefit of) a ... financial institution [or] financial participant ... , or that is a transfer made by or to (or for the benefit of) a ... financial institution [or] financial participant ... in connection with a securities contract, as defined in section 741(7) ... , that is made before the commencement of the case, except under section 548(a)(1)(A) of this title.

[44] A "financial institution" means

> (A) a Federal reserve bank, or an entity that is a commercial or savings bank, industrial savings bank,

participant,[45] or (ii) made by, to or for the benefit of a financial institution or financial participant in

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savings and loan association, trust company, federally-insured credit union, or receiver, liquidating agent, or conservator for such entity and, when any such Federal reserve bank, receiver, liquidating agent, conservator or entity is acting as agent or custodian for a customer (whether or not a "customer", as defined in section 741) in connection with a securities contract (as defined in section 741) such customer; or

(B) in connection with a securities contract (as defined in section 741) an investment company registered under the Investment Company Act of 1940.

11 U.S.C. § 101(22).

[45] A "financial participant" means

(A) an entity that, at the time it enters into a securities contract, commodity contract, swap agreement, repurchase agreement, or forward contract, or at the time of the date of the filing of the petition, has one or more agreements or transactions described in paragraphs (1), (2), (3), (4), (5), or (6) of section 561(a) with the debtor or any other entity (other than an affiliate) of a total gross dollar value of not less than $1,000,000,000 in notional or actual principal amount outstanding (aggregated across counterparties) at such time or on any day during the 15-month period preceding the date of filing of the petition, or has gross mark-to-market positions of not less than $100,000,000 (aggregated across counterparties) in one or more such agreements or transactions with the debtor or any other entity (other than an affiliate) at such time or on any day during the 15-month period preceding the date of the filing of the petition; or

(b) a clearing organization (as defined in section 402 of the Federal Deposit Insurance Corporation Improvement Act of 1991).

11 U.S.C. § 101(22A).

connection with a "securities contract," unless the transfer was intentionally fraudulent within the meaning of section 548(a)(1)(A). *See* 11 U.S.C. § 546(e). I refer to the type of transfer protected by section 546(e) as a Covered Transaction.

The section 546(e) safe harbor is an affirmative defense as to which the Defendants bear the burden of proof. *Tronox Inc. v. Kerr McGee Corp.* (*In re Tronox Inc.*), 503 B.R. 239, 339 (Bankr. S.D.N.Y. 2013) ("§ 546(e) is a classic affirmative defense"; "[c]ases construing § 546(e) have uniformly treated it as an affirmative defense") (citations omitted); *accord Picard v. Merkin* (*In re BLMIS*), No. 11 MC 0012 (KMW), 2011 WL 3897970, at *12 (S.D.N.Y. Aug. 31, 2011); *Grayson Consulting, Inc. v. Wachovia Sec., LLC* (*In re Derivium Capital, LLC*), 437 B.R. 798, 812 (Bankr. D.S.C. 2010), *aff'd*, 716 F.3d 355 (4th Cir. 2013); *Official Comm. of Unsecured Creditors v. Boveri* (*In re Grand Eagle Cos., Inc.*), 288 B.R. 484, 494-95 (Bankr. N.D. Ohio 2003); *contra SIPC v. BLMIS* (*In re BLMIS*), No. 12 MC 115 (JSR), 2013 WL 1609154, at *4 (S.D.N.Y. Apr. 15, 2013) (placing the burden of proof on the plaintiff to prove the nonapplication of section 546(e) in actions to avoid and recover pre-petition transfers made to customers of a brokerage in liquidation under the Securities Investor Protection Act, 15 U.S.C. §§ 78aaa *et seq.*).

Section 546(e) was designed to protect against the ripple effect of requiring a transferee to "repay amounts received in settled securities transactions," which could leave the transferee with "insufficient capital or liquidity to meet its current securities trading obligations, placing other market participants

and the securities markets themselves at risk." *Enron Creditors Recovery Corp. v. Alfa, S.A.B. de C.V.* (*In re Enron Creditors Recovery Corp.*), 651 F.3d 329, 334 (2d Cir. 2011); *see also In re Tribune Co. Fraudulent Conveyance Litig.*, 818 F.3d 98, 120-21 (2d Cir. 2016) (Section 546(e)'s "larger purpose was to promote finality and certainty for investors, by limiting the circumstances, e.g., to cases of intentional fraud, under which securities transactions could be unwound") (alterations and quotations omitted),[46] *petition for cert. filed*, No. 16-317 (U.S. Sept. 12, 2016), *cert. deferred*, 138 S. Ct. 1162 (2018), *mandate recalled*, No. 13-3992(L) (2d Cir. May 15, 2018).

Section 561(d) of the Bankruptcy Code extends the 546(e) safe harbor to proceedings brought by a foreign representative in a chapter 15 case "to the same extent as in a proceeding under chapter 7 or 11 of this title." It provides:

> Any provisions of this title relating to securities contracts, commodity contracts, forward contracts, repurchase agreements, swap agreements, or master netting agreements shall apply in a case under chapter 15, so that enforcement of contractual provisions of such contracts and agreements in accordance with their terms will not be stayed or otherwise limited by operation of

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[46] Bankruptcy Code § 546(g) provides a similar safe harbor regarding swap agreements. *See Whyte v. Barclays Bank PLC*, 644 F. App'x 60 (2d Cir. 2016) (summary order), *cert. denied*, 137 S. Ct. 2114 (2017). To the extent that the Liquidators are seeking to avoid and recover redemption payments made in connection with swap agreements, the same principles apply.

> any provision of this title or by order of a court in any case under this title, *and to limit avoidance powers to the same extent as in a proceeding under chapter 7 or 11 of this title (such enforcement not to be limited based on the presence or absence of assets of the debtor in the United States).*

11 U.S.C. § 561(d) (emphasis added) (the concluding, italicized parenthetical is referred to as the "Enforcement Parenthetical"). Relying on the "plain text" of section 561(d), the Defendants argue that it makes section 546(e) apply extraterritorially to bar the Liquidators' avoidance claims as well as their common law claims. (*Defendants Motion* at 36-37.)

Not surprisingly, the Liquidators disagree. They acknowledge that the safe harbor in section 546(e) bars certain avoidance claims brought by a chapter 7 or chapter 11 trustee, but argue that section 546(e) does not apply extraterritorially, and section 561(d) does no more than make section 546(e) equally applicable (or inapplicable) in a chapter 15. They reason that since section 546(e) does not apply extraterritorially to an action by a chapter 7 or a chapter 11 trustee to avoid a foreign transfer, it does not apply to an action brought by foreign representatives like those brought by the Liquidators in the U.S. Redeemer Actions. (*Liquidators Reply* at 61-62.) Furthermore, even if the Enforcement Parenthetical extended the enforcement of contractual Close-Out Rights[47] to collateral located abroad, the

[47] "Close-Out Rights" as used in this decision refers to the non-debtor's contractual right to cause the termination, liquidation, or acceleration of or to offset or net termination values, payment

Defendants are not seeking to exercise Close-Out Rights; the Liquidators are seeking to avoid transfers. The Enforcement Parenthetical simply clarifies that provisions affecting enforcement of Close-Out Rights apply irrespective of whether the assets of the foreign debtor are present in the United States, but property transferred to a third party prior to a bankruptcy case is neither property of the estate[48] nor property of the debtor when the case is commenced. Therefore, in the Liquidators' claim to avoid a transfer made by the debtor, the property transferred is not an "asset of the debtor" within the Enforcement Parenthetical. (*Id.* at 62-63.) Finally, interpreting section 561(d) to extend the safe harbor to foreign transfers would undermine chapter 15's goal of granting relief to a foreign main proceeding by allowing a Defendant who has received a foreign transfer to assert U.S. bankruptcy law to defeat a BVI avoidance action. (*Id.* at 63-64.)

2. Extraterritoriality

The "presumption against extraterritoriality" is a "longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) ("*Aramco*") (internal quotation marks and citation omitted); *accord RJR Nabisco, Inc. v. European Cmty.*, 136 S.

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amounts, or other transfer obligations as set forth in 11 U.S.C. § 561.

[48] The filing of a petition for recognition under chapter 15 does not create an "estate" or "property of the estate." *See* 11 U.S.C. § 541(a) ("The commencement of a case under sections 301, 302, or 303 of this title creates an estate.").

Ct. 2090, 2100 (2016) ("*Nabisco*"); *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 255 (2010) ("*Morrison*"). The presumption "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord." *Aramco*, 499 U.S. at 248.

The presumption against extraterritoriality involves an exercise in statutory interpretation and calls for a two-step analysis which can be examined in either order. "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." *Nabisco*, 136 S. Ct. at 2101; *accord Morrison*, 561 U.S. at 255 ("When a statute gives no clear indication of an extraterritorial application, it has none."). The first step does not impose a "clear statement rule," because even absent a "clear statement," the context of the statute can be consulted to give the most faithful reading. *Morrison*, 561 U.S. at 265. If the first step yields the conclusion that the statute applies extraterritorially, the inquiry ends.

If it does not, the court must turn to the second step in which the Court must 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. *Nabisco*, 136 S. Ct. at 2101; *accord Morrison*, 561 U.S. at 266-67 (court must look to the "'focus' of congressional concern," *i.e.*, the "objects of the statute's solicitude").

3. The Relationship Between sections 546(e) and 561(d)

Asking whether section 546(e) applies extraterritorially is the wrong question.[49] The correct question is whether section 561(d) makes the safe harbor applicable to proceedings brought by foreign representatives in a chapter 15 case seeking to avoid purely foreign transfers under foreign insolvency laws. The plain text indicates that it does. Section 561(d) serves two purposes. First, it prevents a foreign

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[49] Presumably, section 546(e) will apply extraterritorially to the same extent that the chapter 5 avoidance provisions apply extraterritorially, an issue that has drawn divergent views. *Compare SIPC v. BLMIS* (*In re BLMIS*), 513 B.R. 222, 231 (S.D.N.Y. 2014) (Bankruptcy Code § 550(a) did not apply extraterritorially to permit recovery of foreign transfers), *supplemented by* No. 12-mc-115 (JSR), 2014 WL 3778155 (S.D.N.Y. July 28, 2014); *LaMonica v. CEVA Grp. PLC* (*In re CIL Ltd.*), 582 B.R. 46, 92-93 (Bankr. S.D.N.Y. 2018) ("Congress has not 'clearly expressed' that sections 548 and 550 apply extraterritorially"), *reconsideration granted on other grounds*, Adv. Proc. No. 14-02442 (JLG), 2018 WL 3031094 (Bankr S.D.N.Y. June 15, 2018); *Spizz v. Goldfarb Seligman & Co.* (*In re Ampal-Am. Isr. Corp.*), 562 B.R. 601, 612 (Bankr. S.D.N.Y. 2017) ("the avoidance provisions of the Bankruptcy Code ... do not apply extraterritorially") *with French v. Liebmann* (*In re French*), 440 F.3d 145, 152 (4th Cir.) ("Congress made manifest its intent that § 548 apply to all property that, absent a prepetition transfer, would have been property of the estate, wherever that property is located."), *cert. denied*, 549 U.S. 815 (2006); *Weisfelner v. Blavatnik* (*In re Lyondell Chem. Co.*), 543 B.R. 127, 155 (Bankr. S.D.N.Y. 2016) (same).

representative or a U.S. bankruptcy court from interfering with the enforcement by a non-debtor counterparty of its Close-Out Rights, and "such enforcement [is] not to be limited based on the presence or absence of assets of the debtor in the United States." In other words, the chapter 15 bankruptcy court cannot enjoin a party over which it has personal jurisdiction from exercising its Close-Out Rights to foreclose on collateral regardless of whether the collateral is located within or without the United States. The Liquidators concede as much. (*Foreign Representatives' Supplemental Memorandum of Law Addressing Bankruptcy Code Section 561(d) pursuant to February 1, 2018 Order of the Court*, dated February 15, 2018 ("*Liquidators Supplemental Memo*") at 9 ("[T]he purpose of the parenthetical is apparent: to make as plain as possible that the provisions protecting netting agreements are fully applicable in ancillary proceedings, *even if* the debtor's assets comprising the collateral subject to netting or off-set are sited abroad.") (emphasis in original) (ECF Doc. # 1656).)

Second, section 561(d) limits the foreign representative's ability to recover property transferred in connection with the earlier exercise of Close-Out Rights.[50] It provides that the safe harbors under the Bankruptcy Code "shall apply in a case under chapter 15 ... to limit avoidance powers to the same extent as in a proceeding under chapter 7 or 11

[50] Although section 546(e) does not protect against an intentional fraudulent transfer claim under 11 U.S.C. § 548(a)(1)(A), the BVI Avoidance Claims do not allege intentional fraudulent transfers.

of this title." A chapter 15 foreign representative cannot exercise the avoidance powers available to a trustee in chapter 7 or chapter 11. *See* 11 U.S.C. § 1521(a)(7). Consequently, section 561(d) is necessarily referring to avoidance powers available under non-U.S. law.[51] The Defendants argue that section 561(d) precludes foreign law avoidance claims brought in the United States even when the property transferred in connection with the enforcement of the Close-Out Rights, *i.e.*, the collateral that was foreclosed, was located outside the United States.[52] (*Defendants Motion* at 36; *Defendants Reply* at 17.)

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[51] A foreign representative under section 304 (the predecessor to Chapter 15) also lacked the authority to exercise a trustee's avoidance powers. *See Koreag, Controle et Revision S.A. v. Refco F/X Assocs., Inc.* (*In re Koreag, Controle et Revision S.A.*), 961 F.2d 341, 357 (2d Cir.), *cert. denied*, 506 U.S. 865 (1992).

[52] The Defendants also contend that the safe harbor bars the Liquidators from bringing common law and other non-bankruptcy law claims that effectively seek the same relief based on the same act. *See, e.g.*, *Contemporary Indus. Corp. v. Frost*, 564 F.3d 981, 988 (8th Cir. 2009) (common law unjust enrichment and "excessive shareholder distributions" claims barred because they sought "to recover the same payments ... [that] are unavoidable under Section 546(e)"), *abrogated on other grounds by Merit Mgmt. Grp., LP v. FTI Consulting*, 138 S. Ct. 883 (2018); *AP Servs. LLP v. Silva*, 483 B.R. 63, 71 (S.D.N.Y. 2012) (unjust enrichment claim could not be permitted without "frustrating the purpose of Section 546(e)"); *Official Comm. of Unsecured Creditors of Hechinger Inv. Co. v. Fleet Retail Fin. Grp.* (*In re Hechinger Inv. Co.*), 274 B.R. 71, 96 (D. Del. 2002) (unjust enrichment claim barred where it "effectively acts as an avoidance claim against the shareholders in a transaction that the court has already found is an unavoidable settlement payment").

The Court concludes that the Liquidators' interpretation is unreasonable because it severs the provision that protects Close-Out Rights from the clause that limits foreign avoidance claims. These provisions complement each other and cannot be viewed separately because the same concern — the domino effect of a financial meltdown — animates both clauses. The foreign representative cannot prevent the enforcement of the Close-Out Rights and cannot avoid the transfers that result from the enforcement of Close-Out Rights. Yet under the Liquidators' interpretation, they could not prevent the enforcement of the Close-Out Rights but could nonetheless avoid and recover the corresponding transfers. Their interpretation leads to the absurd result of protecting the transfer at the front end while avoiding it at the back end.

4. The Origins of Section 561(d)

To the extent there is any ambiguity, the history leading to the adoption of section 561(d) confirms the Court's interpretation. Section 561(d) originated with legislation proposed in 1996 by the International Swaps and Derivatives Association, Inc. ("ISDA") and the Public Securities Association ("PSA") (together, "ISDA/PSA"). At that time, ISDA/PSA focused on the concern that "a failure of one large participant in financial markets or a disruption in one market *could lead to widespread difficulties at other institutions or systemic disruptions in other markets or in the financial system as a whole*." International Swaps and Derivatives Association, Inc. & Public Securities Association, *Financial Transactions in Insolvency: Reducing Legal Risk Through Legislative Reform*, at 1

(Apr. 2, 1996) ("*Reducing Legal Risk*") (emphasis added).[53]

Relevant to these adversary proceedings, the ISDA/PSA worried that the bankruptcy of a counterparty to a qualifying transaction could interfere with the non-debtor counterparties' ability to enforce its Close-Out Rights. *Id.* at 1-2. According to the ISDA/PSA, the inability of the non-debtor counterparty to enforce Close-Out Rights could lead to uncertainty, gridlock, lack of liquidity, spread to other institutions and markets and prevent determination of credit exposures critical to the implementation of prudent risk management procedures. *Id.* at 2.

The ISDA/PSA offered a series of legislative proposals one of which addressed ancillary proceedings under the Bankruptcy Code. Proposed § 106(m) would add § 304(d) to the Bankruptcy Code:

> Any provisions of this title relating to securities contracts, commodity contracts, forward contracts, repurchase agreements, swap agreements or master netting agreements shall apply in a case ancillary to a foreign proceeding under this section, so that enforcement of contractual provisions of such contracts and agreements in accordance with their terms will not be stayed or otherwise limited by operation of any provision of this title or by order of a court in

[53] A copy of *Reducing Legal Risk* is annexed as Exhibit A to the *Attorney Declaration of William M. Lemon in Support of Defendants' Supplemental Memorandum of Law Concerning the Legislative History of 11 U.S.C. § 561(d)*, dated Feb. 15, 2018 ("*Lemon Declaration*") (ECF Doc. # 1658).

> any proceeding under this title, and to limit avoidance powers to the same extent as a proceeding under Chapters 7 or 11 of this title (such enforcement not to be limited based on the presence or absence of assets of the debtor in the United States).

Id. at A-19. The ISDA/PSA explained the purpose of the proposed provision in the following manner:

> Section 106(m) clarifies that the provisions of the Bankruptcy Code related to securities contracts, commodity contracts, forward contracts, repurchase agreements, swap agreements and master netting agreements will apply in a Section 304 proceeding ancillary to a foreign insolvency proceeding. This provision is designed so that a bankruptcy court or trustee does not exercise its discretion in a Section 304 proceeding to reach a result that would be at odds with the result that would be required in a non-Section 304 proceeding for a debtor under the Bankruptcy Code.

Id. at 18.

The proposal was prompted by the anxiety over the bankruptcy court's injunctive powers. While the automatic stay did not apply in section 304 ancillary proceedings, bankruptcy courts had broad authority to grant injunctions in favor of foreign representatives and could potentially bar the exercise of the Close-Out Rights, especially the right to foreclose on collateral, leading to a meltdown of the financial system. Fear over injunctive relief came into greater focus with the

insolvency of Long-Term Capital Management ("LTCM") in 1998.

LTCM, a Delaware limited partnership, operated a fund (the "LTCM Fund") organized as a Cayman Island partnership. Beginning in late July 1998, the LTCM Fund started to sustain substantial losses. The President's Working Group on Financial Markets ("Working Group"), which consisted of the Secretary of the Treasury, the Chairman of the Board of Governors of the Federal Reserve, the Chairman of the SEC and the Chairperson of the Commodities Futures Trading Commission, issued a study relating to LTCM's downfall and made certain recommendations to prevent disruptions in the markets. President's Working Group, *Hedge Funds, Leverage, and the Lessons of Long-Term Capital Management* (Apr. 1999) ("*Working Group Report*").[54]

Although the LTCM Fund was ultimately bailed out, the Working Group, among other things, hypothesized the effect of a default on the LTCM Fund's counterparties. It noted that if the LTCM Fund was the subject of a Cayman Islands insolvency proceeding, "its Cayman receiver could have sought a Section 304 Injunction prohibiting at least temporarily the liquidation of U.S. collateral pledged by LTCM to its counterparties." *Id.* at 28. This might force U.S. secured creditors to seek the permission of the foreign bankruptcy court to liquidate their collateral, or at least delay them from liquidating any

[54] A copy of *Working Group Report* is annexed as Exhibit D to the *Lemon Declaration.*

U.S. Treasury securities pledged by the Fund under a master netting agreement. *Id.* at E-8 to E-9.

The Working Group thought an earlier proposal it had submitted to Congress solved the situation and clarified that a U.S. creditor could immediately liquidate its U.S. collateral. *Id.* at E-10. The proposed legislative fix was included in two bills, S. 1914, § 210 (105th Cong., 2nd Sess. April 2, 1998) ("Grassley Bill"); H.R. 4393 (105th Cong., 2nd Sess. Oct. 4, 1998) ("Leach Bill"). *Id.* at E-8 n. 15. Section 210 of the Grassley Bill essentially tracked the language of the ISDA/PSA proposal verbatim.[55] Similarly, section 8(m) of the Leach Bill tracked the ISDA/PSA proposal with slight immaterial modifications,[56] and was

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[55] Section 210 would have added the following provision to the Bankruptcy Code as section 304(d):

> Any provision of this title relating to securities contracts, commodity contracts, forward contracts, repurchase agreements, swap agreements, or master netting agreements shall apply in a case ancillary to a foreign proceeding under this section so that enforcement of contractual provisions of such contracts and agreements in accordance with their terms will not be stayed or otherwise limited by operation of any provision of this title or by order of a court in any proceeding under this title, and to limit avoidance powers to the same extent as a proceeding under chapter 7 or 11 of this title (such enforcement not to be limited based on the presence or absence of assets of the debtor in the United States).

Business Bankruptcy Reform Act, S. 1914, 105th Cong. § 210 (1998).

[56] Section 8(m) proposed to add the following provision to the Bankruptcy Code as section 304(d):

intended to clarify "that the provisions of the Bankruptcy Code related to securities contracts, commodity contracts, forward contracts, repurchase agreements, swap agreements and master netting agreements apply in a section 304 proceeding ancillary to a foreign insolvency proceeding." H.R. REP. NO. 105-688, pt. 1, at 18 (1998).

These bills were not enacted. Similar proposals relating to ancillary proceedings were included in bills submitted in the 106th, 107th and 108th Congresses, but these bills were also not enacted. (*See Liquidators Supplemental Memo* at 5 n. 2 (collecting bills).)

Section 561(d) was ultimately enacted as part of the Bankruptcy Abuse and Consumer Protection Act of 2005 ("BAPCPA") along with other provisions that clarified and expanded the protections afforded to the

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> Any provisions of this title relating to securities contracts, commodity contracts, forward contracts, repurchase agreements, swap agreements, or master netting agreements shall apply in a case ancillary to a foreign proceeding under this section or any other section of this title so that enforcement of contractual provisions of such contracts and agreements in accordance with their terms will not be stayed or otherwise limited by operation of any provision of this title or by order of a court in any proceeding under this title, and to limit avoidance powers to the same extent as in a proceeding under chapter 7 or 11 of this title (such enforcement not to be limited based on the presence or absence of assets of the debtor in the United States).

Financial Contract Netting Improvement Act of 1998, H.R. 4393, 105th Cong. § 8(m) (1998).

exercise of Close-Out Rights. *See* Pub. L. 109-8, 119 Stat. 23 § 907 (2005). The House Report explained:

> New section 561 of the Bankruptcy Code clarifies that the provisions of the Bankruptcy Code related to securities contracts, commodity contracts, forward contracts, repurchase agreements, swap agreements and master netting agreements apply in a proceeding ancillary to a foreign insolvency proceeding *under new section 304 of the Bankruptcy Code.*

H.R. Rep. No. 109-31, pt. 1, at 133 (2005) (emphasis added). Of course, there was no "new" section 304 enacted as part of BAPCPA; BAPCPA abrogated section 304, and substituted the more comprehensive chapter 15 in its place. The legislative history pertaining to section 561(d) was apparently lifted from prior conference reports.

Thus, Section 561(d) traces its lineage to the ISDA/PSA proposal, and its adoption along with the expansion of the safe harbor protections reflect Congressional intent to provide broad protection to avoid the spread of financial contagion. While Congress and the Working Group were primarily and understandably concerned with U.S. creditors and U.S. markets, the ISDA/PSA recognized that the financial contagion they feared did not stop at the border, and neither the statute nor the legislative history suggests that the safe harbors are limited to U.S. creditors or U.S. markets.

The Liquidators' argument that section 561(d) was simply intended to put ancillary proceedings on the same footing as plenary bankruptcies is correct

but misses the point. A chapter 7 or a chapter 11 trustee cannot avoid and recover a transfer that occurred in connection with the enforcement of a Close-Out Right if the exercise of the Close-Out Right could not be prevented under the Bankruptcy Code. The exercise of Close-Out Rights is exempt from the automatic stay under 11 U.S.C. § 362(b), and except for certain intentional fraudulent transfers, the safe harbor bars the trustee from avoiding transfers that occurred in connection with the pre-petition exercise of Close- Out Rights. Similarly, a chapter 15 foreign representative (and the bankruptcy court) cannot prevent the enforcement of Close-Out Rights, even if the exercise of those rights involves the transfer of collateral located abroad and cannot invoke non-U.S. law to avoid and recover those transfers if they have already occurred. Furthermore, the Liquidators' policy argument that the Defendants' interpretation of section 561(d) will undermine chapter 15 by placing limitations on the ability of foreign representative to avoid Covered Transactions involving foreign assets may be true but ignores the policy rationale underlying the adoption and subsequent expansion of the Bankruptcy Code's safe harbor provisions to prevent a financial meltdown.

5. The Liquidators' Foreign Avoidance Claims

Through the extant complaints and/or proposed amendments, the Liquidators seek to avoid and recover "unfair preferences" and "undervalue transactions" pursuant to the Insolvency Act §§ 245 and 246, respectively. As noted earlier, these claims correspond to claims to avoid preferences under 11

U.S.C. § 547 and constructive fraudulent transfers under 11 U.S.C. §§ 544(b)(1) (incorporating state avoidance law) and 548(a)(1)(B). If the subject redemptions were Covered Transactions, the avoidance of those transactions would be barred under 11 U.S.C. §§ 546(e) and 561(d).

There does not appear to be any dispute that the redemptions at issue were Covered Transactions because they were settlement payments made in connection with securities contracts. *Cf. Picard v. Ida Fishman Revocable Tr.* (*In re BLMIS*), 773 F.3d 411, 422-23 (2d Cir. 2014) (payments to BLMIS investors were settlement payments on account of securities contracts), *cert. denied*, 135 S. Ct. 2858 (2015). The more difficult question is whether the transferor or the transferee was a covered entity - either a financial institution or a financial participant. Within weeks of the parties' submissions, the Supreme Court issued *Merit*. It concluded that the transferor or transferee had to be a qualifying entity under section 546(e), *id.* at 892-95, 897, and abrogated the Second Circuit's rule in *Official Comm. of Unsecured Creditors of Quebecor World (USA) Inc. v. Am. United Life Ins. Co.* (*In re Quebecor World (USA) Inc.*), 719 F.3d 94 (2d Cir. 2013) under which the safe harbor applied if a qualifying financial entity acted merely as a conduit or intermediary. *Id.* at 99. Because *Quebecor* was the controlling law in the Second Circuit at the time, neither party had focused on whether the transfer was made by, to or for the benefit of an enumerated financial entity. The *Defendants Motion* argued that the redemptions were sent to "financial institutions" because the redemptions were received in "bank accounts," (*Defendants Motion* at 43-44), but after

Merit, that may not be enough to protect the transfer under section 546(e).

Alternatively, the Defendants argued that Sentry was a "financial participant" and the redemptions it paid are protected from avoidance by the safe harbor. (*Defendants Motion* at 43.)[57] For support, they pointed to the Liquidators' allegations that Sentry held in excess of $6 billion of assets with BLMIS as of October 2008. (*Id*.) According to the Defendants, this admission placed Sentry within the statutory definition of "financial participant" because it held securities contracts with an aggregate value over $1 billion within the fifteen-month time period set forth in the statute. *See* 11 U.S.C. § 101(22A). However, the statute refers to the "15-month period preceding the date of the filing of the petition." *Id*. Sentry's "petition" was filed on June 14, 2010.[58] Since October 2008 was 19 months prior to Sentry's petition, the value of outstanding securities contracts at that time is not dispositive of Sentry's status as a "financial participant."

The change in the law resulting from the Supreme Court's *Merit* decision prompted a flurry of letters from the parties over a two-month span containing new arguments regarding the effect of *Merit* on the Defendants' motions, including whether the redemptions were made by, to or for the benefit of an entity covered by section 546(e). (*See Letter of David*

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[57] The Defendants did not address this argument to the redemption payments made by Sigma and Lambda.

[58] A chapter 15 debtor's "petition" refers to the petition for recognition of a foreign proceeding under 11 U.S.C. § 1504. *See* 11 U.S.C. § 101(42).

J. Molton, dated Mar. 8, 2018 (ECF Doc. # 1671); *Letter of Thomas J. Moloney*, dated Mar. 23, 2018 (ECF Doc. # 1687); *Letter of David J. Molton*, dated Apr. 5, 2018 (ECF Doc. # 1690); *Letter of David J. Molton*, dated Apr. 27, 2018 (ECF Doc. # 1692); *Letter of Thomas J. Moloney*, dated Apr. 27, 2018 (ECF Doc. # 1693); *Letter of David J. Molton*, dated May 9, 2017 (ECF Doc. # 1694); *Letter of Thomas J. Moloney*, dated May 10, 2018 (ECF Doc. # 1695).) Rather than consider the arguments made through the multiple letters, the Court denies the branch of the Defendants' motions seeking dismissal based on sections 546(e) and 561(d) without prejudice to their right to make subsequent motions that the Funds and/or the Defendants were financial participants or financial institutions and without prejudice to the Liquidators' right to oppose those motions.

CONCLUSION

For the reasons stated, the Defendants' motions to dismiss are granted to the extent of dismissing all of the Common Law Claims and the Contract Claims except to the extent that a complaint alleges a constructive trust claim against a Knowledge Defendant. The motions to dismiss the BVI Avoidance Claims are denied without prejudice to a renewed motion based on the applicability of 11 U.S.C. §§ 546(e) and 561(d). Correspondingly, the Liquidators are granted leave to amend to assert constructive trust claims against Knowledge Defendants and BVI Avoidance Claims against all Defendants. The Court has considered the remaining arguments made by the parties, and to the extent not specifically addressed, concludes that they lack merit

or are rendered moot by the disposition of the motions. The Liquidators are directed to settle or submit a consensual order consistent with this decision in each adversary proceeding.

Dated: New York, New York
December 6, 2018

/s/Stuart M. Bernstein
STUART M. BERNSTEIN
United States Bankruptcy Judge

Appendix I

UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

Adv. Proc. No. 10-03496
(Administratively Consolidated)

FAIRFIELD SENTRY LIMITED (IN LIQUIDATION), et al.,
Plaintiffs,
v.
THEODOOR GGC AMSTERDAM, et al.,
Defendants.

Filed: Aug. 6, 2018

MEMORANDUM DECISION AND ORDER REGARDING DEFENDANTS' MOTIONS TO DISMISS FOR WANT OF JURISDICTION

STUART M. BERNSTEIN[1]

United States Bankruptcy Judge

Plaintiffs Kenneth M. Krys and Charlotte Caulfield (together, the "Liquidators"),[2] in their

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[1] The listed attorneys for the Defendants participated at the oral argument; additional defense counsel are set forth in Appendix E to the *Consolidated Memorandum of Law in Opposition to Plaintiffs' Motion for Leave to Amend and in Support of Defendants' Motion to Dismiss*, dated Jan. 13, 2017 ("*Defendants Motion*") (ECF Doc. # 960).

[2] Different individuals have served as Liquidators of the Funds. When used in this memorandum decision, the term refers to the

capacities as foreign representatives of Fairfield Sentry Limited ("Sentry"), Fairfield Sigma Limited ("Sigma"), and Fairfield Lambda Limited ("Lambda," and collectively, the "Funds") seek leave to amend their complaints, (*see Memorandum Of Law in Support of Motion for Leave to Amend*, dated Oct. 21, 2016 ("*Liquidators Motion*") (ECF Doc. # 923)), in 305 adversary proceedings pending in this Court in which the Liquidators seek to recover redemptions paid by the Funds to the defendants (collectively, the "U.S. Redeemer Actions").[3] The defendants in the U.S. Redeemer Actions (collectively, the "Defendants") oppose the amendments and seek dismissal of the U.S. Redeemer Actions for lack of subject matter jurisdiction, lack of personal jurisdiction, and for failure to state a claim. (*See Defendants Motion*.) For the reasons set forth herein, the Defendants' motion to dismiss for lack of subject matter jurisdiction is denied, and the motion to dismiss for lack of personal

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individuals serving in the position during the referenced time-period.

[3] A list of all U.S. Redeemer Actions is attached as Appendix D to the *Foreign Representatives' Memorandum of Law in Opposition to Defendants' Consolidated Memorandum of Law and in Further Support of Foreign Representatives' Motion for Leave to Amend Complaints*, dated Mar. 31, 2017 ("*Liquidators Reply*") (ECF Doc. # 1336). The U.S. Redeemer Actions were administratively consolidated for pretrial purposes. (*See Amended Order Authorizing the Consolidation of Redeemer Actions Pursuant to Federal Rule of Bankruptcy Procedure 7042*, signed Nov. 17, 2010 (ECF Doc. # 25).) Unless otherwise specified, references to docket entries are to documents filed on the electronic docket of the consolidated proceeding, *Fairfield Sentry Limited (In Liquidation) v. Theodoor GGC Amsterdam*, Adv. Proc. No. 10- 03496 (SMB).

jurisdiction is granted to the extent that personal jurisdiction is based solely on the forum selection clause in the Subscription Agreements (defined below). Finally, the balance of the motion to dismiss, which challenges the merits of the Liquidators' claims, must await the disposition of further proceedings discussed at the end of this opinion. The Liquidators' motion for leave to amend is deferred pending resolution of Defendants' dismissal arguments based on the failure to state a claim.

BACKGROUND

A. The Funds and the BVI Liquidation

The pre-2012 background pertaining to these proceedings is set forth in *Fairfield Sentry Ltd. (In Liquidation) v. Theodoor GGC Amsterdam* (*In re Fairfield Sentry Ltd.*), 452 B.R. 64, 69-73 (Bankr. S.D.N.Y. 2011) ("*Fairfield I*") and *In re Fairfield Sentry Ltd. Litig.*, 458 B.R. 665, 671-72 (S.D.N.Y. 2011) ("*Fairfield II*"), familiarity with which is assumed. The Court highlights only those facts relevant to the disposition of the motions before it.

The Funds were organized under the laws of the British Virgin Islands ("BVI"). *Fairfield II*, 458 B.R. at 671. Sentry sold shares to foreign investors and invested virtually all of the proceeds with Bernard L. Madoff Investment Securities LLC ("BLMIS"). *Id.* Sigma and Lambda were "funds of funds." They also sold shares to investors, but invested the proceeds with Sentry which, in turn, invested those funds with BLMIS. The investors could redeem their shares at will, and the redemption payment amounts were based on a calculation of net asset value ("NAV") per

share which depended, for the most part, on the value of Sentry's investment with BLMIS. *Id*.

In December 2008, Madoff admitted to operating the investment advisory business of BLMIS as a Ponzi scheme, and BLMIS was placed into a liquidation proceeding pursuant to section 78eee of the Securities Investor Protection Act, 15 U.S.C. §§ 78aaa, *et seq*. *Fairfield I*, 452 B.R. at 69. In hindsight, the Funds had overpaid the earlier redemptions (and overcharged the earlier subscribers) based on an erroneous view of the value of their BLMIS investments, and after Madoff's arrest, they ceased making redemption payments. *Id*. Certain of the Funds' creditors and shareholders commenced insolvency proceedings against the Funds in the Commercial Division of the Eastern Caribbean High Court of Justice, British Virgin Island ("BVI Court") in February and April 2009, and the BVI Court appointed the Liquidators as the Funds' fiduciaries. *Id*. at 69-70. On June 14, 2010, the Liquidators commenced ancillary proceedings in this Court under Chapter 15 of the Bankruptcy Code to obtain recognition of the BVI liquidation proceedings as "foreign main proceedings" under sections 1502(4), 1515, and 1517 of the Bankruptcy Code. *Id*. at 70. The Court granted the Liquidators' applications on July 22, 2010. *In re Fairfield Sentry Ltd.*, 440 B.R. 60, 63-66 (Bankr. S.D.N.Y. 2010), *aff'd*, No. 10 Civ. 7311(GBD), 2011 WL 4357421 (S.D.N.Y. Sept. 16, 2011), *aff'd*, 714 F.3d 127 (2d Cir. 2013).

B. The U.S. Redeemer Actions

In April 2010, and prior to recognition, the Liquidators began commencing numerous actions in New York state court on behalf of the Funds against a

subset of the Defendants. *Fairfield II*, 458 B.R. at 672. Typically, the Defendants were banks that purchased shares in the Funds they thereafter resold to their customers. *Id.* at 671-72. The banks were the registered owners of the shares, but their customers who acquired the shares were the beneficial owners, and were also sued as Defendants. *Id.* at 672. The Liquidators asserted claims based on money had and received, unjust enrichment, mistaken payment, and constructive trust (the "Common Law Claims"), but the theory of each claim was the same: the Funds had miscalculated the NAV, and consequently, paid inflated redemption prices. *Id.*

Following recognition of the BVI liquidations under Chapter 15 of the Bankruptcy Code, the Liquidators removed the state court actions to the District Court pursuant to 28 U.S.C. § 1452(a),[4] and the District Court referred the actions to this Court under the standing order of referral then in effect. *See Standing Order of Referral of Cases to Bankruptcy Judges*, M-61 (Ward, Acting C.J.) (S.D.N.Y. July 10, 1984) (as amended, the "District Court Standing Order of Reference").[5] The Liquidators filed

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[4] Section 1452(a) of Title 28 states that "[a] party may remove any claim or cause of action in a civil action ... to the district court for the district where such civil action is pending, if such district court has jurisdiction of such claim or cause of action under section 1334 of this title."

[5] The 1984 standing order was superseded in early 2012 following the Supreme Court's decision in *Stern v. Marshall*, 564 U.S. 462 (2011). *See Amended Standing Order of Reference Re: Title 11*, 12 misc. 00032, M10-468(LAP) (S.D.N.Y. Jan. 31, 2012). The changes do not affect the automatic referral of the U.S. Redeemer Actions to this Court.

substantially similar adversary proceedings against other Defendants under the umbrella of the Chapter 15 case, and the Court administratively consolidated the newly filed cases and the removed cases (*i.e.* the U.S. Redeemer Actions). *Fairfield II*, 458 B.R. at 672. The Liquidators also amended certain of the complaints in the U.S. Redeemer Actions to assert avoidance claims under sections 245 and 246 of the BVI INSOLVENCY ACT of 2003 ("INSOLVENCY ACT") to claw back redemptions paid with inflated prices as "unfair preferences" and/or "undervalue transactions" (the "BVI Avoidance Claims"). *Id.* As noted, 305 U.S Redeemer Actions are pending and seek an aggregate recovery of over $6 billion.

A group of Defendants subsequently moved to remand the removed actions to state court based, *inter alia*, on mandatory abstention under 28 U.S.C. § 1334(c)(2).[6] *Fairfield II*, 458 B.R. at 672. The Bankruptcy Court denied the motion, but the District Court reversed the Bankruptcy Court's order. Chief District Judge Preska ruled that the claims asserted in the U.S. Redeemer Actions were not subject to a bankruptcy court's "core" jurisdiction, *Fairfield II*, 458

[6] Section 1334(c)(2) of Title 28 provides

> Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction.

B.R. at 688-89, she assumed that they were "noncore," *id.* at 690, and remanded the proceedings to the Bankruptcy Court to reconsider whether the cases were subject to mandatory abstention under 28 U.S.C. § 1334(c)(2). *Id.* at 691. The Defendants subsequently withdrew their remand request, and the U.S. Redeemer Actions are before this Court. (*See Notice of Withdrawal of Motions to Remand and for Abstention*, dated Jan. 13, 2017 (ECF Doc. # 954).)

C. The BVI Redeemer Actions

Less than a month after the District Court's remand order in *Fairfield II*, this Court entered an order staying the U.S. Redeemer Actions, (*see Amended Order Staying Redeemer Actions*, dated Oct. 19, 2011 (ECF Doc. # 418)), pending further developments in suits brought by the Liquidators against redeemers in the BVI Court, a subject to which I now turn.

The procedure for purchasing and redeeming Fund shares was set forth in the Amended and Restated Articles of Association (the "Articles").[7] Article 10 described the procedure for the redemption of shares. Upon receipt of a written redemption request, the Fund was obligated to redeem or

[7] A copy of Sentry's Articles is attached as Ex. F to the *Declaration of William Hare in Support of Motion for Leave to Amend*, dated Oct. 21, 2016 ("*Hare Declaration*") (ECF Doc. # 925). The Articles for Sigma and Lambda are substantially similar to Sentry's and are attached as Exs. D and E to the *Attorney Declaration of Thomas J. Moloney in Opposition to Plaintiffs' Motion for Leave to Amend and in Support of Defendants' Motion to Dismiss*, Jan. 13, 2017 ("*Moloney Declaration*") (ECF Doc. # 961).

purchase the Member's shares at the Redemption Price. (Article 10(1) & (1)(b).) The Redemption Price for each share was the NAV per share, (Article 10(2)), and the NAV per share was determined by dividing the value of the Fund's net assets by the number of outstanding shares. (Article 11(1)[b][8].) "Any certificate as to the Net Asset Value per Share or as to the Subscription Price or the Redemption Price therefor given in good faith by or on behalf of the Directors shall be binding on the parties." (Article 11(1)[c].)[9] The surrender of any certificate issued in respect to the shares to be redeemed was a condition to Fairfield's obligation to pay the Redemption Price. (Article 10(3)(a).)[10]

In late 2009 and early 2010, the Liquidators commenced actions against shareholders in the BVI Court (the "BVI Redeemer Actions") to recover other redemptions paid to shareholders based upon a mistaken NAV. (*See Statement of Claim* in *Fairfield Sentry Ltd. (In Liquidation) v. Bank Julius Baer & Co. Ltd.,* dated Mar. 12, 2010, at ¶ 9 (attached as Ex. A to the *Hare Declaration*).) The Liquidators alleged that the actual value of the shares was nominal, and the shareholders were "unjustly enriched" and were

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[8] Bracketed letters following Article 11(1) reference subparagraphs of that Article with "[a]" being the first subparagraph and so forth.

[9] The Subscription Price for the purchase of shares under Article 9 was also governed by the NAV per share determined under Article 11.

[10] The redemption obligation was subject to several other conditions, but they are not relevant to the dispute before the Court.

"liable to make restitution" to the Liquidators. (*Id*. at ¶¶ 10-11.)

1. The Preliminary Issues Proceeding

In early 2011, certain defendants in the BVI Redeemer Actions filed applications requesting that the BVI Court hold a trial to determine "preliminary issues." A preliminary issues trial is a mechanism for deciding specific issues that are likely to resolve the case. (*Hare Declaration* at ¶ 23; *Declaration of Phillip Kite in Opposition to Plaintiffs' Motion for Leave to Amend and in Support of Defendants' Motion to Dismiss*, signed Jan. 12, 2017 ("*Kite Declaration*"), at ¶ 9 (ECF Doc. # 963).) On April 20, 2011, Judge Bannister of the BVI Court ordered a trial on two preliminary issues, (1) whether various documents issued to the investors constituted certificates of NAV within the meaning of Article 11 ("Certification Issue"), and (2) whether redeeming investors gave good consideration for the redemption payments by surrendering their shares ("Good Consideration Issue"), and stayed the BVI Redeemer Actions pending a determination of such preliminary issues.

On September 16, 2011, Judge Bannister ruled that the various communications sent to investors by the Fund's administrator, Citco Funds Services (Europe) BV ("Citco"), and/or the Fund's manager, Fairfield Greenwich (Bermuda) Limited were not certificates as set forth in the Articles, *Fairfield Sentry Ltd. (In Liquidation) v. Bank Julius Baer & Co. Ltd.*, Nos. BVIHC (COM) 30-2010, *et al.*, ¶ 33 ("*BVI Court*

PI Decision"),[11] but the redeemers had given good consideration for the redemptions by surrendering their shares. (*Id.* at ¶ 36.) On June 13, 2012, the Eastern Caribbean Court of Appeal ("ECCA") affirmed on both issues and dismissed the appeals. *See Quilvest Fin. Ltd. v. Fairfield Sentry Ltd. (In Liquidation)*, Nos. HCVAP 2011/041, *et al.* ("*ECCA PI Decision*").[12]

The parties appealed to the Privy Council, which rendered its decision on April 16, 2014. *See Fairfield Sentry Ltd. (In Liquidation) v. Migani*, [2014] UKPC 9 ("*Migani*").[13] Initially, the Privy Council opined that, while the lower courts had reviewed the Certification Issue and the Good Consideration Issue separately, the issues "are closely related and have to be considered together." *Id.* at ¶ 6. Furthermore, the claims to recover the redemptions were governed by the Articles and BVI law, *id.* at ¶ 17, and although the subscribers had signed subscription agreements (discussed below) that included a New York choice of law provision, "none of the questions raised by the preliminary issues depends on the terms of the Subscription Agreement. They depend wholly on the construction of the Articles, which is governed by the law of the British Virgin Islands." *Id.* at ¶ 20.

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[11] A copy of the *BVI Court PI Decision* is attached as Ex. B to the *Kite Declaration*.

[12] A copy of the *ECCA PI Decision* is attached as Ex. G to the *Kite Declaration*.

[13] A copy of the *Migani* decision is attached as Ex. Q to the *Hare Declaration*. An electronic version of the opinion without paragraph numbers can be found on the Westlaw database at 2014 WL 1219748.

The Privy Council disagreed with the lower courts' disposition of the Certification Issue. The Liquidators had taken the position that the Articles did not require the Funds to issue a certificate in connection with a redemption request. That implied that the Funds could simply compute the NAV per share without issuing a certificate, and pay the Redemption Price. In the cases before the Privy Council, the Liquidators argued that the Funds had not issued a certificate, were not bound by the NAV per share calculated at the time of the redemption, and could seek to recover the inflated payments that only came to light following Madoff's arrest. *See id.* at ¶ 22.

The Privy Council rejected the Liquidators' position based on the doctrine of finality. The Articles contemplated that the subscription and redemption prices would be "definitively ascertained" at the time of the subscription or redemption "whether or not the determination was correctly carried out in accordance with Articles 11(2) and (3)." *Id.* at ¶ 24. The notion that the directors had the discretion to redeem without issuing a certificate in some cases and not in other cases served no rationale purpose because the purpose of the certification was to lend finality to the purchase or redemption. *Id.* at ¶ 26. Furthermore, unless a certificate was issued, it would always be possible to vary the NAV per share calculated by the Directors at the time of the redemption based on subsequently acquired information. *Id.* at ¶ 23. Accordingly, any document intended to be a definitive determination of the NAV per share at the time of the redemption was a certificate. *See id.* at ¶¶ 29-31. Therefore, the Privy Council reversed the lower courts'

holdings on the Certification Issue, and dismissed the appeal of the Good Consideration Issue. *Id.* at *Conclusion*. In 2016, the Liquidators received approval to discontinue the BVI Redeemer Actions and served notices of discontinuance on the defendants. (*Hare Declaration* at ¶ 68.)

2. The Section 273 Proceeding

Having won the preliminary issues proceeding, certain defendants from the BVI Redeemer Actions applied in the BVI Court to prevent the Liquidators from proceeding with the U.S. Redeemer Actions. They invoked section 273 of the BVI Insolvency Act, which states that "[a] person aggrieved by an act, omission or decision of an office holder [*e.g.*, a liquidator] may apply to the Court and the Court may confirm, reverse or modify the act, omission or decision of the office holder." Insolvency Act § 273. Alternatively, the defendants sought an anti-suit injunction preventing the Liquidators from prosecuting the U.S. Redeemer Actions.

BVI Court Judge Leon denied the application on March 11, 2016, *see UBS AG N.Y. v. Fairfield Sentry Ltd.,* Nos. BVIHC (COM) 2009/0136, *et al.* ("*BVI Court 273 Decision*"),[14] ruling that the defendants lacked standing because they were seeking to advance their interests as Defendants in the U.S. Redeemer Actions instead of as stakeholders in the BVI liquidations of the Funds. *Id.* at ¶¶ 71-72. But even if they had standing, they had failed to sustain their burden, *id.* at ¶ 136, and an anti-suit injunction was

[14] A copy of the *BVI Court 273 Decision* is attached as Exhibit S to the *Hare Declaration*.

inappropriate because the U.S. Bankruptcy Court could determine the portions of the U.S. Redeemer Actions that could proceed. *Id.* at ¶ 142. The applicants appealed to the ECCA, which affirmed the BVI Court's decision on November 20, 2017. *See ABN AMRO Fund Servs. (Isle of Man) 24 Nominees Ltd. v. Krys,* Nos. BVIHCMAP: 11-16, 23-28 of 2016, at ¶ 82 ("*ECCA 273 Decision*").[15]

D. The Current Motions

The Liquidators now seek leave to further amend their complaints in the U.S. Redeemer Actions. (*See Liquidators Motion*.) They contend that discovery has yielded proof showing that Citco lacked good faith when it issued the certificates for the redemptions involved in the U.S. Redeemer Actions. (*See Declaration of David J. Molton in Support of Motion for Leave to Amend*, dated Oct. 21, 2016 ("*Molton Declaration*") at ¶ 5 (ECF Doc. # 924).) They contend that if the certificates were not issued in good faith, they would not be binding under Article 11(1)[c]. (*Liquidators Motion* at 28-29.)

The proposed amended complaint in *Fairfield Sentry Ltd. v. Citigroup Global Mkts. Ltd.*, Adv. Proc. No. 11-02770 (SMB) ("*Proposed Citigroup Complaint*") (attached as Exhibit C to the *Molton Declaration*) is typical. The Liquidators' theory remains unchanged: the redemption payments were based on inflated NAVs per share resulting from an erroneous belief as to the value of the Funds' investments with BLMIS. (*Id.* at ¶¶ 7, 10, 33-35, 93.) The key addition, as

[15] A copy of the *ECCA 273 Decision* is attached to the *Letter of David J. Molton, Esq.* dated Nov. 22, 2017 (ECF Doc. # 1603).

mentioned, is the allegation that Citco—as the Funds' administrator—issued the NAV certificates in bad faith for purposes of Article 11(1). (*Id.* at ¶¶ 41, 70.)[16] The Liquidators seek to recover the redemption overpayments from the Defendants as the registered owners of the shares and/or the Defendants' unknown clients as beneficial owners, based on (i) unjust enrichment, money had and received, mistaken payment, constructive trust, and declaratory judgment (*i.e.*, the Common Law Claims), (ii) unfair preferences or undervalue transactions under section 245 and 246 of the Insolvency Act, (*i.e.*, the BVI Avoidance Claims) and (iii) breach of contract and breach of the implied covenant of good faith and fair dealing (*i.e.*, the "Contract Claims"). (*Id.* at ¶¶ 94-209.)

The Defendants oppose the amendments and seek dismissal of the U.S. Redeemer Actions in their entirety. (*See Defendants Motion*.) They contend that the Court lacks subject matter jurisdiction over the proceedings and personal jurisdiction over the Defendants. (*Defendants Motion* at 17-35.) In addition, the complaints failed to state claims upon which relief can be granted because the redemptions are protected by the safe harbor in 11 U.S.C. §§ 546(e) and 561(d), (*id.* at 36-44), the claims are barred by the doctrines of *res judicata* and/or collateral estoppel, (*id.* at 44-54), any bad faith on the part of Citco is imputed

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[16] The allegations describing Citco's bad faith have been filed under seal. (*See Order Authorizing the Foreign Representatives to File Proposed Amended Complaints in Partially Redacted Form and Unredacted Proposed Amended Complaints Under Seal*, dated Sept. 6, 2016 (ECF Doc. # 909).) The specific allegations do not need to be unsealed for purposes of this omnibus proceeding.

to the Funds and recovery is barred under the doctrine of *ex turpi causa,* (*id.* at 54-55), the Funds failed to allege the existence of an injury on the Common Law and Contract Claims, (*id.* at 58-61), and the BVI Avoidance Claims fail as a matter of law. (*Id.* at 61-70.)

Given the more than 300 U.S. Redeemer Actions, the Court entered an order scheduling oral argument on the following issues common to all U.S. Redeemer Actions:

> 1. Does the Court have "related to" jurisdiction over these adversary proceedings under 28 U.S.C. § 1334(b)?
>
> 2. Which, if any, of the plaintiffs' claims in their proposed, amended complaints are barred by 11 U.S.C. §§ 546(e) and 561(d)?
>
> 3. Did the defendants that executed subscription agreements (or are otherwise bound by the terms of the subscription agreements) consent to this Court's *in personam* jurisdiction?
>
> 4. What claims or issues, if any, are precluded by virtue of the prior proceedings among the parties (including proceedings involving a subset of the parties)?
>
> 5. Is Citco, *et al.*'s alleged bad faith imputed to the plaintiffs, and if so, how does the plaintiffs' bad faith affect its right to pursue the claims asserted in the proposed, amended complaints?
>
> 6. Is a defendant entitled to an offset to the extent it purchased shares in the Funds

based on inflated NAVs resulting from BLMIS' fraud?

(*See Order Scheduling Oral Argument on Motions for Leave to Amend and to Dismiss*, dated Jan. 9, 2018 ("*Scheduling Order*") (ECF Doc. # 1609).)

The Court heard oral argument on January 25, 2018, (*see Transcript of January 25, 2018 Hearing* (*"Hr'g Tr."*) (ECF Doc. # 1648)), and took the matter under advisement.

DISCUSSION

A. Subject Matter Jurisdiction

Pursuant to section 1334(b) of title 28, the District Court has "original but not exclusive jurisdiction of all civil proceedings arising under" the Bankruptcy Code, or "arising in" or "related to" a bankruptcy case. The District Court may refer civil proceedings to the Bankruptcy Court, 28 U.S.C. § 157(a), and the District Court for Southern District of New York does so automatically under the District Court Standing Order of Reference. The District Court held that the U.S. Redeemer Actions neither "aris[e] under" the Bankruptcy Code, *Fairfield II*, 458 B.R. at 675-76, nor "arise in" the Funds' Chapter 15 cases, *id*. at 676-87, and assumed but did not decide that the actions were "related to" the Chapter 15 cases. *Id*. at 689.

A civil proceeding is "related to" a bankruptcy case "if the action's outcome might have any conceivable effect on the bankrupt estate." *SPV Osus Ltd. v. UBS AG*, 882 F.3d 333, 339-40 (2d Cir. 2018) (quoting *Parmalat Capital Fin. Ltd. v. Bank of Am. Corp.*, 639 F.3d 572, 579 (2d Cir. 2011)). When the debtor is an entity involved in a foreign insolvency

proceeding, the "estate," for purposes of determining whether "related to" jurisdiction exists is the foreign estate. *Parmalat*, 639 F.3d at 579 ("In the context of § 1334(b), there is no need to distinguish between estates administered principally in foreign forums and those administered principally in domestic forums."); *accord Hosking v. TPG Capital Mgmt., L.P.* (*In re Hellas Telecomm. (Lux.) II SCA*), 524 B.R. 488, 515 (Bankr. S.D.N.Y. 2015) (applying the *Parmalat* ruling to a Chapter 15 debtor). Here, the "conceivable effect" of the U.S. Redeemer Actions on the Funds' BVI estates is obvious: any recovery will directly increase the size of the foreign estates. The Defendants have conceded this point. (*Hr'g Tr.* at 8:14-20.)

The Defendants nonetheless assert that the Court's "related to" subject matter jurisdiction in a Chapter 15 case is limited to a proceeding that seeks to recover U.S. assets, and the U.S. Redeemer Actions seek to recover foreign assets. (*See Defendants Motion* at 20; *Consolidated Reply Memorandum of Law in Further Support of Defendants' Motion to Dismiss*, dated May 26, 2017 ("*Defendants Reply*") at 3 (ECF Doc. # 1457).) They point out that unlike plenary bankruptcies, a bankruptcy court may only exercise territorial jurisdiction over a Chapter 15 debtor's property located in the United States. *See, e.g.*, 11 U.S.C. § 1520(a)(1) (applying sections 361 and 362 of the Bankruptcy Code to the debtor's U.S. assets); 11 U.S.C. § 1520(a)(2) (applying sections 363, 549 and 552 of the Bankruptcy Code to transfers of the debtor's U.S. assets); 11 U.S.C. § 1521(a)(5) (permitting the entrustment of the administration or realization of the debtor's U.S. assets to the foreign representative); 11 U.S.C. § 1521(b) (allowing the foreign representative

to distribute the debtor's U.S. assets upon receipt of Court-approval); 11 U.S.C. § 1528 (limiting the effect of a Chapter 15 debtor's plenary bankruptcy filing to its U.S. assets). The Defendants seek to engraft this territorial limitation to the Second Circuit's ruling in *Parmalat*. (*Defendants Reply* at 3 ("*Parmalat* dealt only with 'related to' jurisdiction over an action seeking to recover assets located in the United States.").)

The Defendants' argument confuses subject matter jurisdiction over a proceeding with a court's *in rem* jurisdiction over property. "Subject-matter jurisdiction defines the court's authority to hear a given type of case." *United States v. Morton*, 467 U.S. 822, 828 (1984). As stated above, this Court's exercise of subject matter jurisdiction over the U.S. Redeemer Actions is governed by 28 U.S.C. § 1334(b) and, as noted above and conceded by the Defendants, the outcome of the U.S. Redeemer Actions may have a conceivable effect on Funds' estates. The *Parmalat* ruling—that the relevant estate for a foreign debtor is the foreign estate—is not limited to the recovery of U.S. assets; all that is required for the exercise of "related to" jurisdiction is the satisfaction of the "conceivable effect" test, "[n]othing more." 639 F.3d at 579, 579 n. 7. Accordingly, the Court concludes that it has "related to" subject matter jurisdiction over the U.S. Redeemer Actions.

B. Personal Jurisdiction

"In order survive a motion to dismiss for lack of personal jurisdiction, a plaintiff must make a prima facie showing that jurisdiction exists." *SPV Osus*, 882 F.3d at 342 (quotation marks and citation omitted). A

court has "considerable procedural leeway" when considering a pretrial motion to dismiss for lack of personal jurisdiction: "[i]t may determine the motion on the basis of affidavits alone; or it may permit discovery in aid of the motion; or it may conduct an evidentiary hearing on the merits of the motion." *Dorchester Fin. Sec., Inc. v. Banco BRJ, S.A.*, 722 F.3d 81, 84 (2d Cir. 2013) (quoting *Marine Midland Bank, N.A. v. Miller*, 664 F.2d 899, 904 (2d Cir. 1981)). "Prior to discovery, a plaintiff challenged by a jurisdiction testing motion may defeat the motion by pleading in good faith, legally sufficient allegations of jurisdiction. At that preliminary stage, the plaintiff's *prima facie* showing may be established solely by allegations." *Id.* at 84-85 (quoting *Ball v. Metallurgie Hoboken-Overpelt, S.A.*, 902 F.2d 194, 197 (2d Cir. 1990)). The Court construes the pleadings and affidavits "in the light most favorable to the plaintiffs, resolving all doubts in their favor." *Chloé v. Queen Bee of Beverly Hills, LLC*, 616 F.3d 158, 163 (2d Cir. 2010) (quoting *Porina v. Marward Shipping Co.*, 521 F.3d 122, 126 (2d Cir. 2008)).

Two-hundred six defendants (referred to in the *Defendants Memo* as the "Foreign Defendants") have moved to dismiss the complaints on the ground that the Court lacks personal jurisdiction over them. (*See Defendants Motion*, Appendix B-1.) Although the question of personal jurisdiction must be decided on a defendant-by-defendant basis, the Liquidators assert that a large number of these Defendants consented to jurisdiction in New York by signing identical

Subscription Agreements[17] containing a forum selection clause in favor of New York courts and a submission to jurisdiction in New York. (*Liquidators Reply* at 4-11.)[18] Further, they allege that an additional 192 Defendants who were the beneficial owners of the shares consented to jurisdiction, (*Liquidators Reply* at 11 & Appendix D-1), because each subscriber represented that it had authority to sign on behalf of such beneficial owners. (*See* Subscription Agreement at ¶ 27.) Because this issue applied across the board, the Court carved it out for separate consideration.

Parties may consent to personal jurisdiction by entering into contracts with forum selection clauses, *D.H. Blair & Co., Inc. v. Gottdiener*, 462 F.3d 95, 103 (2d Cir. 2006), and a forum selection clause is enforceable "unless it imposes a venue 'so gravely difficult and inconvenient that [the plaintiff] will for all practical purposes be deprived of his day in court.'" *Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp.*, 561 U.S. 89, 110 (2010) (quoting *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 18 (1972)).[19] The Defendants

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[17] A sample Subscription Agreement is attached as Exhibit A to the *Moloney Declaration*.

[18] The Liquidators also assert personal jurisdiction over the Defendants based on purposeful contacts with the U.S. (*Liquidators Reply* at 11-18.) The Court did not schedule oral argument with respect to this issue because the relevant considerations vary on a case-by-case basis, and the purpose of this proceeding was to consider dismissal matters common to most or all of the U.S. Redeemer Actions.

[19] New York law similarly "encourages parties to international commercial agreements to select New York as a forum regardless of other contacts with the state." *Saeco Vending, S.P.A. v. Seaga*

do not argue that it would be gravely difficult or inconvenient to defend these actions in New York where they are represented by experienced and able counsel. Instead, they contend that the Liquidators' claims do not come within the forum selection clause.

The Subscription Agreements contain a limited consent to the jurisdiction of New York courts:

> *New York Courts*. Subscriber agrees that any suit, action or proceeding ("Proceeding") *with respect to this Agreement and the Fund* may be brought in New York. Subscriber irrevocably submits to the jurisdiction of the New York courts with respect to any Proceeding and consents that service of process as provided by New York law may be made upon Subscriber in such Proceeding, and may not claim that a Proceeding has been brought in an inconvenient forum.

(Subscription Agreement at ¶ 19 (emphasis added).) Thus, the Subscriber consented to the forum and to personal jurisdiction in the forum.

As the emphasized language indicates, the Defendants' consent to jurisdiction was limited to any actions "with respect to this Agreement and the Fund," which the Defendants' maintain is not the case. They note that that the Privy Council ruled in *Migani* that the Subscription Agreements and New York law were irrelevant to the Liquidators' right to recover the redemption payments, and hence, the U.S. Redeemer

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Mfg., Inc., No. 15-cv-3280 (AJN), 2016 WL 1659132, at *5 (S.D.N.Y. Jan. 28, 2016) (citing N.Y. GEN. OBLIG. LAW § 5-1402)).

Actions are not "with respect to" the Subscription Agreement. (*Defendants Motion* at 25-26.)

The Liquidators make two responses. First, "and," as used in the italicized clause, should be read in the disjunctive to cover proceedings "with respect to" *either* the Subscription Agreement *or* the Fund, and the Defendants do not dispute that the U.S. Redeemer Actions are "with respect to" the Funds. (*Liquidators Reply* at 6-7.) Second, the U.S. Redeemer Actions are "with respect to" the Subscription Agreement. (*Id*. at 7-8.)

1. "And" *vs.* "Or"

When asked to interpret contractual language, the question is "whether the contract is unambiguous with respect to the question disputed by the parties." *Law Debenture Trust Co. of N.Y. v. Maverick Tube Corp.*, 595 F.3d 458, 465 (2d Cir. 2010) (quoting *Int'l Multifoods Corp. v. Commercial Union Ins. Co.,* 309 F.3d 76, 83 (2d Cir. 2002)). Ambiguity presents a question of law. *Maverick Tube*, 595 F.3d at 465-66. A contract is ambiguous if it "could suggest more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business." *Int'l Multifoods*, 309 F.3d at 83 (internal quotation marks omitted); *accord Cont'l Ins. Co. v. Atl. Cas. Ins. Co.*, 603 F.3d 169, 180 (2d Cir. 2010); *Maverick Tube*, 595 F.3d at 466. An agreement is not ambiguous if it has a definite and precise meaning, and unambiguous language does not become ambiguous because a party urges a different

interpretation that strains the language beyond its ordinary meaning. *Maverick Tube*, 595 F.3d at 467; *Seiden Assocs., Inc. v. ANC Holdings, Inc.*, 959 F.2d 425, 428 (2d Cir. 1992). Where the dispute concerns a provision of the contract, the Court must consider the contract "as a whole to ensure that undue emphasis is not placed upon particular words and phrases." *Bailey v. Fish & Neave*, 868 N.E.2d 956, 959 (N.Y. 2007); *accord Maverick Tube*, 595 F.3d at 468.

If the contract is ambiguous, "'the court may accept any available extrinsic evidence to ascertain the meaning intended by the parties during the formation of the contract.'" *Morgan Stanley Grp. Inc. v. New England Ins. Co.*, 225 F.3d 270, 275-76 (2d Cir. 2000) (quoting *Alexander & Alexander Servs., Inc. v. These Certain Underwriters at Lloyd's,* 136 F.3d 82, 86 (2d Cir. 1998)). "Ambiguity without the existence of extrinsic evidence of intent presents not an issue of fact, but an issue of law for the court to rule on." *Williams & Sons Erectors, Inc. v. S.C. Steel Corp.*, 983 F.2d 1176, 1184 (2d Cir. 1993). The parties have represented that no such extrinsic evidence exists, (*Hr'g Tr.* at 46:13-15; 52:25-53:3), and consequently, the interpretation of the Subscription Agreement presents a pure question of law.

"Words and phrases are to be given their plain and ordinary meaning, and New York courts will commonly refer to dictionary definitions in order to determine that meaning." *Summit Health, Inc. v. APS Healthcare Bethesda, Inc.,* 993 F. Supp. 2d 379, 390 (S.D.N.Y. 2014), *aff'd*, 725 F. App'x 4 (2d Cir. 2018); *accord Archie MD, Inc. v. Elsevier, Inc.*, 16-cv-6614 (JSR), 2017 WL 3421167, at *4 (S.D.N.Y. Mar. 13,

2017). The dictionary definition of "and" is conjunctive. *See* Webster's Third International Dictionary (Unabridged) 80 (1981) (defining "and" to mean "along with or together with ... added to or linked to ... as well as."). New York courts also interpret "and" as conjunctive. *BOKF, N.A. v. Caesars Entm't Corp.*, 162 F. Supp. 3d 243, 246 n. 5 (S.D.N.Y. 2016) (citing *Sasson v. TLG Acquisition LLC*, 9 N.Y.S.3d 2, 4 (N.Y. App. Div. 2015); *Progressive Ne. Ins. Co. v. State Farm Ins. Cos.*, 916 N.Y.S.2d 454, 456-57 (N.Y. App. Div. 2011); *Maxwell v. State Farm Mut. Auto. Ins. Co.*, 461 N.Y.S.2d 541, 543-44 (N.Y. App. Div. 1983)).

Furthermore, reading "and" to mean "or" would violate a basic principle of contract interpretation. In interpreting a contract under New York law, "an interpretation of a contract that has 'the effect of rendering at least one clause superfluous or meaningless ... is not preferred and will be avoided if possible.'" *LaSalle Bank Nat'l Ass'n v. Nomura Asset Capital Corp.*, 424 F.3d 195, 206 (2d Cir. 2005) (quoting *Shaw Grp., Inc. v. Triplefine Int'l Corp.,* 322 F.3d 115, 124 (2d Cir. 2003)); *accord Olin Corp. v. OneBeacon Am. Ins. Co.*, 864 F.3d 130, 148 (2d Cir. 2017); *Galli v. Metz,* 973 F.2d 145, 149 (2d Cir. 1992). Reading the relevant clause as "with respect to this Agreement *or* the Fund" would render "this Agreement" superfluous because any possible dispute between a shareholder and the Fund would necessarily be "with respect to" the Fund.

Accordingly, the forum selection clause covers claims and disputes "with respect to" the Subscription Agreement *and* "with respect to" the Fund. The

Defendants concede that the actions are "with respect to" the Funds, (*see Defendants Reply* at 11), and the remaining inquiry is whether they are also "with respect to" the Subscription Agreements.

2. "With Respect to" the Subscription Agreements

The Subscription Agreement refers to several different Fund-related documents. In some cases, the parties' rights are subject to all of these documents. Thus, the "Subscriber subscribes for the Shares pursuant to the terms herein, the [Confidential Private Placement] Memorandum[20] and the Fund's Memorandum of Association and Articles of Association (collectively, the "Fund Documents")." (Subscription Agreement ¶ 1.) "If the Fund accepts this subscription, Subscriber shall become a shareholder of the Fund and be bound by the Fund Documents." (Subscription Agreement ¶ 2.) In addition, "Subscriber understands that the Fund may compulsorily repurchase such Shares in accordance with the Fund Documents." (Subscription Agreement ¶ 5(a).) In other cases, those rights are defined by or they are referred for informational purposes to specific Fund Documents. For example, "Subscriber acknowledges that reoffers, resales or any transfer of the Shares is subject to the limitations imposed by the Fund's Articles of Association." (Subscription Agreement ¶ 5(a).) Furthermore, "Subscriber is aware

[20] A copy of the Confidential Private Placement Memorandum ("Memorandum") is attached as Exhibit C to the *Declaration of David J. Molton in Further Support of Motion for Leave to Amend and in Opposition to Defendants' Motion to Dismiss*, signed Mar. 31, 2017 (ECF Doc. # 1337).

of the limited provisions for redemptions and has read the section in the Memorandum entitled 'Transfers, Redemptions and Terminations.'" (Subscription Agreement ¶ 9.)[21] If a Subscriber enters into a swap with a third party based in whole or part on the Fund's performance, the Subscriber warrants that "the Third Party has received and reviewed a copy of the Memorandum and the Agreement." (Subscription Agreement ¶ 27.) Lastly, the "Subscriber has received and reviewed the country-specific disclosures in the Memorandum." (Subscription Agreement ¶ 28.)

Certain provisions, on the other hand, refer solely to the Subscription Agreement, and do not have any bearing on the Fund Documents. For example, if the Fund rejects a subscription, it must promptly return the Subscriber's funds, "and this Agreement shall be void." (Subscription Agreement ¶ 2.) Obviously, the Fund Documents do not become void; rather, they don't apply to the non-Subscriber. In addition, "[t]his Agreement shall be governed and enforced in accordance with the laws of New York, without giving effect to its conflict of laws provisions." (Subscription Agreement ¶ 16.) Equally obvious, the reference to the Subscription Agreement does not mean that all of the Fund Documents, including the Articles, are governed by New York law.

The forum selection clause at issue falls into this last category. While the phrase "with respect to" is broad and synonymous with "in relation to," "in connection with," "associated with," and "with

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[21] The referenced section in the Memorandum deals with, among other things, the mechanics of redemption. (*See* Memorandum at 23-25.)

reference to," *see Coregis Ins. Co. v. Am. Health Found., Inc.*, 241 F.3d 123, 128-29 (2d Cir. 2001) (Sotomayor, J); *cf. Lamar, Archer & Cofrin, LLP v. Appling*, 138 S. Ct. 1752, 1760 (2018) ("Use of the word 'respecting' in a legal context generally has a broadening effect, ensuring that the scope of a provision covers not only its subject but also matters relating to that subject."), the Liquidators' interpretation essentially substitutes "Fund Documents" for "Agreement," making all disputes between a Subscriber and the Fund subject to the forum selection clause regardless of their nature. This interpretation ignores the distinctions made within the Subscription Agreement between and among the various Fund Documents, and which Fund Documents obligate or inform the Subscriber.

Furthermore, the Privy Council in *Migani* impliedly if not expressly rejected the Liquidators' argument that their claw back claims were "with respect to" the Subscription Agreements. The Liquidators argued before the Privy Council "that the effect of the contractual provisions governing redemption was not covered by the preliminary issues and ought to be referred back to the [BVI Court]," and "also suggested that at a further hearing in the [BVI Court], New York law, which is the proper law of the Subscription Agreement, might be relevant." *Migani* ¶ 20. Having concluded that the terms of the redemption of shares were found in the Articles rather than the Subscription Agreement, *id.* ¶ 10, the Privy Council "unhesitatingly reject[ed]" the Liquidators' suggestion:

> Nor can the Board discern any basis on which New York law could be relevant, since none of the questions raised by the preliminary issues depends on the terms of the Subscription Agreement. They depend wholly on the construction of the Articles, which is governed by the law of the British Virgin Islands.

Id. ¶ 20.

In essence, the Privy Council held that the Subscription Agreement was irrelevant to actions to recover the inflated redemption payments. To nevertheless construe the Liquidators' claims in the U.S. Redeemer Actions to be "with respect to" the very agreements that the Privy Council judged to be irrelevant would lead to the same surplusage problem noted above, and more importantly, require the application of New York law to resolve the redemption dispute, an argument expressly rejected by the *Migani* court.

Finally, the Liquidators argue that the forum selection clause should apply because the Articles and the Subscription Agreement form an "integrated contract." (*Liquidators Reply* at 9-10.) "Generally, separate writings are construed as one agreement if they relate to the same subject matter and are executed simultaneously." *Commander Oil Corp. v. Advance Food Serv. Equip.*, 991 F.2d 49, 53 (2d Cir. 1993) (listing cases); *accord Carvel Corp. v. Diversified Mgmt. Grp., Inc.*, 930 F.2d 228, 233 (2d Cir. 1991) ("Under New York law, instruments executed at the same time, by the same parties, for the same purpose and in the course of the same transaction will be read

and interpreted together."); *cf. Ripley v. Int'l Rys. of Cent. Am.*, 171 N.E.2d 443, 446 (N.Y. 1960) ("The circumstance that they are different documents does not necessarily mean that they do not form a single contract (*Crabtree v. Elizabeth Arden Sales Corp.*, 305 N.Y. 48, 110 N.E.2d 551), but it does indicate that they are separate unless the history and subject matter shows them to be unified."). Documents executed at different times may still be construed as a single contract if "the parties assented to all the promises as a whole, so that there would have been no bargain whatever if any promise or set of promises had been stricken." *Commander Oil*, 991 F.2d at 53 (quoting 6 Samuel Williston, Williston on Contracts § 863, at 275 (3d ed. 1970)); *accord TVT Records v. Island Def Jam Music Grp.*, 412 F.3d 82, 90 (2d Cir. 2005) (same), *cert. denied*, 548 U.S. 904 (2006).

This is a variation of the argument rejected in *Migani*. All of the Fund Documents are linked to the extent that they dealt with the Subscriber's investment in the Funds. However, while the Subscription Agreement governs subscriptions and refers to the Articles, the Articles govern redemptions and make no mention of the Subscription Agreement. If the Articles and the Subscription Agreement were an integrated, single agreement, the New York law and venue provisions would govern the redemption claims. The *Migani* court, however, ruled that the Articles and BVI law governed and the Subscription Agreement and New York law were irrelevant to the claw back claims. Accordingly, the Defendants' consent to the Subscription Agreement does not constitute consent to personal jurisdiction in the U.S. Redeemer Actions.

I must stop here. The issue of personal jurisdiction is traditionally treated as a threshold question that must be resolved prior to a consideration of the merits. *In re Rationis Enters., Inc. of Pan.,* 261 F.3d 264, 267-68 (2d Cir. 2001). However, the practice is prudential and does not restrict a court's power to address legal issues, at least in a case involving multiple defendants where the court indisputably has jurisdiction over some of the defendants and all of the defendants collectively challenge the legal sufficiency of the plaintiff's cause of action, particularly where the personal jurisdictional challenges are based on factual allegations that must await future development. *ONY, Inc. v. Cornerstone Therapeutics, Inc.*, 720 F.3d 490, 498 n.6 (2d Cir. 2013); *see Chevron Corp. v. Naranjo,* 667 F.3d 232, 246 n. 17 (2d Cir.), *cert. denied*, 568 U.S. 958 (2012).

The Court's disposition of the effect of the forum selection clause in the Subscription Agreement does not resolve the Foreign Defendants' jurisdictional objections. The question is whether the Court should go further at this point and reach the merits of the Liquidators' claims. On the one hand, the Defendants in the 305 adversary proceedings collectively challenge the Liquidators' claims, and the factual disputes relating to the issues of personal jurisdiction will take time to develop. On the other hand, I cannot conclude on the state of this record that I indisputably have personal jurisdiction over at least one defendant in each of the 305 adversary proceedings, and it may be that I have no personal jurisdiction over any of the Defendants in some of the adversary proceedings.

Before going any further and reaching the merits of the Liquidators' claims, the Court will hear from the parties regarding the appropriate way to proceed. Upon further analysis, I may indisputably have personal jurisdiction over at least one defendant in every adversary proceeding. If not, it may make sense to carve out the cases where at least one defendant is indisputably subject to the Court's jurisdiction, and limit the decision on the motions to those cases. A more efficient procedure may be the agreement by the Foreign Defendants to be bound by the Court's determination of the motions, without otherwise waiving any objections to personal jurisdiction. The parties may have other ideas or suggestions.

Accordingly, the parties are directed to contact chambers to schedule a hearing at which to consider the appropriate way to proceed.

So ordered.

Dated: New York, New York
August 6, 2018

/s/Stuart M. Bernstein
STUART M. BERNSTEIN
United States Bankruptcy Judge

Appendix J

RELEVANT STATUTORY PROVISIONS

11 U.S.C. §544. Trustee as lien creditor and as successor to certain creditors and purchasers

(a) The trustee shall have, as of the commencement of the case, and without regard to any knowledge of the trustee or of any creditor, the rights and powers of, or may avoid any transfer of property of the debtor or any obligation incurred by the debtor that is voidable by--

(1) a creditor that extends credit to the debtor at the time of the commencement of the case, and that obtains, at such time and with respect to such credit, a judicial lien on all property on which a creditor on a simple contract could have obtained such a judicial lien, whether or not such a creditor exists;

(2) a creditor that extends credit to the debtor at the time of the commencement of the case, and obtains, at such time and with respect to such credit, an execution against the debtor that is returned unsatisfied at such time, whether or not such a creditor exists; or

(3) a bona fide purchaser of real property, other than fixtures, from the debtor, against whom applicable law permits such transfer to be perfected, that obtains the status of a bona fide purchaser and has perfected such transfer at the time of the commencement of the case, whether or not such a purchaser exists.

(b)(1) Except as provided in paragraph (2), the trustee may avoid any transfer of an interest of

the debtor in property or any obligation incurred by the debtor that is voidable under applicable law by a creditor holding an unsecured claim that is allowable under section 502 of this title or that is not allowable only under section 502(e) of this title.

(2) Paragraph (1) shall not apply to a transfer of a charitable contribution (as that term is defined in section 548(d)(3)) that is not covered under section 548(a)(1)(B), by reason of section 548(a)(2). Any claim by any person to recover a transferred contribution described in the preceding sentence under Federal or State law in a Federal or State court shall be preempted by the commencement of the case.

11 U.S.C. §545. Statutory Liens

The trustee may avoid the fixing of a statutory lien on property of the debtor to the extent that such lien--

(1) first becomes effective against the debtor--

(A) when a case under this title concerning the debtor is commenced;

(B) when an insolvency proceeding other than under this title concerning the debtor is commenced;

(C) when a custodian is appointed or authorized to take or takes possession;

(D) when the debtor becomes insolvent;

(E) when the debtor's financial condition fails to meet a specified standard; or

(F) at the time of an execution against property of the debtor levied at the instance

of an entity other than the holder of such statutory lien;

(2) is not perfected or enforceable at the time of the commencement of the case against a bona fide purchaser that purchases such property at the time of the commencement of the case, whether or not such a purchaser exists, except in any case in which a purchaser is a purchaser described in section 6323 of the Internal Revenue Code of 1986, or in any other similar provision of State or local law;

(3) is for rent; or

(4) is a lien of distress for rent.

11 U.S.C. §546. Limitations on avoiding powers

(a) An action or proceeding under section 544, 545, 547, 548, or 553 of this title may not be commenced after the earlier of--

(1) the later of--

(A) 2 years after the entry of the order for relief; or

(B) 1 year after the appointment or election of the first trustee under section 702, 1104, 1163, 1202, or 1302 of this title if such appointment or such election occurs before the expiration of the period specified in subparagraph (A); or

(2) the time the case is closed or dismissed.

(b)(1) The rights and powers of a trustee under sections 544, 545, and 549 of this title are subject to any generally applicable law that--

(A) permits perfection of an interest in property to be effective against an entity that acquires rights in such property before the date of perfection; or

(B) provides for the maintenance or continuation of perfection of an interest in property to be effective against an entity that acquires rights in such property before the date on which action is taken to effect such maintenance or continuation.

(2) If--

(A) a law described in paragraph (1) requires seizure of such property or commencement of an action to accomplish such perfection, or maintenance or continuation of perfection of an interest in property; and

(B) such property has not been seized or such an action has not been commenced before the date of the filing of the petition;

such interest in such property shall be perfected, or perfection of such interest shall be maintained or continued, by giving notice within the time fixed by such law for such seizure or such commencement.

(c)(1) Except as provided in subsection (d) of this section and in section 507(c), and subject to the prior rights of a holder of a security interest in such goods or the proceeds thereof, the rights and powers of the trustee under sections 544(a), 545, 547, and 549 are subject to the right of a seller of goods that has sold goods to the debtor, in the ordinary course of such seller's business, to

reclaim such goods if the debtor has received such goods while insolvent, within 45 days before the date of the commencement of a case under this title, but such seller may not reclaim such goods unless such seller demands in writing reclamation of such goods--

(A) not later than 45 days after the date of receipt of such goods by the debtor; or

(B) not later than 20 days after the date of commencement of the case, if the 45-day period expires after the commencement of the case.

(2) If a seller of goods fails to provide notice in the manner described in paragraph (1), the seller still may assert the rights contained in section 503(b)(9).

(d) In the case of a seller who is a producer of grain sold to a grain storage facility, owned or operated by the debtor, in the ordinary course of such seller's business (as such terms are defined in section 557 of this title) or in the case of a United States fisherman who has caught fish sold to a fish processing facility owned or operated by the debtor in the ordinary course of such fisherman's business, the rights and powers of the trustee under sections 544(a), 545, 547, and 549 of this title are subject to any statutory or common law right of such producer or fisherman to reclaim such grain or fish if the debtor has received such grain or fish while insolvent, but--

(1) such producer or fisherman may not reclaim any grain or fish unless such producer or fisherman demands, in writing, reclamation of

such grain or fish before ten days after receipt thereof by the debtor; and

(2) the court may deny reclamation to such a producer or fisherman with a right of reclamation that has made such a demand only if the court secures such claim by a lien.

(e) Notwithstanding sections 544, 545, 547, 548(a)(1)(B), and 548(b) of this title, the trustee may not avoid a transfer that is a margin payment, as defined in section 101, 741, or 761 of this title, or settlement payment, as defined in section 101 or 741 of this title, made by or to (or for the benefit of) a commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency, or that is a transfer made by or to (or for the benefit of) a commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency, in connection with a securities contract, as defined in section 741(7), commodity contract, as defined in section 761(4), or forward contract, that is made before the commencement of the case, except under section 548(a)(1)(A) of this title.

(f) Notwithstanding sections 544, 545, 547, 548(a)(1)(B), and 548(b) of this title, the trustee may not avoid a transfer made by or to (or for the benefit of) a repo participant or financial participant, in connection with a repurchase agreement and that is made before the commencement of the case, except under section 548(a)(1)(A) of this title.

(g) Notwithstanding sections 544, 545, 547, 548(a)(1)(B) and 548(b) of this title, the trustee may

not avoid a transfer, made by or to (or for the benefit of) a swap participant or financial participant, under or in connection with any swap agreement and that is made before the commencement of the case, except under section 548(a)(1)(A) of this title.

(h) Notwithstanding the rights and powers of a trustee under sections 544(a), 545, 547, 549, and 553, if the court determines on a motion by the trustee made not later than 120 days after the date of the order for relief in a case under chapter 11 of this title and after notice and a hearing, that a return is in the best interests of the estate, the debtor, with the consent of a creditor and subject to the prior rights of holders of security interests in such goods or the proceeds of such goods, may return goods shipped to the debtor by the creditor before the commencement of the case, and the creditor may offset the purchase price of such goods against any claim of the creditor against the debtor that arose before the commencement of the case.

(i)(1) Notwithstanding paragraphs (2) and (3) of section 545, the trustee may not avoid a warehouseman's lien for storage, transportation, or other costs incidental to the storage and handling of goods.

(2) The prohibition under paragraph (1) shall be applied in a manner consistent with any State statute applicable to such lien that is similar to section 7-209 of the Uniform Commercial Code, as in effect on the date of enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, or any successor to such section 7-209.

(j) Notwithstanding sections 544, 545, 547, 548(a)(1)(B), and 548(b) the trustee may not avoid a transfer made by or to (or for the benefit of) a master netting agreement participant under or in connection with any master netting agreement or any individual contract covered thereby that is made before the commencement of the case, except under section 548(a)(1)(A) and except to the extent that the trustee could otherwise avoid such a transfer made under an individual contract covered by such master netting agreement.

11 U.S.C. §547. Preferences

(a) In this section--

(1) "inventory" means personal property leased or furnished, held for sale or lease, or to be furnished under a contract for service, raw materials, work in process, or materials used or consumed in a business, including farm products such as crops or livestock, held for sale or lease;

(2) "new value" means money or money's worth in goods, services, or new credit, or release by a transferee of property previously transferred to such transferee in a transaction that is neither void nor voidable by the debtor or the trustee under any applicable law, including proceeds of such property, but does not include an obligation substituted for an existing obligation;

(3) "receivable" means right to payment, whether or not such right has been earned by performance; and

(4) a debt for a tax is incurred on the day when such tax is last payable without penalty, including any extension.

(b) Except as provided in subsections (c) and (i) of this section, the trustee may, based on reasonable due diligence in the circumstances of the case and taking into account a party's known or reasonably knowable affirmative defenses under subsection (c), avoid any transfer of an interest of the debtor in property--

(1) to or for the benefit of a creditor;

(2) for or on account of an antecedent debt owed by the debtor before such transfer was made;

(3) made while the debtor was insolvent;

(4) made--

(A) on or within 90 days before the date of the filing of the petition; or

(B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and

(5) that enables such creditor to receive more than such creditor would receive if--

(A) the case were a case under chapter 7 of this title;

(B) the transfer had not been made; and

(C) such creditor received payment of such debt to the extent provided by the provisions of this title.

(c) The trustee may not avoid under this section a transfer--

(1) to the extent that such transfer was--

(A) intended by the debtor and the creditor to or for whose benefit such transfer was made to be a contemporaneous exchange for new value given to the debtor; and

(B) in fact a substantially contemporaneous exchange;

(2) to the extent that such transfer was in payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the transferee, and such transfer was--

(A) made in the ordinary course of business or financial affairs of the debtor and the transferee; or

(B) made according to ordinary business terms;

(3) that creates a security interest in property acquired by the debtor--

(A) to the extent such security interest secures new value that was--

(i) given at or after the signing of a security agreement that contains a description of such property as collateral;

(ii) given by or on behalf of the secured party under such agreement;

(iii) given to enable the debtor to acquire such property; and

(iv) in fact used by the debtor to acquire such property; and

(B) that is perfected on or before 30 days after the debtor receives possession of such property;

(4) to or for the benefit of a creditor, to the extent that, after such transfer, such creditor gave new value to or for the benefit of the debtor--

(A) not secured by an otherwise unavoidable security interest; and

(B) on account of which new value the debtor did not make an otherwise unavoidable transfer to or for the benefit of such creditor;

(5) that creates a perfected security interest in inventory or a receivable or the proceeds of either, except to the extent that the aggregate of all such transfers to the transferee caused a reduction, as of the date of the filing of the petition and to the prejudice of other creditors holding unsecured claims, of any amount by which the debt secured by such security interest exceeded the value of all security interests for such debt on the later of--

(A)(i) with respect to a transfer to which subsection (b)(4)(A) of this section applies, 90 days before the date of the filing of the petition; or

(ii) with respect to a transfer to which subsection (b)(4)(B) of this section applies, one year before the date of the filing of the petition; or

(B) the date on which new value was first given under the security agreement creating such security interest;

(6) that is the fixing of a statutory lien that is not avoidable under section 545 of this title;

(7) to the extent such transfer was a bona fide payment of a debt for a domestic support obligation;

(8) if, in a case filed by an individual debtor whose debts are primarily consumer debts, the aggregate value of all property that constitutes or is affected by such transfer is less than $600; or

(9) if, in a case filed by a debtor whose debts are not primarily consumer debts, the aggregate value of all property that constitutes or is affected by such transfer is less than $8,575 [originally "$5,000", adjusted effective April 1, 2025][1].

(d) The trustee may avoid a transfer of an interest in property of the debtor transferred to or for the benefit of a surety to secure reimbursement of such a surety that furnished a bond or other obligation to dissolve a judicial lien that would have been avoidable by the trustee under subsection (b) of this section. The liability of such surety under such bond or obligation shall be discharged to the extent of the value of such property recovered by the trustee or the amount paid to the trustee.

(e)(1) For the purposes of this section--

(A) a transfer of real property other than fixtures, but including the interest of a seller or purchaser under a contract for the sale of real property, is perfected when a bona fide

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[1] See Adjustment of Dollar Amounts notes set out under this section and 11 U.S.C.A. §104.

purchaser of such property from the debtor against whom applicable law permits such transfer to be perfected cannot acquire an interest that is superior to the interest of the transferee; and

(B) a transfer of a fixture or property other than real property is perfected when a creditor on a simple contract cannot acquire a judicial lien that is superior to the interest of the transferee.

(2) For the purposes of this section, except as provided in paragraph (3) of this subsection, a transfer is made--

(A) at the time such transfer takes effect between the transferor and the transferee, if such transfer is perfected at, or within 30 days after, such time, except as provided in subsection (c)(3)(B);

(B) at the time such transfer is perfected, if such transfer is perfected after such 30 days; or

(C) immediately before the date of the filing of the petition, if such transfer is not perfected at the later of--

(i) the commencement of the case; or

(ii) 30 days after such transfer takes effect between the transferor and the transferee.

(3) For the purposes of this section, a transfer is not made until the debtor has acquired rights in the property transferred.

(f) For the purposes of this section, the debtor is presumed to have been insolvent on and during the 90 days immediately preceding the date of the filing of the petition.

(g) For the purposes of this section, the trustee has the burden of proving the avoidability of a transfer under subsection (b) of this section, and the creditor or party in interest against whom recovery or avoidance is sought has the burden of proving the nonavoidability of a transfer under subsection (c) of this section.

(h) The trustee may not avoid a transfer if such transfer was made as a part of an alternative repayment schedule between the debtor and any creditor of the debtor created by an approved nonprofit budget and credit counseling agency.

(i) If the trustee avoids under subsection (b) a transfer made between 90 days and 1 year before the date of the filing of the petition, by the debtor to an entity that is not an insider for the benefit of a creditor that is an insider, such transfer shall be considered to be avoided under this section only with respect to the creditor that is an insider.

(j) Repealed. Pub.L. 116-260, Div. FF, Title X, § 1001(g)(2)(A)(ii), Dec. 27, 2020, 134 Stat. 3220.

11 U.S.C. §548. Fraudulent transfers and obligations

(a)(1) The trustee may avoid any transfer (including any transfer to or for the benefit of an insider under an employment contract) of an interest of the debtor in property, or any obligation (including any obligation to or for the

benefit of an insider under an employment contract) incurred by the debtor, that was made or incurred on or within 2 years before the date of the filing of the petition, if the debtor voluntarily or involuntarily--

(A) made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted; or

(B)(i) received less than a reasonably equivalent value in exchange for such transfer or obligation; and

(ii)(I) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;

(II) was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital;

(III) intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured; or

(IV) made such transfer to or for the benefit of an insider, or incurred

such obligation to or for the benefit of an insider, under an employment contract and not in the ordinary course of business.

(2) A transfer of a charitable contribution to a qualified religious or charitable entity or organization shall not be considered to be a transfer covered under paragraph (1)(B) in any case in which--

(A) the amount of that contribution does not exceed 15 percent of the gross annual income of the debtor for the year in which the transfer of the contribution is made; or

(B) the contribution made by a debtor exceeded the percentage amount of gross annual income specified in subparagraph (A), if the transfer was consistent with the practices of the debtor in making charitable contributions.

(b) The trustee of a partnership debtor may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within 2 years before the date of the filing of the petition, to a general partner in the debtor, if the debtor was insolvent on the date such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation.

(c) Except to the extent that a transfer or obligation voidable under this section is voidable under section 544, 545, or 547 of this title, a transferee or obligee of such a transfer or obligation that takes for value and in good faith has a lien on or may retain any interest transferred or may enforce any obligation incurred, as

the case may be, to the extent that such transferee or obligee gave value to the debtor in exchange for such transfer or obligation.

(d)(1) For the purposes of this section, a transfer is made when such transfer is so perfected that a bona fide purchaser from the debtor against whom applicable law permits such transfer to be perfected cannot acquire an interest in the property transferred that is superior to the interest in such property of the transferee, but if such transfer is not so perfected before the commencement of the case, such transfer is made immediately before the date of the filing of the petition.

(2) In this section--

(A) "value" means property, or satisfaction or securing of a present or antecedent debt of the debtor, but does not include an unperformed promise to furnish support to the debtor or to a relative of the debtor;

(B) a commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency that receives a margin payment, as defined in section 101, 741, or 761 of this title, or settlement payment, as defined in section 101 or 741 of this title, takes for value to the extent of such payment;

(C) a repo participant or financial participant that receives a margin payment, as defined in section 741 or 761 of this title, or settlement payment, as defined in section 741 of this title, in connection with a

repurchase agreement, takes for value to the extent of such payment;

(D) a swap participant or financial participant that receives a transfer in connection with a swap agreement takes for value to the extent of such transfer; and

(E) a master netting agreement participant that receives a transfer in connection with a master netting agreement or any individual contract covered thereby takes for value to the extent of such transfer, except that, with respect to a transfer under any individual contract covered thereby, to the extent that such master netting agreement participant otherwise did not take (or is otherwise not deemed to have taken) such transfer for value.

(3) In this section, the term "charitable contribution" means a charitable contribution, as that term is defined in section 170(c) of the Internal Revenue Code of 1986, if that contribution--

(A) is made by a natural person; and

(B) consists of--

(i) a financial instrument (as that term is defined in section 731(c)(2)(C) of the Internal Revenue Code of 1986); or

(ii) cash.

(4) In this section, the term "qualified religious or charitable entity or organization" means--

(A) an entity described in section 170(c)(1) of the Internal Revenue Code of 1986; or

(B) an entity or organization described in section 170(c)(2) of the Internal Revenue Code of 1986.

(e)(1) In addition to any transfer that the trustee may otherwise avoid, the trustee may avoid any transfer of an interest of the debtor in property that was made on or within 10 years before the date of the filing of the petition, if--

(A) such transfer was made to a self-settled trust or similar device;

(B) such transfer was by the debtor;

(C) the debtor is a beneficiary of such trust or similar device; and

(D) the debtor made such transfer with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made, indebted.

(2) For the purposes of this subsection, a transfer includes a transfer made in anticipation of any money judgment, settlement, civil penalty, equitable order, or criminal fine incurred by, or which the debtor believed would be incurred by--

(A) any violation of the securities laws (as defined in section 3(a)(47) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(47))), any State securities laws, or any regulation or order issued under Federal securities laws or State securities laws; or

(B) fraud, deceit, or manipulation in a fiduciary capacity or in connection with the purchase or sale of any security registered under section 12 or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78l and 78o(d)) or under section 6 of the Securities Act of 1933 (15 U.S.C. 77f).

11 U.S.C. §561. Contractual right to terminate, liquidate, accelerate, or offset under a master netting agreement and across contracts; proceedings under chapter 15

(a) Subject to subsection (b), the exercise of any contractual right, because of a condition of the kind specified in section 365(e)(1), to cause the termination, liquidation, or acceleration of or to offset or net termination values, payment amounts, or other transfer obligations arising under or in connection with one or more (or the termination, liquidation, or acceleration of one or more)--

(1) securities contracts, as defined in section 741(7);

(2) commodity contracts, as defined in section 761(4);

(3) forward contracts;

(4) repurchase agreements;

(5) swap agreements; or

(6) master netting agreements,

shall not be stayed, avoided, or otherwise limited by operation of any provision of this title or by any order of a court or administrative agency in any proceeding under this title.

(b)(1) A party may exercise a contractual right described in subsection (a) to terminate, liquidate, or accelerate only to the extent that such party could exercise such a right under section 555, 556, 559, or 560 for each individual contract covered by the master netting agreement in issue.

(2) If a debtor is a commodity broker subject to subchapter IV of chapter 7--

(A) a party may not net or offset an obligation to the debtor arising under, or in connection with, a commodity contract traded on or subject to the rules of a contract market designated under the Commodity Exchange Act or a derivatives transaction execution facility registered under the Commodity Exchange Act against any claim arising under, or in connection with, other instruments, contracts, or agreements listed in subsection (a) except to the extent that the party has positive net equity in the commodity accounts at the debtor, as calculated under such subchapter; and

(B) another commodity broker may not net or offset an obligation to the debtor arising under, or in connection with, a commodity contract entered into or held on behalf of a customer of the debtor and traded on or subject to the rules of a contract market designated under the Commodity Exchange Act or a derivatives transaction execution facility registered under the Commodity Exchange Act against any claim arising under, or in connection with, other

instruments, contracts, or agreements listed in subsection (a).

(3) No provision of subparagraph (A) or (B) of paragraph (2) shall prohibit the offset of claims and obligations that arise under--

(A) a cross-margining agreement or similar arrangement that has been approved by the Commodity Futures Trading Commission or submitted to the Commodity Futures Trading Commission under paragraph (1) or (2) of section 5c(c) of the Commodity Exchange Act and has not been abrogated or rendered ineffective by the Commodity Futures Trading Commission; or

(B) any other netting agreement between a clearing organization (as defined in section 761) and another entity that has been approved by the Commodity Futures Trading Commission.

(c) As used in this section, the term "contractual right" includes a right set forth in a rule or bylaw of a derivatives clearing organization (as defined in the Commodity Exchange Act), a multilateral clearing organization (as defined in the Federal Deposit Insurance Corporation Improvement Act of 1991), a national securities exchange, a national securities association, a securities clearing agency, a contract market designated under the Commodity Exchange Act, a derivatives transaction execution facility registered under the Commodity Exchange Act, or a board of trade (as defined in the Commodity Exchange Act) or in a resolution of the governing board thereof, and a right, whether or not evidenced in writing,

arising under common law, under law merchant, or by reason of normal business practice.

(d) Any provisions of this title relating to securities contracts, commodity contracts, forward contracts, repurchase agreements, swap agreements, or master netting agreements shall apply in a case under chapter 15, so that enforcement of contractual provisions of such contracts and agreements in accordance with their terms will not be stayed or otherwise limited by operation of any provision of this title or by order of a court in any case under this title, and to limit avoidance powers to the same extent as in a proceeding under chapter 7 or 11 of this title (such enforcement not to be limited based on the presence or absence of assets of the debtor in the United States).

11 U.S.C. §1501. Purpose and scope of application

(a) The purpose of this chapter is to incorporate the Model Law on Cross-Border Insolvency so as to provide effective mechanisms for dealing with cases of cross-border insolvency with the objectives of--

(1) cooperation between--

(A) courts of the United States, United States trustees, trustees, examiners, debtors, and debtors in possession; and

(B) the courts and other competent authorities of foreign countries involved in cross-border insolvency cases;

(2) greater legal certainty for trade and investment;

(3) fair and efficient administration of cross-border insolvencies that protects the interests of

all creditors, and other interested entities, including the debtor;

(4) protection and maximization of the value of the debtor's assets; and

(5) facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment.

(b) This chapter applies where--

(1) assistance is sought in the United States by a foreign court or a foreign representative in connection with a foreign proceeding;

(2) assistance is sought in a foreign country in connection with a case under this title;

(3) a foreign proceeding and a case under this title with respect to the same debtor are pending concurrently; or

(4) creditors or other interested persons in a foreign country have an interest in requesting the commencement of, or participating in, a case or proceeding under this title.

(c) This chapter does not apply to--

(1) a proceeding concerning an entity, other than a foreign insurance company, identified by exclusion in section 109(b);

(2) an individual, or to an individual and such individual's spouse, who have debts within the limits specified in section 109(e) and who are citizens of the United States or aliens lawfully admitted for permanent residence in the United States; or

(3) an entity subject to a proceeding under the Securities Investor Protection Act of 1970, a stockbroker subject to subchapter III of chapter 7 of this title, or a commodity broker subject to subchapter IV of chapter 7 of this title.

(d) The court may not grant relief under this chapter with respect to any deposit, escrow, trust fund, or other security required or permitted under any applicable State insurance law or regulation for the benefit of claim holders in the United States.

11 U.S.C. §1507. Additional assistance

(a) Subject to the specific limitations stated elsewhere in this chapter the court, if recognition is granted, may provide additional assistance to a foreign representative under this title or under other laws of the United States.

(b) In determining whether to provide additional assistance under this title or under other laws of the United States, the court shall consider whether such additional assistance, consistent with the principles of comity, will reasonably assure--

(1) just treatment of all holders of claims against or interests in the debtor's property;

(2) protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceeding;

(3) prevention of preferential or fraudulent dispositions of property of the debtor;

(4) distribution of proceeds of the debtor's property substantially in accordance with the order prescribed by this title; and

(5) if appropriate, the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns.

11 U.S.C. §1508. Interpretation

In interpreting this chapter, the court shall consider its international origin, and the need to promote an application of this chapter that is consistent with the application of similar statutes adopted by foreign jurisdictions.

11 U.S.C. §1509. Right of direct access

(a) A foreign representative may commence a case under section 1504 by filing directly with the court a petition for recognition of a foreign proceeding under section 1515.

(b) If the court grants recognition under section 1517, and subject to any limitations that the court may impose consistent with the policy of this chapter--

(1) the foreign representative has the capacity to sue and be sued in a court in the United States;

(2) the foreign representative may apply directly to a court in the United States for appropriate relief in that court; and

(3) a court in the United States shall grant comity or cooperation to the foreign representative.

(c) A request for comity or cooperation by a foreign representative in a court in the United States other than the court which granted recognition shall be accompanied by a certified copy of an order granting recognition under section 1517.

(d) If the court denies recognition under this chapter, the court may issue any appropriate order necessary to prevent the foreign representative from obtaining comity or cooperation from courts in the United States.

(e) Whether or not the court grants recognition, and subject to sections 306 and 1510, a foreign representative is subject to applicable nonbankruptcy law.

(f) Notwithstanding any other provision of this section, the failure of a foreign representative to commence a case or to obtain recognition under this chapter does not affect any right the foreign representative may have to sue in a court in the United States to collect or recover a claim which is the property of the debtor.

11 U.S.C. §1515. Application for recognition

(a) A foreign representative applies to the court for recognition of a foreign proceeding in which the foreign representative has been appointed by filing a petition for recognition.

(b) A petition for recognition shall be accompanied by--

(1) a certified copy of the decision commencing such foreign proceeding and appointing the foreign representative;

(2) a certificate from the foreign court affirming the existence of such foreign proceeding and of the appointment of the foreign representative; or

(3) in the absence of evidence referred to in paragraphs (1) and (2), any other evidence acceptable to the court of the existence of such

foreign proceeding and of the appointment of the foreign representative.

(c) A petition for recognition shall also be accompanied by a statement identifying all foreign proceedings with respect to the debtor that are known to the foreign representative.

(d) The documents referred to in paragraphs (1) and (2) of subsection (b) shall be translated into English. The court may require a translation into English of additional documents.

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

(a) Upon recognition of a foreign proceeding, whether main or nonmain, where necessary to effectuate the purpose of this chapter and to protect the assets of the debtor or the interests of the creditors, the court may, at the request of the foreign representative, grant any appropriate relief, including--

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

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

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

(4) providing for the examination of witnesses, the taking of evidence or the delivery of

information concerning the debtor's assets, affairs, rights, obligations or liabilities;

(5) entrusting the administration or realization of all or part of the debtor's assets within the territorial jurisdiction of the United States to the foreign representative or another person, including an examiner, authorized by the court;

(6) extending relief granted under section 1519(a); and

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

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

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

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

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

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

11 U.S.C. §1523. Actions to avoid acts detrimental to creditors

(a) Upon recognition of a foreign proceeding, the foreign representative has standing in a case concerning the debtor pending under another chapter of this title to initiate actions under sections 522, 544, 545, 547, 548, 550, 553, and 724(a).

(b) When a foreign proceeding is a foreign nonmain proceeding, the court must be satisfied that an action under subsection (a) relates to assets that, under United States law, should be administered in the foreign nonmain proceeding.

11 U.S.C. §1525. Cooperation and direct communication between the court and foreign courts or foreign representatives

(a) Consistent with section 1501, the court shall cooperate to the maximum extent possible with a foreign court or a foreign representative, either directly or through the trustee.

(b) The court is entitled to communicate directly with, or to request information or assistance directly from, a foreign court or a foreign representative,

subject to the rights of a party in interest to notice and participation.