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CHAPTER 15 AND FOREIGN THIRD-PARTY RELEASES POST *PURDUE:* BACK TO THE DRAWING BOARD, STATUS QUO OR A BETTER PATH FORWARD?

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Co-Chairs Robbin Itkin and Robert Van Galen

Moderator:
Zack Clement, Zack A. Clement PLLC, US

Panel Participants:
Hannah Crawford, Partner, Kirkland & Ellis International LLP, UK
Robert Keach, Shareholder, Bernstein Shur, US
Dario Oscos, Partner, Oscos Abogados, Mexico
Tracy Sandler, Partner, Osler, Hoskin& Harcourt LLP, Canada

ENFORCEMENT OF FOREIGN PLANS AND CONFIRMATION ORDERS CONTAINING NONCONSENSUAL THIRD-PARTY RELEASES AFTER HARRINGTON V. PURDUE PHARMA LP: CHANGED LANDSCAPE OR MUCH *PURDUE* ABOUT NOTHING

Robert J. Keach
BERNSTEIN SHUR
rkeach@bernsteinshur.com

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"Chapter 15 and Foreign Third-Party Releases Post Purdue: Back to the Drawing Board, Status Quo or a Better Path Forward"

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ENFORCEMENT OF FOREIGN PLANS AND CONFIRMATION ORDERS CONTAINING NONCONSENSUAL THIRD-PARTY RELEASES AFTER HARRINGTON V. PURDUE PHARMA LP: CHANGED LANDSCAPE OR MUCH *PURDUE* ABOUT NOTHING

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Introduction

In the wake of the Supreme Court's decision in Purdue Pharma barring confirmation of plans containing nonconsensual releases of direct claims held by non-debtor third parties against other non-debtor third parties in reliance on sections 1123(b)(6) and 105(a) of the Bankruptcy Code, various methods for coping with the ruling have been discussed by practitioners, academics and jurists. As detailed below, the aftermath of Purdue is being actively litigated in lower courts. Among the discussed alternatives, confirming a plan containing nonconsensual third-party releases in a foreign insolvency proceeding and then achieving recognition and enforcement of that plan in a U.S. chapter 15 proceeding is being considered as a possible "Purdue workaround." Moreover, foreign plans originated by foreign debtors contain such releases, and foreign representatives regularly seek recognition and enforcement of such plans under Chapter 15. As discussed below, however, it has been argued that Purdue—read in conjunction with relevant provisions of chapter 15—bars recognition and enforcement of foreign plans and confirmation orders containing nonconsensual third-party releases. This paper will explore whether that position has legal support in chapter 15 jurisprudence and whether the Supreme Court's decision in Purdue materially alters the rules or process for achieving recognition and enforcement of foreign plans containing nonconsensual third-party

**The author co-authored and filed an amicus brief in both the Second Circuit and the Supreme Court in Harrington v. Purdue Pharma LP on behalf of certain former commissioners of the ABI Commission to Study the Reform of Chapter 11 (and is a former co-chair of that ABI Commission). He was also the chapter 11 trustee in the cross-border case of Montreal Maine & Atlantic Railway, Ltd. which featured, *inter alia*, a sanctioned CCAA plan containing third-party releases which were enforced in the U.S. Chapter 15 case. He also teaches Cross-Border Insolvency at Boston College Law School.

releases. To get there, however, one must (1) examine the statutory framework and the pre-Purdue chapter 15 case law on post-recognition relief in general, as well as with respect to enforcement of foreign plans, including plans with such releases; and (2) survey the post-Purdue reactions to date in the lower courts, including (however limited) in the chapter 15 context. This paper takes that journey below.

Relevant Chapter 15 Provisions

The issue presented implicates several provisions of chapter 15. Chapter 15 uniquely contains an expression of its fundamental purpose, in section 1501 of the Bankruptcy Code, which provides, in relevant part, that:

> **(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.

11 U.S.C. §1501. Similarly, to avoid any doubts about its grounding in universalism (or at least modified universalism), the chapter also sets forth the standard for interpretation of its provisions:

> 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. §1508.

Fundamentally, these two sections establish that the presumptive role of the U.S. bankruptcy court is to assist the foreign court in the administration of the foreign proceeding where possible and that chapter 15 should be interpreted, when possible, so as to establish consistency of application worldwide.

Chapter 15 contains two sections governing the relief that a chapter 15 court can provide to a foreign representative seeking assistance following the recognition of the foreign proceeding (including the recognition of the foreign proceeding as a foreign main proceeding)[1]. Section 1507 provides that:

> **(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. §1507 (emphasis supplied). Section 1521 also proscribes a scheme for post-recognition relief, stating, in pertinent part, that:

> **(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

[1] Subject only to section 1506's "public policy exception" (discussed below), recognition of a foreign proceeding is mandatory if the requirements of §1517 are met; comity plays no role in recognition of a foreign proceeding under chapter 15. See, e.g., In re Black Gold S.A.R.L, 635 B.R. 517, 521 (9th Cir. B.A.P. 2022).

> 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).

11 U.S.C. §1521 (emphasis supplied). In the case of relief sought under section 1521, the immediately following section provides an additional standard to be met:

> The court may grant relief under section …1521… only if the interests of the creditors and other interested entities, including the debtor, are sufficiently protected.

11 U.S.C. §1522(a). In addition, section 1522(b) allows the court to place appropriate conditions or limits upon the relief sought. 11 U.S.C. §1522(b).

Finally, chapter 15 provides for the ultimate governor on the provision of relief, albeit one that is to be sparingly used. Section 1506—the so-called "public policy exception"—provides that:

> Nothing in this chapter prevents the court from refusing to take an action governed by this chapter if the action would be ***manifestly contrary to the public policy of the United States.***

11 U.S.C. §1506 (emphasis supplied). UNCITRAL's Guide to Enactment, persuasive authority in light of sections 1501 and 1508, provides a clear and emphatic statement that the exception should only very rarely come into play:

> The purpose of the expression "manifestly", used also in many other international legal texts as a qualifier of the expression "public policy", is to emphasize that public policy exceptions should be interpreted restrictively and that article 6 [§1506] is only intended to be invoked under exceptional circumstances concerning matters of fundamental importance for the enacting State.

UNCITRAL Model Law on Cross Border Insolvency with Guide to Enactment and Interpretation 52 (2014)[2].

Chapter 15 Case Law-Relief Generally

The relationship between sections 1507 and 1521 "is not entirely clear." In re Rede Energia S.A., 515 B.R. 69, 90 (Bankr. S.D.N.Y. 2014) (citing In re Toft, 453 B.R. 186, 190 (Bankr. S.D.N.Y. 2011). The Fifth Circuit has held that courts should apply the two sections in a three-step progression: if the relief sought is one of the types listed specifically in section 1521, that section applies; if not, the court next determines whether the relief qualifies as "appropriate relief" under section 1521, meaning whether the type of relief sought was available under now-repealed section 304; and, finally, if that is not the case, the court decides whether to provide "additional assistance" under section 1507 based on principles of comity. In re Vitro S.A.B. de C.V., 701 F.3d 1031, 1054 (5th Cir. 2012).

[2] The more recently finalized UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments with Guide to Enactment provided the following caution about identical language in Article 7 of that model law at ¶73:

> The purpose of the expression "manifestly", which is also used in many other international legal texts as a qualifier of the expression "public policy" (including the MLCBI), is to emphasize that the public policy exception should be interpreted restrictively and that article 7 is only intended to be invoked under exceptional circumstances concerning matters of fundamental importance for the enacting State. In some States, that may include situations where the security or sovereignty of the State has been infringed.

While courts outside of the Fifth Circuit have acknowledged the procedural hierarchy of Vitro, they have not been compelled to follow it, and have generally applied one or both sections as the basis of relief.[3]

The majority of courts take the approach of the bankruptcy court in In re Hanjin Shipping Co. Ltd. when considering whether to provide the relief sought by the foreign representative: "In light of the universalist approach under Chapter 15, a court must provide aid to the foreign main proceeding (here, Korea) absent plain language to the contrary or a vital public policy concern." In re Hanjing Shipping Co., Ltd., No. 16-27041 (JKS), 2016 WL 6679487, at *6 (D.N.J. Sept. 20, 2016). "Since the Debtor is a company based in South Korea and has commenced insolvency proceedings in its home country, the Court's role is to direct creditors to the Korean court for an orderly and fair distribution of the Debtor's assets." Id. This was the case because "[t]here is nothing in the record that would indicate that the Korean Court will not provide due process to all parties." Id. Or, as the court in Cozumel Caribe summarized, citing seminal authorities:

> As the court stated in Altos Hornos, "deference to the foreign court is appropriate so long as the foreign proceedings are procedurally fair and … do not contravene the laws or public policy of the United States." Altos Hornos, 412 F.3d at 424. In analyzing procedural fairness, courts have looked to the following nonexclusive factors:
>
> (1) Whether creditors of the same class are treated equally in the distribution of assets; (2) whether the liquidators are considered fiduciaries and are held accountable to the court; (3) whether creditors have the rights to submit claims which, if denied, can be submitted to a bankruptcy court for adjudication; (4) whether the liquidators are required to give notice to potential claimants; (5) whether there are provisions for creditors meetings; (6) whether a foreign country's insolvency laws favor its own citizens; (7) whether all assets are marshalled before one body

[3] In Rede Energia, discussing the Vitro approach, the court stated that "It remains to be seen whether the three-part analysis crafted by the Vitro court is embraced by other courts." 515 B.R. at 91.

> for centralized distribution; and (8) whether there are provisions for an automatic stay and for the lifting of such stays to facilitate the centralization of claims.
> Finanz AG Zurich v. Banco Economico S.A., 192 F.3d 240, 249 (2nd Cir. 1999).

CT Investment Mgmt Co., LLC v. Cozumel Caribe S.A. de C.V. (In re Cozumel Caribe S.A. de C.V.), 482 B.R. 96, 114-115 (Bankr. S.D.N.Y. 2012).

Thus, the primary focus in considering whether to grant discretionary relief sought under sections 1507 and 1521 is the fundamental fairness of and the due process afforded by the foreign insolvency process. However, a minority of courts have at times declined to provide relief, despite a finding that the foreign insolvency regime was generally fair and embraced due process, where the particular results in a case threatened property interests of a US-based secured creditor or where due process was found lacking in the specific instance. Bank of New York v. Treco (In re Treco) 240 F.3d 148, 159 (2d Cir. 2001) (section 304 case) ("Because the same foreign priority rules may be 'substantially in accordance' with United States law as applied in some circumstances but not as applied to others, a comparison of the priority rules cannot be conducted in the abstract. A court must consider the effect of the difference in the law on the creditor in light of the particular facts presented."); In re Sivec SRL, 476 B.R. 310, 325-6 (E.D. Okla. 2012) ("…this court is not determining that Italy's bankruptcy system is not legitimate…What the Court is deciding is that in this particular case, basic elements of due process are lacking…").

As for section 1506, the "public policy exception is clearly drafted in narrow terms." In re Toft, 453 B.R. 186, 193 (Bankr. S.D.N.Y. 2011). The exception is "to be invoked only under "exceptional circumstances concerning matters of fundamental importance'." Id. at 194. "[F]oreign judgments are generally granted comity as long as the proceedings in the foreign court 'are according to the course of a civilized jurisprudence,

i.e. fair and impartial." Id. (citing Ephedra Prods. Liability Litig., 349 B.R. 333, 336 (S.D.N.Y. 2006)). In addition, the Toft court found that section 1506 should be used only if resort to another section, such as 1522, is unavailable. Id. at 195. In Toft, the court denied issuance of the relief sought by the foreign representative because the relief would have violated constitutional privacy rights and likely sanctioned criminal violations of federal wiretap statutes. Id. at 196.[4]

Third-Party Releases in Chapter 11 Plans Prior to Purdue

Before the Purdue decision, beginning with MacArthur Co. v. Johns-Manville Corp., 837 F.2d 89 (2d Cir. 1988), the majority of circuit courts endorsed the use of nonconsensual third-party releases in plans under appropriate circumstances. These circuits included at least the First, Second, Third, Fourth, Sixth, Seventh, and Eleventh Circuits. See Monarch Life Ins. Co. v. Ropes & Gray, 65 F.3d 973, 983-84 (1st Cir. 1995); In re Metromedia Fiber Network, Inc., 416 F.3d 136, 141 (2d Cir. 2005); In re Lower Bucks Hosp., 571 Fed. Appx. 139, 144 (3d Cir. 2014); Nat'l Heritage Found., Inc. v. Highbourne Found., 760 F.3d 344, 347 (4th Cir. 2014); In re Dow Corning Corp., 280 F.3d 648, 658 (6th Cir. 2002); In re Airadigm Commc'ns, Inc., 519 F.3d 640, 657 (7th Cir. 2008); In re Seaside Eng'g & Surveying, Inc., 780 F.3d 1070, 1078-79 (11th Cir. 2015).

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[4] The public policies at issue in section 1506 are also limited to the most fundamental policies of the United States:

> The exception is read narrowly, with legislative history stating that "the word 'manifestly' in international usage restricts the public policy exception to *the most fundamental policies of the United States*." In re Fairfield Sentry Ltd., 714 F.3d at 139. Thus, "even the absence of certain procedural or constitutional rights will not itself be a bar under [Section] 1506." In re OAS, 533 B.R. at 104 (quoting Vitro II, 701 F.3d at 1069). The party invoking the public policy exception bears the burden of proof. See In re Ashapura Minechem Ltd., 2011 WL 5855475, at *4 (Bankr. S.D.N.Y. Nov. 22, 2011), *aff'd*, 480 B.R. 129 (S.D.N.Y. 2012).

In re P.J. Bakrie Telecom Tbk, 626 B.R. 859, 890 (Bankr. S.D.N.Y. 2021).

Within these circuits, courts employed multi-factor balancing tests to determine whether third-party releases should be approved. See, e.g., In re Tribune Co., 464 B.R. 126, 176-180 (Bankr. D. Del. 2011) (summarizing the Third Circuit's approach and applying a four-factor test); Dow Corning, 280 F.3d at 658 (enumerating a seven-factor test, which has been applied by the Fourth and Eleventh Circuits). But see Airadigm, 519 F.3d at 657 (permitting third-party releases but eschewing the multi-factor approach and favoring an analysis that "is fact intensive and depends on the nature of the reorganization"). Although the factors applied by these courts varied slightly from circuit to circuit, each approach involved examining whether the nonconsensual release was necessary to the success of the reorganization, whether the non-debtor releasee contributed assets to the reorganization, whether the plan provided a mechanism for the payment of the claims of the class affected by the release, and whether the settlement, including the use of third-party releases, was supported by the majority of the affected claimants.

Similarly, a bankruptcy court within the Eighth Circuit approved nonconsensual third-party releases using a balancing test that considered: (1) the "identity of interest between the debtor and the third-party non-debtor, usually an indemnity relationship, such that a suit against the non-debtor is, in essence, a suit against the debtor or will deplete assets of the estate"; (2) whether "[t]he non-debtor has contributed substantial assets to the reorganization"; (3) whether "[t]he injunction is essential to reorganization"; (4) whether "[a] substantial majority of the creditors agree to such injunction"—specifically, whether "the impacted class or classes have 'overwhelmingly' voted to accept the proposed plan treatment"; and (5) whether "[t]he plan provides a mechanism for the payment of all, or substantially all, of the claims of the class or classes affected by the injunction." In re

Master Mortg. Inv. Fund, Inc., 168 B.R. 930, 935 (Bankr. W.D. Mo. 1994). No one factor was dispositive, and the list was neither exclusive, nor conjunctive; in all instances, the inquiry was fact-driven. See, e.g., In re Charles St. African Methodist Episcopal Church of Bos., 499 B.R. 66, 100 (Bankr. D. Mass. 2013) (explaining that it would apply the factors from Master Mortgage and noting that the factors are a "useful starting point," but they are "neither exclusive or conjunctive requirements") (quoting In re Washington Mut., Inc., 442 B.R. 314, 346 (Bankr. D. Del. 2011)).

A minority of circuits held in particular cases (none mass tort cases) that nonconsensual releases were inappropriate.[5] See In re Pac. Lumber Co., 584 F.3d 229, 252-53 (5th Cir. 2009); In re Lowenschuss, 67 F.3d 1394, 1401-02 (9th Cir. 1995); In re W. Real Est. Fund, 922 F.2d 592, 600 (10th Cir. 1990), modified sub nom. Abel v. West, 932 F.2d 898 (10th Cir. 1991).[6]

The ABI Commission to Study the Reform of Chapter 11 provided in its report that a blanket prohibition on nonconsensual third-party releases was inadvisable and

[5] These holdings are premised on the argument that section 524(e) of the Bankruptcy Code—which simply explains the scope of a debtor's discharge—necessarily precludes nonconsensual third-party releases. This interpretation of section 524(e) was rejected by the majority circuits. See, e.g., Dow Corning, 280 F.3d at 657. The Second Circuit, in affirming the Purdue bankruptcy court's confirmation of the plan, and citing its sister circuits, also rejected section 524(e) as a basis for barring nonconsensual releases. See In re Purdue Pharma L.P., 69 F.4th at 74-75.

[6] The Fifth Circuit, however, stated that third-party releases might be appropriate in mass tort cases. See, e.g., Pac. Lumber, 584 F.3d at 252 (explaining that third-party "non-debtor releases are most appropriate as a method to channel mass claims toward a specific pool of assets"); Feld v. Zale Corp., 62 F.3d 746, 760-61 (5th Cir. 1995) (distinguishing its holding from Drexel Burnham, 960 F.2d at 293, on the factual basis that the Drexel Burnham court approved an injunction of third-party claims because it channeled those claims to allow recovery from separate assets, whereas the "the injunction at issue in this case provided no alternative means . . . to recover from [the third-party insurer]"). At least one court within the Tenth Circuit found that the alleged bar on third-party releases attributed to the holding in Western Real Estate Fund was not absolute, noting that section 524(e) does not preclude such releases. See In re Midway Gold US, Inc., 575 B.R. 475, 505 (Bankr. D. Col. 2017). And a more recent Ninth Circuit decision suggested that release of third-party claims could be imposed in a plan. See Blixseth v. Credit Suisse, 961 F.3d 1074, 1081-85 (9th Cir. 2020); see also Purdue Pharma, 633 B.R. at 101-02 (explaining the recent movement of the minority circuits away from an absolute ban on third-party releases).

recommended their continued use under certain conditions. In particular, the Commission included in the Report this recommendation:

> In reviewing a proposed third-party release included in a chapter 11 plan, the court should consider and balance each of the following factors: (i) the identity of interests between the debtor and the third party, including any indemnity relationship, and the impact on the estate of allowing continued claims against the third party; (ii) any value (monetary or otherwise) contributed by the third party to the chapter 11 case or plan; (iii) the need for the proposed release in terms of facilitating the plan or the debtor's reorganization efforts; (iv) the level of creditor support for the plan; and (v) the payments and protections otherwise available to creditors affected by the release. In a case involving the application of third-party releases to creditors and interest-holders not voting in favor of the plan, the court should give significant weight to the last of these factors.

AM. BANKR. INST., COMMISSION TO STUDY THE REFORM OF CHAPTER 11: 2012 – 2014 FINAL REPORT AND RECOMMENDATIONS (2014) at p. 252, http://commission.abi.org/full-report. In the ABI Commission's view, balancing these factors made third-party releases available only in appropriate cases, while ensuring that the recipients of releases pay adequate consideration for them, and that the parties releasing claims receive as much or more than they would receive through nonbankruptcy litigation, and likely receive that consideration far sooner. The ABI Commission believed that this balancing test would prevent overuse of nonconsensual releases; the test is exacting and stringent, requiring a particularized factual basis and substantial and credible evidence. Id. at 255-56.

Pre-Purdue Recognition of Releases in Foreign Plans Under Chapter 15

Before Purdue, the authority of a bankruptcy court in the U.S. to enter an order enforcing a Canadia CCAA plan confirmation order[7] was routine and non-controversial

[7] This paper uses "confirmation" and "confirming" to reference the foreign court's approval of a plan under applicable foreign insolvency law, even though that regime may use different terminology, such as "sanction order" under the CCAA.

even where the plan contained nonconsensual third-party releases. "The U.S. and Canada share the same common law traditions and fundamental principles of law. Canadian courts afford creditors a full and fair opportunity to be heard in a manner consistent with standards of U.S. due process. U.S. federal courts have repeatedly granted comity to Canadian proceedings." In re Metcalfe & Mansfield Alternative Investments, 421 B.R. 685, 698 (Bankr. S.D.N.Y. 2010); see also, Cornfeld v. Investors Overseas Servs., Ltd., 471 F. Supp. 1255, 1259 (S.D.N.Y.) *aff'd,* 614 F.2d 1286 (2d Cir. 1979) ("The fact that the foreign country involved is Canada is significant. It is 'well-settled' in New York that the judgments of the Canadian courts are to be given effect under principles of comity."). The Court in Metcalfe confirmed that "the correct inquiry… is whether the foreign orders should be enforced in the United States," as opposed to whether a U.S. court would be permitted to grant the same relief in a plenary chapter 11 case. Metcalfe, 421 B.R. at 696.

Metcalfe involved the recognition and enforcement of an order which contained third-party releases. In the underlying Canadian proceedings in Metcalfe, the Court of Appeal for Ontario held that the Companies Creditors Arrangement Act (the "CCAA"), Canada's statute governing bankruptcy proceedings, permits the inclusion of third party releases in a plan of compromise or arrangement to be sanctioned by the court. Metcalfe, 421 B.R. at 694. The U.S. Bankruptcy Court in Metcalfe granted comity to the Canadian orders, specifically finding that it was not precluded from doing so by the public policy exception under § 1506 of the Bankruptcy Code. Id. at 698. The Bankruptcy Court noted "that principles of enforcement of foreign judgments and comity in chapter 15 cases strongly counsel approval of enforcement in the United States of the third-party non-debtor

release and injunction provisions included in the Canadian Orders, *even if those provisions could not be entered in a plenary chapter 11 case*." Id. at 696 (emphasis added).

The jurisprudence on enforcement of plan confirmation orders issued by foreign courts with respect to plans containing nonconsensual third-party releases took a slight left turn in a chapter 15 case in Texas addressing a Mexican plan where certain insider guarantors were to be released apparently on the strength of insider votes for an otherwise controversial plan. Vitro S.A.B. de C.V. v. ACP Master Ltd. (In re Vitro S.A.B. de C.V.), 473 B.R. 117 (Bankr. N.D. Tex. 2012). While finding that the Mexican proceedings were not inherently or specifically unfair to the objecting parties, the Vitro bankruptcy court—following an extensive survey of section 1506 cases—noted that the "Fifth Circuit has largely foreclosed non-consensual non-debtor releases and permanent injunctions outside of the context of mass tort claims being channeled toward a specific pool of assets." Id. at 131. The court then rejected enforcement of the plan confirmation order for three reasons: (1) the plan and order did not provide for the distribution of proceeds of the debtor's property substantially in accordance with the order prescribed by the Bankruptcy Code in violation of section 1507(b)(4) because of the releases ("Under a chapter 11 plan, the noteholders would receive their distributions from the debtor and would be free to pursue their other obligors, in this case the non-debtor guarantors"); (2) because of the third-party releases, the plan and order did not sufficiently protect the interests of creditors in the U.S. or provide an appropriate balance between the interests of the creditors and the debtor (and its non-debtor subsidiaries) in violation of sections 1521 and 1522; and (3) the public policy exception applied ("The expression by Congress in §524, paired with the case law in this Circuit, lead this Court to conclude that the protection of third party claims in a bankruptcy

case is a fundamental policy of the United States.") Id. at 132. The court also suggested that the Mexican system's allowance for retention of equity interests without full payment of (or consent of) creditors in contrast to the U.S. Bankruptcy Code's absolute priority rule might also run afoul of the strictures of section 1507. Id.

The case reached the Fifth Circuit on appeal and the circuit court affirmed, applying the three-part analytical hierarchy discussed above, but eventually affirming only on the ground that the bankruptcy court did not abuse its discretion in finding that the plan and order failed to comply with the requirements of sections 1521, 1522 and 1507. The circuit court indeed found that the relief (enforcement of the plan and the releases) might have been available under section 1507 but that the plan proponents had failed to meet their burden of proof with respect to the extraordinary circumstances required to justify nonconsensual third-party releases under the approach of the majority of circuits. Vitro, 701 F. 3d at 1057-1069. The circuit court emphasized that "in so holding, we stress the deferential standard under which we review the bankruptcy court's determination. It is not our role to determine whether the above-summarized evidence would lead us to the same conclusion." Id. at 1069. The circuit court further emphasized that "we do not reach whether the Concurso plan would be manifestly contrary to a fundamental public policy of the United States," although the opinion strongly suggests that the circuit panel would have reached a different conclusion than the bankruptcy court on §1506. Id.

The Fifth Circuit summarized its consideration of the Mexican plan's releases under its three-part test as follows:

> Applying our analytic framework to Vitro's request for relief, the bankruptcy court did not err in denying relief. Sections 1521(a)(1)-(7) and (b) do not provide for discharging obligations held by non-debtor guarantors. Section 1521(a)'s general grant of "any appropriate relief" also does not provide the necessary relief because

> our precedent has interpreted the Bankruptcy Code to foreclosure such a release, and because when such relief has been granted, it has been granted under § 1507, not § 1521. Even if the relief sought were theoretically available under § 1521, the facts of this case run afoul of the limitations in §1522. Finally, although we believe the relief requested may theoretically be available under § 1507 generally, Vitro has not demonstrated circumstances comparable to those that would make possible such a release in the United States, as contemplated by § 1507(b)(4).

Id. at 1057-58.

Sino-Forest, decided after Metcalfe, also involved the recognition and enforcement of an order with compelled third-party releases. There, the bankruptcy court noted that the Canadian courts "specifically found that the approval of the sanction (confirmation) order and the settlement order was consistent with a prior opinion of the Court of Appeal for Ontario establishing the requirements for third-party releases under the CCAA." In re Sino-Forest Corp., 501 B.R. 655, 658 (Bankr. S.D.N.Y. 2013) (the "prior opinion" being the Ontario court's decision referenced in Metcalfe). As in Metcalfe, the bankruptcy court granted comity to the Canadian orders, and found that § 1506 did not preclude it from doing so. Id. at 665. In Sino-Forest, the bankruptcy court reiterated its ruling in Metcalfe that "the correct inquiry in a chapter 15 case was not whether the Canadian orders could be enforced under U.S. law in a plenary chapter 11 case, but whether recognition of the Canadian courts' decision was proper in the exercise of comity in a case under chapter 15." Id. at 662.[8]

The case of Muscletech Research and Development Inc. involved a litigation case where the entire purpose of the CCAA filing was to deal with the wide-ranging products

[8] Sino-Forest distinguishes Vitro, given that it was decided on the grounds that "the bankruptcy court did not abuse the discretion expressly provided in section 1507(b)." Sino-Forest, 501 B.R. at 665. Further, Sino-Forest distinguishes the unique facts of Vitro, specifically that it concerned "a Mexican court order approving a reorganization plan that vitiated guarantees issued by [the debtor's] U.S.-based affiliates, under loan agreements governed by U.S. law." Id. These bases for distinguishing and limiting Vitro are somewhat typical.

liability claims in the case and where, without the contributions of the third parties who were to benefit from third-party releases and injunctions, no funds would have existed to pay a meaningful dividend. The plan sanction order in Muscletech was recognized and enforced by U.S. District Judge Rakoff, as was the related claims procedure despite the fact that U.S. claimants would not enjoy the right to a jury trial given the releases and mandatory claims process. In re Ephedra Products Liab. Litig., 349 B.R. 333 (S.D.N.Y. 2006) (recognizing and enforcing Canadian order approving claims resolution procedure in Muscletech).[9]

Consistent with those cases, the United States Bankruptcy Court for the Southern District of New York recognized and enforced the order approving a U.K. scheme of arrangement that contained the compelled release of the guarantee liabilities of non-debtor affiliates. In re Avanti Comm. Group PLC, 582 B.R. 603 (Bankr. S.D.N.Y. 2018). The bankruptcy court first recognized that, in the U.S., "[t]hird-party releases are often problematic in chapter 11 cases – seemingly prohibited entirely in some Circuits but permitted under limited circumstances in other Circuits." Id. at 606. However, the circuit split and general uncertainty did not prevent the bankruptcy court from enforcing the U.K. scheme; the standard was whether to extend comity:

> The issues presented by third-party releases in chapter 15 cases have received a different analysis than in chapter 11 cases, focusing primarily on the foreign court's authority to grant such relief. The issue in chapter 15 cases then is whether to recognize and enforce the foreign court order based on comity. Well-settled case law in the UK expressly authorizes third-party releases in scheme proceedings, particularly the release of

[9] See also Steven Golick, *Canadian Ruling Favors Third-Party Releases*, 27 AM. BANKR. INST. J. 40 (August 2008) (describing use of third-party releases in ABCP matters and Canadian precedent, including Muscletech).

> affiliate-guarantees. The UK Court sanctioned the Avanti Scheme, and the Court concludes that the Avanti Scheme should be recognized and enforced in the U.S.

Id. at 606-07.

Surveying the case law above, and additional cases as well, the Bankruptcy Court for the Southern District of New York again recognized and enforced a plan confirmation order containing nonconsensual releases in In re Agrokor d.d., 591 B.R. 163 (Bankr. S.D.N.Y. 2018). The court emphasized that the plan in question was the product of a system (and proceeding) characterized by fairness and due process:

> With respect to the Croatian Proceeding, the record reflects that the Foreign Debtors' creditors received proper notice of the Croatian Proceeding and of these Chapter 15 cases. The record also reflects that the substance and procedures set forth in the EA Law comport with broadly recognized principles for insolvency laws. Moreover, the creditor distributions approved in the Settlement Agreement closely follow the waterfall provisions of the U.S. Bankruptcy Code. Additionally, as discussed above, over two-thirds of non-insider creditors voted to approve the Settlement Agreement, avoiding the taint of the insider votes that prevented recognition and enforcement in the Vitro case.
>
> Additionally, the standards for due process set forth in the Second Circuit's nonexclusive list of factors of procedural fairness in Finanz AG Zurich were satisfied by the Croatian Proceeding.

Id. at 190-91.

However, finding that a foreign plan process is procedurally and substantively fair is not a matter of either simple general experience, conjecture, or universalist tendencies of the chapter 15 court; rather, it is a matter of evidence. In re PT Bakrie Telecom TBK, 628 B.R. 859, 884 (Bankr. S.D.N.Y. 2021). This is particularly true when the plan contains a third-party release. In PT Bakrie, the court discussed methodically and extensively the need for a proper record, and it bears extensive quotation below:

> But finding a source for the third-party release in the language of the foreign judgment does not end the inquiry. The Court must next

consider whether such a third-party release is appropriate when viewed through the prism of comity. That is more problematic. As a practical matter, enforcing a third-party release in this case would release the Issuer, the Subsidiary Guarantors, and individual directors and commissioners of BTEL and the Issuer from any liability in the ongoing New York litigation initiated by the Objecting Noteholders. See Objecting Noteholders' Opposition ¶ 6; Motion for Recognition and Enforcement of Indonesian PKPU Plan ¶¶ 39, 98-100. In deciding whether to extend comity to enforce the PKPU Plan containing this third-party release, the Court must consider whether the foreign proceeding abided by fundamental standards of procedural fairness as demonstrated by a clear and formal record. These considerations overlap with those of Sections 1521 and 1507, which assure the just treatment and protection against prejudice of claim holders in the United States through adequate procedural protections. See 11 U.S.C. §§ 1521, 1522(a), 1507(b)(1-2); In re Atlas Shipping, 404 B.R. at 740; In re Rede Energia, 515 B.R. at 94-95; In re Oi, 587 B.R. at 268. Here, there is no clear and formal record that sets forth whether or how the foreign court considered the rights of creditors when considering this third-party release. Indeed, the record contains no information about how this third-party release was presented to the Indonesian court for consideration or whether any creditors were heard—or even had the ability to be heard—as to the third-party release.

…

Moreover, there is nothing in the record about the justification for any third-party release. The Commercial Court Judgment does not provide any explanation, not is there any explanation anywhere else in the records of the PKPU proceeding. It simply exists in the foreign judgment. The Foreign Representative does not even offer a justification in his pleadings, and instead is content to simply rely on the language of the Commercial Court Judgment itself. But relying on the Commercial Court Judgment is insufficient where it does not provide any justification for the release, either under Indonesian law or otherwise. The lack of such explanation is particularly noteworthy given the testimony of the Objecting Noteholders' expert witness that a third-party release is not standard for Indonesian PKPU proceedings but instead must be justified under Indonesian law. See Sidharta Testimony ¶ 97. This testimony was not rebutted by the Foreign Representative.

> This record is problematic when viewed against the Supreme Court's guidance in Hilton on the need for a "clear and formal record" in evaluating comity. Hilton, 159 U.S. at 205-06, 16 S.Ct. 139.

Id. at 884-85. The PT Bakrie court emphasized that in refusing to enforce the plan's releases pending the development of a more thorough record, the "Court's decision today is not a ruling on the permissible scope of third-party releases under Indonesian law. Indeed, the releases in a foreign proceeding subject to chapter 15 **need not be identical to those that a U.S. court would endorse in a chapter 11 case**." Id. at 886 (emphasis supplied). But, the court continued:

> But to grant comity to the PKPU Plan and its third-party release, there must be at least a rudimentary record in the foreign proceeding as to the basis for such releases and procedural fairness of the underlying process. Without such a record, a party seeking comity becomes free to cobble together a rationale for the decision reached after the fact. See Al-Haramain Islamic Found., Inc. v. Bush, 507 F.3d 1190, 1203 (9th Cir. 2007); *cf*. Animal Sci. Prod., Inc. v. Hebei Welcome Pharm Co., —U.S.—,138 S. Ct. 1865, 1868, 201 L.Ed.2d 225 (noting that "the transparency of the foreign legal system" is a relevant consideration when deciding the weight to afford "a foreign state's views about the meaning of its own laws" under principles of international comity). Of course, the parties are free to return to the Indonesian Court to further develop the record on this issue, consistent with the substantive and procedural requirements of Indonesian law. But based on the current record, the Court cannot conclude that the Foreign Representative has met its burden for granting the additional relief.

Id. at 887. The court also suggested further development of the record on certain voting issues. Id. at 887-90. The court emphasized, however, that nothing in the plan (including the releases) would trigger the public policy exception of section 1506. Id. at 890-91.

The significant takeaway from these pre-Purdue cases is that the relevant inquiry is not whether a U.S. court could have confirmed a plan containing a nonconsensual third-party release like the one in the foreign plan it is being asked to enforce, but rather whether

to extend comity based on the characteristics of the foreign regime and process as applied in the case before it in the Chapter 15. U.S. bankruptcy courts in chapter 15 cases—other perhaps than the Vitro lower court—have never required that the releases in the foreign plan be releases that could legally be part of a chapter 11 plan.

Plan and Confirmation Order Enforcement Under Chapter 15 Generally

The chapter 15 cases involving plan enforcement where the foreign plans contain nonconsensual third-party releases are consistent with the general standards for enforcing orders confirming foreign plans set forth in the seminal case on the subject, Rede Energia, S.A., 515 B.R. 69 (Bankr. S.D.N.Y. 2014). Following an extensive review of the relief sections of chapter 15 and their historical roots, as well as a nod to the Vitro three-part test discussed above, the court in Rede Energia noted that "[o]f particular significance to the case at bar is the well-established principle that the relief granted in a foreign proceeding and the relief available in the United States **do not need to be identical**." Id. at 91 (emphasis supplied). Thus, "[f]oreign judgments are generally granted comity as long as the proceedings in the foreign court 'are according to the course of a civilized jurisprudence, i.e. fair and impartial." Id. at 92 (quoting In re Toft, 453 B.R. 186, 194 (Bankr. S.D.N.Y. 2011)). Finding that the Brazilian plan confirmation proceedings at issue met that standard, the court found the requested plan enforcement relief proper under both sections 1521 and 1507, and that relief should not be denied under section 1506. Id.

The Rede Energia court found that plan enforcement was "relief of a type that courts have previously granted under section 304 of the Bankruptcy Code and other applicable law; further it was the type of relief available to a trustee or DIP under the current Bankruptcy Code, citing sections 1141, 524 and 1142(b). Id. at 93. The court also found the interests of the debtors and their creditors, including the objecting parties, were

sufficiently protected under 1522. Id. at 94. The court further found the relief available under section 1507 under principles of comity. Id. at 94-97. The court rejected the argument that the Brazilian plan's failure to observe chapter 11-style absolute priority meant that it ran afoul of section 1507(b)(4). Id. at 97. Similarly, the failure to observe absolute priority did not trigger the narrow public policy exception, and neither did any other plan provision. Id. at 103-04. The court also distinguished the Second Circuit's decision in Treco as inapposite because it involved violation of the rights of a secured party in assets in the U.S. created under U.S. law and was not based on section 1506. Id. at 103. In conclusion, the court turned back to fundamentals: "Where, as here, the proceedings in the foreign court progressed according to the course of a civilized jurisprudence and where the procedures followed in the foreign jurisdiction meet our fundamental standards of fairness, there is no violation of public policy." Id. at 107; see also, In re U.S. Steel Canada, Inc., 571 B.R. 600, 609-12 (Bankr. S.D.N.Y. 2017) (citing Rede Energia for the principle that plan enforcement orders are authorized under both 1507 and 1521 and finding that "based on the principles of international comity and in accordance with the requirements of the Bankruptcy Code, this Court will recognize and enforce the Sanction Order and the Plan."); In re CGG S.A., 579 B.R. 716 (Bankr. S.D.N.Y. 2017) (granting motion to recognize and enforce a French Safeguard Plan that had been confirmed by a French court); In re Oi S.A., 587 B.R. 253, 265-74 (Bankr. S.D.N.Y. 2018) (noting that the "determination of whether to enforce a plan confirmed in a foreign proceeding should be made on a case-by-case basis," and enforcing the Brazilian plan under sections 1521 and 1507); In re Energy Coal S.P.A., 582 B.R. 619 (Bankr. D. Del. 2018) (granting injunction in support of foreign plan).

The Purdue Pharma Decisions

Bankruptcy Judge Robert Drain confirmed a plan in Purdue that, while consented to by the overwhelming majority of affected claimants, contained nonconsensual third-party releases applicable to a small number of holdouts. See In re Purdue Pharma L.P., 633 B.R. 53, 61, 115 (Bankr. S.D.N.Y. 2021). Following the reasoning of the majority of the circuit courts at the time, Judge Drain relied upon the established statutory basis in the Bankruptcy Code for confirmation of plans containing such releases and applied the multi-factor test adopted by the majority of circuit courts (and the ABI Commission) with relevant factual findings backed by substantial evidence. See Id. at 85-95. On appeal, finding the Second Circuit authority unclear but in any event unsatisfied, the district court reversed, sending the case to the Second Circuit.

The Second Circuit affirmed Judge Drain's order confirming the plan. See In re Purdue Pharma L.P., 69 F.4th 45 (2d Cir. 2023). The circuit, for the first time, embraced a multi-factor test. The Second Circuit's seven-factor test was entirely consistent with, and perhaps an improvement upon, the ABI Commission's proposal. The Second Circuit found, in unity with a majority of circuit courts, statutory authority for approval of plans containing nonconsensual third-party releases in sections 1123(b)(6) and 105 of the Bankruptcy Code. Id. at 72-73. The circuit court held that the "ultimate authority for the imposition of nonconsensual releases of direct third-party claims against non-debtors is rooted—as it must be—in the Bankruptcy Code, specifically 11 U.S.C. §§ 105(a) and 1123(b)(6)." In re Purdue Pharma L.P., 69 F.4th at 72.

The Supreme Court in a 5-4 decision, reversed the Second Circuit. Its holding was narrow and premised entirely on construction of the Bankruptcy Code; it simply found that § 1123(b)(6) did not authorize inclusion of nonconsensual third-party releases in chapter

11 plans. The court did not address or rely upon any of the myriad due process or other constitutional issues asserted by the appellants or their amici curiae. The majority held simply as follows: "Confining ourselves to the question presented, we hold only that the bankruptcy code does not authorize a release and injunction that, as part of a plan of reorganization under Chapter 11, effectively seeks to discharge claims against a nondebtor without the consent of the affected claimants." Harrington v. Purdue Pharma LP, 603 U.S. 204, 227 (2024). Critically, the Court emphasized what it was NOT deciding:

> As important as the question we decide today are ones we do not. Nothing in what we have said should be construed to call into question *consensual* third-party releases offered in connection with a bankruptcy reorganization plan; those sorts of releases pose different questions and may rest on different legal grounds than the nonconsensual release at issue here. See, e.g., In re Specialty Equipment Cos., 3 F.3d, 1043, 1047 (CA7 1993). Nor do we have occasion today to express a view on what qualifies as a consensual release or pass upon a plan that provides for the full satisfaction of claims against a third-party nondebtor. Additionally, because this case involves only a stayed reorganization plan, we do not address whether our reading of the bankruptcy code would justify unwinding reorganization plans that have already become effective and been substantially consummated.

Id. at 226 (emphasis in original).

In its statutory construction—primarily its deconstruction of section1123(b)(6)—the Supreme Court expressly noted that the Bankruptcy Code did in fact authorize nonconsensual third-party releases in asbestos-related bankruptcy cases under section 524(g). Id. at 222. The court expressly recognized that the Bankruptcy Code "*does* authorize courts to enjoin claims against third parties without their consent" in the context of asbestos-related chapter 11 cases and under that section. Id. (emphasis in original).

Also of note, the majority opinion (in response to a criticism in the dissent) makes clear that the holding has no impact on the release by the debtor or the trustee of so-called

derivative claims, precisely because such claims "belong to the debtor's estate." Id. at 219-20.

Aftermath of the SCOTUS Decision

Given the Supreme Court's clarity about what it did not decide, the undecided issues have figured prominently in the lower courts since the opinion was released. On the issue of what constitutes a consensual release, the courts are split—as they were pre-Purdue—over whether consent requires a claim holder to "opt in" (expressly consent to a release in a writing submitted to the court or as part of the voting process) or simply not "opt out" (not respond to negative notice indicating that a failure to respond (or to check a certain box) will constitute consent to a release).[10] The judges of the U.S. Bankruptcy Court for the Southern District of Texas have ruled that "opt out" release mechanisms in plans are acceptable, post-Purdue, and establish consent (when the claimant fails to opt out) since such mechanisms were approved prior to the Purdue decision even though the Fifth Circuit generally barred nonconsensual third-party releases. See e.g., In re Robertshaw US Holdings Corp., 662 B.R. 300, 322-23 (Bankr. S.D. Tex. 2024); see also Findings of Fact, Conclusions of Law and Order Confirming the Second Amended Joint Chapter 11 Plan of Reorganization of FTX Trading Ltd. And Its Debtor Affiliates, In re FTX Trading Ltd., Case No. 22-11068 (JTD) (Bankr. D. Del., Oct. 8, 2024) [Dkt. No. 26404] (confirming plan with opt-out release structure). One bankruptcy judge in Delaware who had previously authorized opt-out mechanisms as analogous to binding litigants who default in answering a complaint or creditors who fail to file claims by a published and noticed bar

[10] See generally, Karen Leung, *Purdue Pharma Ruling Roils Courts With Opt-In vs. Opt-Out Debate; Parties Test Scope of Nondebtor Releases in Chapter 15, 'Full Pay,' Asbestos Cases,* OCTUS *(Oct 28, 2024),* https://app.reorg.com/v3#/items/intel/1937?item_id=288031*(collecting cases).*

date has ruled that Purdue vitiates reliance on the "default" theory of consent, but notes that opt out mechanisms might still be available if the protections used in class action settlements (class fiduciary, class counsel, court approval of notice, etc.) were present. The court also noted that "opting in" might be manifested in various ways other than, say, signing a release. Compare In re Arsenal Intermediate Holdings, LLC, Case No. 23-10097 (CTG), 2023 WL 2655592 (Bankr. D. Del., March 27, 2023) with In re Smallhold, Inc., 665 B.R. 704, 714-726 (Bankr. D. Del. 2024). See also In re Lavie Case Centers, LLC, Case No. 24-55507-PMB, 2024 WL 4988600 (Bankr. N.D. Ga. Dec. 5, 2024) (taking approach similar to Smallhold court).

Robertshaw is instructive. In response to Purdue, the court stated as follows:

> A few important points here. Nothing is construed to question consensual third-party releases offered in connection with a chapter 11 plan. There was also no occasion for the Supreme Court to express a view on what constitutes a consensual release. The Supreme Court confined its decision to the question presented. This Court will not narrow or expand the scope of the Supreme Court's holding. These words must be read literally.
>
> Second, contrary to the Trustee's position, the consensual third-party releases in the Plan are appropriate, afforded affected parties constitutional due process, and a meaningful opportunity to opt out. There is nothing improper with an opt-out feature for consensual third-party releases in a chapter 11 plan. And what constitutes consent, including opt-out features and deemed consent for not opting out, has long been settled in this District. Hundreds of chapter 11 cases have been confirmed in this District with consensual third-party releases with an opt-out. And, again, Purdue did not change the law in this Circuit.

662 B.R. at 323 (internal citations and footnotes omitted).

Courts have found nonconsensual releases appropriate in the case of full payment plans. See In re Bird Global, Inc., Case No. 23-20514-CLC (Bankr. S.D. Fla.).[11] Still other

[11] *But see*, David R. Kuney, *The Aftermath of Purdue Pharma: The Myth of the Full-Pay Plan*, 43-AUG Am. Bankr. Inst. J 12 (2024)

courts have found that releases and injunctions in plans that are not reliant on section 1123(b)(6), but rather are in support of sales free and clear under section 363 of the Bankruptcy Code, are not affected by the SCOTUS decision, including sales free and clear of liability insurance policies (buy backs of policy rights by the insurer who is then protected as the purchaser free and clear of claims, including from third-party nondebtor claims). In re Hopeman Brothers, Inc., Case No. 24-32428-KLP, 2025 WL 297652 (Bankr. E.D. Va., January 24, 2025) (citing Munford v. Munford (In re Munford), 97 F.3d 449 (11th Cir. 1996) and Markland v. Davis (In re Centro Grp., LLC), No. 21-11364, 2021 WL5158001 (11th Cir. Nov. 5, 2021);. see also, In re the Roman Catholic Diocese of Rockville Centre, 665 B.R. 71 (Bankr. S.D.N.Y. 2024); Bird Global, supra. Again, the narrow holding of Purdue did not prevent approval of the sale of policy rights free and clear of claims and the accompanying injunction against nondebtor third party claims against the insurers executing the buy-back as a §363 sale:

> This Court concurs with the analysis of Bird Global. A decision that would permit a creditor to independently pursue its claim against property of the debtor after it has been sold in bankruptcy would have a chilling effect on the sale of assets in bankruptcy. Purdue was not intended to thwart that process. Perhaps, this is why the Court has not found, and has not been pointed to, any decision extending Purdue's decision to §363 sales.
>
> As the Supreme Court stated, its decision in Purdue is limited to the issue before it, i.e., whether non-consensual non-debtor releases may be included in chapter 11 plans. Nothing in its opinion suggests that the protections afforded a buyer pursuant to §363, including the ability of the purchaser to obtain the asset free of the claims of the debtor's creditors, were intended to be abrogated. Instead, creditor claims transfer to the proceeds of the sale, just as has occurred here with the Insurance Settlement and the establishment of the Liquidation Trust.

Hopeman Brothers, 2025 WL 297652 at *4. In addition, the use of classic settlement bar orders to protect settling parties from indemnity and similar claims of non-settling parties is unaffected. Bird Global, supra.

Post-Purdue, Courts have also examined the scope of what constitutes a derivative claim (also referred to as a "general claim") and have found claims against third parties (such as successor liability and related claims) to be owned by the estate; the claim is general/derivative and owned by the estate unless the claim arises out of distinct conduct of the nondebtor third party directed specifically to the nondebtor claimant and causing that claimant particularized injury that can be directly traced to the nondebtor's conduct. In re Whittaker, Clark & Daniels, 663 B.R. 1 (Bankr. D.N.J. 2024). If the nondebtor claimant merely suffered the same harm as all similarly situated claimants from actions of the debtor entity (and seeks to hold the nondebtor third party liable for such actions), the claim is general/derivative and belongs to the estate). Id. at *4-6 ("…the Successor Liability Claims are general to the Debtors' estates by their very nature, as they seek to hold nondebtor entities indirectly liable for the Debtors' tort liabilities, rather than remedy a harm that a Tort Claimant or creditor can directly trace to a non-debtor third party."); see also Fin. Oversight & Mgmt. Bd. For Puerto Rico v. Est. of Serrano, 102 F.4th 527 (1st Cir. 2024) (pre-Purdue decision on the scope of derivative claims). An expansive definition of derivative/general claims would obviate the need for many nonconsensual third-party releases.

Post-Purdue Cases Re: Enforcement of Foreign Plans Containing Third-Party Releases

The issue of whether Purdue affects the capacity of a chapter 15 court to enforce a foreign plan or confirmation order containing nonconsensual third-party releases has been

raised but not, at this writing, fully litigated. In the chapter 15 case of Yuzhou Group, filed in the Bankruptcy Court for the Southern District of New York post-Purdue, the Office of the United States Trustee ("UST") filed the *Limited Objection of [UST] to the Verified Petition Under Chapter 15 for Recognition of a Foreign Main Proceeding and Related Relief*. Yuzhou Group Holdings Company Limited, Chapter 15 Case No. 24-11441 (LGB) (Bankr. S.D.N.Y.)[Doc. 10] (the "UST Objection"). The UST Objection is attached to this paper as Exhibit A. In the chapter 15 petition, the foreign representative sought enforcement of allegedly nonconsensual releases approved in the foreign main proceeding in Hong Kong. The UST Objection, among other contentions, argues that, in light of Purdue (1) the release provisions should not be enforced because the releases are not available relief under section 1521(a)(1)-(7) and 1521(b); (2) the release provisions should not be enforced because they are not "appropriate relief" under section 1521(a); (3) the release provisions should not be enforced because the record is incomplete and the court cannot therefore determine that enforcement of the releases is allowed under section 1507(b) and principles of comity; and (4) enforcement of the releases is (and the releases themselves are) manifestly contrary to the public policy of the United States. The UST Objection has not yet been ruled upon.[12]

[12] The UST raised similar objections to enforcement under chapter 15 of certain alleged exculpatory clauses in the case of Unigel Participacoes S.A., Chapter 15 Case No. 24-11982 (MG) (Bankr. S.D.N.Y.) [Doc. 18**]**. This matter was apparently resolved prior to any decision regarding the objection. The UST Objection in Yuzhou has caused some consternation among commentators:

> The U.S. Trustee's, or UST's Chapter 15 limited objection to Yuzhou Group Holding's third-party releases under its Hong Kong scheme of arrangement risks undermining the effectiveness of some Asian cross-border restructurings involving U.S. law governed debt. Certain third-party releases are commonplace under Hong Kong schemes (as well as schemes in other jurisdictions, such as Singapore, Caymen Islands and England). These can include releasing a scheme company's subsidiary that is a co-debtor or guarantor/security provider in favor of a claim that is being compromised under the scheme. The releases are often necessary for the implementation of a scheme restructuring.

In two post-Purdue rulings, judges in chapter 15 cases in the Southern District of New York and Delaware (on the same day) enforced confirmed foreign plans or foreign orders involving releases. In re Americanas S.A., No. 23-10092 (MEW), 2024 WL 3506637 (Bankr. S.D.N.Y., July 22, 2024) (Brazilian plan); In re Nexii Building Solutions Inc., Chapter 15 Case No. 24-10026(JKS) (Bankr. D. Del. July 22, 2024) (CCAA sale process; ancillary order).

In Americanas, the Brazilian plan did not provide for nonconsensual releases but rather that an arguably enhanced return was available for parties granting releases. No objection was filed to the motion to enforce the plan, but the court nonetheless made relevant inquiries. The foreign representative ("FR") admitted that the provisions were designed to incentivize releases and that some creditors had objected, in the Brazilian proceedings, that the provisions for releases were coercive, but that the Brazilian court had overruled the creditors' objections to that effect. 2024 WL 3506637, at *2. The court found that the terms of the plan, including the releases, were not manifestly contrary to public policy. Id. at *3. Further, the court found that an order enforcing the the terms of the plan

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> But should the UST's limited objection be upheld, obviating U.S. bankruptcy court recognition of third-party releases under a Hong Kong scheme, creditors that do not take part in the given scheme would be free to pursue claims against the third parties in the U.S. and possibly other jurisdictions. In turn, a scheme company could be liable under a subrogation/contribution claim. This represents potential residual enforcement risk. Any such claims could upend a restructuring proposal. This would likely impact whether a Hong Kong court would deem a scheme to be effective in the U.S. and whether it was viewed as having substantial effect – which could affect whether a scheme is approved. Given this, if the UST's limited objection is upheld, companies would need to reconsider their approach to third-party releases in a scenario where, despite a scheme being approved, there were non-participating creditors and the company had U.S.-law-governed debt or U.S. assets.

Jeff Burton, *Legal Analysis: UST Ch15 Objection to Yuzhou's HK Scheme Third-Party Releases Highlights Different Jurisdictional Approaches, Risks Undermining Cross-Border Restructuring Effectiveness*, OCTUS (Dec. 4, 2024), https://app.reorg.com/v3#/items/intel/8168?item_id=294757.

and the releases was otherwise within the relief available under sections 1507 and 1521 of chapter 15 and, accordingly, entered an order enforcing the plan. Id. at *3-5.

Nexii Building involved a motion filed by the foreign representative seeking recognition and enforcement of the provisions in an ancillary order entered following a CCAA sale process. The ancillary order contained release provisions akin to Chapter 11-style exculpations of various professionals, officers and directors regarding their respective roles and actions during the CCAA proceedings. The FR's motion specifically addressed the SCOTUS decision in Purdue, arguing that, notwithstanding that decision, the exculpations/releases were not manifestly contrary to public policy, did not implicate section 1506, and could be recognized and enforced pursuant to sections 1521 and 1507, principally relying on the standard set forth in Metcalfe. [Dkt. No. 50, at paragraphs 22-25]. Without objection, the court entered an order recognizing and enforcing the ancillary order. [Dkt. No. 66]. The FR's motion, supporting declaration, and the court's order are attached to this paper collectively as Exhibit B.

Does Purdue Compel a Finding that Enforcement of Foreign Plans with Nonconsensual Third-party Releases is Manifestly Contrary to Public Policy of the United States?

Notwithstanding the UST Objection, the argument that Purdue requires a finding that enforcement of foreign plans containing nonconsensual third-party releases is manifestly contrary to public policy of the United States and implicates section 1506 is difficult to make or support. The Supreme Court's 5-4 decision in Purdue was based purely on statutory construction grounds; the Court did not rely on any of the various due process or other constitutional arguments made by the appellants or their amici. The majority in

Purdue expressly disclaimed any reliance on policy, arguing that policy issues were for the legislative branch. In addition, as the Supreme Court expressly acknowledged, nonconsensual third-party releases are unquestionably authorized by the Bankruptcy Code in asbestos-related cases under section 524(g), and various forms of nonconsensual third-party release mechanisms not expressly reliant on section 1123(b)(6) or plan confirmation are still being approved and enforced in U.S. bankruptcy courts, as detailed above. Given the exceedingly narrow reach of section 1506, and the above considerations, an argument that enforcement of nonconsensual third-party releases in foreign plans implicates the public policy exception appears lacking. Given §524(g) and the prevalence of release mechanisms notwithstanding Purdue, it cannot be maintained that protection of third-party claims in insolvency proceedings is one of the "most fundamental policies of the United States." However, the UST can also be expected to continue to litigate the point.

Enforcement of Releases as Relief Under Section 1521 Post-Purdue

While it has been argued, in reliance on Vitro's §1521 analysis, that Purdue means that enforcement of nonconsensual third-party releases in foreign plans is relief that is not available under section 1521(a)(7), because, after Purdue, such relief is not "additional relief that may be available to a trustee [under the Bankruptcy Code]," this contention arguably reads section 1521(a)(7) too narrowly, and contrary to sections 1501 and 1508. Section 1521(a)(7) has generally been read to refer to the generic type of relief being sought (i.e. plan enforcement) and not to require that the plan sought to be enforced only contain provisions that a chapter 11 debtor or trustee could put in a plan. *See* Oi S.A., 587 B.R. at 266-67 (noting that plan enforcement "is also relief of a type available under U.S. law," citing Rede Energia and §1142(b)).

Vitro could also be read to support an argument that enforcing plans with releases is not "appropriate relief" under section 1521 generally. Vitro, 701 F.3d at 1058 ("Section 1521(a)'s general grant of "any appropriate relief" also does not provide the necessary relief because our precedent has interpreted the Bankruptcy Court to foreclose such a release, and because when such relief has been granted, it has been granted under §1507, not §1521.") But, as detailed above, other courts have enforced foreign plans with nonconsensual third-party releases under both sections. Critically, enforcement of such foreign plans has—beyond Vitro—never depended on a finding that a U.S. chapter 11 court could have confirmed a plan with the same type of release. The legacy of Metcalfe, Sino Forest, Muscletech, Avanti and Agrokor is that precisely the opposite is true: the question is not whether a U.S. Court could grant the release but whether or not to extend comity to enforce the foreign plan. See P.T. Bakrie, 628 B.R. at 876 (to the effect that the releases need not be identical to ones that a chapter 11 debtor or trustee could obtain in a chapter 11 plan). As stated in Rede Energia and its progeny, foreign plans do not need to limit themselves to Bankruptcy Code compliant provisions; if that were the case, those courts would be required to reject plans that did not honor absolute priority (and they did not do so). Plan enforcement was also relief clearly available under §304.[13]

The argument that Purdue eliminates section 1521 as a source of authority for recognition and enforcement of foreign plans with nonconsensual releases is simply a back door version of the long-rejected argument that foreign plans must contain only provisions identical to those mandated by chapter 11. Vitro's statement that the relief was not "appropriate relief" because the 5th Circuit precedent barred most nonconsensual releases

[13] In re Board of Directors of Telecom Argentina S.A., 2006 WL 686867 (Bankr. S.D.N.Y. 2006) (§304 case recognizing and enforcing foreign plan).

simply reads §1521 too narrowly. However, since even Vitro acknowledged that section 1507 was a source for plan enforcement relief, the argument may also be simply beside the point. Most courts apply both sections to support plan enforcement and will likely continue to do so, but one section is more than enough. Curiously, even the UST Objection seems to suggest that releases could be approved via §1507 on an appropriate record (but for §1506).

The Record Supporting Plan Enforcement

As detailed in PT Bakrie, discussed above, foreign representatives seeking enforcement of foreign plans with nonconsensual third-party releases must be prepared to present evidence and create a record in the chapter 15 court as to the proceedings generating the plan, the legal basis and factual justification for the releases under applicable foreign law, notice, due process and fairness to all creditors. Expert declarations as to the applicable foreign law and the fact that it was complied with in the proceedings in question may be advisable. (Indeed, in PT Bakrie, opponents of enforcement presented an expert declaration that was unopposed). This, of course, all starts with creating a proper record in the foreign insolvency proceeding on all factual and legal elements justifying the releases. This was required pre-Purdue; there is a high likelihood of greater scrutiny in a post-Purdue proceeding. It must be remembered, as Judge Lane emphasized in Oi S.A., that the "determination of whether to enforce a plan confirmed in a foreign proceeding should be made on a case-by-case basis. 587 B.R. at 265 (citing Treco, 240 F.3d at 156.)

Can a U.S. Entity File a Foreign Insolvency Proceeding Just to Obtain Nonconsensual Third-Party Releases?

The discussion above raises, then, one of the questions posed in the opening section of this paper. Can a U.S.-based entity with no meaningful connection to the foreign country

in question file an insolvency proceeding in that country with the primary purpose being to obtain confirmation of a plan containing nonconsensual third-party releases? And if so, would a chapter 15 court in the U.S. recognize the foreign insolvency proceeding as either a foreign main or non-main proceeding? And if it recognized the proceeding, would it enforce the plan (or the releases)?

Of course, bankruptcy courts in the U.S. have permitted foreign entities to file chapter 11 cases, requiring only that such entities have minimal property (retainers paid to U.S. lawyers) located here. See, e.g., In re JPA No. 111 Co., Ltd., 2022 WL 298428 (Bankr. S.D.N.Y., Feb. 1, 2022) (denying motion to dismiss foreign entity chapter 11 because property requirement was satisfied and debtor was in good faith trying to maximize creditor return via a section 363 sale process). Often, the foreign chapter 11 debtor is trying to obtain relief under chapter 11 that is not available under its home country insolvency or restructuring regime. In addition, U.S.-based entities, such as Syncreon, have been allowed to use English law schemes of arrangement to implement debt restructurings even where chapter 11 was available as an option.

Moreover, U.S. bankruptcy courts in chapter 15 cases have held that recognition of the foreign proceeding is mandatory if the requirements of section 1517 are met, subject only to §1506; even the fact that the foreign proceeding was filed in bad faith or that the debtor had engaged in misconduct in the foreign proceeding would not prevent recognition of the proceeding, since such factors would not implicate section 1506. See, e.g., Black Gold S.A.R.L., 635 B.R. at 529 ("Only a handful of courts have addressed whether a foreign debtor's misconduct or 'bad faith' is a proper basis for invoking §1506 to deny recognition. Those that have done so have concluded that misconduct or bad faith, standing

alone, is insufficient.") (collecting cases); In re Culligan Ltd., 2021 WL 2787926 at *16 (Bankr. S.D.N.Y. July 2, 2021) (finding that filing a foreign proceeding as "litigation tactic" is insufficient grounds to deny recognition).

Under the scenario described above—a U.S. entity with no or few material contacts with the foreign state filing a proceeding in that foreign state—the more difficult issue (and planning challenge) for purposes of achieving recognition may be the whether the entity's foreign proceeding can qualify as either a foreign main proceeding or a foreign nonmain proceeding. "In order to grant recognition, the Court must find that the [foreign proceeding] constitutes either a main or nonmain proceeding with respect to *each chapter 15 Debtor*." In re Servicos de Petroleo Constellation S.A., 600 B.R. 237, 270 (Bankr. S.D.N.Y. 2019) (emphasis supplied). "If a proceeding does not qualify as a main or nonmain proceeding, it cannot be recognized under chapter 15." Id. at 271. Section 1502 of the Bankruptcy Code defines a "foreign main proceeding" as a foreign proceeding pending in the country where the debtor has the center of its main interests, or "COMI". 11 U.S.C. §1502(4). A "foreign nonmain proceeding" is defined as a foreign proceeding, other than a foreign main proceeding, pending in a country where the debtor has an "establishment." 11 U.S.C. §1502(5). "Establishment" is defined as any place of operations where the debtor carries out a nontransitory economic activity." 11 U.S.C. §1502(2).

While a full discussion of the issues considered in determining COMI is beyond the reach of this paper, the location of COMI is predominantly driven by where creditors reasonably expect COMI to be, and migration of COMI is possible over time where creditors have systematically become informed of the COMI shift and the shift is for a

legitimate purpose, such as where the state of previous COMI does not offer a restructuring alternative. See e.g., In re Sunac China Holdings, Ltd., 656 B.R. 715 (Bankr. S.D.N.Y. 2024)(finding Hong Kong COMI despite incorporation and registered office in the Caymans and operations in China where "creditor expectations and creditors' overwhelming approval of the Debtors' Hong Kong restructuring" support finding of Hong Kong COMI); In re Mod. Land (China) Co., 641 B.R. 768 (Bankr. S.D.N.Y. 2022) (COMI in Caymans despite incorporation in BVI and operations in China where Cayman COMI was consistent with creditor expectations based upon statements in offering memoranda and other facts); In re Ocean Rig UDW Inc., 570 B.R. 687 (Bankr. S.D.N.Y. 2017) (finding COMI shift to Cayman Islands appropriate where creditors were systematically informed of shift and shift was necessary to pursue reorganization as opposed to value-destructive liquidation).

As for recognition as a foreign nonmain proceeding, "[s]everal factors contribute to identifying an establishment: the economic impact of the debtor's operations on the market, the maintenance of a minimum level of organization for a period of time, and the objective appearance to creditors whether the debtor has a local presence." Mod. Land, 641 B.R. at 784-85 (internal quotations and citations omitted) (refusing to recognize Cayman proceedings as foreign nonmain proceedings where "recognition would be inconsistent with the goals of foreign nonmain proceedings" and "neither the bankruptcy proceeding itself nor the Debtor's bookkeeping activities constitute nontransitory activity and the Debtor does not otherwise affect the local marketplace in the Cayman Islands."). Courts have consistently refused to recognize a foreign proceeding as a foreign nonmain proceeding where these elements are absent or inadequately proven by evidence. Id. at

785-86. See also In re the Petition of Shimmin, No. 22-10039-JDL, 2022 WL 9575491 at *8 (Bankr. W.D. Okla. Oct. 14, 2022); In re Mood Media Corp., 569 B.R. 556, 562-63 (Bankr. S.D.N.Y. 2017); In re Creative Fin. Ltd., 543 B.R. 498, 521 (Bankr. S.D.N.Y. 2016); In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd., 389 B.R. 325, 338-39 (S.D.N.Y. 2008). Of particular note is Mood Media which refused to recognize CBCA proceedings involving U.S. subsidiaries as foreign nonmain proceedings as to those entities; the fact that the U.S. entities were subject to oversight by the Canadian parent's directors, guaranteed debt issued by Canadian entities, paid intercompany obligations to Canadian entities, and provided services to Canadian affiliates "does not mean that the U.S. companies have a place of operations [in Canada]." Mood Media, 569 B.R. at 562. Under the scenario outlined above, a U.S.-based "foreign debtor" may be challenged in achieving recognition of its foreign proceeding, although it is not impossible.[14]

However, while recognition is mandatory when the requirements of section 1517 are met, relief under sections 1507 and 1521 is discretionary. Black Gold S.A.R.L. 635

[14] This issue works both ways of course. In the WOM S.A. case, the noteholders seeking dismissal of the chapter 11 case argued, *inter alia*, that the "Debtors have also stated that they do not intend to seek recognition of these Chapter 11 Cases under Chile's version of Chapter 15 because they do not believe it is possible … without recognition, the Debtors will not be able to enforce any Chapter 11 plan against Chilean parties that do not consider themselves bound by the automatic stay, this Court's orders, or the provisions of the Bankruptcy Code." Motion of the Ad Hoc Group of WOM Noteholders for an Order Dismissing the Debtors' Chapter 11 Cases Under Section 305(a) and 1112(b) of the Bankruptcy Code and for Lack of Jurisdiction, or in the Alternative, Appointing a Chapter 11Trustee, In re WOM S.A., Case No. 24-10628 (KBO) (Dkt. #143) (Bankr. D. Del., April 23, 2024) at ¶ 47. ("WOM Motion to Dismiss"). The Debtors did not disagree that they were not seeking recognition under Chile's version of chapter 15, but noted: "Courts have administered numerous chapter 11 cases and confirmed chapter 11 plans filed by foreign debtors who successfully exited chapter 11 while not commencing local recognition proceedings…If and when such action becomes necessary, the Debtors may seek that relief in Chile." Debtor's Objection to [WOM Motion to Dismiss]. In re WOM S.A., Case No. 24-10628 (KBO) (Dkt #256)(Bankr. D. Del. June 2, 2024) at ¶ 50. Theses matters were resolved prior to any ruling on the WOM Motion to Dismiss.

B.R. at 532.[15] A failure to grant relief (plan enforcement) would be reviewed under an abuse of discretion standard (as in Vitro). Although, for the reasons stated above, Purdue should not prevent enforcement of foreign plans with nonconsensual third-party releases, and §1506 should not be implicated, a U.S. bankruptcy court in a chapter 15 case could be less inclined to extend comity if evidence establishes that the foreign proceeding was filed solely or even primarily to achieve a release of direct third-party claims against nondebtor third parties.

One possible (but undeveloped) argument is that there is a prescriptive comity argument against the practice of filing in a foreign country with which the debtor has no real connection.[16] While there has been push back and litigation recently in chapter 11 cases filed by foreign entities, for example in the cases of WOM, S.A. and Intrum AB, no

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[15] "After recognition, chapter 15 has other tools available to deal appropriately with misconduct and cases filed in bad faith…For example, a court can entertain abstention and dismissal under §305…Finally, §1517(d) offers the remedy of modifying or terminating recognition if the grounds for granting it were fully or potentially lacking or have ceased to exist." Black Gold S.A.R.L. at 635 B.R. at 532-33. *See also*, In re Kiener Maschinenbau GmbH, 664 B.R. 863 (Bankr. N.D. Ga. 2024)(recognizing German insolvency proceeding as a foreign main proceeding but, in a non-mass tort context, granting relief from stay to allow a tort claimant to pursue wrongful death litigation in the U.S. since only beneficiary of stay would be the debtor's insurer; any collection efforts limited to insurance).

[16] *See* Vertiv Inc. v. Wayne Burt PTE, Ltd., 92 F.4th 169, 176, note 4 (3rd Cir. 2024)(defining prescriptive comity as "the respect sovereign nations afford each other by limiting the reach of their laws" and citing, *inter alia*, Hartford Fire, 509 U.S. at 817. Cf., In re JSC BTA Bank, 434 B.R. 334 (Bankr. S.D.N.Y. 2010)(construing chapter 15, despite apparent plain meaning to the contrary, to limit reach of the U.S. automatic stay only to foreign proceedings that involve or affect property located, actually or legally, within the territorial jurisdiction of the United States). *See* generally Bruce A. Markell, *The International Two-Step: Recognizing Domestic Chapter 15 Reorganizations*, 98 AM. BANKR. L.J. 1 (Spring 2024). Referring to the possibility of a U.S. entity filing abroad and then seeking chapter 15 relief, Prof. Markell commented:

> In such restructurings, a United States court will have to decide whether chapter 15 requires it to respect another nation's legislative decision to permit restructurings in that foreign nation by non-native debtors, as well as whether sometimes alien relief afforded will be carried over to the United States. As set forth above, nothing in the Model Law explicitly prohibits this, leaving the court to decide whether such evasion of chapter 11 is "manifestly contrary to the public policy." As set forth above, that will be a difficult task, especially if the restructuring occurs in a country, such as the United Kingdom, known for the fairness of its procedure.

Id. at 48.

court has yet ruled that the practice must be curtailed. To date, eligibility to file the chapter 11 via the property rule has been sufficient.

Conclusion

Purdue raises the issue of whether recognition and enforcement of foreign plans with nonconsensual third-party releases is still appropriate. Upon a proper record, given the established chapter 15 and section 304 jurisprudence, it should be, but the issue remains to be litigated. Time will tell. In the interim, proponents of enforcement of such plans would do well to be exceedingly diligent in building a record in support of enforcement, both in the foreign proceeding and in the U.S. court when seeking enforcement via chapter 15.

EXHIBIT
A

WILLIAM K. HARRINGTON
UNITED STATES TRUSTEE, REGION 2
U.S. Department of Justice
Office of the United States Trustee – NY Office
Alexander Hamilton Custom House
One Bowling Green, Room 534
New York, NY 10004
Tel. (212) 510-0500
By: Mark Bruh
Trial Attorney

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re	:	Chapter 15
YUZHOU GROUP HOLDINGS COMPANY LIMITED,[1]	:	Case No. 24-11441 (LGB)
Debtor in a Foreign Proceeding.	:	

LIMITED OBJECTION OF UNITED STATES TRUSTEE TO THE VERIFIED PETITION UNDER CHAPTER 15 FOR RECOGNITION OF A FOREIGN MAIN PROCEEDING AND RELATED RELIEF

[1] Yuzhou Group Holdings Company Limited's company registration number is 209366, and the location of its registered office is Conyers Trust Company (Cayman) Limited, Cricket Square, Hutchins Drive, P.O. Box 2681, George Town, Grand Cayman KY1-1111, Cayman Islands.

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TO THE HONORABLE LISA G. BECKERMAN
UNITED STATES BANKRUPTCY JUDGE:

William K. Harrington, the United States Trustee for Region 2 (the "United States Trustee"), by and through his undersigned counsel, hereby submits this limited objection (the "Limited Objection") to the *Verified Petition Under Chapter 15 for Recognition of a Foreign Main Proceeding and Related Relief.* In support of thereof, the United States Trustee respectfully states as follows:[2]

I. PRELIMINARY STATEMENT

By its Chapter 15 Petition, in addition to seeking recognition of the foreign main proceeding, the Foreign Representative is also seeking recognition and enforcement from this Court of the nonconsensual third-party releases proposed in the Hong Kong Proceeding. But chapter 15 is an ancillary proceeding, and the Court should not allow the Debtor to circumvent Bankruptcy Code provisions to receive extraordinary relief through chapter 15 that is not available to debtors under chapter 11. Chapter 15 was enacted to aid a foreign proceeding, not copy it and adopt it as your own. As set forth herein, there are four reasons why this wholesale adoption approach by the Foreign Representative and the Debtor is inappropriate:

(1) Adoption of the Releases expands chapter 15 beyond the authority provided for post-recognition relief under sections 1507 and 1521;

(2) the Foreign Representative does not require the approval of this Court to enforce the Releases, and because there is no current case or controversy, it is premature to seek enforcement of the Releases;

(3) the Releases are manifestly contrary to public policy; and

(4) if the Releases are instead construed to be an exculpation, they similarly are manifestly contrary to public policy because they are overly broad and in contravention of relevant case law.

[2] Capitalized terms not otherwise defined herein shall have the meaning ascribed to them in the Verified Petition.

First, because enforcement or adoption of the proposed Releases is not necessary to effectuate the purposes of chapter 15, nor in the interest of creditors or needed to protect the assets of the Debtor, the requested relief regarding the Releases does not fall under the Court's general power to grant any appropriate relief under section 1521(a) and thus the Releases cannot be approved under that section. Furthermore, because the record is incomplete about the information presented to creditors and the Hong Kong Court about the Releases, the Court cannot assess whether the principles of comity are satisfied under section 1507(b) and, thus, should not grant recognition of the Releases under that section.

Second, the Foreign Representative, at this juncture, does not need any action or approval from this Court regarding the Releases. If the Releases are approved by the Hong Kong Court, and if it is necessary in the future, the Released Parties may raise the Releases as an affirmative defense for any act, omission, transaction, or other occurrence relating to the Hong Kong Proceeding. In any event, it is premature, redundant, and unnecessary to grant enforcement of the Releases in the Recognition Order because there is currently no actual controversy. Instead, this Court is being asked to issue an advisory opinion about possible defenses to claims that have not yet been asserted.

Third, the relief requested is "manifestly contrary to public policy"[3] because third-party releases may not be imposed without consent through a bankruptcy plan under United States law. *Harrington v. Purdue Pharma, L.P.*, 603 U.S. ___, 144 S. Ct. 2071 (2024). Accordingly, the Court cannot grant comity and enforce the nonconsensual third-party releases issued through a scheme in the Hong Kong Proceeding.

[3] 11 U.S.C. § 1506.

Finally, if the Releases are construed to be an exculpation as may be argued by the Foreign Representative, it still would be manifestly contrary to public policy to approve the same because to the extent that applicable law authorizes exculpation beyond 11 U.S.C. § 1125(e), the Releases provide overly broad coverage in contravention of the case law.

II. BACKGROUND

A. General Background

1. On August 22, 2024, Kwok Ying Lan, in her capacity as the foreign representative (the "Foreign Representative") for Yuzhou Group Holdings Company Limited ("Yuzhou" or the "Debtor"), commenced this chapter 15 case (the "Chapter 15 Petition"). ECF No. 1. Concurrent with the filing of the Chapter 15 Petition, the Debtor also filed a *Verified Petition Under Chapter 15 for Recognition of a Foreign Main Proceeding and Related Relief* (the "Verified Petition"). ECF No. 2

2. Also on August 22, 2024, the Foreign Representative filed a *Motion for Entry of an Order Scheduling a Hearing on Chapter 15 Petition for Recognition and Related Relief and Specifying Form and Manner of Service of Notice.* ECF No. 5.

3. On August 27, 2024, the Court entered an *Order Scheduling Hearing on Chapter 15 Petition and Related Relief and Specifying Form and Manner of Service of Notice.* ECF No. 6. The Court scheduled the Hearing for October 2, 2024, at 10:00 a.m.; objections to the Chapter 15 Petition must be filed on or before September 25, 2024, at 4:00 p.m. *Id.*

B. The Scheme

4. The Debtor is the subject of a proceeding in Hong Kong entitled *In the Matter of Yuzhou Group Holdings Company Limited* (Case Number HCMP 1068/2024) (the "Hong Kong Proceeding") currently pending before the High Court of the Hong Kong Special Administrative Region Court of First Instance (the "Hong Kong Court") concerning a scheme of arrangement (the "Scheme") between Yuzhou and those persons defined in the Scheme as "Scheme Creditors" (the "Scheme Creditors"). *See* Verified Petition, p. 1 of 58.

5. According to Foreign Representative, the Debtor held scheme meetings for each class of creditors for the Scheme on September 12, 2024, to solicit approval of the Scheme by the requisite majority of each such class of creditors under Hong Kong law. If the Scheme is approved by each class of creditors, the Debtor will ask the Hong Kong Court to sanction the Scheme at a hearing scheduled for September 24, 2024 (the "Sanction Hearing"). *Id.* at ¶ 3, p. 4 of 58.

C. The Releases

6. According to the Foreign Representative,

> [t]he Scheme provides for certain releases (the "Releases") of claims relating to the negotiation, preparation, implementation and consummation of the Schemes and/or the Restructuring against the Debtor, ***each member of the Yuzhou Group, and each of the following (in each case, in their capacities as such): (i) the Advisors, (ii) any Director, (iii) the Information Agent, (iv) the Blocked Scheme Creditor Tabulation Agent, (v) the Existing Debt Administrative Parties and predecessors, (vi) the New Notes Administrative Parties, (vii) the Holding Period Trustee, (viii) the Escrow Agent, (ix) Ad Hoc Group, and (x) any other Scheme Creditor (or its Designated Recipient, as applicable)*** and each of ***their respective Affiliates*** (collectively, the "Released Parties"). The Scheme also provides for releases with respect to the Existing Debt Finance Documents, including for any breaches or defaults thereunder, against the Existing Debt Administrative Parties and their predecessors. The Releases are required to provide the

> Released Parties with comfort and take key decisions and steps to facilitate and implement the Restructuring and in certain cases, to prevent potential claims arising against Yuzhou following the Restructuring by virtue of Yuzhou having provided certain indemnities to some of these parties that would undermine the effect of the Schemes. The Scheme Creditors do not, by virtue of the Releases, waive their rights or remedies under the Scheme or the documents that implement the Debtor's restructuring and do not waive any claims arising out of fraud, willful default or willful misconduct by any of the Released Parties.

Id. at ¶ 26, pp. 15-16 of 58 (emphasis added).

7. According to Debtor's counsel, the Releases are binding on a creditor whether or not a creditor voted in favor of it.

> The effect of a scheme of arrangement is that if the requisite statutory majorities are obtained and the Hong Kong Court approves the scheme of arrangement, then the terms of the scheme of arrangement become binding on all members of the relevant class or classes of creditors as a matter of Hong Kong law, whether or not a creditor voted in favor of it.

See Declaration of Andrew Payne as Hong Kong Counsel in Support of Verified Petition Under Chapter 15 for Recognition of a Foreign Main Proceeding and Related Relief (the "Payne Decl."), ECF No. 4 at ¶ 16, p. 7 of 16.

> Once the sanction order is filed, the scheme of arrangement ***will bind all scheme creditors***, including those creditors who voted in favor of the scheme of arrangement, ***those creditors who voted against it, and those creditors who did not vote at all.***

Id. at ¶ 24, p. 10 of 16 (emphasis added).

III. ARGUMENT

A. The Releases Do Not Qualify for Post-Recognition Relief Under Sections 1507 and 1521

The Foreign Representative generally cites section 1521 and 1521(a) as a basis for recognizing and enforcing the Scheme. *See* Verified Petition at ¶¶ 91, 92, 94. After recognition of a foreign insolvency proceeding, a bankruptcy court is empowered under section 1521 to

"grant any appropriate relief" when necessary "to effectuate the purpose of this chapter and to protect the assets of the debtor or the interests of the creditors."[4]

Section 1521(a) provides:

> Upon recognition of a foreign proceeding, whether main or non-main, 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).[5]

[4] 11 U.S.C. § 1521(a); *In re Vitro S.A.B. de C.V.*, 701 F.3d 1031, 1044 (5th Cir. 2012).
[5] 11 U.S.C. § 1521(a).

In addition, a bankruptcy court may provide "additional assistance,"[6] subject to certain factors imposed by section 1507(b) and "consistent with the principles of comity."[7]

"The relationship between [Section] 1507 and [Section] 1521 is not entirely clear." *In re PT Bakrie Telecom Tbk*, 628 B.R. 859, 877 (Bankr. S.D.N.Y. 2021) (quoting *In re Toft,* 453 B.R. 186, 190 (Bankr. S.D.N.Y. 2011) (citing In re *Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.,* 389 B.R. 325, 333 (S.D.N.Y. 2008), *aff'g* 374 B.R. 122 (Bankr. S.D.N.Y. 2007)). "As the considerations for Sections 1521 and 1507 overlap, courts have debated which standard should apply in a given case." *PT Bakrie Telecom Tbk,* 628 B.R. at 877.

In *In re Vitro,* the Fifth Circuit adopted a three-step framework for analyzing requests for post-recognition relief under chapter 15. *See In re Vitro S.A.B. de C.V.,* 701 F.3d 1031, 1054 n.23 (5th Cir. 2012); *but see In re Rede Energia S.A.*, 515 B.R. 69, 91 (Bankr. S.D.N.Y. 2014) (noting that it remains to be seen whether the "analysis crafted by the *Vitro* court [as to Sections 1521 and 1507] is embraced by other courts."). Under the *Vitro* court's framework, first, a court should consider whether the requested relief falls under sections 1521(a)(1)-(7) and (b). *Id.* at 1056. Second, if it does not, then a court should decide whether the requested relief is "appropriate relief" under section 1521(a). *Id.* The inquiry here focuses on whether such relief was previously available under section 304 or is currently provided for under United States law. *Id.* at 1056-57. Third, if the requested relief is not available under section 1521, then a court should consider whether the requested relief is available as "additional assistance" under section 1507. *Id.* at 1057. Neither section 1521 nor 1507 provides the Court authority to enforce the Releases here.

1. The Court Should Not Enter an Order Enforcing the Release Provisions

[6] 11 U.S.C. § 1507(a); *In re Vitro,* 701 F.3d at 1044.
[7] 11 U.S.C. § 1507(b).

of the Recognition Order Because the Releases Are Not Available Relief Under Section 1521(a)(1)-(7) and (b)

None of the seven bases for relief enumerated in section 1521(a) apply here. The first five concern the debtor—its assets, affairs, rights, obligations, or liabilities—and do not explicitly authorize the Releases for the benefit of non-debtors like the Released Parties. The sixth enumerated provision concerns an extension of relief upon the filing of a petition, which is inapplicable to the relief requested. The seventh enumerated provision concerns the relief available to a trustee, which does not include authority for the type of relief afforded by the Releases at issue in this chapter 15 case. Accordingly, the Releases are not relief that is available under sections 1521(a)(1)-(7). *See Vitro,* 701 F.3d at 1058-59.

Section 1521(b), which concerns "entrust[ing] the distribution of all or part of the debtor's assets located in the United States to the foreign representative . . . provided that the court is satisfied that the interests of creditors in the United States are sufficiently protected," also does not explicitly apply.[8] The Foreign Representative did not seek relief under section 1521(b).

2. *The Court Should Not Enter an Order Enforcing the Release Provisions of the Recognition Order Because the Releases Are Also Not "Appropriate Relief" Under Section 1521(a)*

Section 1521(a) includes a bankruptcy court's "more general power to grant 'any appropriate relief.'" *Vitro*, 701 F. 3d at 1059. But the statute ties that general power to a specific precondition, that such relief must be "necessary to effectuate the purpose of this chapter and to protect the assets of the debtor or the interests of the creditors."[9] In *PT Bakrie Telecom Tbk*, the Court (Hon. Judge Lane) observed that:

[8] 11 U.S.C. § 1521(b); *See Vitro,* 701 F.3d at 1059-60.
[9] 11 U.S.C. § 1521(a); *see PT Bakrie Telecom Tbk*, 628 B.R. at 876.

> Courts have found such "appropriate relief" under Section 1521(a) to be the same type of relief that was previously available under Chapter 15's predecessor, Section 304 of the Bankruptcy Code. *Vitro II*, 701 F.3d at 1054. But relief under Section 1521(a) may only be granted if the "interests of the creditors and other interested entities, including the debtor, are sufficiently protected." 11 U.S.C. § 1522(a); *see also In re Intl. Banking Corp. B.S.C.*, 439 B.R. 614, 626–27 (Bankr. S.D.N.Y. 2010) (same). "[S]ufficient protection" embodies three basic principles: "the just treatment of all holders of claims against the bankruptcy estate, the protection of U.S. claimants against prejudice and inconvenience in the processing of claims in the [foreign] proceeding, and the distribution of proceeds of the [foreign] estate substantially in accordance with the order prescribed by U.S. law." *In re Atlas Shipping A/S*, 404 B.R. 726, 740 (Bankr. S.D.N.Y. 2009) (quoting *In re Artimm, S.r.L.*, 335 B.R. 149, 160 (Bankr.C.D.Cal.2005)).

PT Bakrie Telecom Tbk, 628 B.R. at 876.

Under the *ejusdem generis* canon, "the catchall must be interpreted in light of its surrounding context and read to 'embrace only objects similar in nature' to the specific examples preceding it. *Purdue Pharma, L.P.,* 144 S. Ct. at 2082-83. Paired with its "context dependent" term "appropriate," *id.* at 2083, the Releases sought by the Debtor are not similar in nature to the relief provided in section 1521(a). The relief provided in section 1521(a)-(7) protects the Debtor, Debtor's assets and creditors. However, the proposed Releases are designed to protect non-debtors. In *Vitro*, the Fifth Circuit found similarly in discussing section 1521(a)'s grant of "any appropriate relief." The *Vitro* court stated:

> The relief Vitro seeks, a non-consensual, non-debtor release through a bankruptcy proceeding, is generally not available under United States law. Indeed, this court has explicitly prohibited such relief. *In re Pac. Lumber Co.,* 584 F.3d 229, 251–52 (5th Cir.2009) (discharge of debtor's debt does not affect liability of other entities on such debt and denying non-debtor release and permanent injunction); *In re Zale Corp.,* 62 F.3d 746, 760 (5th Cir.1995) ("Section 524 prohibits the discharge of debts of nondebtors."). Because our law prohibits the requested discharge, a request for such relief more properly falls under § 1507, which was included to address such circumstances.

Vitro, 701 F.3d at 1059.

Moreover, the Releases here do not fall within the category of "appropriate relief" because third-party releases may not be imposed without consent through a bankruptcy plan under United States law. *Harrington v. Purdue Pharma, L.P.*, 603 U.S. ___, 144 S. Ct. 2071 (2024). Additionally, the Court's recognition and enforcement of the Releases is not necessary "to effectuate the purpose of this chapter and to protect the assets of the debtor or the interests of the creditors" under section 1521(a). As discussed below, this Court's recognition of the releases is not necessary, because the Releases, if approved by the Hong Kong Court, can be used as an affirmative defense in a later proceeding without this Court's action. Moreover, the "interests of creditors" are not served by forcing releases on them with respect to non-debtor entities. Lastly, the assets of the Debtor are protected under the provisions of the Scheme, and the Releases are not necessary to protect the Debtor's assets; instead, they are being used to protect non-debtors.

3. *The Court Should Not Enter an Order Enforcing the Release Provisions Because the Record is Incomplete About the Releases in Determining Whether the Principles of Comity Are Satisfied Under Section 1507(b)*

Under section 1507(a), a court "may provide additional assistance to a foreign representative under this title or under other laws of the United States."[10] In determining whether to grant additional assistance, "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

[10] 11 U.S.C. § 1507(a).

(5) if appropriate, the provision of an opportunity for a fresh start for the individual that such foreign proceeding includes.[11]

In *In re PT Bakrie Telecom Tbk,* the Court denied post-recognition relief under section 1521 and 1507 regarding enforcement of a third-party release of claims relating to certain senior notes because of the lack of record as to the basis for the release and as to the procedural fairness of the underlying process. *PT Bakrie Telecom Tbk,* 628 B.R. at 885. The Court found the record supplied by the Foreign Representative to be "problematic when viewed against the Supreme Court's guidance in *Hilton* on the need for a 'clear and formal record' in evaluating comity." *Id.*; quoting *Hilton v. Guyot,* 159 U.S. 113, 205-06, 16 S. Ct. 139, 40 L. Ed. 95 (1895); *see also, Vitro*, 701 F.3d at 1057 ("[R]elief under § 1507 'is in nature more extraordinary' than that provided under § 1521, as a result of which 'the test for granting that relief is more rigorous.'"). Leif M. Clark, *Chapter 15 Bankruptcy Strategies: Leading Bankruptcy Experts on Understanding the Filing Process and Achieving Successful Outcomes in Cross–Border Insolvency Cases—Advice for Handling Cross–Border Bankruptcy Cases Effectively* (Aspatore Sept. 2012), *available at* 2012 WL 3279175, at *10.

At the time of filing this Limited Objection, there is very little information about the record presented concerning the Releases to the Hong Kong Court. There has been no record provided as to the basis for the release and as to the procedural fairness of the underlying process. The Debtor alleges that the "Scheme and Explanatory Statement [are] comparable to a disclosure statement required under 1125 of the Bankruptcy Code" and creditors had "notice of and an opportunity to participate" in connection with the Hong Kong Proceeding. *See* Verified Petition at ¶ 108. However, the record is devoid as to any meaningful information regarding

[11] 11 U.S.C. § 1507(b).

those creditors, *e.g.*, are any of them insiders[12] and what percentage are they of the voting class? Additionally, the only information we do know is that no attempt was made to secure consent from the creditors for the Releases. In *Vitro*, 701 F.3d 1067, the the Fifth Circuit refused to enforce the nonconsensual releases because the debtor's Mexican reorganization plan was comprised largely of insider votes in violation of section 1129(a)(10) of the Bankruptcy Code. *Cf. In re Avanti Commc'ns Grp. PLC,* 582 B.R. 603, 619 (Bankr. S.D.N.Y. 2018) ("[T]he Avanti Scheme has near unanimous support (all creditors that voted cast votes in favor of the Scheme), and that support does not rely on votes by insiders.").

Regardless of whether the creditors are insiders or not, what is known is that creditors in the Hong Kong Proceeding have no ability to affirmatively consent to the Releases, as required under United States law. In the absence of information about the basis and procedure underlying the Releases, the Court cannot assess whether any of the considerations in section 1507(b) are impacted. Accordingly, as in *PT Bakrie Telecom Tbk,* the Court here should deny post-recognition relief of the Releases.

B. The Foreign Representative Does Not Require the Action by this Court to Enforce the Releases in the United States

In any event, no action is needed at this juncture by this Court to enforce the Releases as there is currently no case or controversy involving the Releases. The Released Parties, if

[12] Three entities own over 68% of the issued shares of the Debtor. The Foreign Representative, Kwok Ying Lan (Executive Director and Chairman of the Debtor), directly holds 1,384,239 shares of the Debtor (.021%) and indirectly holds 1,918,663,481 of the shares of the Debtor (29.31%) through her wholly owned company, Plentiful Wise Developments Limited (collectively, 29.33% of the equity interests of the Debtor); Lam Lung On (Non-Executive Director of the Debtor) directly holds 27,729,929 shares of the Debtor (.42%) and indirectly holds 1,919,109,051 shares (29.32%) through his wholly owned company, Studious Profits Limited (collectively, 29.74% of the equity interests of the Debtor); and Overseas Chinese Town (Asia) Holdings Limited indirectly holds 650,729,098 shares (9.94%) of the Debtor through its wholly-owned subsidiary, City Legend International Limited. *See* Chapter 15 Petition, Corporate Ownership Statement, p. 17 of 18.

necessary, may assert the Releases—if approved by the Hong Kong Court—as defenses where they think the Releases apply. They may raise the Releases as an affirmative defense for any act, omission, transaction, or other occurrence relating to the Hong Kong Proceeding. The court in which the defense is raised will determine the applicability of the Releases. But it is premature, redundant, and unnecessary to grant enforcement of the Releases in the Recognition Order because there is currently no actual controversy. Instead, this Court is being asked to issue an advisory opinion about possible defenses to claims that have not yet been asserted.

C. The Releases Are Manifestly Contrary to Public Policy

Section 1506 of the Bankruptcy Code provides that:

> Nothing in this chapter prevents the court from refusing to take an action governed by the chapter if the action would be manifestly contrary to the public policy of the United States.[13]

The Second Circuit has held in interpreting section 1506 that "the key determination required by this Court is whether the procedures used . . . meet our fundamental standards of fairness." *Cunard S.S. Co. Ltd. v. Salen Reefer Servs. AB,* 773 F.2d 452, 457 (2d Cir.1985).

Prior to *Purdue Pharma*, there was inconsistent approval of third-party releases by bankruptcy courts. In analyzing the application of section 1506 with respect to third-party releases, the Court (Hon. Chief Judge Glenn) has remarked that forcing nonconsensual third-party releases on parties is arguably "manifestly contrary to public policy." *Cf. Avanti Commc'ns Grp.*, 582 B.R. at 619 (quoting *In re Sino–Forest Corp.*, 501 B.R. 655, 665 (Bankr. S.D.N.Y. 2013) (enforcing foreign order containing third-party releases, noting that, in the Second Circuit, "where the third-party releases are not categorically prohibited, it cannot be argued that the issuance of such releases is manifestly contrary to public policy")). Notwithstanding that

[13] 11 U.S.C. § 1506.

observation, the *Avanti* court did not analyze the appropriateness of granting such releases under a chapter 15. It looked to the principles of comity under section 1507, which it found as the authority to recognize a UK court approved scheme and the releases contained therein. *Avanti*, 582 B.R. at 615.

Since the Supreme Court's decision in *Purdue Pharma*, "our fundamental standards of fairness" regarding third-party releases have changed. Nonconsensual third-party releases in chapter 11 plans are unlawful in their entirety. *Purdue Pharma*, 144 S. Ct. at 2084 ("[A] bankruptcy court's powers are not limitless and do not endow it with the power to extinguish without their consent claims held by non-debtors . . . against other non-debtors[.]"); *Id.* at 2086 (holding that "nothing in the bankruptcy code contemplates (much less authorizes)" a nonconsensual release of direct claims held by creditors against non-debtor third parties).

Here, the Scheme involves nonconsensual third-party releases. "Once the sanction order is filed, the scheme of arrangement will bind all scheme creditors, including those creditors who voted in favor of the scheme of arrangement, those creditors who voted against it, and those creditors who did not vote at all." *See* Payne Decl. at ¶ 24, p. 10 of 16. There is no affirmative consent by "non-debtors. . . against other non-debtors." The Debtor proposes to extinguish creditor rights without their consent. Accordingly, the Court should deny giving effect to the Releases set forth in the Scheme.

D. If the Releases are Construed to be an Exculpation, They are Overly Broad in Contravention of Relevant Case Law

The Foreign Representative makes a passing reference to exculpation in the Verified Petition. "The Releases are narrow in scope and are consistent with the types of releases and exculpations that are generally provided (and approved) in chapter 11 cases." *See* Verified

Petition at ¶ 95, p. 44 of 58. However, even if the Releases are construed to be a form of exculpation, they still would be manifestly contrary to public policy.

The Second Circuit has not ruled on the parameters set by the Bankruptcy Code as to exculpation. But, to the extent that the Court finds that applicable law authorizes exculpation beyond 11 U.S.C. § 1125(e), the purported exculpation set forth in the Scheme is overly broad and in contravention of the case law. Circuits courts in other circuits have found that the purported exculpation like that set forth in the Scheme is in violation of the law.

First, the purported exculpation should not extend past the Restructuring Effective Date, to avoid exculpating actions that have not yet occurred and are as yet unknown. *In re Washington Mut., Inc.*, 442 B.R. 314, 350 (Bankr. D. Del. 2011) (exculpations cover "actions in the bankruptcy case") (citing *In re PWS Holding Corp.*, 228 F.3d 224, 246 (3d Cir. 2000)). Exculpation clauses should not extend past the effective date of a plan, to avoid exculpating actions that have not yet occurred and are yet unknown. *See In re Mallinckrodt PLC*, 639 B.R. 837, 883 (Bank. D. Del. 2022) (exculpation "only extends to conduct that occurs between the Petition Date and the effective date"). In addition, post-effective date entities cannot receive prospective immunity by exculpation, just as they cannot receive prospective immunity through a release. *See Wash. Mut.*, 442 B.R. at 348 ("The Liquidating Trust and its Trustee have not done anything yet for which they need a release. They will not even come into existence until the Plan is confirmed.").

The Recognition Order should not grant prospective releases to entities that do not yet exist, or exculpate them, on account of future conduct and claim that have yet to arise.

Second, the purported exculpation extends beyond what bankruptcy courts have allowed in this District for "claims against exculpated parties based on the negotiation, execution, and

implementation of agreements and transactions that were approved by the Court." *In re Aegean Marine Petroleum Network, Inc.* 599 B.R. 717, 721 (Bankr. S.D.N.Y. 2019). The purported exculpation provides for parties to be exculpated for "Restructuring." That is beyond "agreements and transactions that were approved by the Court."

Third, the purported exculpation is inappropriate because the list of parties, in addition to being unknowable by virtue of the inclusion of "respective Affiliates", surely extends to individuals or entities that cannot be classified as estate fiduciaries. Exculpation should not shield anyone who is not a court-supervised fiduciary from liability. *Aegean Marine*, 599 B.R. at 721. Courts have held that trustees, the debtor's officers and directors, official committees and their members, and counsel to estate fiduciaries may not be exculpated for conduct that is not court-supervised conduct that carries out estate fiduciary duties during the chapter 11 case, that is, conduct that occurs after the petition has been filed and before the plan's effective date. *See, e.g., Matter of Highland Cap. Mgmt., L.P.*, 48 F.4th 419, 437 (5th Cir. 2022); *Patterson v. Mahwah Bergen Retail Grp., Inc.*, 636 B.R. 641 (E.D. Va. 2022); *In re Washington Mutual, Inc.*, 442 B.R. 314 (Bankr. D. Del. 2011); *In re PTL Holdings LLC*, 2011 WL 5509031 (Bankr. D. Del. Nov. 10, 2011); *Pac. Lumber*, 584 F.3d at 252. Exculpation is based "to some extent . . . on the theory that court-supervised fiduciaries are entitled to qualified immunity for their actions." *Aegean*, 599 B.R. at 720. Parties who had nothing to do with the bankruptcy process should not be entitled to benefit from such exculpations.

Fourth, while the purported exculpation excepts acts that constitute fraud, willful default or willful misconduct, it does not also carve out claims for gross negligence, as well as bad faith, breach of fiduciary duty, and legal malpractice, release of which is prohibited under section of

the New York Rules of Professional Conduct, *i.e.*, N.Y. Comp. Codes R. & Res. Tit. 22 § 1200.8 Rule 1.8(h)(1).

E. Waiver of the 14-Day Stay Should Not be Permitted

The Foreign Representative requests that the Court waive the 14-day stay of effectiveness of the Recognition Order. *See* Verified Petition at ¶ 117, p. 55 of 58. Such a provision is inappropriate. The Foreign Representative alleges that a delay in implementing the Restructuring could result in loss of market confidence, which may seriously impact the viability of the business. *Id.* However, there is no evidence for such conclusory statements and they are hardly a basis to grant the extraordinary relief requested. Moreover, the proposed Restructuring Effective Date is not until December 31, 2024. *Id.* at ¶ 42.

The United States Trustee, among other parties, may seek to appeal the Recognition Order. An immediate waiver of the 14-day stay may not provide sufficient time to seek a stay pending appeal. Accordingly, the 14-day stay should not be waived.

IV. CONCLUSION

For the reasons set forth above, this Court should sustain the Limited Objection, deny giving effect to the Releases set forth in the Scheme, and grant such other and further relief as it may deem just and proper.

Dated: New York, New York
September 25, 2024

Respectfully submitted,

WILLIAM K. HARRINGTON
UNITED STATES TRUSTEE

By: */s/ Mark Bruh*
Mark Bruh
Trial Attorney
One Bowling Green, Room 534
New York, NY 10004-1408
Telephone: (212) 510-0500

EXHIBIT
B

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	Chapter 15
NEXII BUILDING SOLUTIONS INC., et al.,[1]	Case No. 24-10026 (JKS)
Debtors in a Foreign Proceeding.	(Jointly Administered)

FOREIGN REPRESENTATIVE'S MOTION FOR ENTRY OF ORDER (I) RECOGNIZING AND ENFORCING THE ANCILLARY ORDER, (II) APPROVING THE PROCEDURE GOVERNING CLOSING OF CHAPTER 15 CASES AND (III) GRANTING RELATED RELIEF

Nexii Building Solutions, Inc., in its capacity as the authorized foreign representative (the "Foreign Representative") of the above-captioned foreign debtors (collectively, the "Debtors" or "Nexii"), which are the subject of jointly-administered proceedings (the "CCAA Proceedings") under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (as amended, the "CCAA") in the Supreme Court of British Columbia (the "Canadian Court"), respectfully submits this motion (this "Motion") for the entry of an order, pursuant to sections 105(a), 350, 1507, 1517(d), 1520, and 1521 of title 11 of the United States Code (the "Bankruptcy Code"), Rule 5009 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), and Rule 5009-2 of the Local Rules for the United States Bankruptcy Court District of Delaware (the "Local Rules"), (i) recognizing and enforcing the Ancillary Order (defined below), (ii) approving the procedure governing closing of these chapter 15 cases (the "Chapter 15 Cases") and (iii) granting related relief. In support of the relief requested herein, the Foreign Representative respectfully represents as follows:

[1] The Debtors in these Chapter 15 Cases, along with the last four digits of each Debtor's unique identifier, are Nexii Building Solutions Inc. (0911), Nexii Construction Inc. (1333), NBS IP Inc. (9930), and Nexii Holdings Inc. (5873). The Debtors' service address for purposes of these Chapter 15 Cases is 1455 West Georgia Street, #200, Vancouver, British Columbia V6G 2T3.

JURISDICTION AND VENUE

1. The United States Bankruptcy Court for the District of Delaware (the "Court") has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334 and the Amended Standing Order of Reference from the United States District Court for the District of Delaware, dated February 29, 2012. The Foreign Representative confirms its consent, pursuant to Bankruptcy Rule 7008 and Local Rule 9013-1(f), to the entry of a final order by the Court in connection with this Motion to the extent that it is later determined that the Court, absent consent of the parties, cannot enter final orders or judgments in connection herewith consistent with Article III of the United States Constitution.

2. This is a core proceeding under 28 U.S.C. § 157(b)(2)(P). Venue of these Chapter 15 Cases are proper in this Court pursuant to 28 U.S.C. § 1410.

3. The statutory bases for the relief requested herein are sections 105(a), 350, 1507, 1517(d), 1520, and 1521 of the Bankruptcy Code, Bankruptcy Rule 5009, and Local Rule 5009-2.

BACKGROUND

4. On January 11, 2024, the Debtors commenced the CCAA Proceedings with the Canadian Court pursuant to sections 9, 11, 11.51, 11.52, and 23 of the CCAA with the goal of pursuing a sale process under the supervision of the Canadian Court.

5. The key orders entered in the CCAA Proceedings to date include the following: (a) *Initial Order*, entered on January 11, 2024 (the "Initial CCAA Order"); (b) *Amended and Restated Initial Order*, entered on January 22, 2024; and (c) *Sale Process and Origin Engagement Order* (the "Sale Process Order"), entered on January 22, 2024, governing a

sale process in Canada and authorizing the engagement of Origin Merchant Partners ("Origin") as investment banker to advise throughout the sale process.

6. On January 11, 2024, (the "Petition Date"), the Foreign Representative filed voluntary petitions for relief under chapter 15 of the Bankruptcy Code for each of the Debtors in this Court. A description of the Debtors' business and the events leading up to the commencement of the CCAA Proceedings and these Chapter 15 Cases is included in the *Declaration of Foreign Representative Pursuant to 11 U.S.C. § 1515 and Rule 1007(a)(4) of the Federal Rules of Bankruptcy Procedure and in Support of Verified Petition for (I) Recognition of Foreign Main Proceedings, (II) Recognition of Foreign Representative, and (III) Related Relief Under Chapter 15 of the Bankruptcy Code* [Docket No. 7] (the "Tucker Declaration") and the *Declaration of Kibben Jackson in Support of Verified Petition for (I) Recognition of Foreign Main Proceedings, (II) Recognition of Foreign Representative, and (III) Related Relief Under Chapter 15 of the Bankruptcy Code* [Docket No. 8], which are incorporated herein by reference.

7. On January 17, 2024, the Court entered the *Order Granting Provisional Recognition of the Initial CCAA Order Pursuant to Section 1519 of the Bankruptcy Code* [Docket No. 30], giving full force and effect on a provisional basis to the Initial CCAA Order, among other relief.

8. On February 9, 2024, the Court entered the *Order Granting Petition for (I) Recognition as Foreign Main Proceeding, (II) Recognition of Foreign Representative, and (III) Related Relief Under Chapter 15 of the Bankruptcy Code* [Docket No. 44] (the "Recognition Order"), granting the Debtors' verified petitions and recognizing the CCAA Proceedings as foreign main proceedings pursuant to section 1517 of the Bankruptcy Code, among other relief.

9. On June 24, 2024, KSV Restructuring Inc. (the "Monitor"), in its capacity as the Court-appointed Monitor of the Debtors in the CCAA Proceedings, filed its *Notice of Application* (the "Application") for an order approving the asset purchase agreement (the "Purchase Agreement") between the Debtors and Nexiican Holdings Inc. ("Purchaser" or "Nexiican") and Nexii, Inc. (together with Nexiican, the "Purchaser Parties").

10. The Monitor's *Application* also sought an order (the "Ancillary Order"),[2] among other things, approving the Monitor's conduct, activities, and fees and disbursements (and those of its counsel) in the CCAA Proceeding and the termination of the CCAA Proceedings. The *Application* included a request to discharge the Monitor and release certain parties, including the Monitor, the Debtors' DIP Lenders, Secured Lenders, counsel to the Monitor, Debtors, and DIP Lenders, their affiliates, partners, employees and agents, and the current and former directors and officers of the Debtors pursuant to the Ancillary Order (the "CCAA Releases").

11. On June 28, 2024, the Canadian Court entered its *Approval and Vesting Order* (the "Canadian Sale Order") and the Ancillary Order, recognizing and approving: (i) the sale of substantially all of the Debtors' assets (the "Assets") to the Purchaser Parties pursuant to the terms and conditions set forth in the Canadian Sale Order; (ii) the termination of the CCAA Proceedings; and (iii) the CCAA Release. A copy of the Ancillary Order is attached to the Proposed Order as **Exhibit 1.**

The CCAA Sale Process

12. The sale of the Assets in accordance with the terms and conditions of the Canadian Sale Order represented the culmination of the orderly sale process authorized by the

[2] Capitalized terms not otherwise defined herein shall have their meaning as set forth in the Ancillary Order or the Tucker Declaration, as applicable.

Canadian Court. Following its engagement, Origin commenced a comprehensive marketing and sale process in Canada under the supervision of the Canadian Court (the "Sale Process"). On January 24, 2024, Origin launched the Sale Process by distributing an interest solicitation letter (the "Teaser") detailing the acquisition opportunity to potential purchasers and investors. The Teaser was distributed to 188 interested parties, which included Canadian and United States operators in the construction industry, financial groups, and other strategic parties, including certain parties that contacted the Monitor and/or Origin following the commencement of the CCAA Proceedings.

13. Parties that executed a non-disclosure agreement attached to the Teaser (the "NDA") were provided with access to an online dataroom, which contained historical and projected financial information and other relevant diligence information, such as operational metrics, personnel information, and material contracts and agreements. In total, 26 interested parties executed an NDA and were provided access to the dataroom, 11 of which were interested in exploring transaction opportunities with the Debtors.[3]

14. Pursuant to the Sale Process Order, the deadline for interested parties to submit a binding qualified bid, including a 10% purchase price deposit, was March 7, 2024. As of such date, however, the Debtors did not receive any Qualified Bids that were in a form for which approval could be sought in the CCAA Proceedings. However, the Debtors, Origin, and the Monitor continued to market the Debtors' assets and engage in discussions with potential purchasers of the Debtors' assets.

[3] The Omicron Entities (as defined in the Tucker Declaration) became petitioners in the CCAA Proceedings subsequent to the Petition Date, but are not Debtors in these Chapter 15 Cases. The assets of the Omicron Entities, who did not have any assets or operations in the United States, were previously sold in the CCAA Proceedings.

15. Notwithstanding that Origin spent nearly six (6) months marketing the Debtors' assets, the only qualified bid that was submitted for the Debtors' assets in the Sale Process came from the Purchase Parties.

16. Pursuant to the Purchase Agreement, the Purchaser Parties are purchasing substantially all of the Debtors' assets (as defined in the Asset Purchase Agreement in greater detail, the "Purchased Assets") in exchange for more than $22,500,000.00 of total consideration, which includes $22,200,000.00 of assumed secured indebtedness, $500,000.00 of cash consideration, and assumption of additional liabilities relating to Resale Warranty Obligations (as defined in the Purchase Agreement) and assumed contracts and leases (collectively, the "Purchase Price"). The Purchase Agreement is attached to the Foreign Representative's *Motion Pursuant to Section 105(a), 363, 365, 1501, 1507, 1520, and 1521 of the Bankruptcy Code and Bankruptcy Rules 2002, 6004, 6006, and 9014, for Entry of an Order (I) Recognizing and Enforcing the Approval and Vesting Order, (II) Approving the Sale of Substantially all the Debtors' Assets Free and Clear of Liens, Claims, and Encumbrances, and (III) Granting Related Relief* (the "Sale Recognition Motion"), filed contemporaneously herewith.

The Ancillary Order

17. Pursuant to the Ancillary Order, the Canadian Court (i) approved the activities and fees of the Monitor and the Monitor's counsel; (ii) terminated the CCAA Proceedings upon the Monitor's filing of a Monitor's Termination Certificate in the CCAA Proceedings; (iii) discharged the Monitor as of the termination of the CCAA Proceedings; (iv) approved the CCAA Releases; and (v) granted related relief, which included a request of this Court's "aid and recognition" in giving effect to the Ancillary Order.[4] The CCAA Releases,

[4] Ancillary Order at ¶ 20.

found in paragraphs 13 through 16 of the Ancillary Order, provides that the Released Parties (as defined in the Ancillary Order) are:

> released and discharged from any and all claims that any person may have or be entitled to assert against the Released Parties, whether known or unknown, matured or unmatured, foreseen or unforeseen, existing or hereafter arising, based in whole or in part on any action or omission, transaction, dealing or other occurrence existing or taking place on or prior to the date of the filing of the Monitor's Termination Certificate in any way relating to or arising out of the assets, obligations, business or affairs of the Petitioners or in respect of these CCAA Proceedings (the "**Released Claims**" and each a "**Released Claim**") and any such Released Claims are hereby released, stayed, extinguished and forever barred, with prejudice, and the Released Parties shall have no liability in respect thereof, provided however that Released Claims shall not include any claim arising out of gross negligence or willful misconduct on the part of the Released Parties.[5]

The CCAA Releases were, at the request of certain of the Debtors' creditors, limited to provide that they would not "have any effect on any rights, remedy, suit or proceeding against any personal indemnitor or guarantor in respect of any indemnity or guarantee made by such Nexii Directors and Officers in his or her personal capacity."[6]

RELIEF REQUESTED

18. By this Motion, the Foreign Representative respectfully requests (i) that the Court enter an order, in substantially the form attached hereto as **Exhibit A** (the "Proposed Order"), recognizing and enforcing the Ancillary Order; (ii) that, upon the Notice of Full Administration, attached to this Motion as **Exhibit B**, the Court enter the order attached to this Motion as **Exhibit C** (the "Proposed Case Closing Order"), closing the Chapter 15 Cases; and (iii) that the Court grant any other relief that may be necessary and appropriate, including entry of a final decree after entry of the Proposed Case Closing Order.

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5 Ancillary Order at ¶ 13.

6 *Id.* at ¶ 15.

BASIS FOR RELIEF REQUESTED

A. The Court should recognize and give force and effect to the Ancillary Order within the territorial jurisdiction of the United States.

19. The Foreign Representative respectfully submits that the Court should recognize and give effect to the Ancillary Order within the territorial jurisdiction in the United States. Chapter 15 of the Bankruptcy Code empowers "courts with broad, flexible rules to fashion relief that is appropriate to effectuate the objective of the chapter in accordance with comity."[7] The Court has the power to provide additional assistance to a foreign representative under the Bankruptcy Code or other laws of the United States, consistent with the principles of comity.[8]

20. Section 1521(a) of the Bankruptcy Code authorizes this Court, "at the request of the foreign representative, [to] grant any appropriate relief"[9] to the Foreign Representative, provided that the "interests of the creditors and other interested entities, including the debtor, are sufficiently protected."[10] Moreover, the Court may provide "additional assistance" to the Foreign Representative,[11] and may grant recognition of the Ancillary Order so long as recognition is not "manifestly contrary to the public policy of the United States."[12]

21. Here, the Court may exercise its discretion under sections 1507 and 1521 of the Bankruptcy Code, and consistent with the principles of comity, to recognize and enforce

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7 *In re Rede Energia, S.A.*, 515 B.R. 69, 91 (Bankr. S.D.N.Y. 2014) (citing *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.*, 389 B.R. 325, 333-34 (S.D.N.Y. 2008)); *see also In re SPhinX, Ltd.*, 351 B.R. 103, 112 (Bankr. S.D.N.Y. 2006) ("chapter 15 maintains—and in some respects enhances—the 'maximum flexibility . . . that section 304 provided bankruptcy courts in handling ancillary cases in light of principles of international comity and respect for the laws and judgments of other nations") (internal citations omitted), *aff'd* 371 B.R. 10 (S.D.N.Y. 2007).

8 *See* 11 U.S.C. §§ 1507 and 1521.

9 11 U.S.C. § 1521(a).

10 11 U.S.C. § 1522.

11 11 U.S.C. § 1507(a).

12 11 U.S.C. § 1506.

the Ancillary Order.[13] The relief requested by the Ancillary Order is consistent with, and not contrary to, the public policy of the United States and the Foreign Representative submits that the Court has the discretion to enter the Proposed Order recognizing and enforcing the Ancillary Order, including the CCAA Releases.

22. The Foreign Representative is cognizant of the recent decision in *Harrington v. Purdue Pharma L.P.*, __ S. Ct. __, 2024 U.S. LEXIS 2848 (June 27, 2024), in which the Supreme Court of the United States held that "the bankruptcy code does not authorize a release and injunction that, as part of a plan of reorganization under Chapter 11, effectively seeks to discharge claims against a nondebtor without the consent of affected claimants."[14] Importantly, the majority in *Purdue* rested its decision on the statutory construction (including the context and history) of section 1123(b)(6) of the Bankruptcy Code,[15] not on any determination that non-consensual third party releases are contrary to the public policy of the United States.[16]

23. As noted above, section 1506 of the Bankruptcy Code provides that "[n]othing in this chapter prevents the court from refusing to take an action governed by this chapter if the action would be manifestly contrary to the public policy of the United States."[17] This provision "requires a narrow reading . . . [it] does not create an exception for any action under Chapter 15 that may conflict with public policy, but only an action that is '*manifestly*

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13 *See generally In re ABC Learning Centres Ltd.*, 720 F.3d 301, 306 (3d Cir. 2013) ("Foreign Representatives can access U.S. courts to request enforcement of orders of the foreign proceeding and to stay actions against foreign debtors' property in the United States.").

14 2024 U.S. LEXIS 2848, at *32.

15 *Id.*, at *28 ("If text and context supply two strikes against the plan proponents and the dissent's construction of § 1123(b)(6), history offers a third.").

16 *Cf. id.*, at *31 ("Both sides of this policy debate may have their points. But, in the end, we are the wrong audience for them.").

17 11 U.S.C. § 1506.

contrary.'"[18] The public policy exception embodied in section 1506 is only implicated by actions that offend "the most fundamental policies of the United States"[19] and "invoked only 'under exceptional circumstances concerning matters of fundamental importance [to the United States].'"[20]

24. As the United States Court of Appeals for the Third Circuit has held, the section 1506 public policy exception only applies "'where the procedural fairness of the foreign proceeding is in doubt or cannot be cured by the adoption of additional protections' or where recognition 'would impinge severely a U.S. constitutional or statutory right.'"[21] "The mere fact of conflict between foreign law and U.S. law, absent other considerations, is insufficient to support the invocation of the public policy exception."[22]

25. The CCAA Releases do not implicate section 1506 of the Bankruptcy Code and, accordingly, should be enforced through the recognition and enforcement of the Ancillary Order pursuant to sections 1507 and 1521 of the Bankruptcy Code. Indeed, in pre-*Purdue* cases, bankruptcy courts have found that "section 1506 did not bar enforcement of the third party releases because the Canadian court had statutory authority to grant such relief, the question of the Canadian court's jurisdiction had been fully litigated and carefully considered in Canada, including on appeal, and 'the procedures used in Canada meet our fundamental standards of fairness,'"[23] even though such releases "arguably could not be granted in a U.S.

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18 *Morning Mist Holdings Ltd. v. Krys* (*In re Fairfield Sentry Ltd.*), 714 F.3d 127, 139 (2d Cir. 2013) (emphasis in original).

19 *Fairfield Sentry*, 714 F.3d at 139 (quoting H.R. Rep. No. 109-31, pt. 1, at 109 (2005)); *see also ABC Learning*, 728 F.3d at 309.

20 *Fairfield Sentry*, 714 F.3d at 139 (quoting Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency at ¶ 89).

21 *ABC Learning*, 728 F.3d at 309 (quoting *In re Qimonda AG Bankr. Litig.*, 433 B.R. 537, 570 (E.D. Va. 2010)).

22 *Qimonda*, 433 B.R. at 570.

23 *In re Toft*, 453 B.R. 186, 194 (Bankr. S.D.N.Y. 2011) (quoting *In re Metcalfe & Mansfield Alt. Invs.*, 421 B.R. 685, 697 (Bankr. S.D.N.Y. 2010)).

bankruptcy proceeding."[24] So too here; the CCAA Releases, which were granted by the Canadian Court in a collective proceeding after notice and a hearing, are not manifestly contrary to public policy and accordingly should be applied through the recognition and enforcement of the Ancillary Order.

B. The case closing procedure should be approved.

26. Upon entry of an order recognizing and enforcing the Sale Recognition Motion and the Proposed Order by this Court, and with the closing of the transaction contemplated by the Canadian Sale Order and the pending termination of the CCAA Proceedings, the Foreign Representative has determined that there will no longer be a reason for these Chapter 15 Cases to remain open.

27. Section 1517(d) of the Bankruptcy Code provides that a case under chapter 15 of the Bankruptcy Code may be closed in the manner prescribed under section 350 of the Bankruptcy Code,[25] which, in turn, provides that a case shall be closed "[a]fter an estate is fully administered."[26] Local Rule 5009-2 provides, in relevant part, that:

> Upon written motion, a foreign representative in a proceeding recognized under § 1517 of the Code, may seek the entry of a final decree when the purpose of the representative's appearance in the Court is completed. Such motion shall describe the nature and results of the representative's activities in the Court and shall include a final decree order that (i) orders the closing of the case and (ii) identifies in the caption and in the body of the order the case name and the case number of each case to be closed under the order.

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24 *Toft*, 453 B.R. at 194; *see also In re PT Bakrie Telecom Tbk*, 628 B.R. 859, 882 (Bankr. S.D.N.Y. 2021) ("Even in Circuits where third-party releases in United States bankruptcy cases are categorically impermissible, . . . such relief may be permitted under chapter 15." (citing cases); *In re Sino-Forest Corp.*, 501 B.R. 655, 661-666 (Bankr. S.D.N.Y. 2013).

25 11 U.S.C. § 1517(d).

26 11 U.S.C. § 350(a).

> The foreign representative shall file a certificate of service with the Court that notice has been given. If no objection has been filed by the United States Trustee or a party in interest within 30 days after the certificate is filed, there shall be a presumption that the case has been fully administered and the Court may close the case.[27]

28. A party may apply for an order closing a bankruptcy case after substantially all of the issues have been resolved and the case has been substantially consummated.[28] A case may be considered fully administered when all administrative claims have been provided for and there are no outstanding motions, contested matters or adversary proceedings.[29]

29. A chapter 15 case is deemed to be fully administered when the purpose for the foreign representative's appearance is complete.[30] If no objection to a final report is filed after 30 days' notice, the case is deemed to have been fully administered and the chapter 15 case may be closed.[31]

30. Once the Debtors close the sale transaction pursuant to the Canadian Sale Order and the order granting the Sale Recognition Motion and the Monitor files the requisite certificate in accordance with the Ancillary Order, the CCAA Proceedings will be terminated and the purpose of the Foreign Representative's appearance will be complete. There will be no outstanding motions, contested matters, or adversary proceedings in these Chapter 15 Cases. Pursuant to the orders entered by the Canadian Court, the Foreign Representative will have disposed of all of the Debtors' assets in the United States and is authorized by the Ancillary

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27 Local Rule 5009-2.

28 *See In re A.H. Robins, Co., Inc.*, 219 B.R. 145 (10th Cir. 1998).

29 *See In re Kliegl Brothers*, 238 B.R. 531 (Bankr. E.D.N.Y. 1999).

30 *See* Fed. R. Bankr. P. 5009(c).

31 *Id.*; Local Rule 5009-2(b); *In re Ginsberg*, 164 B.R. 870, 873 (Bankr. S.D.N.Y. 1994).

Order to close the Debtors' cases. Consequently, the Chapter 15 Cases will be fully administered and ripe for closure.

31. Bankruptcy Rule 5009(c) also requires that the foreign representative file a final report when the purpose of the foreign representative's appearance has been completed, which report should describe the nature and results of the foreign representative's actions in the chapter 15 case.[32] To reduce the costs and expenses for the benefit of the Debtors and their creditors, the Foreign Representative requests that this Motion and the Ancillary Order (to be supplemented by the filing of the Notice of Full Administration) be deemed as the Foreign Representative's final report under Bankruptcy Rule 5009(c) and the written motion seeking entry of a final decree in these Chapter 15 Cases under Local Rule 5009-2, subject to the 30-day objection period upon the filing of the Notice of Full Administration. Upon the filing of a certification of no objection or a certification of counsel indicating that no objections were received to the Notice of Full Administration, or that any such objections have been resolved by the Foreign Representative and the applicable objecting party, the Foreign Representative respectfully requests that the Court enter the Proposed Case Closing Order.

32. The Foreign Representative submits that this Motion and the Ancillary Order, together with the other filings in these Chapter 11 Cases and the CCAA Proceedings, fully describe the activities that the Foreign Representative took or needs to take to fully administer these Chapter 15 Cases, their nature, and likely result, and neither notice nor ability to object to the closing of these Chapter 15 Cases will be compromised under the foregoing procedure. Accordingly, by this Motion, the Foreign Representative submits that the Chapter 15 Cases will soon be ready for closure and thus seeks approval of the foregoing procedures for their closure.

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[32] Fed. R. Bankr. P. 5009(c).

NOTICE

33. In accordance with Local Rule 5009-2, notice of this Motion will be provided to: (i) all persons or bodies authorized to administer foreign proceedings of the Debtors; (ii) principal parties that have appeared in the CCAA Proceedings as of the date of service of the relevant pleadings; (iii) the Office of the United States Trustee for the District of Delaware; (iv) the Debtor's secured creditors and their counsel, if known; (v) counsel to any parties in ongoing litigation with the Debtors; (vi) the Office of the Delaware Secretary of State; (vii) the Internal Revenue Service; (viii) the Securities and Exchange Commission; and (ix) any party that has requested notice pursuant to Bankruptcy Rule 2002. In light of the nature of the relief requested herein, the Foreign Representative submits that no other or further notice of this Motion is necessary or required.

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CONCLUSION

WHEREFORE, the Foreign Representative respectfully requests that the Court enter the Proposed Order granting the relief requested herein and such other and further relief as the Court deems just and proper.

Dated: July 1, 2024

PACHULSKI STANG ZIEHL & JONES LLP

/s/ Steven W. Golden

Steven W. Golden (DE Bar No. 6807)
Colin R. Robinson (DE Bar No. 5524)
Brooke E. Wilson (admitted *pro hac vice*)
919 North Market Street, 17th Floor
Wilmington, Delaware 19899-8705
Tel: 302-652-4100
Fax: 302-652-4400
sgolden@pszjlaw.com
crobinson@pszjlaw.com
bwilson@pszjlaw.com

-and-

BARACK FERRAZZANO KIRSCHBAUM & NAGELBERG LLP

Nathan Q. Rugg (admitted *pro hac vice*)
Alexander F. Berk (admitted *pro hac vice*)
200 West Madison Street, Suite 3900
Chicago, IL 60606
Tel.: (312) 984-3100
Fax: (312) 984-3150
nathan.rugg@bfkn.com
alexander.berk@bfkn.com

Attorneys for Foreign Representative

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	Chapter 15
NEXII BUILDING SOLUTIONS INC., et al.,[1]	Case No. 24-10026 (JKS)
Debtors in a Foreign Proceeding.	(Jointly Administered)

DECLARATION OF WILLIAM TUCKER IN SUPPORT OF FOREIGN REPRESENTATIVE'S MOTION PURSUANT TO SECTIONS 105(A), 363, 365, 1501, 1507, 1520, AND 1521 OF THE BANKRUPTCY CODE AND BANKRUPTCY RULES 2002, 6004, 6006, AND 9014, FOR ENTRY OF AN ORDER (I) RECOGNIZING AND ENFORCING THE APPROVAL AND VESTING ORDER, (II) APPROVING THE SALE OF SUBSTANTIALLY ALL OF THE DEBTORS' ASSETS FREE AND CLEAR OF LIENS, CLAIMS, AND ENCUMBRANCES, AND (III) GRANTING RELATED RELIEF

I, WILLIAM TUCKER, to the best of my information and belief, state as follows:

1. I am the former Chief Executive Officer of the Debtors (as defined below) and currently an independent contractor of the Debtors providing, among other things, the services of a Chief Executive Office. I am intimately familiar with the above-captioned debtors (collectively, the "Debtors") which are the subject of jointly-administered proceedings (the "CCAA Proceedings") under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 (as amended, the "CCAA") in the Superior Court of British Columbia, (the "Canadian Court"), and, as such, have knowledge of the matters contained in this declaration (the "Declaration").

2. I submit this declaration in support of the *Foreign Representative's Motion Pursuant to Sections 105(A), 363, 1501, 1507, 1520, and 1521 of the Bankruptcy Code, and Bankruptcy Rules 2002, 6004, 6005, and 9014, for Entry of an Order (I) Recognizing and Enforcing the Approval and Vesting Order, (II) Approving the Sale of Substantially All of the*

[1] The Debtors in these chapter 15 cases (the "Chapter 15 Cases"), along with the last four digits of each Debtor's unique identifier, are Nexii Building Solutions Inc. (0911), Nexii Construction Inc. (1333), NBS IP Inc. (9930), and Nexii Holdings Inc. (5873). The Debtors' service address for purposes of these Chapter 15 Cases is 1455 West Georgia Street, #200, Vancouver, British Columbia V6G 2T3.

Debtors' Assets Free and Clear of Lien, Claims, and Encumbrances, (III) Recognizing and Enforcing the Administrative Reserves Order, and (IV) Granting Related Relief (the "Motion")[2] filed contemporaneously herewith.

3. Except as otherwise stated herein, the statements in this Declaration are based on my personal knowledge or opinion except as otherwise noted. If I were called upon to testify, I could and would testify competently to the facts set forth herein. I am authorized to submit this Declaration on behalf of the Debtors.

Events Leading to a Sale of Substantially All of the Debtors' Assets and the Asset Purchase Agreement

4. Since commencing the CCAA Proceedings and these Chapter 15 Cases, the Debtors, through the Monitor and with the close involvement of the Canadian Court approved investment banker Origin, have been focused on a value maximizing sale of all or substantially all of the Debtor's assets pursuant to the CCAA to a strategic partner or partners that can utilize the Debtors' proprietary technology.

5. Following entry of the Sale Process Order and approval of Origin's engagement, Origin commenced the Sale Process, which involved comprehensive marketing with the goal of consummating a sale under the supervision of the Canadian Court. On January 24, 2024, Origin launched the Sale Process by distributing the Teaser, which detailed the acquisition opportunity to potential purchasers and investors. The Teaser was distributed to 188 interested parties, which included Canadian and United States operators in the construction industry, financial groups, and other strategic parties, including certain parties that contacted the Monitor and/or Origin following the commencement of the CCAA Proceedings.

6. Parties that executed the NDA attached to the Teaser were provided with access to

[2] Capitalized terms used but not defined herein shall have the meaning given to them in the Motion.

an online dataroom, which contained historical and projected financial information and other relevant diligence information, such as operational metrics, personnel information, and material contracts and agreements. In total, 26 interested parties executed an NDA and were provided access to the dataroom, 11 of which were interested in exploring transaction opportunities with the Debtors.

7. Pursuant to the Sale Process Order, the deadline for interested parties to submit a binding qualified bid, including a 10% purchase price deposit, was March 7, 2024. As of such date, however, the Debtors had not received any Qualified Bids that were in a form for which approval could be sought in the CCAA Proceedings. However, the Debtors, Origin, and the Monitor continued to market the Debtors' assets and engage in discussions with potential purchasers of the Debtors' assets.

8. Notwithstanding that Origin spent nearly six (6) months marketing the Debtors' assets, the only qualified bid that was submitted for the Debtors' assets in the Sale Process came from third-party bidders Nexiican Holdings Inc. and Nexii, Inc., the Buyers under the Asset Purchase Agreement. Although the Buyers have names that are similar to the Debtors, the principals of the Buyers are not related to the Debtors and the Buyers were incorporated for the purpose of implementing the transactions subject to the Asset Purchase Agreement.

9. Pursuant to the Asset Purchase Agreement[3] the Buyers are purchasing the Purchased Assets, which comprise substantially all of the Debtors' assets, in exchange for a Purchas Price of more than $22,500,000.00 of total consideration, which includes $22,200,000.00 of assumed secured indebtedness, $500,000.00 of cash consideration, and assumption of additional liabilities relating to Resale Warranty Obligations (as defined in the Asset Purchase Agreement)

[3] A true and correct copy of the Asset Purchase Agreement is attached to the Approval and Vesting Order as Schedule B, which is attached as Exhibit 1 to the proposed form of order submitted contemporaneously herewith.

and assumed contracts and leases. The Purchased Assets will be conveyed to the Buyers free and clear of Encumbrances (other than Permitted Encumbrances).

10. On or about June 27, 2024, the Buyers paid a good faith deposit in the amount of CAD 250,000 to the Debtors as required under the Asset Purchase Agreement.

11. The Asset Purchase Agreement requires that closing take place on or before August 15, 2024 at 11:59 p.m. (Vancouver time). The Asset Purchase Agreement authorizes the Buyers, in their sole discretion, to make written offers of employment to the Debtors' employees that are contingent on the Closing.

12. I believe a sale of the Purchased Assets other than one free and clear of all interests, except as otherwise provided in the Asset Purchase Agreement and the Approval and Vesting Order would yield substantially less value for the Debtors and their creditors than the alternative. Therefore, I believe a sale free and clear of all interests is in the best interests of the Debtors, their creditors, and other parties in interest.

13. I believe the Sale is the best transaction available to the Debtors under the circumstances, and to ensure the Debtors' assets are maximized for the benefit of their stakeholders, including employees and counterparties to contracts and leases that are being assumed by the Buyers. I believe that failure to consummate the Sale would be detrimental to the Debtors, their stakeholders, and the public interest.

14. I believe the Asset Purchase Agreement was negotiated without fraud or collusion, in good faith, and from an arm's-length bargaining position. I believe the Debtors did not enter into the Asset Purchase Agreement for the purpose of hindering, delaying, or defrauding the Debtors' present or future creditors.

Executed on this 1st day of July, 2024 British Columbia, Canada

/s/ William Tucker

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	Chapter 15
NEXII BUILDING SOLUTIONS INC., et al.,[1]	Case No. 24-10026 (JKS)
Debtors in a Foreign Proceeding.	(Jointly Administered)
	Ref. Docket No. 50

ORDER (I) RECOGNIZING AND ENFORCING THE ANCILLARY ORDER, (II) APPROVING THE PROCEDURE GOVERNING CLOSING OF CHAPTER 15 CASES AND (III) GRANTING RELATED RELIEF

Upon consideration of the motion (the "Motion") of Nexii Building Solutions, Inc., in its capacity as the authorized foreign representative (the "Foreign Representative" or "Foreign Representative") for the above-captioned foreign debtors (the "Debtors") in a proceeding (the "CCAA Proceeding") commenced under Canada's *Companies' Creditors Arrangement Act*, R.S.C. 1985, C-36, as amended, and pending before the Supreme Court of British Columbia (the "Canadian Court"), for the entry of an order, pursuant to sections 105(a), 350, 1517(d), 1520, and 1521 of title 11 of the United States Code (the "Bankruptcy Code"), (i) recognizing and enforcing the Ancillary Order (defined below), (ii) approving the procedure governing closing of these chapter 15 cases (the "Chapter 15 Cases") and (iii) granting related relief; the Court finding that (a) it has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334, (b) this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2), and (c) venue is proper in this Court and this District pursuant to 28 U.S.C. § 1410; and due and sufficient notice of the Motion having been given; and it appearing that no other or further notice need be provided; and that the relief requested is in the best interest of the Debtors, its creditors, and other parties in interest in the

[1] The Debtors in these chapter 15 cases (the "Chapter 15 Cases"), along with the last four digits of each Debtor's unique identifier, are Nexii Building Solutions Inc. (0911), Nexii Construction Inc. (1333), NBS IP Inc. (9930), and Nexii Holdings Inc. (5873). The Debtors' service address for purposes of these Chapter 15 Cases is 1455 West Georgia Street, #200, Vancouver, British Columbia V6G 2T3.

Chapter 15 Case; and all creditors and other parties in interest, including the Debtors, are sufficiently protected in the grant of relief ordered hereby in compliance with section 1522(a) of the Bankruptcy Code; and after due deliberation and sufficient cause appearing therefor,

NOW THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED THAT:

1. The Motion is GRANTED as set forth herein.

2. The Ancillary Order, a copy of which is attached hereto as Exhibit 1, is hereby recognized and enforced and given full force and effect in the United States and is binding on all persons subject to this Court's jurisdiction pursuant to sections 1521, 1525, and 1527 of the Bankruptcy Code.

3. The Foreign Representative is authorized to seek entry of an order closing these Chapter 15 Cases by filing and serving a Notice of Full Administration, subject to a thirty (30) day objection period after service of the Notice of Full Administration. If no objections are filed upon the expiration of the thirty (30) day objection period, the Foreign Representative may file a certificate of no objection along with the Proposed Case Closing Order for entry by the Court.

4. This Court shall retain jurisdiction with respect to all matters arising from or related to the implementation of this Order.

Dated: July 22nd, 2024
Wilmington, Delaware

J. KATE STICKLES
UNITED STATES BANKRUPTCY JUDGE

Exhibit 1

Ancillary Order

No. S240195
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, RSC 1985, c C-36, as amended

and

IN THE MATTER OF NEXII BUILDING SOLUTIONS INC., NEXII CONSTRUCTION INC, NBS IP INC., NEXII HOLDINGS INC., 4540514 CANADA INC., 1061660 B.C. LTD., 0592286 B.C. LTD, 0713447 B.C. LTD, AND 0597783 B.C. LTD

PETITIONERS

ANCILLARY ORDER

BEFORE THE HONOURABLE	)	
	)	June 28, 2024
JUSTICE STEPHENS	)	

ON THE APPLICATION of KSV Restructuring Inc., in its capacity as the Court-appointed Monitor (in such capacity the "**Monitor**"), coming on for hearing at Vancouver, British Columbia, on the 28th day of June, 2024; AND ON HEARING from counsel of the Monitor, Michael Shakra and Andrew Froh, and those other counsel listed on **Schedule "A"** hereto, and no one else appearing although duly served; AND UPON READING, the material filed, including the Third Report of the Monitor dated June 24, 2024 (the "**Third Report**"); AND PURSUANT TO the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**"), the British Columbia *Supreme Court Civil Rules*, and the inherent jurisdiction of this Court;

THIS COURT ORDERS AND DECLARES THAT:

1. Capitalized terms used in this Order and not otherwise defined herein shall have the meaning ascribed to them in the: (i) Initial Order of Justice Stephens made on January 11, 2024 (the "**Initial Order**"), as amended by the Order of Justice Stephens dated January 22, 2024 (the "**Amended and Restated Initial Order**"); or (ii) the First Report (as defined in the Amended and Restated Initial Order), the Second Report of the Monitor dated April 19, 2024 (the "**Second Report**") and the Third Report, as the case may be.

2. The time for service of this Notice of Application and supporting materials is hereby abridged such that the Notice of Application is properly returnable today.

APPROVAL OF ACTIVITIES AND FEES

3. The activities of the Monitor as described in the First Report, the Second Report and the Third Report are hereby approved; provided however that only KSV Restructuring Inc. in its personal capacity and only with respect to its own personal liability, shall be entitled to rely upon or utilize in any way such approval.

4. The Monitor's fees and disbursements in the aggregate amount of CAD $ 587,284.18 plus applicable taxes, for the period from January 1, 2024 to May 31, 2024, as set out in Third Report, be and are hereby approved.

5. The fees and disbursements of the Monitor's legal counsel, Bennett Jones LLP ("**Bennett Jones**") in the aggregate amount of CAD $689,476.54, plus applicable taxes, for the period from January 11, 2024 to June 18, 2024 as set out in the Third Report, be and are hereby approved.

6. The Monitor's and Bennett Jones' estimated aggregate future fees and disbursements up $250,000 to the CCAA Termination Time, as outlined in the Third Report, are hereby approved.

TERMINATION OF CCAA PROCEEDINGS

7. Upon service by the Monitor of an executed certificate substantially in the form attached hereto as **Schedule "B"** (the "**Monitor's Termination Certificate**") on the service list in these CCAA Proceedings ("**Service List**") certifying that, to the best of the knowledge and belief of the Monitor, all matters to be attended to in connection with the CCAA Proceedings have been completed, the within CCAA Proceedings shall be terminated without any further act or formality (the "**CCAA Termination Time**"), save and except as provided in this Order, and provided that nothing herein impacts the validity of any Orders made in these CCAA Proceedings or any actions or steps taken by any Person (as defined in the Initial Order).

8. The Monitor is hereby directed to file a copy of the Monitor's Termination Certificate with the Court and post a copy of the Monitor's Termination Certificate on its website as soon as is practicable following the CCAA Termination Time.

9. Each of the Charges set out in paragraph 43 of the Amended and Restated Initial Order shall terminate effective as of the CCAA Termination Time, without any further act or formality.

DISCHARGE OF THE MONITOR

10. Effective at the CCAA Termination Time, KSV Restructuring Inc. shall be and is hereby discharged from its duties as the Monitor and shall have no further duties, obligations or responsibilities as Monitor from and after the CCAA Termination Time, provided that,

notwithstanding its discharge as Monitor, KSV Restructuring Inc. shall have the authority to carry out, complete or address any matters in its role as Monitor that are ancillary or incidental to these CCAA Proceedings or the Transaction following the CCAA Termination Time, as may be required or appropriate ("**Monitor Incidental Matters**").

11. Notwithstanding any provision of this Order, the Monitor's discharge or the termination of these CCAA proceedings, nothing herein shall affect, vary, derogate from, limit or amend, and the Monitor shall continue to have the benefit of, all of the rights, approvals and protections in favour of the Monitor at law or pursuant to the CCAA, the Initial Order, or any other Order of this Court in these CCAA proceedings or otherwise, all of which are expressly continued and confirmed following and after the CCAA Termination Time, including in connection with any Monitor Incidental Matters and other actions taken by the Monitor following the CCAA Termination Time with respect to the Petitioners or these CCAA proceedings.

12. No action or other proceeding shall be commenced against the Monitor in any way arising from or related to its capacity as Monitor, including in connection with any Monitor Incidental Matters taken after the CCAA Termination Time, except with prior leave of this Court on not less than fifteen (15) days prior notice to the Monitor.

RELEASE

13. Effective as of the CCAA Termination Time, KSV Restructuring Inc. (whether in its capacity as Monitor or otherwise), the DIP Lenders, the Secured Lenders, counsel to the Monitor, counsel to the Petitioners and counsel to the DIP Lenders and each of their respective affiliates, partners, employees and agents, the Petitioners and its employees, and current and former officers and directors, as applicable, (collectively, the "**Nexii Directors and Officers**") (the aforementioned, collectively, the "**Released Parties**") be and are hereby released and discharged from any and all claims that any person may have or be entitled to assert against the Released Parties, whether known or unknown, matured or unmatured, foreseen or unforeseen, existing or hereafter arising, based in whole or in part on any action or omission, transaction, dealing or other occurrence existing or taking place on or prior to the date of the filing of the Monitor's Termination Certificate in any way relating to or arising out of the assets, obligations, business or affairs of the Petitioners or in respect of these CCAA Proceedings (the "**Released Claims**" and each a "**Released Claim**") and any such Released Claims are hereby released, stayed, extinguished and forever barred, with prejudice, and the Released Parties shall have no liability in respect thereof, provided however that Released Claims shall not include any claim arising out of gross negligence or willful misconduct on the part of the Released Parties.

14. Any Released Claim asserted against the Nexii Directors and Officers that is covered by the D&O Policy (as defined in the first affidavit of William Tucker sworn January 10, 2024) (each an "**Insured Claim**"), but only to the extent of any such available insurance, shall not be compromised, released, discharged, cancelled or barred by this Order, and any

person having an Insured Claim shall be irrevocably limited to recovery in respect of such Insured Claim solely from the proceeds of the applicable insurance policies, and persons with Insured Claims shall have no right to, and shall not, directly or indirectly, seek any recoveries in respect thereof from the Nexii Directors and Officers, other than enforcing such person's rights to be paid by the applicable insurer(s) from the proceeds of the applicable insurance policies.

15. Nothing in this Order, including, without limitation, the releases of the Nexii Directors and Officers provided for herein, shall have any effect on any rights, remedy, suit or proceeding against any personal indemnitor or guarantor in respect of any indemnity or guarantee made by such Nexii Directors and Officers in his or her personal capacity

16. Notwithstanding any other provision of this Order, nothing in this Order shall waive, discharge, release, cancel or bar any claim against the Released Parties that is not permitted to be released pursuant to s. 5.1(2) of the CCAA.

STAY EXTENSION

17. The Stay Period granted in paragraph 16 of the Amended and Restated Initial Order, as extended pursuant to paragraph 3 of the Ancillary Order dated April 26, 2024, is hereby extended to the earlier of: (a) the CCAA Termination Time; and (b) August 31, 2024.

GENERAL

18. The Petitioners or the Monitor may apply to the Court as necessary to seek further orders and directions to give effect to this Order.

19. Endorsement of this Order by counsel appearing, other than counsel for the Monitor, is hereby dispensed with.

20. THIS COURT HEREBY REQUESTS the aid and recognition of any court, tribunal and regulatory or administrative bodies, having jurisdiction in Canada or in the United States of America, including the United States Bankruptcy Court overseeing the Petitioners' proceedings under Chapter 15 of the Bankruptcy Code in Case No. 24-10026-JKS, or in any other foreign jurisdiction, to give effect to this Order and to assist the Petitioners or the Additional Petitioners, the Monitor, and their respective agents in carrying out the terms of this Order. All courts, tribunals and regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Petitioners, the Additional Petitioners and the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Petitioners, the Additional Petitioners and the Monitor and their respective agents in carrying out the terms of this Order.

THE FOLLOWING PARTIES APPROVE THE FORM OF THIS ORDER AND CONSENT TO EACH OF THE ORDERS, IF ANY, THAT ARE INDICATED ABOVE AS BEING BY CONSENT:

ENDORSEMENTS ATTACHED

S240195

Signature of
☐ Party ☑ Lawyer for KSV Restructuring Inc.

Bennett Jones LLP
(Michael Shakra)

BY THE COURT

REGISTRAR

CHECKED

Schedule "A"

List of Counsel

NAME	PARTY
Michael Shakra and Andrew Froh	The Monitor, KSV Restructuring Inc.
Kyle Plunkett (MS Teams)	Powerscourt Investments XXV, LP, Trinity Capital Inc., Powerscourt Investments XXV Trust, Horizon Technology Finance Corporation and Horizon Credit II LLC
Vicki Tickle	Counsel to the Purchaser Parties, Nexiican Holdings Inc. and Nexii, Inc.

Schedule "B"

Form of Monitor's Certificate

No S240195
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, RSC 1985, c C-36, as amended

and

IN THE MATTER OF NEXII BUILDING SOLUTIONS INC., NEXII CONSTRUCTION INC, NBS IP INC., NEXII HOLDINGS INC., 4540514 CANADA INC., 1061660 B.C. LTD., 0592286 B.C. LTD, 0713447 B.C. LTD, AND 0597783 B.C. LTD.

PETITIONERS

MONITOR'S CERTIFICATE

1. Capitalized terms used but not otherwise defined in this Monitor's Certificate shall have the meaning given to them in the Order of the Supreme Court of British Columbia (the "**Court**") pronounced on June 28, 2024 (the "**Ancillary Order**").

2. Pursuant to an Order of the Court pronounced January 11, 2024 (the "**Initial Order**"), KSV Restructuring Inc. was appointed as the monitor (in such capacity, the "**Monitor**") of the Petitioners. The proceedings commenced therein are hereinafter referred to as the "**CCAA Proceedings**".

3. Pursuant to the Approval and Vesting Order, the Court ordered that the within CCAA Proceedings shall be terminated without any further act or formality (the "**CCAA Termination Time**") upon, among other things, the delivery by the Monitor on the service list in these CCAA Proceedings ("**Service List**") of this Monitor's Certificate certifying that, to the best of the knowledge and belief of the Monitor, all matters to be attended to in connection with the CCAA Proceedings have been completed

THE MONITOR HEREBY CERTIFIES as follows:

1. To the best of its knowledge, all the remaining matters to be attended to in connection with the CCAA Proceedings have been completed

Dated at the City of Vancouver, in the Province of British Columbia, this [●] day of [●], 2024.

KSV Restructuring Inc., in its capacity as the Court-appointed Monitor of the Petitioners and not in its personal capacity.

_____

Name:

Title:

No. S240195
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

AND

IN THE MATTER OF NEXII BUILDING SOLUTIONS INC., NEXII CONSTRUCTION INC, NBS IP INC., NEXII HOLDINGS INC., 4540514 CANADA INC., 1061660 B.C. LTD., 0592286 B.C. LTD, 0713447 B.C. LTD, AND 0597783 B.C. LTD.

PETITIONERS

ANCILLARY ORDER

American College of Bankruptcy

Annual Meeting Educational Program
March 21, 2025

Post *Purdue* Comity to Foreign Reorganization Plans Containing Third Party Releases

***Personal Thoughts of Zack Clement ***

Zack Clement

Zack A. Clement PLLC
541 A West 23rd Street
Houston Texas, 77008
832 274 7629
zack.clement@icloud.com
www.zackclement.com

Did *Harrington v. Purdue Pharma,* 603 U.S. 204 (2024) change the ability of U.S. courts to use Chapter 15 to grant comity to and enforce foreign restructuring plans containing third party releases.

Question 1. Post *Purdue,* can foreign plans confirmed in Mexico, Canada and England containing third party releases be enforced through Chapter 15, if they are:

(a) *procedurally fair* enough to be given comity under §1507(b) and §1509(b)(3), and

(b) do not violate the Chapter 15 limits on comity because they:

(i) are not *"manifestly contrary to public policy*" (under §1506),

(ii) are *"substantially in accordance"* with the allocation of resources in Chapter 11 (under §1507(b)(4)), and

(iii) the "interests of creditors in the United States are *sufficiently protected*" under §1521(b) and §1522(a).

Question 2. Post *Purdue*, can either an (i) opt-out or (ii) opt-in procedure establish that a third party release has been given consensually?

A. What *Purdue* said and did not say.

The U.S. Supreme Court held in *Herrington v. Purdue Pharma,* 603 U.S. 204 (2024) that Chapter 11 of the Bankruptcy Code does not authorize non-consensual third party releases, ending the split between the circuits on this issue. *Purdue* expressed no view about the policy behind third party release. It simply said that, if Congress wanted bankruptcy courts to be able to give third party releases in non-asbestos driven Chapter 11 cases, as §524(g) authorizes for asbestos cases, it would have to legislate that.

> Both sides of the policy debate may have their points. But, in the end, we are the wrong audience for them. As the people's elected representatives, Members of Congress enjoy the power, consistent with the Constitution, to make policy judgments about the proper scope of a bankruptcy discharge. **Someday, Congress may choose to add to the bankruptcy code special rules for opioid-related bankruptcies as it has for asbestos-related cases. Or it may choose not to do so. Either way, if a policy decision like that is to be made, it is for Congress to make.** Despite the misimpression left by today's dissent, our only proper task is to interpret and apply the law as we find it; and nothing in present law authorizes the Sackler discharge.
>
> **…[W] e hold only that the bankruptcy code does not authorize a release and injunction that, as part of a plan of reorganization under Chapter 11, effectively seeks to discharge claims against a non debtor without the consent of affected claimants.**

Purdue thus took no position on whether a nonconsensual third party release violates U.S. public policy. It simply said the Bankruptcy Code does not authorize a U.S. bankruptcy court to confirm a plan that imposes a third party release on a non-consenting party, other than as permitted in 11 U.S.C. §524(g) in asbestos cases.

Non-consensual third party release refers to a release contained in a plan of reorganization or liquidation that releases, without its consent, a creditor's direct cause of action against a non-debtor third party, such as a guarantor or insurance company.

While *Purdue* was a mass tort case, the third party releases contained in foreign plans often involve members of corporate groups that guaranteed debts of a parent or other affiliates. Allowing creditors to seek full recovery from affiliate guarantors would defeat the purpose of the restructuring. *Re CoulourOZ Investment* 2 LLC, [2020] EWHC 1864 (Ch).

Mexican, Canadian, English, Dutch and other laws continue to permit non-consensual third party releases. Can they be enforced through Chapter 15?

B. Relevant Chapter 15 provisions.

1. §1521 describes relief that "may" be granted after recognition of a foreign case "whether main or nonmain," including §1521(7) "granting **any additional relief that may be available to a trustee** [under the U.S. Bankruptcy Code] "if the court is "satisfied that the interests of creditors in the United States are **sufficiently protected."**

   §1522(a) provides that the court may grant relief under §1521, "only if the interests of the creditors and other interested entities, including the debtor, are **sufficiently protected**."

   The Fifth Circuit concluded in *Vitro* that §1521 does not authorize enforcement of foreign plans granting relief that is not "available to a trustee [under U.S. law]." *Purdue* held that U.S. law does not permit a trustee/debtor in possession to give a non-consensual third party release.

2. §1507(a) the court "may provide **additional assistanc*e***"

   (b) In doing so "the court shall consider whether such additional assistance, consistent with the principles of **comity,** will reasonably assure—

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

3. §1506 permits a court to decline to take an action that would be **"manifestly contrary to the public policy of the United States."**

4. §1509(b)(3) provides that after a foreign proceeding has been recognized under §1517 "a court in the United States **shall grant comity** or cooperation to the foreign representative."

C. Overview of Case Law Pre-Purdue.

Preface

Prior to *Purdue*, U.S. courts frequently granted recognition under Chapter 15 to foreign insolvency proceedings and enforced plans of reorganization from those proceedings containing third party releases, except where (i) there was not an adequate record of procedural fairness to support comity, or (ii) the result under the foreign plan was so "substantially" different from what Chapter 11 permits as to appear unfair to a Chapter 15 court.

Case Summary

In re Vitro S.A.B. de CV, 701 F.3d 1031 (5th Cir. 2012) is the only circuit court opinion to address enforcement of a foreign plan containing third party releases. There a Mexican debtor with U.S affiliate guarantors asked a Texas bankruptcy court to use Chapter 15 to enforce a confirmed Mexican reorganization plan that unfairly elevated equity over debt. Insiders caused a creditor class to vote to accept a plan that left $500 million to old equity, while unsecured creditor class members were paid 40% and required to release their guarantee claims against non debtor third party affiliates.

This plan was not enforced because it did not comply with §1507(b)(4) requiring allocation of value "substantially in accordance with the order prescribed by [Chapter 11]."

Before and after *Vitro*, Bankruptcy Courts in the Second Circuit have enforced foreign plans containing third party releases on facts that could be distinguished from *Vitro*. See, e.g., *In re Metcalfe & Mansfield Alternative Investments*, 421 B.R. 685 (Bkr. S.D.N.Y. 2010); *In re Sino–Forest Corporation*, 501 B.R. 655 (Bkr. S.D.N.Y. 2013); *In re Avanti Communications Group PLC,* 582 B.R. 603 (Bkr. S.D.N.Y. 2018); *In In re Agrokor d.d.,* 591 B.R. 163 (Bkr. S.D.N.Y. 2018).

Post *Vitro,* the bankruptcy court found in *In re Rede Energia S.A*., 515 B.R. 69 (Bkr. S.D. N.Y. 2014) that a Brazilian plan did not violate §1507(b)(4) even though it left value for equity that would violate the U.S. absolute priority rule test for what is a fair and equitable plan.

In re PT Bakrie Telecom Tbk, 628 B.R. 859 (Bankr. SDNY 2021) found there was not sufficient evidence of proper procedures to give comity to an Indonesian plan containing a third party release.

Early in 2024 pre *Purdue,* a Bankruptcy Court in the Fifth Circuit, where *Vitro* is controlling law, enforced foreign plans from England and the Netherlands that contained third party releases.

D. Opinions post-Purdue.

After the Supreme Court's opinion in *Purdue*, bankruptcy courts in New York, Wilmington and Houston have used Chapter 15 to enforce foreign court orders that grant third party releases.

> *In re Americanas, S.A, et al*, Decision And Order Giving Force And Effect To The Brazilian RJ Plan And Granting Related Relief, 2024 WL 3506637 (Bkr. S.D.N.Y. July 22, 2024) (Judge Wiles);
>
> *In re Nexii Building Solutions Inc., et al,* Case No. 24-10026, Order (I) Recognizing and Enforcing The Ancillary Order, (II) Approving the Procedure Governing Closing of Chapter 15 Cases and (III) Granting Ancillary Relief (Bkr. D. Del. July 22, 2024) (Judge Stickles).
>
> *In re Light S.A.,* Order Granting (I) Recognition of Brazilian Proceeding, (II) Full Force And Effect To Brazilian Plan, And (III) Certain Related Relief, Case No. 24-9053) (enjoining claims against related entities, having the effect of third party releases) (Bkr. S.D. Tex. Nov.11, 2024) (Judge Lopez).

In late 2024 the U.S. Trustee in S.D. N.Y., who had successfully objected to the third party releases in *Purdue*, filed objections to enforcement of foreign plans containing third party releases in *Unigel Participacoes S.A.,* 24-11982 (Bkr. S.D.N.Y. 2024) (Judge Glenn) and *In re Yuzhou Group Holdings Company Limited,* Case No. 24-11441 (Bkr. S.D.N.Y.) (Judge Beckerman).

In *Unigel* Brazilian debtor asked for an exculpation for officers, directors and professionals in connection enforcement of a Brazilian restructure order. The U.S. Trustee objected that this was a third party release that is prohibited by *Purdue*. At a hearing on December 9, 2024, the parties in *Unigel* settled this issue, and Judge Glenn remarked that "no parties in any other matter should take that [approval of a settlement] as a determination of any of the previously disputed issues."

In *Yuzhou Group* before Judge Beckerman, the U.S. Trustee filed a limited objection to the petition for recognition and additional relief arguing that the third party releases provided in a Hong Kong scheme of arrangement were not appropriate relief in Chapter 15, and could not be approved because they were manifestly contrary to the public policy of the United States under §1506. Hearing on this issue has been adjourned.

Judge Beckerman previously expressed a view about foreign plans containing third party releases in *In re Huachen Energy, Ltd., Case No. 22-10005.*

> "Principles of enforcement of foreign judgments through comity in Chapter 15 cases strongly counsel approval of enforcement in the United States of third-party, non-debtor release and injunction provisions even if those provisions could not be entered in a plenary Chapter 11 case. (citing *Metcalfe*).

Dkt. No. 22 (Transcript) at p. 19; Dkt. No. 19 (Order Recognizing Foreign Proceeding and Granting Additional Relief) (Bankr. S.D.N.Y. Feb 1 and Feb.2, 2022).

E. Overview of Policy Concerning Comity and Third Party Releases.

Abstention and COMI have been construed in a way that encourages granting comity by enforcing a foreign plan.

Concerning abstention.

In re Avianca, 303 B.R. 1 (Bkr. S.D.N.Y. 2003) (Judge Gropper), and *In re Monitor Single Lift I, Ltd.,* 381 B. R. 455 (Bkr. S.D. N.Y. 2008) (Judge Glenn) respected foreign companies' choice to use Chapter 11 to reorganize their debt. Applying the §305(a)(1) standard that **"**the interests of creditors **and the debtor** would be better served," they respected each debtor's rational choice that Chapter 11 was in its "interests" and did not dismiss because the Chapter 11 case was not a main case at the debtor's COMI.

Concerning COMI.

Judges Klein, Glenn and Lane have interpreted COMI to respect choice of (i) St. Vincent and the Grenadines, (ii) the Cayman Islands, and (iii) Hong Kong as a forum to liquidate or reorganize companies that had substantial operations in other countries.

In *In re Tri-Continental Exch. Ltd,* 349 B.R. 627, 634-35 (Bkr. E.D. Cal. 2006) the SEC of Saint Vincent and Grenadine, the IFSA, filed a petition for winding up in the Eastern Caribbean High Court of Justice. Joint provisional liquidators were appointed and spent a lot of time and effort collecting the assets of this insurance fraud around the world.

Judge Klein focused on where restructure decisions were being made at the time the Chapter 15 petition was filed, and gave deference to insolvency proceedings that had gone on for some time in St. Vincent, even though the debtors had conducted most of their fraudulent activity in the U.S. and Canada. He noted that § 1521(b) gave him the power to ensure that U.S. creditors were "sufficiently protected" in this forum that the Saint Vincent securities regulator had chosen.

The Second Circuit followed this approach in *In re Fairfield Sentry Ltd.,* 714 F.3d 127, 138 (2nd Cir. 2013) finding that the debtor's center of main interest had shifted from New York and Connecticut, where Bernie Madoff had orchestrated a fraud, to the Cayman Islands where liquidators had been making business decisions for the debtor for over a year by the time the Chapter 15 petition was filed.

In *In re Modern Land (China) Co., Ltd.,* 641 B.R. 768 (Bkr. S.D.N.Y. 2022) and *In re Sunac China Holdings Limited*, 656 B.R. 715 (Bkr. S.D.N.Y. 2024) Judges Glenn and Lane followed this approach in cases where debtors were still in possession and had been conducting restructure negotiations. hey found that COMI was in the Cayman Islands and Hong Kong where the debtor had been making restructure decisions for a long time for companies that owned and operated

real estate in the People's Republic of China. See Judge Gropper's persuasive article defending Judge Glenn's opinion in *Modern Land*. *Recognition and Relief in Chapter 15*, ABI Journal.

Indeed, in *In re Ocean Rig UDW Inc.,* 570 B.R. 687 (Bkr. S.D.N.Y. 2017) Judge Glenn held that company officers had properly moved from the Marshall Islands to the Cayman Islands to conduct restructure and use a better restructure law thereby establishing COMI

These opinions establish respect for debtor's choice of forum and support giving comity to fair foreign insolvency proceedings.

Concerning third party releases

Prior to *Purdue,* the majority of U.S. circuit courts permitted confirmation of plans containing non-consensual third-party releases, if certain justifications could be proved. The Ninth, Tenth and Fifth Circuits did not.

Beginning *In re Zale Corp.,* 62 F.3d 746, 760 (5th Cir.1995) the Fifth Circuit held that bankruptcy courts could not order non-consensual third party releases. However, the Fifth Circuit has extolled the policy virtues of third party releases when used by a receiver appointed by the SEC in connection with a securities fraud. See *Zacarias v. Stanford International Bank, Limited*, 931 F.3d 382 (5th Cir. 2019).

After *Zale,* courts in the Fifth Circuit have used the opt-out approach to determine consent to third party releases. They have continued to do so post-*Purdue. In re Robertshaw US Holding Corp.*, No. 24-90052, 2024 WL 3897812, at 17 (Bkr. S.D. Tex. Aug. 16, 2024).

F. More Detail About How the Courts Analyzed Comity Pre-*Purdue.*

In *In re Metcalfe & Mansfield Alternative Investments*, 421 B.R. 685 (Bkr. S.D.N.Y. 2010), Judge Glenn found that a Canadian plan containing a third party release had afforded due process meriting comity and was fair, and enforced it in the U.S. He made no finding under §1507(b)(4).

Metcalfe had reorganized $32 billion of commercial paper in one of the largest restructures ever in Canada, had substantial creditor support, and had been through many appeals in Canada.

The Monitor who represented the Canadian case argued that it should be enforced either because (i) its third party release qualified for approval under 2nd Circuit standards or (ii) as a matter of comity.

The court found "it is far from clear that the third-party non-debtor release and injunction provisions would be consistent with the jurisdictional limits *Manville* imposes on a bankruptcy court," therefore the correct analysis was whether comity should be given under Chapter 15.

> As explained below, principles of enforcement of foreign judgments and comity in chapter 15 cases strongly counsel approval of enforcement in the United States of the

> third-party non-debtor release and injunction provisions included in the Canadian Orders, even if those provisions could not be entered in a plenary chapter 11 case.

The court found authority to exercise discretion to give comity in §1507(b).

> While recognition of the foreign proceeding turns on the objective criteria under § 1517, "relief [post-recognition] is largely discretionary and turns on subjective factors that embody principles of comity." *In re Bear Stearns High– Grade Structured Credit Strategies Master Fund, Ltd.,* 389 B.R. 325, 333 (S.D.N.Y.2008) (citing §§ 1507, 1521, and 1525). "Once a case is recognized as a foreign main proceeding, **chapter 15 specifically contemplates that the court will exercise its discretion consistent with principles of comity."** *Atlas Shipping,* 404 B.R. at 738; *see generally* Allan L. Gropper, *Current Devs. in Int'l Insolvency Law: A United States Perspective,* 15 J. BANKR.L. & PRAC. 2, Art. 3, at 3– 5 (Apr.2006).

The court did not mention §1507(b)(4) as limiting discretion. Rather, it focused on the public policy limit set by §1506, and found that *Metcalfe* did not violate its "narrowly interpreted" standard.

> But this public policy exception is narrowly construed. *See In re Ephedra Prods. Liab. Litig.,* 349 B.R. 333 (S.D.N.Y.2006). *Ephedra* involved a chapter 15 proceeding in which the foreign representative moved to recognize and enforce in the United States a claims resolution procedure ordered by an Ontario court, even though the procedure arguably deprived parties of the constitutional right to a jury trial. *Id.* at 334–35. In recognizing the order, the district court ruled that **the public policy exception embodied in § 1506 should be "narrowly interpreted**, as the word 'manifestly' in international usage restricts the public policy exception to the most fundamental policies of the United States." *Id.* at 336 (citing H.R.REP. NO. 109–31(I) at 109, *reprinted in* 2005 U.S.C.C.A.N. 88, 172).

The court went on to say that comity focuses on whether the foreign proceeding has been fair, and does not require the relief to be the same as in the U.S.

> **The relief granted in the foreign proceeding and the relief available in a U.S. proceeding need not be identical**. A U.S. bankruptcy court is not required to make an independent determination about the propriety of individual acts of a foreign court. *See In re Bd. of Dirs. of Multicanal S.A.,* 307 B.R. 384, 391 (Bkr.S.D.N.Y.2004) (noting that neither case law nor section 304 (the statutory predecessor to chapter 15) require a determination that the foreign proceeding is identical to the U.S. proceeding). **The key determination required by this Court is whether the procedures used in Canada meet our fundamental standards of fairness**. *See Cunard S.S. Co. Ltd. v. Salen Reefer Servs. AB,* 773 F.2d 452, 457 (2d Cir.1985)

The court then described how general comity principles focus on whether there had been a full and fair trial.

> In *Hilton v. Guyot,* the Supreme Court held that if the foreign forum provides "a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it is sitting," the judgment should be enforced and not "tried afresh." *Hilton,* 159 U.S. at 202–03, 16 S.Ct. 139.

The court noted that "comity should be extended with less hesitation" to a proceeding from a Canadian "sister common law jurisdiction with procedures akin to our own."

> "[W]hen the foreign proceeding is in a sister common law jurisdiction with procedures akin to our own, comity should be extended with less hesitation, there being fewer concerns over the procedural safeguards employed in those foreign proceedings." ***In re*** *Bd. of Dirs. of Hopewell Intl. Ins. Ltd., Inc.,* 238 B.R. 25, 66 (Bankr.S.D.N.Y.1999), *affd,* 275 B.R. 699 (S.D.N.Y.2002) (internal quotation marks and citations omitted). The U.S. and Canada share the same common law traditions and fundamental principles of law. Canadian courts afford creditors a full and fair opportunity to be heard in a manner consistent with standards of U.S. due process. U.S. federal courts have repeatedly granted comity to Canadian proceedings.

Moreover, issues concerning third party releases had been fully litigated in the Canadian case.

> As explained above, the issue of the jurisdiction of the Ontario Court to enter the Plan and Sanction Order, and in particular the third-party non-debtor release and injunction provisions, was contested and fully litigated in the Canadian Courts. The Ontario Court concluded that it had jurisdiction to enter the relief; the Ontario Court of Appeal confirmed the jurisdictional grounding of the Plan and Sanction Order; and the Supreme Court of Canada denied review. In these circumstances, principles for recognition of foreign judgments strongly support the exercise of this Court's discretion to give *res judicata* effect to the Canadian Orders.

The court concluded that there was strong evidence supporting comity in this case of great significance to Canada.

> The justifications for giving *res judicata* effect to the Canadian Courts' carefully reasoned determination that the Ontario Court had jurisdiction, and for giving effect to the Plan and Implementation Order, under principles of international comity, are particularly strong in this case.
>
> …
>
> The Canadian Proceedings were the result of near- cataclysmic turmoil in the Canadian commercial paper market following the onset of the global financial crisis. The far-reaching Plan was adopted with near-unanimous creditor support, approved by the

> Ontario Court, and then affirmed on appeal by the Ontario Court of Appeal in the face of a jurisdictional challenge to the inclusion of third-party non- debtor release and injunction provisions. There is no basis for this Court to second-guess the decisions of the Canadian courts. Principles of comity in chapter 15 cases support enforcement of the Canadian Orders in the United States whether or not the same relief could be ordered in a plenary case under chapter 11. Therefore, the Court will enter an order recognizing this case as a foreign main proceeding and enforcing the Canadian Orders.

In re Vitro, S.A.B. de C.V., 473 B.R. 117 (Bankr. N.D. Tx. 2012) was a very different kind of case. Insiders had caused an unsecured creditor class to vote for a plan that left a half billion dollars to shareholders, while creditors were paid 40% and were forced to release their third party guarantee claims against U.S. affiliates that were not part of the bankruptcy filing.

The bankruptcy court found that this violated public policy under §1506. The Fifth Circuit declined to address §1506, but found that this plan did not "provide for the distribution of proceeds of the debtor's property substantially in accordance with the order prescribed by Title 11" as required by §1507(b)(4). *In re Vitro S.A.B. de CV, 701 F.3d 1031 (5th Cir.2013).*

The Fifth Circuit criticized Vitro for relying too much on how fair the Mexican proceedings were, and not sufficiently addressing the difference in result under Mexican and U.S. law.

> Vitro's second witness, Luis Mejan—an expert in Mexican bankruptcy law—was cross-examined at trial, and his expert report and expert rebuttal were introduced in lieu of direct examination. Mejan's expert report provides a comprehensive breakdown of the LCM and how it operates in the *concurso* context. **This merely establishes, however, that the LCM is a process comparable to that of the United States, a fact which no party seriously disputes**.
>
> **The bankruptcy court also had to consider whether the results yielded under the LCM, on the facts of this case, were comparable to the result likely in the United States**. *See In re Treco,* 240 F.3d at 159 ("A court must consider the effect of the difference in the law on the creditor in light of the particular facts presented."); *In re Sivec SRL,* 476 B.R. at 324 ("The fact that priority rules and treatment of claims may not be identical is insufficient to deny a request for comity. What this Court must consider is the effect of that difference on the creditor in light of the existing facts.").
>
> **Mejan's expert report extensively describes Mexican law, but does not explain how the results achieved in this case would compare to those in a United States bankruptcy proceeding**. When asked if he had considered "whether other plans that had been approved or enforced in the United States were comparable to Vitro in terms of what happened in the Mexican proceedings," Mejan conceded that he "did not conduct a specific search in order to make [that] comparison." This failure is especially troubling given Vitro's request for relief which, under United States law, would not be available in this circuit, and would only be available under the narrowest of circumstances in some of our sister circuits.

The Fifth Circuit noted that "many of the factors that might sway us in favor of granting comity and reversing the bankruptcy court …are absent here" where Vitro put insider creditors into a general class of unsecured creditors and they controlled the vote to leave a half billion dollars for equity.

> Vitro has not shown that there existed truly unusual circumstances necessitating the release. To the contrary, the evidence shows that equity retained substantial value. The creditors also did not receive a distribution close to what they were originally owed. Moreover, the affected creditors did not consent to the Plan, but were grouped together into a class with insider voters who only existed by virtue of Vitro reshuffling its financial obligations between it and its subsidiaries. It is also not the case that the majority of the impacted group of creditors, consisting predominantly of the Objecting Creditors, voted in favor of the Plan. Nor were non- consenting creditors given an alternative to recover what they were owed in full.
>
> Vitro cannot rely on the fact that a substantial majority of unsecured creditors voted in favor of the Plan. Vitro's majority depends on votes by insiders. To allow it to use this as a ground to support enforcement would amount to letting one discrepancy between our law and that of Mexico (approval of a reorganization plan by insider votes over the objections of creditors) make up for another (the discharge of non-debtor guarantors). *Cf. CIBC Bank & Trust Co. (Cayman) Ltd.,* 886 F.Supp. at 1114.

The Fifth Circuit distinguished *Metcalfe* where the evidence of justification had been much better.

> We agree that *Metcalfe* is distinguishable. The fact that the Plan approved here was the result of votes by insiders holding intercompany debt means that, although under *Metcalfe* non- debtor releases may be enforced in the United States under Chapter 15, the facts of this case exceed the scope of that decision. We further observe that in that case the Canadian court's decision to approve the non-debtor release "reflect[ed] similar sensitivity to the circumstances justifying approving such provisions," a sensitivity we find absent in the Mexican court's approval of the Plan. 421 B.R. at 698. The Canadian court's decision [in *Metcalfe*] was also the result of "near-cataclysmic turmoil in the Canadian commercial paper market following the onset of the global financial crisis." *Id.* at 700. As already discussed, Vitro's evidence on this point largely emphasizes the turmoil only Vitro would be exposed to.

The Fifth Circuit explicitly declined to rule on public policy under §1506.

> "Because we conclude that relief is not warranted under 1507, however, and would also not be available under 1521**, we do not reach whether the Concurso plan would be manifestly contrary to a fundamental public policy of the United States [under 1506].** …[W]e do not reach the Objecting Creditors' arguments that the Plan violates a fundamental public policy for infringing on the absolute priority rule, the Contract Clause of the United States Constitution, U.S. Constitution. art I, sec. 10, cl. 1, the Trust

> Indenture Act of 1939, 15 U.S.C. secs 77aaa, et seq., or the interests of the United States in protecting creditors from so called "bad faith schemes."

Soon after *Vitro* in *In re Sino–Forest Corporation*, 501 B.R. 655 (Bkr. S.D.N.Y. 2013) Judge Glenn (i) analyzed a Canadian plan containing a third party release, (ii) found that it was entitled to comity, and (iii) this time made a finding that it did not violate §1507(b)(4).

The court described how the comity analysis that it had applied in *Metcalfe* supported the same result *in Sino-Forest*

> [i]In *Metcalfe,* focusing specifically on extending comity to orders of Canadian courts, the Court explained that "[t]he U.S. and Canada share the same common law traditions and fundamental principles of law. Canadian courts afford creditors a full and fair opportunity to be heard in a manner consistent with standards of U.S. due process. U.S. federal courts have repeatedly granted comity to Canadian proceedings." *Metcalfe,* 421 B.R. at 698. Applying the doctrine of comity, and recognizing that the issue of the third- party non-debtor release had been fully and fairly litigated in the Canadian courts, the Court held that it could recognize and enforce the release. *Id.* at 699.
>
> **The same analysis, with the same conclusion, applies here. The parties to the Canadian proceedings in this case had a full and fair opportunity to litigate the issues, and the trial court reached a reasoned decision that it had the jurisdiction to grant the requested relief and that such relief was appropriate in the circumstances**. The Objectors' appeal to the Court of Appeal for Ontario failed. While an additional motion for leave to appeal may be filed in the Supreme Court of Canada, this Court sees no reason to await the outcome of such at motion (if it is made) before ruling on the pending matter; the issues raised are not novel here or in Canada, as this Court's decision in *Metcalfe* demonstrates.

The court then made a ten word finding about how §1507(b)(4) did not limit comity in *Sino-Forest*.

> "Once a case is recognized as a foreign main proceeding, chapter 15 specifically contemplates that the court will exercise its discretion consistent with principles of comity." *Atlas Shipping A/S,* 404 B.R. at 738. While the factors identified in section 1507(b)(1)– (5), required to be considered in determining whether to extend comity in a case under chapter 15, may, in some circumstances, narrow application of the common law rules for extending comity, none of those factors comes into play here. Extending comity here does not affect (1) the just treatment of creditors, (2) protection of creditors in the United States against prejudice or inconvenience, (3) prevention of preferential or fraudulent disposition of property of the debtor, (4) **distribution of proceeds substantially in accordance with Bankruptcy Code priorities,** or (5) the opportunity for a fresh start.

Sino-Forest supported this §1507(b)(4) fact finding by distinguishing *Vitro*.

> The Fifth Circuit's decision in *Vitro* does not dictate a different result. The Fifth Circuit, on direct appeal from the bankruptcy court, affirmed the bankruptcy judge's decision refusing to extend comity to a Mexican court order approving a reorganization plan that vitiated guarantees issued by Vitro's U.S.-based affiliates, under loan agreements governed by U.S. law.
>
> The Fifth Circuit concluded that the bankruptcy court did not abuse the discretion expressly provided in section 1507(b). *See Vitro,* 701 F.3d at 1042 ("A court's decision to grant comity is ... reviewed for abuse of discretion."); *id.* at 1069 ("[W]e hold that Vitro has not met its burden of showing that the relief requested under the Plan—a non-consensual discharge of non-debtor guarantors —is substantially in accordance with the circumstances that would warrant such relief in the United States.
>
> …
>
> The Fifth Circuit's [*Vitro* opinion] was largely premised on an analysis of section §1507(b) (4)—"distribution of proceeds of the debtor's property substantially in accordance with the order prescribed by this title [11] ..."—concluding that the bankruptcy court did not abuse its discretion in finding that Vitro did not carry its burden under that subsection. *See Vitro,* 701 F.3d at 1065–…
>
> **[M]any of the same distinguishing facts are present here [in *Sino-Forest]:* the Plan has near unanimous support, that support does not rely on votes by insiders and "the Canadian court's decision to approve the non-debtor release 'reflect[ed] similar sensitivity to the circumstances justifying approving such provisions' " as those considered by U.S. courts**. *Id.* at 1068 (quoting *Metcalfe,* 421 **B.R**. at 698). No one has objected to the relief requested here, and as already stated, the requested relief does not run afoul of any of the subsections of section 1507(b).

One year later in *Rede Energia S.A*., 515 B.R. 69 (Bankr S.D. N.Y. 2014) Judge Chapman enforced a Brazilian plan that did not contain a third party release, but had a small violation of the absolute priority rule that had been approved through fair procedures in Brazil, with substantial creditor support.

The court found that enforcement was supported by §1521, §1507(b), and not prohibited by §1506.

> For the reasons that follow, the Court finds that the requested Plan Enforcement Relief is proper under both sections 1521 and 1507 of the Bankruptcy Code and should not be denied pursuant to the public policy exception in section 1506, and it therefore grants the Plan Enforcement Relief.

The court described *Vitro's* three step analysis and said it remained to be seen whether other courts would follow it.

> The Fifth Circuit in *In re Vitro S.A.B. de C.V.,* 701 F.3d 1031, 1054 (5th Cir.2012), considered, as a matter of first impression, whether a foreign representative may independently seek relief under either section 1521 or section 1507 and whether a court may itself determine under which provision such relief would fall. The *Vitro* court concluded that a court confronted by this situation should first consider the specific relief enumerated under section 1521(a) and (b), and, if the relief is not provided for there, the court should then consider whether the requested relief falls more generally under section 1521's grant of any appropriate relief. *Id*. at 1054. "Appropriate relief," the Fifth Circuit concluded, is "relief previously available under Chapter 15's predecessor, § 304." *Id*. "Only if a court determines that the requested relief was not formerly available under § 304," the Fifth Circuit continued, "should a court consider whether relief would be appropriate as 'additional assistance' under § 1507." *Id*. It remains to be seen whether the three-part analysis crafted by the *Vitro* court is embraced by other courts.

The court then analyzed the three issues that *Vitro* had analyzed*,* finding first that the requested enforcement was allowed under §1521 because it was the kind of relief that had been permitted under old §304.

> The Court agrees. The request by the Foreign Representative that the Court (i) enforce the Brazilian Reorganization Plan and the Confirmation Decision and (ii) enjoin acts in the U.S. in contravention of the Confirmation Decision is relief of a type that courts have previously granted under section 304 of the Bankruptcy Code and other applicable U.S. law. *See, e.g., Bd. of Dirs. of Telecom Arg.,* 528 F.3d at 174–76; *see also In re Petition of Garcia Avila,* 296 B.R. 95, 114–15 (Bankr.S.D.N.Y.2003); *see generally* 11 U.S.C. § 1141(d)(1)(A) (granting discharge to chapter 11 debtor upon confirmation except as otherwise provided for in the plan); 11 U.S.C. § 524(a) (describing the effect of a discharge).

The court assessed the Ad Hoc group's request that it apply a balancing of the equities test to deny enforcement, found that this raised an issue under §1521's "sufficiently protected" standard, and concluded that, upon balancing the equities, the Ad Hoc creditors were "sufficiently protected."

> The Court finds that the interests of the Rede Debtors and their creditors, including the members of the Ad Hoc Group, will be **sufficiently protected** by the granting of the Plan Enforcement Relief. Enforcement of the Confirmation Decision—and ordering an injunction against actions the Ad Hoc Group may pursue in the United States in contravention of such decision—will allow the Rede Debtors to reorganize and to make distributions to creditors (including to the 63 percent of Noteholders who are not members of the Ad Hoc Group and who are not contesting any aspect of the Brazilian Reorganization Plan), consistent with the Brazilian Reorganization Plan.
>
> …

> Denying the relief would also mean that the Ad Hoc Group would likely return to Brazil to attempt to renegotiate and seek a higher distribution, or would commence lawsuits against the Debtor in the United States to recover further on its claims.
>
> In short, the Ad Hoc Group simply wants another chance to renegotiate the terms of the Brazilian Reorganization Plan and offers no evidence that its efforts would be successful. Moreover, the Plan Enforcement Relief does not prevent the Ad Hoc Group from continuing to assert its rights under Brazilian law in the pending appeals of the decisions of the Brazilian Bankruptcy Court.
>
> In balancing the interests of the Rede Debtors against those of the Ad Hoc Group, the Court concludes that the Plan Enforcement Relief passes muster under section 1522(a) and is relief that is proper under section 1521.

The court said that, although it did not need to reach the issue because it had already approved enforcement of the Brazilian plan under §1521, the plan could also be enforced under §1507.

Noting that §1507(b) (1-5) was meant to repeat the elements of comity under § 304, the court went through each of these standards. It found §1507(b)(4) requiring that the court shall "reasonably assure… (4) distribution of proceeds of the debtor's property substantially in accordance with the order prescribed by this title" had been meet, even though the U.S. absolute priority rule was violated.

This was because Brazil's bankruptcy laws had [1] **"meaningful protections"** and [2] "different treatment of certain unsecured creditors has a [a] **reasonable basis** and was [b] **necessary** to consummate the Plan.

> As discussed in sections IV.B. and IV.C. below [focusing primarily on §1506 public policy but also applicable to §1507(b)(4)] , the cram-down provisions of Brazilian bankruptcy law provide [1] **meaningful protections** that are similar to the protections embodied in U.S. law and the Plan's different treatment of certain unsecured creditors has a [2] **reasonable basis** and was[3] **necessary** to consummate the Plan. As such, proceeds under the Brazilian Reorganization Plan are being distributed substantially in accordance with U.S. law pursuant to section 1507(b)(4).

In section IV.B, the court addressed the objection that failure to apply the absolute priority rule made the Brazilian plan unenforceable under § §1506 and §1507(b)(4) by explaining how Brazilian law contains creditor protections very close to U.S. law.

> Brazilian bankruptcy law's cram-down requirements provide protections against junior stakeholders receiving or retaining value when dissenting senior stakeholders are not paid in full; such protections are similar (but not identical) to those in the United States. Under Brazilian bankruptcy law, a plan may only be crammed down if, among other things, (i) the dissenting class approves by at least one-third in amount and at least one-third in number and (ii) all classes, in the aggregate, approve by a majority in amount. (Law Stip. at ¶ 18.)

> Here, 74 percent of all claims, in amount, voted in favor of the Brazilian Reorganization Plan, and, in the class of unsecured claims, 66.34 percent, in amount, and 47.7 percent, in number, voted to accept. **This is only 0.3 percent less in amount and 2.3 percent less in number than would be required under the Bankruptcy Code for the class to have accepted, such that the absolute priority rule would not apply**. *See* 11 U.S.C. §1126(c). The Foreign Representative argues that, with a difference this small, it is difficult to see how the Brazilian Reorganization Plan could be considered manifestly contrary to U.S. public policy. The Court finds this argument persuasive.

The result in this case was not that much different from what Chapter 11 would permit. The court found that "equity holders do not retain meaningful value under the Plan at the expense of the Rede Debtors' unsecured creditors."

> With respect to the treatment of shareholders, although Brazilian law does not permit the cancellation of equity without the consent of shareholders, **Rede equity holders do not retain meaningful value under the Plan at the expense of the Rede Debtors' unsecured creditors.** The remaining minority shares will be vastly diluted upon consummation of the Brazilian Reorganization Plan.

The court described substantial contribution to be made, some by shareholders, diluting shareholder interests, and found that this was in keeping with the absolute priority rule.

> First, the Rede Debtors will make a capital call to repay Energisa approximately R $498 billion for the amount Energisa paid to the creditors of the Rede Debtors in exchange for the assignment of their approximately R$2 billion in claims, within one year of such assignment and with 12.5 percent interest. (Fact Stip. at ¶ 95.)
>
> Under the Plan, Energisa will also assume certain guarantees of the debts of the Rede Group that had been provided by the Controlling Shareholder. (Fact Stip. at ¶ 43.)
>
> In addition, pursuant to the ANEEL Plan, Energisa will invest a minimum of R$1.2 billion in the Rede Concessionaires, which Energisa anticipates accomplishing by flowing such funds through the Rede Debtors via a series of capital calls. (Fact Stip. at ¶ 95.)
>
> …
>
> **This significant dilution of outstanding equity under the Brazilian Reorganization Plan is consistent with the purpose of the absolute priority rule in the U.S., which is designed to prevent shareholders from retaining equity in reorganized companies without contributing new value.** *See Case v. Los Angeles Lumber Prods. Co.,* 308 U.S. 106, 121–22, 60 S.Ct. 1, 84 L.Ed. 110 (1939).

The court interpreted §1506 to set a generalized "meting our fundamental standards of fairness" standard and

> The public policy exception embodied in section 1506 permits a court to decline to take any action, including granting additional relief or assistance pursuant to section 1521 and 1507 of the Bankruptcy Code, if such action would be manifestly contrary to the public policy of this country. Where, as here, the proceedings in the foreign progressed according to the course of a civilized jurisprudence and where the procedures followed in the foreign jurisdiction meet our fundamental standards of fairness, there is no violation of public policy.

Applying this standard, the court concluded that "the distribution scheme in the Brazilian Reorganization Plan is not manifestly contrary to the public policy of the United States."

> Therefore, although Brazilian bankruptcy law does indeed differ from U.S. law in certain respects, the Foreign Representative has successfully demonstrated that the distribution scheme in the Brazilian Reorganization Plan is not manifestly contrary to the public policy of the United States. This Court will not decline to extend comity and grant additional relief simply because Brazilian bankruptcy law is not identical to U.S. bankruptcy law. *See Ackermann v. Levine,* 788 F.2d 830, 842 (2d Cir.1986) (" 'We are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home.' ") (quoting *Loucks v. Standard Oil Co. of N.Y.,* 224 N.Y. 99, 110–11, 120 N.E. 198 (1918) (Cardozo, J.)).

The court also relied on this to support a finding that the §1507(b)(4) "distribution of proceeds of the debtor's property substantially in accordance with the order prescribed by [Chapter 11]" standard had been met.

Four years later in *In re Avanti Communications Group PLC,* 582 B.R. 603 (Bkr SDNY 20, Judge Glenn made the same two findings of (i) comity under §1507(b) and (ii) "substantial" similarity under §1507(b)(4) to enforce an English plan that contained a third party release.

Judge Glenn described again how comity focuses on whether a foreign court has used fair procedures and given due process.

> In deciding whether to grant appropriate relief or additional assistance under chapter 15, courts are guided by principles of comity and cooperation with foreign courts. *See, e.g.*, *In re Atlas Shipping*, 404 B.R. at 738; *In re Bear Stearns High–Grade Structured Credit Strategies Master Fund, Ltd.*, 389 B.R. 325, 333 (S.D.N.Y. 2008). The Supreme Court has held that a foreign judgment should not be challenged in the US if the foreign forum provides: **"[A] full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it [is] sitting** ...." *Hilton v. Guyot*, 159 U.S. 113, 202–03, 16 S.Ct. 139, 40 L.Ed. 95 (1895); *see also Victrix S.S. Co., S.A. v. Salen Dry Cargo A.B.*, 825 F.2d 709, 713 (2d Cir. 1987)…. *Avanti,* 582 B.R. at 616-17.

Judge Glenn distinguished the *Vitro* plan describing how it was so "*substantially"* unfair because it permitted insiders to dominate a vote to approve a plan that left value to equity while creditors were not paid in full, and forced to release claims against third party guarantors.

> *Vitro* had a number of very troubling facts that the Fifth Circuit concluded supported the bankruptcy court's exercise of discretion in refusing to enforce the plan approved by the Mexican court. **Most significantly, the plan created only a single class of unsecured creditors and the necessary creditor votes to approve the plan were only achieved by counting the votes of insiders**. *Id.* at 1039. Insider votes are not counted under the Bankruptcy Code. *See* 11 U.S.C. §1129(a)(10) ("If a class is impaired under the plan, at least one class of claims that is impaired under the plan has accepted the plan, *determined without including any acceptance of the plan by any insider.*") (emphasis added); *see also CIBC Bank & Trust Co. (Cayman) Ltd.*, 866 F. Supp. 1105, 1114 (S.D.N.Y. 1995) (concluding that "the Code prevents 'insiders' from voting on whether a reorganization plan will be accepted by a class of impaired creditors").
>
> **Of the approximately 75% of principal amount of unsecured debt that voted in favor of the plan in *Vitro*, over 50% of all voting claims were held by intercompany debt holders.** *Id.*

Similarly, under Mexican law only 50% in amount had to vote to approve the plan. Absent the subsidiaries' votes of intercompany debt in favor of the plan, that plan could not have been approved. *Id. Avanti*, 582 B.R. at 617-18.

Later in 2018, Judge Glenn enforced a plan from Croatia containing a third party release when there was an adequate record of procedural fairness in the Croatian proceeding. *In In re Agrokor d.d.,* 591 B.R. 163 (Bkr. SDNY 2018).

By contrast, three years later in *In re PT Bakrie Telecom Tbk,* 628 B.R. 859 (Bkr. SDNY 2021), Judge Lane declined to enforce an Indonesian plan containing third party releases because there was not an adequate record that the Indonesian proceeding had been fair.

Judge Lane started, as Judge Chapman had, by saying that the relationship between §1521 and §1507 is not clear; however, all enforcement under §1521 or §1507 is premised on comity that considers subjective factors.

> In any event, relief under either Section 1507 or Section 1521 is within the discretion of the Court and depends upon principles of comity. *Compare* 11 U.S.C.§ 1517 (if requirements for recognition are met, relief "shall" be granted) *with* 11 U.S.C. §§ 1521 and 1507 (both providing that the court "may" provide additional relief after recognition); *see In re Tri-Contl. Exch. Ltd.*, 349 B.R. 627, 636–37 (Bankr. E.D. Cal. 2006) (The bankruptcy court has "broad latitude to mold [additional] relief to meet specific circumstances.") (citing H.R. Rep. No. 109– 31, at 116 (2005)); *In re Atlas Shipping*, 404 B.R. at 738 ("While recognition of the foreign proceeding turns on the objective criteria under § 1517, 'relief [post-recognition under Sections 1521 and 1507] is largely

> discretionary and turns on subjective factors that embody principles of comity' ") (quoting *In re Bear Stearns*, 389 B.R. at 333); *In re Toft,* 453 B.R. at 190 (same).

Judge Lane described comity, as Judge Glenn had, as focusing on "fundamental standards of procedural fairness."

> In sum, federal courts assessing whether to extend comity look to (1) whether the foreign proceeding abided by fundamental standards of procedural fairness; (2) whether the foreign proceeding violated the laws or public policy of the United States; and (3) whether the foreign judgment was affected by fraud. *See Hilton*, 159 U.S. at 205–06, 16 S.Ct. 139; *Altos Hornos*, 412 F.3d at 428; *Marcus*, 796 F. Supp. 2d at 392. The moving party—typically the party seeking enforcement of a foreign judgment—holds the burden of showing that comity is appropriate. *See Allstate Life Ins. Co. v. Linter Grp. Ltd.*, 994 F.2d 996, 999 (2d Cir. 1993) (citing *Drexel Burnham Lambert Group, Inc. v. Galaari*, 777 F.2d 877, 880 (2d Cir. 1985)).

Judge Lane focused on the broad extent of the third party releases in *PT Bakrie.*

> As a practical matter, enforcing a third-party release in this case would release the Issuer, the Subsidiary Guarantors, and individual directors and commissioners of BTEL and the Issuer from any liability n the ongoing New York litigation initiated by the Objecting Noteholders. *See* Objecting Noteholders' Opposition ¶ 6; Motion for Recognition and Enforcement of Indonesian PKPU Plan ¶¶ 39, 98–100.

Judge Lane found inadequate record evidence of the reason for such broad releases.

> Here, there is no clear and formal record that sets forth whether or how the foreign court considered the rights of creditors when considering this third-party release. Indeed, the record contains no information about how this third-party release was presented to the Indonesian court for consideration or whether any creditors were heard—or even had the ability to be heard—as to a third-party release. *Cf. In re Metcalfe & Mansfield Alt. Investments*, 421 B.R. at 698–99 (noting that "Canadian courts afford creditors a full and fair opportunity to be heard in a manner consistent with standards of U.S. due process"); *In re Avanti Commc'ns. Grp.*, 582 B.R. at 618 ("Avanti's Scheme Creditors had a full and fair opportunity to vote on, and be heard in connection with, the Scheme."); *Soc'y of Lloyd's v. Reinhart*, 402 F.3d 982, 987– 88 (10th Cir. 2005) (finding the proceedings under UK law in the UK courts afford creditors a full and fair opportunity to be heard in a manner consistent with U.S. due process standards); *see also Allstate*, 994 F.2d at 999 (listing the eight factors…that courts consider when evaluating procedural fairness).
>
> Moreover, there is nothing in the record about the justification for any third-party release. The Commercial Court Judgment does not provide any explanation, nor is there any explanation anywhere else in the records of the PKPU Proceeding. It simply exists in the foreign judgment. The Foreign Representative does not even offer a justification in his pleadings, and instead is content to simply rely on the language of the Commercial Court Judgment itself. But relying on the Commercial Court Judgment is insufficient where it

> does not provide any justification for the release, either under Indonesian law or otherwise. The lack of such explanation is particularly noteworthy given the testimony of the Objecting Noteholders' expert witness that a third-party release is not standard for Indonesian PKPU proceedings.

Judge Lane found inadequate evidence of procedural fairness.

> The Commercial Court Judgment does not provide any explanation, nor is there any explanation anywhere else in the records of the PKPU Proceeding. It simply exists in the foreign judgment. The Foreign Representative does not even offer a justification in his pleadings, and instead is content to simply rely on the language of the Commercial Court Judgment itself. But relying on the Commercial Court Judgment is insufficient where it does not provide any justification for the release, either under Indonesian law or otherwise. The lack of such explanation is particularly noteworthy given the testimony of the Objecting Noteholders' expert witness that a third-party release is not standard for Indonesian PKPU proceedings but comity contemplates a clear and formal record…

Judge Lane found that the evidence in *PT Bakrie* was not nearly as good as that which had justified third party releases in other cases.

> The record here as to the third-party release also stands in stark contrast to perhaps the most similar precedent available: the Chapter 15 case of *In re Metcalfe & Mansfield Alt. Invs.*, 421 B.R. 685. In *Metcalfe*, the court granted the additional relief of enforcing a plan with a third-party release based on a robust record in the Canadian insolvency proceedings. *Id.* at 693. The court in *Metcalfe* reviewed the decisions of the Ontario Court and the Ontario Court of Appeals, noting that both courts "issued lengthy, reasoned written decisions upholding the jurisdiction of the Ontario Court under the CCAA to approve the non-debtor release and injunction provisions" and "more than 30 parties appealed the Ontario Court decision approving those provisions." *Id.* The court in *Metcalfe* found that the Canadian courts' treatment of the issue of third-party releases reflected a "similar sensitivity to the circumstances justifying approving such provisions" as the Second Circuit's decision in *Metromedia*. *Id.* at 698. The decisions of other bankruptcy courts granting additional relief under Chapter 15 reflect a similar approach. For example, the court in *Sino-Forest* also extended comity to a Canadian court proceeding enforcing third-party releases based on the clear record before it. ***In re*** *Sino-Forest Corp.*, 501 B.R. at 658–61. In reaching this conclusion, the court in *Sino-Forest* examined the specific provisions of a settlement agreement, the Canadian court's settlement endorsement clearly setting forth the basis for its decision with respect to the third-party releases after holding a hearing in which objections were considered and overruled, and a written decision of the Court of Appeals of Ontario dismissing the appeal on the same reasoning. *Id. See also In re Avanti Commc'ns. Grp.*, 582 B.R. at 609–10, 618 (reviewed the "Scheme" containing third-party releases and the UK court's review and endorsement of the Scheme, and found that the "[c]reditors had a full and fair opportunity to vote on, and be heard in connection with, the Scheme"); *cf. In re Sivec SRL*, 476 B.R. 310, 324 (Bankr. E.D. Okla. 2012) (the Court was unconvinced that the interests of the U.S. creditor in that case would be protected in the Italian proceeding and,

> thus, refused to extend comity based on, *inter alia*, inadequate and conflicting information provided to the Court regarding the authority of an Italian judge to determine the parties' dispute in the Italian bankruptcy proceeding, the authorship and veracity of requests for comity allegedly submitted by this judge, and the status of the Italian proceeding).

Noting the need for at least a rudimentary record, he said the foreign proponent could go back to "develop" a better record.

> [T]o grant comity to the PKPU Plan and its third-party release, there must be at least a rudimentary record in the foreign proceeding as to the basis for such releases and procedural fairness of the underlying process. Without such a record, a party seeking comity becomes free to cobble together a rationale for the decision reached after the fact. *See Al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d 1190, 1203 (9th Cir. 2007); *cf. Animal Sci. Prod., Inc. v. Hebei Welcome Pharm. Co.*, —— U.S. ——, 138 S. Ct. 1865, 1868, 201 L.Ed.2d 225 (2018) (noting that "the transparency of the foreign legal system" is a relevant consideration when deciding the weight to afford "a foreign state's views about the meaning of its own laws" under principals of international comity). Of course, the parties are free to return to the Indonesian Court to further develop the record on this issue, consistent with the substantive and procedural requirements of Indonesian law. But based on the current record, the Court cannot conclude that the Foreign Representative has met its burden for granting the additional relief.

In early 2024, prior to *Purdue* and in the Fifth Circuit where *Vitro* was the controlling law, Judge Lopez in Houston gave comity to and enforced plans containing third party releases that *McDermott* affiliates had confirmed in England and the Netherlands. The record showed that the foreign proceedings had given due process and the plans were fair. Based on this evidence, Judge Lopez found the following and entered an order enforcing the foreign plans.

> G. In the interests of the public and international comity, the relief granted in this Order is necessary and appropriate, consistent with the public policy of the United States, warranted pursuant to sections 105(a), 1507, 1521, 1522, and 1525 of the Bankruptcy Code, and will not give rise to undue hardship to any party in interest. To the extent that any hardship or inconvenience may result to such parties, it is outweighed by the benefits of the requested relief to the Foreign Representative, the Debtors, the Group, their creditors, and other parties in interest.
>
> …
>
> L. Pursuant to sections 1507 and 1521 of the Bankruptcy Code, the Foreign Representative, the Debtors, and the Group, as applicable, are entitled to the additional assistance and discretionary relief requested in the Motion.
>
> M. Consistent with section 1507(b) of the Bankruptcy Code, the relief granted in this Order will reasonably assure: (i) the just treatment of all holders of claims against or interests in the Debtors' property; (ii) the protection of claim holders in the United States

against prejudice and inconvenience in the processing of claims in the Foreign Proceedings; (iii) the prevention of preferential or fraudulent dispositions of property of the Debtors; and (iv) the distribution of proceeds of the Debtors' property

G. Purdue Means That It Will Be Very Difficult To Use §1521 To Enforce Foreign Plans Containing Third Party Releases.

Judge King held in *Vitro* that 1521's authority **"**[to] grant…any additional relief that may be available to a trustee… [under U.S. Chapter 11]" is limited to the relief that the Bankruptcy Code authorizes

Purdue held that the U.S. Bankruptcy Code does not give bankruptcy courts the power to order or enforce a third party releases in non-asbestos chapter 11 cases.

H. §1507(b)(4) Is Not New; It Was Part Of §304(c) Prior Standard For Comity.

To give comity under §1507 by enforcing a foreign reorganization plan a court must be "reasonably assure[d] [that]… distribution of proceeds of the debtor's property [will be] substantially in accordance with the order prescribed by [Chapter 11]."

> **(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….**

These are the same elements that had governed whether comity should be given to foreign reorganization plans under old §304(c).

> (c) In determining whether to grant relief under subsection (b) of this section, the court shall be guided by what will best assure an economical and expeditious administration of such estate, consistent with-
> (1) just treatment of all holders of claims against or interests in such estate;
> (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 such estate;
> (4) distribution of proceeds of such estate substantially in accordance with the order prescribed by this title;

(5) comity…

I am not aware of a bankruptcy court using §304 to enforce a foreign reorganization plan containing a third party release.

I. Post *Purdue*, What Evidence Is Relevant Under §1507(b)(4)?

The opinions discussed in this Memorandum applying §1507(b)(4) are fact and evidence based. It was as easy to conclude that the *Vitro* plan did not allocate value "substantially in accordance" with Chapter 11 because it allocated a half billion dollars to old equity based on a vote controlled by insiders, while paying creditors 40%, and requiring them to release guarantees from third party non-debtor affiliates.

In *Sino Forest, Avanti, Agrokor* and *McDermott,* the courts either explicitly or implicitly, found that the foreign plans containing third party releases allocated value "substantially in accordance with [Chapter 11]" as required by §1507(b)(4), and supported that finding by distinguishing *Vitro*.

When those opinions were written, there was still a question whether Chapter 11 contained authority to enforce a third party release. The Fifth Circuit view that the Bankruptcy Code did not authorize a third party release was still the minority position among the circuits. As Judge King described in *Vitro,* many circuits still permitted a debtor to try to meet a high burden to justify a third party release and listed the kind of things they had to prove.

> Similarly, in *In re Dow Corning Corp.,* the court observed that enjoining a non-consenting creditor's claim against a non-debtor is a "dramatic measure" and instructed courts to approve such a release only when the following seven factors are present:
>
> > (1) There is an identity of interests between the debtor and the third party, usually an indemnity relationship, such that a suit against the non- debtor is, in essence, a suit against the debtor or will deplete the assets of the estate; (2) The non-debtor has contributed substantial assets to the reorganization; (3) The injunction is essential to reorganization, namely the reorganization hinges on the debtor being free from indirect suits against parties who would have indemnity or contribution claims against the debtor; (4) The impacted class, or classes, has overwhelmingly voted to accept the plan; (5) The plan provides a mechanism to pay for all, or substantially all, of the class or classes affected by the injunction; (6) The plan provides an opportunity for those claimants who choose not to settle to recover in full and; (7) The bankruptcy court made a record of specific factual findings that support its conclusions. *Vitro,* 701 F.3d at 1061-62.

Purdue ended the ability prove the seven *Dow Corning* factors to justify a third party release in a Chapter 11 case. However, *Purdue* did not end the ability to prove under §1507(b) the other "factors that might sway us in favor of granting comity" that were present in *Metcalfe, Sino Forest, Avanti, McDermott, Reede Energia and Agrokor.*

Those other factors differ from case to case. A generalization is that they tend to be about how a big problem had caused the need for the third party release; that the release was not overbroad and offered meaningful protections; that it had been presented in a fair open way; that it had substantial creditor support; that it was necessary to the plan; and that the difference in the resulting allocation under the plan from what would be available under Chapter 11 was small and seemed fair.

These are not suggested as standards, but are a starting point for reading how *Vitro* failed to justify its third party releases under §1507(b)(4): .

> [W]e observe that many of the factors that might sway us in favor of granting comity and reversing the bankruptcy court to that are absent here.
>
> …
>
> *Vitro* has not shown that there existed truly unusual circumstances necessitating the release. To the contrary, the evidence shows that equity retained substantial value. The creditors also did not receive a distribution close to what they were originally owed. Moreover, the affected creditors did not consent to the Plan, but were grouped together into a class with insider voters who only existed by virtue of Vitro reshuffling its financial obligations between it and its subsidiaries. It is also not the case that the majority of the impacted group of creditors, consisting predominantly of the Objecting Creditors, voted in favor of the Plan. Nor were non- consenting creditors given an alternative to recover what they were owed in full. Vitro cannot rely on the fact that a substantial majority of unsecured creditors voted in favor of the Plan. Vitro's majority depends on votes by insiders. To allow it to use this as a ground to support enforcement would amount to letting one discrepancy between our law and that of Mexico (approval of a reorganization plan by insider votes over the objections of creditors) make up for another (the discharge of non-debtor guarantors). *Cf. CIBC Bank & Trust Co. (Cayman) Ltd.,* 886 F.Supp. at 1114.

Likewise, they are a starting point for reading how *Metcalfe* had much better evidence of reasonableness and fairness to justify the third party releases it approved.

> The bankruptcy court [in *Vitro*] distinguished *Metcalfe* because, in that case, "there was near unanimous approval of the plan by the creditors, who were not insiders of the debtor .... the plan was negotiated between the parties and there appears not to have been a timely objection .... [and] the release was not complete like the one in the present case." *Vitro II,* 473 B.R. at 131**.**
>
> We agree that *Metcalfe* is distinguishable. The fact that the Plan approved here [in *Vitro*] was the result of votes by insiders holding intercompany debt …the facts of this case exceed the scope of that decision. We further observe that in that case the Canadian court's decision to approve the non-debtor release "reflect[ed] similar sensitivity to the circumstances justifying approving such provisions," a sensitivity we find absent in the Mexican court's approval of the Plan. 421 B.R. at 698. The Canadian court's decision was

also the result of "near-cataclysmic turmoil in the Canadian commercial paper market following the onset of the global financial crisis." *Id.* at 700. As already discussed, Vitro's evidence on this point largely emphasizes the turmoil only Vitro would be exposed to.

J. Study of Model Law Enforcement Of Foreign Plans Of Reorganization.

Based on opinions discussed here and comments made by foreign judges at seminars during 2024, it appears that foreign courts might be using the following analysis to determine whether to give comity and enforce bankruptcy reorganization plans from foreign countries:

> Is the order sought to be enforced so "substantially" far off from how my country would allocate value that I won't exercise discretion to enforce it?

This is a genericized version of the §1507(b)(4) test that has not been enacted in all jurisdictions that have adopted the Model Law. It is not clear whether use of this concept means that courts are finding a public policy violation, or are simply describing how they are exercising discretion.

A detailed survey of reasons given for enforcement and non-enforcement would give greater insight into what is being decided on a case by case basis when courts assess similarities and differences in substantive law.

The American College of Bankruptcy and the International Insolvency Institute would provide a great service if they undertook such a survey.

Zack Clement

Zack A. Clement, PLLC
541A W. 23rd St, Houston, TX 77008
(832) 274-7629
zack.clement@icloud.com
www.zackclement.com

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