UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 20-CIV-21964-CMA

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

TCA FUND MANAGEMENT GROUP, CORP. and
TCA GLOBAL CREDIT FUND, LTD.,

Defendants, and

TCA GLOBAL CREDIT FUND, LP; TCA GLOBAL
CREDIT FUND, LTD.; TCA GLOBAL CREDIT
MASTER FUND, LP,

Relief Defendants.
____/

FOREIGN REPRESENTATIVES' MEMORANDUM OF LAW IN OPPOSITION TO RECEIVER'S MOTION FOR APPROVAL OF DISTRIBUTION PLAN AND FIRST INTERIM DISTRIBUTION [ECF NO. 208], AND REQUEST FOR HEARING

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Eleanor Fisher and Tammy Fu, in their capacity as Foreign Representatives (the "Foreign Representatives") of Relief Defendant TCA Global Credit Fund, Ltd. ("Feeder Fund Ltd."), as recognized by Order of this Court (the "Recognition Order") in the Chapter 15 case of Feeder Fund Ltd. (the "Chapter 15 Case")[1] dated June 4, 2021 [Chapter 15 Case, ECF No. 8], by and through undersigned counsel and pursuant to S.D. Fla. L.R. 7.1(c) and this Court's Order entered March 8, 2022 [ECF No. 217], file this Memorandum of Law in Opposition to the Receiver's *Motion for Approval of Distribution Plan and First Interim Distribution* [ECF No. 208] (the "Distribution Motion"), and rely upon the following facts and substantial matters of law:[2]

BACKGROUND

1. The Foreign Representatives serve as the Joint Official Liquidators (the "JOLs") of Feeder Fund Ltd. in its ongoing liquidation proceeding (the "Cayman Proceeding") before the Grand Court of the Cayman Islands (the "Cayman Court"), having been appointed as JOLs by Order of the Cayman Court dated May 13, 2020.[3]

[1] By agreement with the Receiver the Chapter 15 Case was withdrawn to this Court from the U.S. Bankruptcy Court for this District, and docketed as Case No. 1:21-cv-21905-CMA. By further Order dated August 25, 2021, the Court closed the Chapter 15 Case for administrative purposes only and directed that all further filings be made in this Receivership Case.

[2] Paragraph 8(i) of the Recognition Order expressly reserved the right of the Foreign Representatives "to appear and be heard in this Chapter 15 Case or, as appropriate, the Receivership Case upon entry of the Intervention Order, in respect of any liquidation plan proposed by the Receiver for the Receivership Entities, including any proposed distribution scheme contained therein . . . ." Recognition Order, paragraph 8(i) (capitalized terms defined in therein). The referenced Intervention Order was entered in this Receivership Case on June 9, 2021 [ECF No. 147].

[3] The Cayman Proceeding was commenced by the filing of a Winding Up Petition on April 1, 2020, prior to the commencement of this action by the SEC and appointment of the Receiver on May 11, 2020.

2. From the earliest days of their communications following the appointment of the Receiver by this Court and the JOLs by the Cayman Court, the parties have discussed that potentially irreconcilable differences exist between the statutory distribution scheme established by the laws of the Cayman Islands for companies organized and regulated under Cayman Islands law such as Feeder Fund Ltd.[4] and the principles of equity typically applied by U.S. courts in federal equity receivership cases involving only domestic entities. In the rare case where, as here, cross-border considerations come into play, principles of international comity and respect for foreign law also must be addressed.

3. By way of the Distribution Motion, the Receiver asks the Court to exercise its equitable powers to approve and adopt a proposed distribution scheme under the so-called "Rising Tide" methodology. In so doing, the Receiver points out that under existing federal law there are "no set rules or specific plan terms or means of implementation that govern distribution plans in federal equity receiverships."[5]

4. In opposing that Motion, the Foreign Representatives do not question the Receiver's good faith nor the sincerity of his efforts to propose a plan of distribution that is consistent with principles of equity typically applied by federal courts in respect of federal equity receiverships involving U.S. entities. Rather, the thrust of this Memorandum is that the Receiver's approach is simply too narrow in light of the cross-border context of this case, and other recent cases and developments presenting similar considerations.

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[4] Arguably the same laws of the Cayman Islands apply with similar or equal force to all of the Receivership entities save for TCA Fund Management Group and TCA Global Lending Corp (the so-called "Nevada blocker" company); however, the Foreign Representatives were appointed as JOLs and recognized as foreign representatives only for Feeder Fund Ltd.

[5] Distribution Motion at p.15 (citation omitted).

5. Unlike the cases cited in the Distribution Motion, this case presents serious considerations of international comity, in the form of what appears to be an issue of first impression in the federal courts: ***whether, based on principles of "equity" and federal common law, a U.S. court presiding over a federal equity receivership can impose a scheme of distribution upon the foreign investors in a legal entity within that receivership[6] that was organized under and regulated by the laws of a foreign jurisdiction, in disregard of a statutory distribution priority scheme created under the laws of that jurisdiction, over the objection of foreign liquidators appointed by the foreign court to oversee the liquidation of the subject entity.[7]***

6. In addressing this issue, and the concept of "fairness" as presented in the Distribution Motion, the Court necessarily must consider whether interests of international comity and respect for foreign law[8] – including cross-border application of the "internal affairs doctrine"

[6] It bears mention here that the foreign entity in question, Feeder Fund Ltd., is named in the Complaint initiating this action as a relief defendant over which the only relief sought by the SEC was the appointment of the Receiver, and not a primary defendant accused of any violations of the federal securities laws or active wrongdoing.

[7] The Court's grant of recognition to the Cayman Proceeding as a foreign nonmain rather than a foreign main proceeding has no bearing on whether the distribution scheme for Feeder Fund Ltd. shall be governed by U.S. or Cayman Islands law. Indeed, paragraph 12 of the Recognition Order provides, in pertinent part, that "nothing contained in the Stipulated Motion, nor in the grant of foreign nonmain recognition as provided in this Order . . . (iii) shall in any way diminish, impair or give greater weight to any of the arguments to be made by the JOLs or the Receiver in respect of the Court's consideration of any matter brought before the Court, whether those arguments are based on the laws and regulations of the United States and/or the Cayman Islands or principles of international comity; or (iv) shall in any way enlarge or improve the entitlement or argument for relief of either the JOLs or the Receiver in respect of the Court's consideration of any matter based on the grant of foreign nonmain recognition rather than foreign main recognition." Recognition Order at para. 12.

[8] Case law indicates that principles of comity can be raised defensively in litigation. *See, e.g.*, *EMA Garp Fund v. Banro Corp.*, No. 18 Civ. 1986, 2019 U.S. Dist. LEXIS 27387 (S.D.N.Y. Feb. 21, 2019) (dismissing claims brought by shareholders against CEO and company reorganized in Canadian proceeding as matter of international comity to the Canadian proceeding).

– permit it simply to sweep away the governing legal principles of the foreign distribution scheme in favor of a distribution plan proposed in the name of "equity" and adherence to principles of federal common law that, absent a "uniquely federal interest," should not control based on a recent decision of the United States Supreme Court.[9]

A. Equity Must Follow the Law

7. For almost 170 years it has been a fundamental principle of American jurisprudence – one of the "postulates or legal truisms, admitting of no dispute . . . [t]hat wherever the rights or the situation of parties are clearly defined and established by law, equity has no power to change or unsettle those rights or that situation, but in all such instances the maxim *equitas sequitur legem* is strictly applicable." *Magniac v. Thomson*, 15 How. (56 U.S.) 281, 299 (1853) (rejecting equitable argument surrounding fraud allegations upon creditors for marriage settlement). Translated to English, the simple meaning of this revered axiom is that "equity must follow, or in other words, be subordinate to the law." *Id.* at 302.

8. Consistent with this well-established principle, equity does not write on a clean slate. "Courts of equity can no more disregard statutory and constitutional requirements and provisions than can courts of law." *Hedges v. Dixon County*, 150 U.S. 182, 192 (1893) (rejecting argument that a court of equity can declare valid bonds that are otherwise void by law).

9. Upon this principle, where there is a statutory scheme in place – in this instance, a foreign statute[10] governing the distribution of assets of a company in liquidation, as adopted in the jurisdiction in which the company was organized and regulated – a court is not free simply to

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[9] *Rodriguez v. Federal Deposit Insurance Corporation,* 589 U.S. ___, 140 S. Ct. 713 (2020).

[10] By Notice filed on April 29, 2022, the Foreign Representatives have stated their intention to raise the foreign laws of the Cayman Islands under Fed. R. Civ. P. 44.1.

disregard or toss aside that statutory scheme in the name or interest of "equity"; rather, under the long-held maxim, "equity must follow the law."

10. Consistent with this principle, a recent and widely publicized appellate decision of the Privy Council[11] makes clear that the statutory distribution scheme that governs the liquidation of a company organized under the laws of the Cayman Islands would not be disregarded in favor of a plan advanced by the court-appointed liquidators under principles of equity:

> [T]he construction advanced by the appellant would work a very large and unprecedented change in the law, by empowering liquidators to impose a scheme of fair distribution of their own devising in substitution for the members' legal rights, without providing liquidators with any principled guidance either about when it would be appropriate for them to do so, or as to the contents of such a scheme.

Pearson v Primeo Fund [2020] UKPC 3 ("Primeo 2020") (rejecting proposal by liquidator to distribute the surplus of assets in a solvent company in liquidation to investors using the "net investment method").[12] "[T]he supposed new power would run counter to the fundamental principle applicable to liquidation in the Cayman Islands and in most comparable jurisdictions that the assets of the company are to be applied *pari passu* among the classes of stakeholders (creditors and members) in accordance with their legal rights as at the commencement of the liquidation." *Id.* at paragraph 55.

B. Cayman Islands Law Governing Distribution of Assets from a Company in <u>Liquidation</u>

[11] The Privy Council of the United Kingdom is a court of limited jurisdiction that operates as the final court of appeal for cases emanating from 27 Commonwealth countries, UK overseas territories and crown dependencies, including the Cayman Islands, The Bahamas, Bermuda, and the British Virgin Islands.

[12] A true and correct copy of the *Primeo Fund* decision is attached as Exhibit D to the *Declaration of Katharine Lucy Bladen Pearson Regarding Issues of Cayman Islands Law in Relation to Receiver's Motion for Approval of Distribution Plan* (the "Pearson Declaration"), which has been filed with Court contemporaneously herewith.

11. There is no dispute that the Feeder Fund Ltd. is an entity organized under the laws of the Cayman Islands,[13] and subject to regulation by the Cayman Islands Monetary Authority ("CIMA").[14] Contemporaneously with this Memorandum, the Foreign Representatives have filed the Pearson Declaration setting forth a summary of the applicable laws of the Cayman Islands governing the distribution of assets from a company in liquidation.

C. The Receiver's Proposed Plan of Distribution Departs Materially From the Requirements of Cayman Islands Law

12. As the Receiver contends, Rising Tide plans have found favor under the equitable principles typically applied by courts in federal equity receiverships involving domestic entities. Accordingly, this Objection is not directed to the Receiver's recommendation of that type of distribution plan over a *pro rata* plan or other equitable option, but rather to the advancement of any scheme of distribution for Feeder Fund Ltd. that does not conform to the statutory scheme established under the laws of the Cayman Islands. As set forth more fully below and in the Pearson Declaration, the proposed Distribution Plan rearranges the strict priority of distribution under Cayman law and treats multiple classes of stakeholders differently than such law requires.

13. To begin, the Foreign Representatives note that in this case the Receiver proposes to make a direct distribution to Feeder Fund Ltd. investors from TCA Global Credit Master Fund, LP (the "Master Fund"). Under Cayman law, the Master Fund would make payments to its

[13] A true and correct copy of the Amended and Restated Memorandum and Articles of Association of TCA Global Credit Fund, Ltd. (adopted by Special Resolution Dated 30 April 2010) (the "Feeder Fund Ltd. Articles") is attached as Exhibit A to the Pearson Declaration. The Feeder Fund Ltd. Articles are governed by Cayman Islands law. Paragraph 1 of the Feeder Fund Ltd. Articles defines "Law" to mean the Companies Law (as amended) of the Cayman Islands.

[14] It is noteworthy here that while it was the SEC that commenced this action and obtained the appointment of the Receiver over the Receivership Entities, including Feeder Fund Ltd. as a relief defendant, it was CIMA and not the SEC that exercised regulatory authority over Feeder Fund Ltd. throughout the period of its operations.

creditors and then return the surplus capital to each of the feeder funds for distribution to stakeholders in those funds in accordance with the priority scheme. Pearson Declaration at p.9. This Cayman law entity-based approach has been adopted in recent cross-border liquidation cases in which the U.S. fiduciary makes a distribution to the foreign liquidators of the feeder fund, who then make distributions to stakeholders in accordance with the requirements of applicable law in their jurisdictions. Several of these recent developments are addressed in more detail below.

14. Unregistered Subscribers. The proposed treatment of "Unpaid Subscribers" is described at pp. 29-32 of the Distribution Motion. While Cayman law requires that traceable funds advanced by Unregistered Subscribers be held on trust for their benefit, the Foreign Representatives agree with the Receiver that in this instance substantially all such funds, except for approximately $230,000, appear to have been commingled by the former management of Feeder Fund Ltd., and that as a result trust claims (believed to be in excess of $7.7 million) cannot be honored. However, under Cayman Islands law, the Unregistered Subscribers would be treated as ordinary creditors of the feeder funds for the balance of their funds, and therefore would take priority in distribution over investors to whom shares actually were issued.

15. Redemption Creditors. Under Cayman law, investors who have validly issued notices of the redemption of their equity interests with a redemption date prior to the earlier of the suspension of redemptions or the commencement of liquidation are treated as creditors, and in such capacity hold priority over investors who have not so redeemed and are treated as shareholders. Pearson Declaration at p.13. The proposed Distribution Plan ignores this statutory distinction in treating all former and current investors equally under the Rising Tide method,

thereby disregarding Cayman Islands law in the name of "equity" and depriving Redemption Creditors of their statutory priority as creditors.[15]

16. Other Creditors. Under Cayman law, the claims of trade creditors are afforded priority in distribution over the interests of investors (both redeemed and unredeemed). Pearson Declaration at pp.13-14. Yet the Distribution Scheme expressly disclaims any intention to pay any claims of legitimate Feeder Fund Ltd. creditors, thus improperly subordinating those claims to the interests of investors.

17. Expenses of Administration. Notably, the Receiver's Distribution Plan makes no provision whatsoever for payment of the fees and expenses of Cayman-based JOLs/Foreign Representatives, including those of their retained professionals. This intentional omission wholly deprives the Foreign Representatives and their professionals of compensation for their efforts in compliance with the statutory obligations imposed by their appointment and engagement under Cayman Islands law.[16]

18. The JOLs and their professionals are subject to the oversight of the Cayman Court, which has approved and allowed more than $1 million in fees to date. Cayman Islands Order, attached as Exhibit C to the Pearson Declaration. Yet the Distribution Plan wholly ignores and

[15] By letter dated January 21, 2020 attached as Exhibit E to the Pearson Declaration, the Master Fund notified all existing investors of the decision of the board of directors of Feeder Fund Ltd. to suspend their redemption rights in anticipation of winding up and liquidation. The transmittal of this letter reflects awareness by the TCA Receivership Entities, through their common management and employees, of the priority in distribution under Cayman Islands law governing the winding up and liquidation of companies, and should not lightly be disregarded.

[16] Section 109(1) of the Cayman Islands Companies Act (2022 Revision) (the "Act") provides that the expenses of the liquidation, including the fees of the liquidators and their professionals, "are payable out of the company's assets in priority to all other claims." The Cayman Companies Winding Up Rules, 2018 (the "CWR") set forth the order in which the various expenses are paid. CWR Order 20, rule 1. *See* Pearson Declaration at pp.4-6.

fails to provide for any payment of these fees and expenses, proposing instead to pay the first distribution directly to investors from the Master Fund without regard to the relative rights of the "Feeder Funds," (as defined in the Distribution Motion), and the efforts of the JOLs and their professionals in respect of Feeder Fund Ltd.[17]

19. This situation is particularly troubling in light of the Receiver's unilateral "grab" of some $4 million held in an account of Feeder Fund Ltd. at Butterfield Bank in Guernsey at a time when he was aware of the appointment of the JOLs and made no effort to recognize their rights in and to all or a portion of those funds (the "Guernsey Funds"). To date, the Receiver has declined to turn over any of the Guernsey Funds to the JOLs to satisfy their administrative fees and expenses, and apparently intends – inappropriately, in the view of the Foreign Representatives – to use such funds to pay the initial distribution to investors under the method described in the Distribution Motion.

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[17] The law of the Cayman Islands provides for the allowance and payment of the fees and costs of the JOLs and their professionals for the performance of their duties under Cayman law. Compensation and reimbursement of these fees and costs are subject to review and approval by the Liquidation Committee appointed under Cayman law and by the Cayman Court, and are payable from the assets of the Feeder Fund Ltd. as a priority over distributions to stakeholders, as are the fees and expenses of the Receiver and his professionals in this Receivership case. Under principles of international comity and the internal affairs doctrine as discussed below, these determinations in the Cayman Islands are entitled to recognition and enforcement by this Court. To do otherwise would impose a double standard that unfairly favors the Receiver and offers nothing to the JOLs. Consider, for example, the significant time and expense incurred by both the Receiver and JOLs (each acting in good faith in their fiduciary capacities pursuant to the Orders of the Courts that appointed them) and their respective professionals to negotiate draft protocols and the extensive conditions attached to the Chapter 15 filing, Recognition Order and Intervention Order entered by this Court, as well as to communicate with and respond to inquiries from Feeder Fund Ltd. investors and convening meetings of creditors and contributories as required by Cayman law. What notions of "equity" justify the payment of only the Receiver's fees and expenses incurred in those efforts, while those of the JOLs and their professionals that have been submitted to and approved by the Cayman Court in the Cayman Proceeding remain unpaid?

LEGAL ARGUMENT

A. Subjective Notions of Equity and Fairness are No Basis to Disregard Statutory Law

20. The Foreign Representatives respect the Receiver's repeated references in the Distribution Motion to principles of equity and fairness. Nevertheless, it must be noted that the distribution of assets from a company in liquidation tends in almost all cases to be a zero-sum game – any distribution scheme that makes choices between and among stakeholders as to who should receive priority in payment necessarily will advantage some of those parties at the expense of others. For this practical reason as well, the Foreign Representatives respectfully submit that principles of equity should not be applied in a manner to sweep away a statutory distribution scheme under the foreign law that governed Feeder Fund Ltd. and, by contract, the rights of investors in that Fund.

21. Here, adoption of the proposed Distribution Plan under principles of "equity" will cause prejudice to creditors (both ordinary creditors and Redemption Creditors), whose claims are entitled to be paid ahead of investors under Cayman law. Similarly, the priorities afforded under established Cayman law to the Foreign Representatives and their Cayman and US professionals are disregarded and kicked to the curb by the proposed Distribution Plan.

22. As these examples serve to illustrate, what is "fair and equitable" to one set of stakeholders of a company in liquidation operates to disadvantage others. It is for this reason that, much like the United States Bankruptcy Code, the laws of the Cayman Islands provide for a strict order of distribution applicable to the liquidation of companies organized under those laws, as described more fully in the Pearson Declaration.

23. There is no doubt that federal courts have the ability and authority to apply foreign law – here, the laws of the Cayman Islands – as the Foreign Representatives have requested under

Fed. R. Civ. P. 44.1. In furtherance of that application, it is well established that *even in the face of a conflicting U.S. statute*, the court should grant comity to principles of foreign law. As Mr. Justice Cardozo wrote while serving as Chief Judge of the New York Court of Appeals:

> Our own scheme of legislation may be different. . . . That is not enough to show that public policy forbids us to enforce the foreign right. . . . *If a foreign statute gives the right, the mere fact that we do not give a like right is no reason for refusing to help the plaintiff in getting what belongs to him. We are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home.*

Loucks v. Standard Oil Co., 120 N.E. 198, 201 (N.Y. 1918) (emphasis added). Mr. Justice Cardozo's argument is even stronger here, where the interests of the foreign statute and right are not weighed against "[o]ur own scheme of legislation," but against notions of equity and reliance on federal common law that, as discussed immediately below, has been curtailed if not vitiated by more modern jurisprudence.

B. Principles of Federal Common Law Do Not Override the Interests of International Comity, Application of the "Internal Affairs Doctrine," and Statutory Law

24. The Receiver's reliance on multiple decisions applying principles of "equity" to approve Rising Tide and other distribution schemes strips away long-established principles of comity and ultimately falls under the weight of recent case law that vastly limits the application of federal common law. As noted, none of those cases appears to address the situation here, in which the Court is asked to elevate principles of equity to defeat a statutory scheme and set of rights established under the laws of the foreign jurisdiction that govern the receivership entity before it.

25. International Comity. The basic principles of international comity in U.S. jurisprudence arise from *Hilton v. Guyot*, 159 U.S. 113, 164 (1895), defining comity as "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to the international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws." To be sure,

the Court also held that comity "is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other." *Id.* at 163-64.

26. In this instance, where the Court has granted recognition to the Cayman Proceeding under Chapter 15, "a court in the United States shall grant comity or cooperation to the foreign representative." 11 U.S.C. §1509(b)(3). While that section is expressly "subject to any limitations that the court may impose consistent with the policy of this chapter," 11 U.S.C. §1509(b), the policy considerations attendant to Chapter 15 firmly support the grant of comity to the Cayman Islands "legislative act" in the form of the statutory scheme that governs the distribution of assets in the liquidation of a Cayman company.[18]

27. Internal Affairs Doctrine. As explained by the U.S. Supreme Court, the "internal affairs doctrine" is a conflict of laws principle that "recognizes that only one State should have the authority to regulate a corporation's internal affairs—matters peculiar to the relationships among or between the corporation and its current officers, directors, *and shareholders*—because otherwise a corporation could be faced with conflicting demands." *Edgar v. MITE Corp.* 457 U.S. 624, 645 (1982) (emphasis added). The Feeder Fund Ltd. stakeholders to whom the Receiver proposes to make the Rising Tide distribution are the shareholders of that Fund, and this well-established doctrine should be applied so as to allow that distribution to be made in accordance with the priority scheme under Cayman Islands law.

[18] *See* 11 U.S.C. §§1501(a)(1) (objective of Chapter 15 of "cooperation between . . . courts of the United States, . . . trustees, examiners (and) debtors . . . and the courts and other competent authorities of foreign countries involved in cross-border insolvency cases); 1501(a)(3) ("fair and efficient administration of cross-border insolvencies that protects the interests of all creditors, and other interested entities . . . .").

28. Consistent with the principles of international comity described above, courts in the U.S. have not hesitated to apply the "internal affairs doctrine" in cross-border situations. *See e.g.*, *Freedman v. magicJack Vocaltec Ltd.,* 963 F.3d 1125, 1133 (11th Cir. 2020) ("Under Florida's choice-of-law rules - the relevant state's laws for choice-of- law purposes here - a court is to adhere to the 'internal affairs' doctrine when faced with a question concerning corporate powers, as codified in the Florida Business Corporation Act.") (applying Israeli law to characterization of shareholder derivative analysis); *Euroboor B.V. v. Grafova,* No. 2:17-cv-02157-KOB, 2021 U.S. Dist. LEXIS 182157, at *33 (N.D. Ala., Sept. 23, 2021) ("For purposes of the internal affairs doctrine, courts look to the corporation's place of incorporation as the source of law applicable to claims regarding the corporation's internal affairs regardless of whether the corporation's place of incorporation is a sister state or a foreign country.") (applying United Arab Emirates law to corporate veil-piercing claim); *Mason-Mahon v. Flint*, 166 A.D.3d 754 at *559-560 (2d Dep't 2018) ("Based upon the internal affairs doctrine, the substantive law of the United Kingdom governs the merits of this [shareholder derivative] action" in respect of nominal defendant "organized under the laws of the United Kingdom.").

29. For this reason as well, the Court should decline to elevate principles of "equity" over considerations of international comity, and give effect to the internal affairs doctrine that supports the application of Cayman Islands law in respect of the distribution to be made to stakeholders in Feeder Fund Ltd.

30. Federal Common Law. In recent years, the clear trend in the law has been to curtail the application of federal common law as a rule of decision absent the justification of a unique or overriding federal interest. *See Danforth v. Minnesota*, 552 U. S. 264, 290-91 (2008) ("And while there are federal interests that occasionally justify this Court's development of common-law rules

of federal law, our normal role is to interpret law created by others and 'not to prescribe what it shall be.'") (quoting *Am. Trucking Assns., Inc. v. Smith*, 496 U.S. 167, 201 (Scalia, J., concurring in judgment)); *Atherton v. FDIC*, 519 U.S. 213, 225 (1997) (holding that federal interest regarding corporate governance standards for federally chartered banks was not one of the few and restricted areas to justify the application of federal common law). *See also In re 3M Combat Arms Earplug Prods. Liab. Litig.*, 474 F. Supp. 3d 1231, 1260 (N.D. Fla. 2020) (curtailing application of federal common law where design aspects of Army procurement contract did not implicate unique federal interests).

31. That undeniable trend reached its crescendo in the Supreme Court's unanimous decision in *Rodriguez v. Federal Deposit Insurance Corporation,* 589 U.S. ___, 140 S. Ct. 713 (2020), in which the Court held squarely that federal common law is to supply the rule of decision only where "necessary to protect uniquely federal interests." 140 S. Ct. at 717 (*quoting Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U. S. 630, 640 (1981) and *Banco Nacional de Cuba v. Sabbatino*, 376 U. S. 398, 426 (1964)).

32. *Rodriguez* arose from a dispute between the Chapter 7 bankruptcy trustee of a bank holding company, and the FDIC as receiver for the failed bank subsidiary, over the right to receive the proceeds of a federal tax return payable to the holding company as taxpayer in respect of losses incurred by the failed bank. In asserting the rights of the bank, the FDIC principally relied on the well-established case of *In re Bob Richards Chrysler-Plymouth Corp*., 473 F. 2d 262 (9th Cir. 1973), for the proposition that under federal common law, "a tax refund due from a joint return generally belongs to the company responsible for the losses that form the basis of the refund." *Barnes v. Harris*, 783 F.3d 1185, 1195 (10th Cir. 2015) (adopting *Bob Richards*) Rejecting that approach and reversing the decision of the Tenth Circuit, the Court noted first that "[t]he cases in

which federal courts may engage in common lawmaking are few and far between." 140 S. Ct. at 716. "[O]nly limited areas exist in which federal judges may appropriately craft the rule of decision." *Id.*, *citing Sosa v. Alvarez-Machain,* 542 U. S. 692, 729 (2004).

33. It is difficult to conceive of a "uniquely federal interest" that would justify sweeping away the statutory distribution scheme applicable to the liquidation of a company that is organized under the laws of the Cayman Islands and regulated by CIMA rather than the SEC. It should be clear from *Rodriguez* that the appointment of a federal receiver at the request of the SEC is insufficient to create or establish that "uniquely federal interest"; indeed, in *Rodriguez*, the automatic appointment of a *federal agency* created by Congress and *required by federal statute* to serve as receiver for a failed bank[19] was not enough to create such an interest.

34. Just as the Supreme Court vitiated the "*Bob Richards* rule" in *Rodriguez* in favor of the application of state law to govern the allocation of a federal tax refund between a bank holding company and its failed bank subsidiary, the Court here should decline to follow federal common law precedents approving "equitable" distribution schemes in favor of the statutory scheme imposed by Cayman Islands law to allocate the distribution of Feeder Fund Ltd.'s assets in liquidation between and among its stakeholders. To exalt notions of "equity" and principles of federal common law over the statutory scheme provided by the laws governing the liquidation of the Cayman-organized Feeder Fund Ltd. would be inconsistent with *Rodriguez.*

35. Indeed, the federal interest here is far less compelling – even non-existent – than arguably existed in *Rodriguez*, in that (i) the funds to be distributed are in the hands of a receiver

[19] 12 U.S.C. §1821(c)(2)(a)(II) ("The [FDIC] shall be appointed receiver, and shall accept such appointment, whenever a receiver is appointed for the purpose of liquidation or winding up the affairs of an insured Federal depository institution by the appropriate Federal banking agency, notwithstanding any other provision of Federal law.").

rather than the U.S. Treasury,[20] and (ii) the investors of record in Feeder Fund Ltd. who may be eligible to share in the distribution are overwhelmingly non-U.S. persons and entities.[21] *See In re EHT US1, Inc.*, 630 B.R. 410, 425 (Bankr. D. Del. 2021) (in Chapter 11 bankruptcy case involving complicated corporate structure designed to enable foreign investors to avoid US tax liability [as is true of the TCA feeder fund structure], "the Court finds that federal common law should not determine whether a trust is a 'business trust' under the Bankruptcy Code. Rather, the law of the jurisdiction in which the trust is organized, in this case the Republic of Singapore, shall govern.").[22]

36. Clearly, the continued application of federal common law precedents in the absence of the "uniquely federal interest" required by the *Rodriguez* decision would fly directly in the face of the bedrock principle that equity must follow the law. Accordingly, the Court should reject the multiple pre-*Rodriguez* decisions offered by the Receiver to justify the imposition of an

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[20] Even where the subject funds emanated from the government coffers, the *Rodriguez* Court asked rhetorically, "what unique interest could the federal government have in determining how a consolidated corporate tax refund, once paid to a designated agent, is *distributed* among group members?" 140 S. Ct. at 717-18 (emphasis in original).

[21] While the Foreign Representatives are aware of the Receiver's independent efforts to identify the beneficial holders of investors in Feeder Fund Ltd., the records available to them reflect that only around 5% of the investors of record are based in the United States. Indeed, the Offering Memorandum of Feeder Fund Ltd. states that "the Fund was formed for investment by non-U.S. investors and U.S. tax-exempt investors." Offering Memorandum at p.11.

[22] Judge Sontchi's well-reasoned decision acknowledges "a split of authority as to whether the law of the jurisdiction in which the trust resides or federal common law governs." *Id.* at 423. However, the conflicting decisions applying federal common law were issued prior to the Supreme Court's opinion in *Rodriguez,* which only can be described and must be treated as a watershed event in the evolution of federal common law as the rule of decision in federal cases. *But see In re Quadruple D Trust,* 2022 Bankr. LEXIS 698, at *25; __ B.R. __ (Bankr. D. Colo. Mar. 18, 2022) (disagreeing with holding in *EHT*, differentiating between "statutory interpretation" and "the creation of federal common law[,]" and recognizing that under *Rodriguez* "only limited areas exist in which federal judges may appropriately craft the rule of decision.").

"equitable" distribution scheme that would override the statutory scheme applicable to the liquidation of companies organized under and subject to the laws of the Cayman Islands.

C. By Ignoring the Governing Laws of the Cayman Islands the Proposed Distribution Scheme Also Upsets the Legal Rights and Reasonable Expectations of Investors

37. The proposed Distribution Scheme ignores not only the statutory laws of the Cayman Islands and interests of international comity, but also the contractual rights and reasonable expectations of the investors under the Feeder Fund Ltd. offering documents[23] that their rights would be governed by Cayman Islands law and jurisdictional provisions:

> This Subscription Agreement will be governed by and construed in accordance with the laws of the Cayman Islands, without regard to conflicts of laws principles. The Subscriber submits to the exclusive jurisdiction of the Cayman Islands courts with respect to any actions against the Fund, the Investment Manager, the Administrator or the Fund's board of directors.

Feeder Fund Ltd. Subscription Agreement at ¶16.[24] The contractual choice of law provisions in the Subscription Agreement circulated to every Feeder Fund Ltd. investor bear a rational relationship to the investment decision, and accordingly are entitled to enforcement.[25]

38. Perhaps the reported case to address these considerations most directly, albeit in the context of a contested Chapter 15 petition rather than the setting presented here, is *In re Ascot Fund Ltd.*, 603 B.R. 271 (Bankr. S.D.N.Y. 2019). Recognizing the same principles of "Governing

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[23] *See In re Oi Brasil Holdings Coöperatief U.A.*, 578 B.R. 169, 228 (Bankr. S.D.N.Y. 2017) ("To assess the expectations of the first bucket of creditors—the noteholders—this Court primarily looks to the associated indentures and offering materials.").

[24] True and correct copies of a sample Subscription Agreement and the Offering Memorandum are attached as Exhibit B to the Pearson Declaration.

[25] *See Acosta v. Campbell*, No. 6:04-cv-761-ORL-28DAB, 2005 U.S. Dist. LEXIS 39889, at *28 (M.D. Fla. Nov. 4, 2005) ("Florida courts enforce the choice of law provision provided by the parties so long as the jurisdiction chosen in the contract has a rational relationship with the transaction."), *adopted by* 2006 U.S. Dist. LEXIS 4088 (M.D. Fla. Jan. 18, 2006).

Law, Appropriate Forum and . . . Creditors' Expectations" advanced here by the Foreign Representatives, Judge Stuart Bernstein rejected a challenge to Chapter 15 recognition by an investor in a Cayman Islands feeder fund. In so doing, the Court noted the multiple provisions of the Debtor's Articles of Association, Offering Memorandum and Subscription Agreement referencing the application of Cayman Islands law, to support the conclusion that "From the Ascot Fund investors' point of view, and as a matter of fact and law, they invested in a Cayman fund and their rights were to be determined under Cayman law." 603 B.R. at 283-84 (citing extensively to provisions in the governing documents).

39. These same types of provisions calling for the application of Cayman Islands law appear in the governing documents for Feeder Fund Ltd.:

- As referenced above, the Feeder Fund Ltd. Articles reflects its organization under Cayman Islands law. The winding-up provisions in those Articles provide for a Cayman distribution process, *i.e.*, distribution first in satisfaction of creditor claims (para. 167), followed by a distribution of available assets among the shareholders (para. 168).[26]

- The Offering Memorandum describes Feeder Fund Ltd. as "a Cayman Islands exempted company," and notes that both it and the Master Fund are subject to the laws and regulations of the Cayman Islands: "The Fund and the Master Fund are regulated under the

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[26] "167. If the Company shall be wound up the liquidator shall apply the assets of the Company in such manner and order as he thinks fit in satisfaction of creditors' claims.

168. Subject to any rights and restrictions for the time being attributed to any Class or Series, the assets available for distribution among the Shareholders shall then be applied in the following priority:

(a) first, in the payment to the Shareholders of a sum equal to the par value of the Shares held by them; and

(b) second, in the payment of any balance to Shareholders, such payment being made in proportion to the Net Asset Value per Share of the relevant Class and Series held."

Mutual Funds Law (2015 Revision) of the Cayman Islands ("Mutual Funds Law"). The [Cayman Islands] Monetary Authority has supervisory and enforcement powers to ensure compliance with the Mutual Funds Law." Offering Memorandum at p.87.

- The Subscription Agreement refers again to Feeder Fund Ltd. as "a Cayman Islands exempted company," and directs that "[e]ach prospective investor should read the Fund's Memorandum of Association and Articles of Association (and) the Offering Memorandum of the Fund," as well as documents relating to the Master Fund. Subscription Agreement, "Instructions to Subscribers" at PDF p.2.
- Most notably, the Subscription Agreement also provides that it "will be governed by and construed in accordance with the laws of the Cayman Islands, without regard to conflicts of laws principles." Subscription Agreement at para. 16.[27]

40. Moreover, as Judge Bernstein noted directly in his Decision, the distribution process in that case involved "two distinct distributions. The first, from Ascot Partners to Ascot Fund, will be determined presumably under either Delaware or New York law and in accordance with the relevant Ascot Partners documents and will be subject to the approval of the New York court," *Id.* at 284, in which a receivership action was pending. *Id.* at 275 n.4. "*The second, from Ascot Fund to its shareholders should be determined under Cayman law in accordance with the Ascot Fund documents and will be subject to the approval of the Cayman Court.*" *Id.* at 284. (emphasis added).[28]

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[27] The Subscription Agreement further provides that the "Subscriber submits to the exclusive jurisdiction of the Cayman Islands courts with respect to any actions against the Fund, the Investment Manager, the Administrator or the Fund's board of directors." *Id.*

[28] While the organizational structure of the TCA Global entities includes the so-called "Nevada blocker," the point remains that the process of routing payments to stakeholders of Feeder Fund Ltd. involves not a single distribution from the Master Fund as contemplated by the Receiver, but

41. The same analysis applies here in respect of the Receiver's initial distribution from the Master Fund, and then the further distribution to be made to investors in Feeder Fund Ltd. – most properly by the JOLs in the Cayman Winding Up Proceeding. As Judge Bernstein reiterated and concluded on this point, "while Delaware or New York law will determine how the Receiver will distribute Ascot Partners assets to the Ascot Fund, *Cayman law will govern how Ascot Fund's assets will be distributed to its shareholders consistent with the Ascot Fund's documents and the expectations of its shareholders*." *Id*. at 285 (emphasis added).

42. The Foreign Representatives freely acknowledge that this Court is not bound by decisions of the bankruptcy court for the SDNY, nor of any other bankruptcy court, but the simple fact is that *Judge Bernstein got it exactly right* in his *Ascot Fund* decision. Precisely as with the investor objecting to Chapter 15 recognition in that case, the Receiver here "is trying to bypass the Cayman Court and have the [receivership] Court decide its dispute regarding the appropriate distribution methodology." *Id.* at 284. In so doing, like the disgruntled investor in *Ascot Fund*, the Receiver "conflates two [or in this instance, perhaps more than two] distinct distributions." *Id.*

D. The Court Should Deny the Distribution Motion and Direct the Receiver and Foreign Representatives to Present a Joint Motion or Protocol to Govern the Distribution to Stakeholders of Feeder Fund Ltd., or Invoke the JIN Guidelines

43. As the Court noted in its June 4, 2021 Order withdrawing the reference of the Chapter 15 Case from the Bankruptcy Court, "the JOLs commenced the Chapter 15 case primarily to promote cooperation between themselves and the Receiver, and to enable the JOLs to intervene and be heard in the Receivership Action with respect to issues affecting" Feeder Fund Ltd. *Order on Withdrawal of Reference* [Chapter 15 Case, ECF No. 7]. The goal of cooperation recognized

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multiple distributions implicating the laws of more than one jurisdiction, specifically including the principles of Cayman Islands law that govern that Fund.

by the Court is the most fundamental principle of Chapter 15, hardwired into section 1501(a)(1) of the Bankruptcy Code,[29] and further amplified by sections 1525 (cooperation and direct communication between the Chapter 15 court and foreign courts and representatives), 1526 cooperation and direct communication between trustee or other person authorized by the court and foreign courts or representatives) and 1527 (forms of cooperation). 11 U.S.C. §§1525-1527.

44. Commendably, recent cases involving the SEC and foreign liquidators appear to be moving toward the spirit of cooperation envisioned by the Court and the foregoing provisions of Chapter 15. In *SEC v. Direct Lending Investments, LLC*, Case No. 2:10-cv-02188 (C.D. Cal. Nov. 20, 2020), the District Court appointed a receiver over a U.S. entity and its subsidiaries, including a Cayman Islands feeder fund that was the subject of a separate liquidation proceeding before the Grand Court of the Cayman Islands in which the receiver himself was appointed as one of the JOLs. Pursuant to a stipulation in the U.S. and Cayman cases, the receiver filed a distribution motion that included a separate distribution scheme for the foreign entity.[30] The Court approved the separate distribution scheme under Cayman Islands law for the Cayman feeder fund entity,

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[29] "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."

11 U.S.C. §1501(a)(1).

[30] *Notice of Motion and Motion of Receiver for Approval of: (1) Distribution Plan; (2) Rising Tide Distribution Methodology with Respect to DLIF Investor Claims; (3) Proposed Interim Distribution; and (4 Notice of Distribution Plan.* [*Direct Lending* Dkt. #321].

while maintaining a distribution scheme for the U.S. entities under U.S. principles of law and equity. [Dkt. #337].

45. More recently, the District Court for the Middle District of Florida approved an agreement between the SEC receiver and a Cayman feeder fund for the payment of a previously approved distribution "pursuant to written instructions provided by" a director of the successor entity to the feeder fund, for further distribution to stakeholders in accordance with Cayman Islands law. *SEC v. Founding Partners Stable-Value Fund, LP et al.,* Case No. 2:09-cv-229-JES-NPM (M.D. Fla. Jan. 4, 2022).[31]

46. Most recently, in a U.S.-Cayman case that has been hailed as "a significant and progressive step in the constructive cooperation and dealings of both jurisdictions with each other in the best interests of international creditor investor protection," the courts in both countries approved and gave effect to an agreement between the SEC and Cayman JOLs for the release of frozen funds from an SEC enforcement action to the JOLs to pay a dividend to creditors of the Cayman Islands fund in accordance with Cayman law. *In re Income Collecting 1-3 Months T-Bills Mutual Fund*, Chapter 15 Case No. 21-11601(DSJ) (Bankr. S.D.N.Y. Feb. 17, 2022). As Mr. Justice Doyle took care to say in paragraph 28 of the Cayman Judgment:

> I congratulate the SEC for also seeing the good sense of such compromise. Such a refreshing and pragmatic attitude on their behalf will greatly assist in creditors being properly protected. I would wish to encourage more cooperation between the SEC and Cayman office holders in the future but for present purposes simply wish to thank the SEC for their assistance in this case. Such assistance reflects well upon the international reputation of the SEC and the Cayman Islands. [32]

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[31] Unopposed Order on CVP SVP LLC's Motion to Modify the Court's June 24, 2021 Order [Dkt. #574], entered pursuant to the *Further Response of FP Offshore Ltd. Regarding CVP SVP LLC'S Motion to Modify the Court's June 24, 2021 Order* [Dkt. #573] (noting "lack of objection from the Receiver and SEC").

[32] Judgment of Grand Court of Cayman Islands entered 4 February 2022, attached as Exhibit 1 to *Subsequent Information Report Pursuant to 11 U.S.C.§1518* filed by Cayman JOLs as foreign representatives [Chapter 15 Case No. 21-11601 Dkt. #22-1]; see paragraphs 29 ("significant and

47. As clear from the record in *Direct Lending*, and from the release of funds to the Cayman Islands successor in *Founding Partners* and JOLs in *Income Collecting T-Bills*, the relevant U.S. parties – the SEC receivers in *Direct Lending* and *Founding Partners* and the SEC itself in *T-Bills* – reached agreements with the Cayman liquidators to enable the distributions to stakeholders in the Cayman-organized funds to proceed in accordance with Cayman Islands law.

48. It is precisely because of those agreements that protracted litigation was avoided and thus the issue presented in this case is one of first impression. To be clear, insofar as the Foreign Representatives are aware or have been able to determine, **no U.S. court has blessed the effort of a federal equity receiver to make a direct distribution to stakeholders of a foreign entity based on considerations of equity and federal common law, in derogation of foreign law and principles of international comity, over the objection of fiduciaries appointed for that entity by the sovereign court of the foreign jurisdiction under whose laws that entity was organized and regulated.**

49. The accommodations reached in both *Direct Lending* and *Founding Partners* reflect precisely the "distinct distributions" approach that Judge Bernstein correctly identified in *Ascot Fund*, and that the Distribution Motion seeks improperly to "conflate" in disregard of the Cayman Islands law that governs Feeder Fund Ltd. The same enlightened approach and result in those cases, and in *Income T-Bill* in which there was no U.S. receivership, should apply here as well – whether imposed by the Court in the form of a separate distribution scheme for Feeder Fund Ltd. or by denial of the Distribution Motion and direction to the Receiver and Foreign

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progressive step"), 30-32 (approving calculation of reserve and payment of interim dividend to creditors " as contemplated by the JOLs."); *Order Granting Recognition of Foreign Main Proceeding and Certain Related Relief* [*Id.* Dkt. #23].

Representatives to cooperate and seek agreement on an acceptable distribution mechanism through joint motion and/or protocol.

50. In advancing these objectives of cooperation, the JOLs wish to make the Court aware of the Judicial Insolvency Network Guidelines ("JIN Guidelines") that have been approved by sixteen courts in leading jurisdictions around the world[33] as applicable to cross-border insolvency cases in their jurisdictions. The adopting jurisdictions include both the Grand Court of the Cayman Islands before which the Cayman Proceeding is pending and the Bankruptcy Court for the Southern District of Florida from which the Chapter 15 Case was withdrawn to this Court.[34]

51. "The JIN Guidelines address key aspects of and the modalities for communication and cooperation amongst courts, insolvency representatives and other parties involved in cross-border insolvency proceedings, including the conduct of joint hearings." http://jin-global.org/jin-guidelines.html. To the extent that it may be helpful to a resolution of the significant issues posed by the Distribution Motion and addressed in this Response, the Foreign Representatives respectfully urge the Court to consider application of and resort to the JIN Guidelines and related Modalities of Court-to-Court Communications.[35]

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[33] These jurisdictions include the leading insolvency courts in the U.S. (Southern District of New York, District of Delaware, Southern District of Texas), England & Wales, Canada, Brazil, Singapore, Korea, The Netherlands, Australia, Bermuda and the Eastern Caribbean.

[34] *In Re: Adoption of Guidelines for Communication and Cooperation Between Courts in Cross-Border Insolvency Matters,* Admin. Order 2018-03 (Bankr. S.D.Fla. Feb. 1, 2018) (Isicoff, C.J.), https://www.flsb.uscourts.gov/sites/flsb/files/documents/general-orders/AO_2018-03_Adoption_of_Guidelines_for_Communication_and_Cooperation_Between_Courts_in_Cross-Border_Insolvency_Matters.pdf__;!!Hj9Y_P0nvg!CPsAeea3E712XWlTFCXfZYmUJjhZfvvhBBdA5ww6u3njnbZndveG-1FxBfwXb0ULXelmTaQ$.

[35] "While the JIN Guidelines focus on the principles of court-to-court communication, the focus of the Modalities is on the mechanics for initiating, receiving and engaging in such communication. The Modalities thus prescribe the issues that need to be addressed to facilitate communication." http://jin-global.org/modalities.html.

CONCLUSION

52. As described more fully above, the Distribution Motion and principles of equity that it advances may be fine as far as they go; here, however, it is respectfully submitted that they do not go so far as to justify – nor to provide any support for – the approval of a distribution scheme that would ignore and sweep aside the statutory scheme duly adopted by the sovereign nation under whose laws Feeder Fund Ltd. was organized and regulated from its inception. In furtherance of their fiduciary duties imposed by the laws of the Cayman Islands, the Foreign Representatives respectfully object and ask the Court to decline from taking the proposed step that offends principles of international comity and respect for foreign law, while ignoring the reasonable expectations of investors from around the world under the governing documents provided as an inducement to their investments.

53. In opposing the Receiver's Motion as presented, it is not the objective of the Foreign Representatives to delay unreasonably the first interim distribution that Motion seeks authority to make. Accordingly, the Foreign Representatives respectfully request that in denying the Motion in its present form, the Court direct the Receiver and SEC to negotiate in good faith with the Foreign Representatives on the issues raised in this Memorandum, or even better, consider invoking the JIN Guidelines and Modalities to facilitate court-to-court communication with the Grand Court of the Cayman Islands in an effort to reach a coordinated resolution of the critical issues presented here.

REQUEST FOR HEARING

Pursuant to Local Rule 7.1(b)(2) of this Court, the Foreign Representatives respectfully request that the Court schedule oral argument on the Distribution Motion at a date convenient to the Court and parties. In support of this request, the Foreign Representatives respectfully submit that the multiple issues raised and discussed above in this case of first impression are deserving of close consideration that would be aided by oral argument, at which the Court can pose questions to counsel for the parties in interest and consider more fully the multinational legal and practical consequences of its decision in this case. The Foreign Representatives estimate the time required for argument is not more than one hour per side.

Dated: April 29, 2022

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