No. 22-13412-B

In the United States Court of Appeals for the Eleventh Circuit

ELEANOR FISHER AND TAMMY FU, IN THEIR CAPACITY AS FOREIGN REPRESENTATIVES OF RELIEF DEFENDANT, TCA GLOBAL CREDIT FUND, LTD. (IN OFFICIAL LIQUIDATION),

Appellants,

v.

UNITED STATES SECURITIES AND EXCHANGE COMMISSION,

Appellee.

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

REPLY BRIEF OF APPELLANTS, ELEANOR FISHER AND TAMMY FU, IN THEIR CAPACITY AS FOREIGN REPRESENTATIVES OF RELIEF DEFENDANT, TCA GLOBAL CREDIT FUND, LTD. (IN OFFICIAL LIQUIDATION)

Mark D. Bloom
John R. Dodd
Baker & McKenzie LLP
1111 Brickell Avenue, 10th Floor
Miami, Florida 33131
mark.bloom@bakermckenzie.com
john.dodd@bakermckenzie.com
Telephone: 305-789-8900
Counsel for Appellants

CERTIFICATE OF INTERESTED PERSONS

Pursuant to Eleventh Circuit Rule 26.1, the following is a list of all persons and entities known to Appellants, Eleanor Fisher and Tammy Fu, in their capacity as Foreign Representatives of Relief Defendant, TCA Global Credit Fund, Ltd. (in Official Liquidation), to have an interest in the outcome of this appeal:

Altonaga, Cecilia M., United States District Judge

Avila, Rodriguez, Hernandez, Mena & Ferri, Attorneys for Respondent, Ocean Bank AW Exports Pty Ltd, Claimant

Baker & McKenzie LLP, Attorneys for Appellant

Banque Pictet & CIE S.A., Petitioner in Cayman Islands Winding Up Proceeding

Bast Amron LLP, Attorneys for Armand Zohari, Tritium Fund, Hsueh-Feng Tseng, and Fide Funds Growth

Bast, Jeffrey P., Attorney for Armand Zohari, Tritium Fund, Hsueh-Feng Tseng, and Fide Funds Growth

Batista, Paul J., Attorney for Jonathan E. Perlman, Receiver

Benjamin, Todd, Claimant

Bloom, Mark D., Attorney for Appellants

Blum, W. Barry, Attorney for Jonathan E. Perlman, Receiver

Bradylyons, Morgan, Attorney for Securities and Exchange Commission

Broxom, Warwick, Claimant

Cahill Gordon & Reindel LLP, Attorneys for Credit Suisse

Claritas Legal Limited, Cayman Islands Counsel for Appellants

Clearstream Banking S.A., Limited Objector

Credit Suisse, Limited Objector

Cuccia II, Richard A., Attorney for Paycation Travel, Inc., Xstream Travel, Inc. and David Manning

Cuccia Wilson, PLLC, Attorneys for Paycation Travel, Inc., Xstream Travel, Inc. and David Manning

Dodd, John R., Attorney for Appellant

Dorchak, Joshua, Attorney for Clearstream Banking S.A.

EY Cayman Ltd.

Fide Funds Growth

Fisher, Eleanor, Foreign Representative of Relief Defendant TCA Global Credit Fund, Ltd.

Fu, Tammy, Foreign Representative of Relief Defendant TCA Global Credit Fund, Ltd.

Fulton, Andrew, IV, Attorney for Lease Corporation of America

Garno, Gregory M., Attorney for Jonathan E. Perlman, Receiver

Genovese, Joblove & Battista, P.A., Former Attorneys for Jonathan E. Perlman,

Receiver[1]

Genovese, John H., Attorney for Jonathan E. Perlman, Receiver

Hall, Jason, Attorney for Credit Suisse

Harney Westwood and Riegels, Cayman Islands Counsel for Appellants

Hill, Ezekiel, Attorney for Securities and Exchange Commission

Kaplan Saunders Valente & Beninati, LLP, Attorneys for AW Exports Pty Ltd, Warwick Broxom, and Jonathan James Kaufman

Kaufman, Jonathan James, Claimant

Kellogg, Jason Kenneth, Attorney for Todd Benjamin International, Ltd. and Todd Benjamin

Kelley & Fulton, P.A., Attorneys for Claimant, Lease Corporation of America

Lease Corporation of America, Claimant

Leggett, Jaime B., Attorney for Armand Zohari, Tritium Fund, Hsueh-Feng Tseng, and Fide Funds Growth

Levine Kellogg Lehman Schneider & Grossman, Counsel for Todd Benjamin International, Ltd. and Todd Benjamin

McIntosh, Elizabeth G., Attorney for Jonathan E. Perlman, Receiver

Moot, Stephanie N., Attorney for Securities and Exchange Commission

Mora, Martha Rose, Attorney for Respondent, Ocean Bank

[1] Genovese, Joblove & Battista, P.A. was acquired by Venable, LLP.

Morgan, Lewis & Bockius LLP, Attorneys for Clearstream Banking S.A.

Ocean Bank, Non-Party Respondent

Paycation Travel, Inc., Claimant

Pearson, Katharine Lucy Bladen, Cayman Islands Attorney for Appellants

Perlman, Jonathan, E., Receiver

Roldan Cora, Javier A., Attorney for Clearstream Banking S.A.

TCA Fund Management Group Corp., Defendant, Receivership Entity

TCA Global Credit Fund GP, Ltd., Defendant, Receivership Entity

TCA Global Credit Fund, L.P., Defendant, Receivership Entity

TCA Global Credit Fund, Ltd., Defendant

TCA Global Credit Master Fund, L.P., Defendant

TCA Global Lending Corp.

Tritium Fund, Claimant

Tseng, Hsueh-Feng, Claimant

Todd Benjamin International, Ltd., Claimant

U.S. Securities and Exchange Commission, Plaintiff

Valente, Charles A., Attorney for AW Exports Pty Ltd, Warwick Broxom, and Jonathan James Kaufman

van de Linde, Peter, Claimant

Venable, LLP, Attorneys for Jonathan E. Perlman, Receiver

Verges, Teresa, Attorney for Securities and Exchange Commission

Xstream Travel, Inc., Claimant

Zohari, Armand, Claimant

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Appellants, Eleanor Fisher and Tammy Fu, in their capacity as Foreign Representatives of Relief Defendant, TCA Global Credit Fund, Ltd., state that, to the best of their knowledge based on the information in their possession, there is no parent corporation or any publicly held corporation that owns 10% or more of its stock.

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases **Page(s)**

Statutes

REPLY ARGUMENT[1]

The District Court's Order adopting the Receiver's Distribution Plan for the Cayman Islands Feeder Fund, Ltd., over the Foreign Representatives' objection and request for comity, elevated principles of equity—never before applied in a cross-border insolvency situation—over the statutory distribution scheme mandated by the sovereign laws of the Cayman Islands, based on the conclusion that Cayman law would produce an "unequal and unfair result." ECF No. 248.

While both the SEC and Receiver embrace that ruling, the Supreme Court has rejected not only the District Court's reasoning, but also its conclusion. *See Canada S. R. Co. v. Gebhard*, 109 U.S. 527, 536–40 (1883). Just as the unsuccessful petitioners in *Gebhard* elected to invest in a Canadian company and thereby subjected themselves to Canadian law governing the distribution to stakeholders when that company became insolvent, the investors in the Feeder Fund, Ltd.—a fund in which U.S. taxpayers were ineligible to invest—chose to invest in a Cayman Islands investment fund. In so doing, they subjected themselves to Cayman law, with all its attendant benefits and risks. It is not inequitable, let alone "manifestly contrary" to U.S. public policy, to grant comity by recognizing that Cayman statutory law, rather than subjective principles of equity that heretofore have been

[1] Any capitalized terms used and not otherwise defined herein shall have meaning set forth in Initial Brief.

applied only in purely domestic receivership situations, governs the distribution to which those investors assented.

To the contrary, it is a well-established principle of American jurisprudence, most recently reaffirmed by the Supreme Court's unanimous decision in *Law v. Siegel*, 571 U.S. 415 (2014) (Scalia, J.), that equity must follow the law. Although a district court has latitude when operating purely as a court of equity, it cannot prioritize equity and create new rules in derogation of an existing legal scheme, as was the case here: the Cayman Islands Companies Act sets out the distribution scheme that governs Cayman Islands companies that are the subject of court-ordered liquidation proceedings in the Cayman Islands, as the Feeder Fund, Ltd. is here.

Congress also has made clear that the grant of comity to foreign representatives appointed to act for a foreign debtor that is the subject of a foreign insolvency proceeding is not only appropriate, but mandatory. 11 U.S.C. § 1509(b)(3) ("[A] court in the United States shall grant comity or cooperation to the foreign representative."). Contrary to the unambiguous words of the statute, Appellees offer an alternative interpretation, contending that section 1509(b)(3) requires only that the court grant comity by "providing to the foreign representative full access to proceedings in all U.S. courts." Receiver's Br. at 28. This novel interpretation fails, because comity—a defined legal term—means, and has always

meant, "recognition . . . [of] the legislative, executive or judicial acts of another nation." *Hilton v. Guyot*, 159 U.S. 113, 164 (1895).

Unable to grapple legitimately with the plain text, Appellees improperly invoke the surplusage canon of statutory interpretation, contending that interpreting "comity" in accordance with its plain meaning would render various provisions of Chapter 15 superfluous and "negate" the discretion otherwise afforded to courts in that Chapter. Yet, the rule against surplusage is inapplicable where, as here, the statutory language is unambiguous. And, in any event, Appellees have failed to show that there is any surplusage issue—they do not provide any examples evidencing that mandatory comity under section 1509(b)(3) negates courts' discretion to grant additional assistance or any appropriate relief under sections 1507 and/or 1521 and 1522.

More to the point, the Foreign Representatives in this case did not request affirmative relief in opposing the Distribution Motion and therefore did not trigger the District Court's discretion under sections 1507 or 1521 and 1522. To be sure, there are many instances where those sections are invoked because the foreign representative seeks not merely comity but affirmative relief or additional assistance. *This is not such a case*. The Foreign Representatives appeared before the District Court in a defensive posture to argue that the Receiver's proposed Distribution Plan

violated well-established principles of international comity and limitations on federal equity powers and common law.

The District Court's legal error—which contravened 140-year-strong Supreme Court precedent as well as section 1509(b)(3) and other principles of comity that are the "principal objective" of Chapter 15 of the Bankruptcy Code, *see In re Vitro S.A.B. de C.V.*, 701 F.3d 1031, 1044 (5th Cir. 2012)—is subject to *de novo* review.[2] For the reasons set forth in the Initial Brief and below, the Distribution Order must be reversed.[3]

I. THE DISTRICT COURT IMPROPERLY INVOKED PRINCIPLES OF EQUITY AND ENGAGED IN FEDERAL COMMON-LAW MAKING DESPITE THE PLAIN LANGUAGE OF CHAPTER 15 AND THE CAYMAN ISLANDS COMPANIES ACT.

Appellees insist that the District Court's decision was properly driven by principles of equity, presenting the circular argument that, effectively, it was proper

[2] Although Appellees concede that this appeal involves statutory interpretation and choice of law questions, they nonetheless contend that the District Court's decision is subject to review for abuse of discretion. SEC's Br. at 14–15; Receiver's Br. at 10. This contention is belied by the arguments they present on appeal, including statutory interpretation arguments.

[3] The Foreign Representatives reiterate that oral argument would be helpful to the Court in resolving the complex cross-border insolvency issues of first impression squarely presented. Appellees' briefs seek to evade oral argument by falsely contending that the law is settled, ignoring the Foreign Representatives' cross-border cases and failing to engage with the issues. If anything, the law in cross-border situations is well-settled in favor of Appellants, and the outcome of this case in reconciling or deciding between those two lines of authority has significant consequences for billions of dollars of indirect foreign investment in the U.S.

to apply principles of equity because it would have been inequitable not to apply equity. What underlies and fatally undermines that argument is Appellees' failure—in over 91 pages of briefing—to engage with the merits of the Foreign Representatives' arguments, all of which are supported by Supreme Court precedent.

Ignoring the long-standing principle that equity must follow the law, Appellees contend that cases involving *purely domestic* federal equity receiverships control the outcome of this appeal. That argument fails because it disregards the framework applicable in cross-border insolvency cases.

A. Where, as Here, an Applicable Legal Scheme Exists, Equity Must Follow That Law.

Appellees repeatedly invoke the concept of equity, encouraging this Court to affirm because the District Court "grant[ed] fair relief to as many investors as possible." Receiver's Br. at 29; *see also* SEC's Br. at 33–34. In support of this narrow argument, Appellees rely solely on the discretion afforded to district courts in the domestic receivership context. SEC's Br. at 39–41; Receiver's Br. at 46–48. While a court may have wide latitude when functioning purely as a court of equity, this case presents two legal schemes—the Cayman Islands Companies Act and Chapter 15 of the Bankruptcy Code—that require a different outcome than that reached by District Court.

It is a fundamental principle of American jurisprudence that a court's discretion to impose equitable remedies must yield where a legal scheme controls.

See Magniac v. Thomson, 56 U.S. 281, 302 (1853). Where Congress has enacted a law, "it is not for courts to alter the balance struck by the statute." *Siegel*, 571 U.S. at 427; *see also Hedges v. Dixon Cnty.*, 150 U.S. 182, 192 (1893) ("Courts of equity can no more disregard statutory and constitutional requirements and provisions than can courts of law."). The same deference must be afforded to legislative acts of foreign sovereign nations under principles of international comity. *See Gebhard*, 109 U.S. at 539. The Cayman Islands Companies Act set forth the applicable distribution scheme here, so equity cannot operate to "abrogate or [] assail [this] perfect and independent legal right." *Magniac*, 56 U.S. at 302.

Appellees contend that the District Court properly invoked equity "because the application of Cayman law would produce a result entirely at odds with principles of equity," SEC's Br. at 16, and laud the Receiver's Distribution Plan as "fair and reasonable." Receiver's Br. at 33–35. This argument transposes the analysis; equity must follow the law, not the other way around. Principles of equity do not permit the District Court to depart from statutory law. The standard to disregard foreign law is a high one: it is insufficient to determine that the foreign law is not identical and does not afford the same protections as under U.S. law. *See Vitro*, 701 F.3d at 1044. The District Court did not engage in the proper analysis here.[4]

[4] For a court to determine that U.S. law should apply, it first must engage in the proper analysis under *Vitro* and its progeny, and find that the foreign jurisdiction's laws are *repugnant to* the laws of the U.S. Appellees contend that the District Court

Appellees next depart from the facts of record to implore the Court to consider the "American investors" or "American citizens," *see, e.g.*, Receiver's Br. at 37, 40, whom they falsely contend would suffer a perceived injustice if the Court were to reverse. In actuality, the Feeder Fund, Ltd. was formed for investment by non-U.S. investors and U.S. tax-exempt investors. *See* ECF No. 240 at 16 n.21 (quoting Offering Memorandum at 11). In other words, U.S. taxpaying citizens did not and could not invest in the Feeder Fund, Ltd.[5] This attempt to persuade the Court based on false (or at minimum, misleading) information lays bare Appellees' inability to directly address the principles set forth in *Gebhard*, 109 U.S. 527 and *In re Board of Directors of Telecom Argentina, S.A.*, 528 F.3d 162 (2d Cir. 2008).

In an unbroken 140-year line of cases,[6] U.S. courts have granted comity and given effect to foreign law governing the distribution to stakeholders of insolvent foreign companies—even over the objections of actual American investors who challenged the application of foreign law to those distributions. *See, e.g.*, *Gebhard*,

---

properly declined to apply Cayman law because it was not "comparable" to U.S. law. This argument misreads *Vitro* and inverts the legal standard. Foreign laws need not be "identical" to U.S. law, "they merely must not be repugnant to our laws and policies." *Vitro*, 701 F.3d at 1044. The District Court erred in conflating "comparable" with "repugnant." *See* Initial Brief at 31–33.

[5] The record reflects that foreign investors made up over 90% of all invested monies in the Feeder Fund, Ltd. *Id.*

[6] *See* Initial Br. at 49–53. Appellees fail to offer a single intervening case that holds otherwise.

109 U.S. at 539 ("[E]very person who deals with a foreign corporation impliedly subjects himself to such laws of the foreign government[.]"); *Telecom Argentina*, 528 F.3d at 171–72 ("Comity is generally appropriate where the foreign proceedings do not violate the laws or public policy of the United States and if the foreign court abides by fundamental standards of procedural fairness.").

In both instances, U.S. courts found nothing inequitable about binding U.S. investors to the foreign laws governing insolvency distributions to which they had voluntarily submitted themselves. To the contrary, the Supreme Court in *Gebhard* admonished those investors, and warned future investors, "to protect [themselves] against all unjust legislation of the foreign government by refusing to deal with its corporations." 109 U.S. at 539. Contrary to Appellees' contention, courts do not exalt subjective notions of equity over the law where, as here, foreign law dictates the outcome at issue.

The Foreign Representatives seek to hold investors to a standard based on the body of law they had reason to expect would apply since the time of their investment in the foreign funds at issue. The investors were free to invest their money anywhere and chose to invest in a Cayman Islands entity governed by Cayman laws. To the extent this approach is unfair, that issue must be taken up with Congress and the Supreme Court. *See* 11 U.S.C. § 1509(b)(3); *Gebhard*, 109 U.S. at 538–39.

B. The District Court Improperly Created Federal Common Law as a Rule of Decision.

Appellees contend that the District Court was justified to engage in common-law making based on a purported grant of authority to the SEC to seek relief pursuant to section 78u(d)(5).[7] This argument rests on the flawed proposition that the Receiver was empowered to act on the SEC's behalf because the SEC requested the appointment of the Receiver *ab initio*, and can bestow its statutory powers and privileges upon the Receiver and deputize him to take action in its name. SEC's Br. at 40–41; Receiver's Br. at 32 n.13.

Appellees' unsupported position fails; a court-appointed receiver does not have the authority to seek relief pursuant to a statute that expressly grants that right only to the SEC. While the SEC has statutory authority to enforce the nation's security laws, *Lucia v. SEC*, 138 S. Ct. 2044, 2049 (2018), the Receiver is neither an Officer of the United States (i.e., subject to the Appointment's Clause), nor an employee of the SEC. By law, the SEC may not delegate its statutory authority to this third party, who is "but the creature of the court," *SEC v. Safety Fin. Serv., Inc.*,

[7] Although the SEC recognizes that the District Court engaged in common-law making, SEC's Br. at 41–42, the Receiver argues that the District Court did *not* so engage, but instead merely "exercised its discretion" to overrule the Foreign Representatives' objection. Receiver's Br. at 48–49. Federal common-law making involves the "judicial 'creation' of a special rule of decision," as opposed to the mere interpretation of a statute, *Atherton v. FDIC*, 519 U.S. 213, 218 (1997)—precisely what the District Court did in creating a rule of decision based on the facts of this case. *See* ECF No. 284 at 22–24.

674 F.2d 368, 373 (5th Cir. 1982), and not an extension of the SEC. *See SEC v. Vuuzle Media Corp.*, No. 21-cv-1226, 2022 U.S. Dist. LEXIS 71451, *13 (D.N.J. Apr. 19, 2022) (recognizing that the SEC does not have "unbridled discretion to delegate its functions"). Indeed, Congress gave the SEC limited authority to delegate its role, which does not include delegation to a Court-appointed Receiver. *See* § 78d-1(a).

Although the SEC may have statutory authority to seek equitable relief from a court in respect of violations of federal securities laws, no cases support the proposition that this authority extends to the powers of a receiver to craft a plan for a foreign entity that the SEC has not accused of any such violations.[8] Appellees' unsupported argument cannot stand up to the principles of international comity developed and reiterated in foreign insolvency proceedings for 140 years and codified in Chapter 15.

Appellees alternatively contend that the District Court had the authority to engage in common-law making under *Rodriguez v. FDIC*, 589 U.S. ___, 140 S. Ct. 713 (2020), based on the mistaken rationale that disputes that implicate our relations with foreign nations are traditionally subjects for federal common law cases. SEC's Br. at 41–42; Receiver's Br. at 48–49. Notably, the District Court rejected this

[8] The Debtor was named only as a relief defendant in the SEC's Enforcement Action. *See* Initial Br. at 2–3.

argument, *see* ECF No. 284 at 22, and neither the SEC nor the Receiver have appealed any portion of the Distribution Order. Nonetheless, there can exist no unique U.S. federal interest in the selection of a distribution scheme for the assets of a foreign debtor in foreign liquidation proceedings with over 90% foreign investors—all of whom agreed to be subject to the laws of a foreign jurisdiction. *See Rodriguez*, 589 U.S. ___, 140 S. Ct. at 717–18 (federal interest in payment of tax refund did not extend to distribution of that refund among members of taxpayer group).

II. CHAPTER 15 MANDATES THAT THE COURT GRANT COMITY TO THE LAWS OF THE CAYMAN ISLANDS GOVERNING DISTRIBUTIONS TO STAKEHOLDERS IN THE FEEDER FUND, LTD.

Subject only to limitations that the bankruptcy court may impose that are consistent with Chapter 15 policies, section 1509(b)(3) mandates the court "grant comity or cooperation to foreign representative" upon recognition. § 1509(b)(3).[9] Notwithstanding the plain language of the statute, Appellees offer a stilted interpretation that would, in effect, redefine "comity," as nothing more than "providing to the foreign representative full access to proceedings in all U.S. courts."

[9] Reading sections 1509(b)(3), 1501, and 1525 together, it is evident that Congress intended for the grant of comity to be mandatory unless such a grant would conflict with goals or policies of Chapter 15, or would be "manifestly contrary" to U.S. public policy under section 1506. *See In re Varig Logistica S.A.*, No. 09-15717-RAM, 2021 Bankr. LEXIS 2992, at *21 (S.D. Fla. Oct. 29, 2021).

Receiver's Br. at 28; SEC's Br. at 18–21. Appellees' argument fails. Where, as here, the plain language of the statute is clear, there is no room for construction. Further, under century-old common law, the meaning of "comity"—acknowledging and respecting the decisions or actions taken by another jurisdiction—is settled, and has never been interpreted so narrowly as to mean only "access to U.S. proceedings."

Confronted with this undeniable truth, Appellees argue that the Foreign Representatives' *objection* to the Distribution Motion would have been more properly filed as a request for *affirmative relief* under one of sections 1507, 1521, or 1522. This argument likewise crumbles, on the faulty assumption that the Foreign Representatives were seeking relief from the District Court. They were not. Rather, in a defensive posture, the Foreign Representatives objected to a distribution plan that was contrary to Cayman law. Having granted recognition of the Cayman proceeding, it was mandatory for the District Court to grant comity by acknowledging and recognizing Cayman law.

A. Comity is a Defined Term That Encompasses Far More Than Mere Access to U.S. Courts.

The "starting point for interpreting a statute is the language of the statute itself." *AIG Baker Sterling Heights, LLC v. Am. Multi-Cinema, Inc.*, 508 F.3d 995, 1000 (11th Cir. 2007) (quoting *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)); *United States v. Fisher*, 6 U.S. 358, 399 (1805) ("Where a law is plain and unambiguous . . . no room is left for construction."). Here, there

is nothing ambiguous about the language of section 1509(b)(3), which makes clear that, upon recognition of a foreign proceeding (and subject only to limitations that are consistent with the policies of Chapter 15), the grant of comity and cooperation to a foreign representative is mandatory. *In re Basis Yield Alpha Fund (Master)*, 381 B.R. 37, 45 (Bankr. S.D.N.Y. 2008); 8 COLLIER ON BANKRUPTCY § 1509.02 ("[A]fter recognition, [a] court must grant comity and cooperation.").

Notwithstanding the plain language, Appellees attempt to inject ambiguity into an otherwise clear statute by arguing that the use of the prepositional phrase "to the foreign representative," indicates that "comity" as used in section 1509(b)(3) warrants a novel definition akin to "access to U.S. courts." Receiver's Br. at 17–28. Otherwise, Appellees contend, Congress would have replaced the phrase "to the foreign representative" with "to the foreign court, foreign court order, or foreign substantive law." Receiver's Br. at 19–20; *see also* SEC Br. at 20, n.4.

Appellees fail to explain, however, how the use of the phrase "to the foreign representative" renders the term "comity" ambiguous. It does not. The foreign representative is the authorized representative of the foreign debtor. 11 U.S.C. § 101(24). By granting comity to a foreign representative, a court acknowledges and recognizes foreign law as may be applicable in the foreign proceeding.

The fundamental problem with the Appellees' proffered interpretation is that it would require the Court to change the text of the statute, replacing "comity" with

"access." To this proposal, "[t]he short answer is that Congress did not write the statute that way." *Russello v. United States*, 464 U.S. 16, 23 (1983) (quoting *United States v. Naftalin*, 441 U.S. 768, 773 (1979)). Had Congress intended to mandate only "access to proceedings in all U.S. courts," it would have done so.[10] *Id.*

Moreover, Appellees' proposed modification fails to account for the term "cooperation." To grant "comity or cooperation," certainly cannot mean only access, as that reading accords no weight to "cooperation." *See Williams v. Taylor*, 529 U.S. 362, 404 (2000) ("[W]e must give effect, if possible, to every clause and word of a statute."). The inclusion of "or cooperation," makes clear that the statute has a broader meaning than advanced by Appellees. *See Vitro*, 701 F.3d at 1047 ("Although use of the word 'comity' connotes recognition of another judicial proceeding, the word 'cooperation' suggests a much broader meaning."). In employing "comity" in section 1509(b)(3) and reinforcing its intent with the reference to "cooperation," there can be no question that Congress intended to invoke the term's well-established meaning.

Even if the Court were persuaded that "comity" as used in section 1509(b)(3) were reasonably susceptible to more than one interpretation, it must be guided by the established meaning of "comity" at common law. *See Taylor v. United States*,

[10] Appellees implicitly admit by failing to address this argument that "access" to court proceedings is set forth in the preceding subsections. *See* §§ 1509(b)(1)–(b)(2).

495 U.S. 575, 592 (1990) ("[A] statutory term is generally presumed to have its common-law meaning."); *Morissette v. United States*, 342 U.S. 246, 263 (1952) ("[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed.").

At common law, "comity" refers to "the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws." *Hilton*, 159 U.S. at 163–64; *see also* Black's Law Dictionary, *Comity* (11th ed. 2019) ("A principle or practice among political entities (as countries, states, or courts of different jurisdictions), whereby legislative, executive, and judicial acts are mutually recognized.").

The common-law definition of "comity" is also consistent with this Court's jurisprudence construing and applying that term. *See e.g.*, *Daewoo Motor Am. v. GMC*, 459 F.3d 1249, 1257–58 (11th Cir. 2006) (affirming grant of comity to a Korean bankruptcy court's approval of a sale of the assets of company and the

treatment of creditor claims under Korean law);[11] *Golden Dawn Corp. v. Neves (In re Neves)*, 783 F. App'x 995, 996 (11th Cir. 2019) (affirming grant of comity in cross-border bankruptcy matter). As invoked in this case, comity is not an empty vessel, but rather a cup that runneth over with 140 years of established jurisprudence upholding the application of foreign law to distribution schemes for foreign companies that are the subject of insolvency proceeding in their home countries.

Accordingly, "comity" must be construed in accordance with its accepted common law meaning, which is consistent with the express purpose underlying Chapter 15—i.e., "cooperation between . . . the courts and other competent authorities of foreign countries involved in cross-border insolvency cases[.]" § 1501(a)(1); *see also* § 1525 ("Consistent with section 1501, the court *shall* cooperate to the maximum extent possible with a foreign court or a foreign representative[.]"); *Vitro*, 701 F.3d at 1053 ("A central tenet of Chapter 15 is the importance of comity in cross-border insolvency proceedings."); *In re Varig Logistica S.A.*, No. 09-15717-RAM, 2021 Bankr. LEXIS 2992, at *21 (S.D. Fla. Oct. 29, 2021) ("[C]onsistent with section 1501, section 1525(a) of the Bankruptcy Code

[11] "In matters concerning bankruptcy the extension of comity enables the assets of a debtor to be dispersed in an equitable, orderly, and systematic manner, rather than in a haphazard, erratic or piecemeal fashion." *Daewoo*, 459 F.3d at 1258 (citation omitted).

requires this Court to cooperate to the maximum extent possible with the foreign court." (citations omitted)).

Appellees further argue that "mandatory comity" would grant foreign representatives "a license to obtain any relief" at all. Receiver's Br. at 16–17. But the Foreign Representatives are not arguing for any such proverbial blank check, and the structure of Chapter 15 safeguards against it. First, recognition itself is a gatekeeper that ensures the foreign proceeding is a collective proceeding and therefore entitled to this muscular version of comity that applies in insolvency. *See* 11 U.S.C. § 101(23); *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.*, 389 B.R. 325, 333 (S.D.N.Y. 2008). Second, section 1509(b) permits courts to limit comity only so long as "consistent with the policy" of chapter 15. *See* §§ 1501(a)(1)–(3). Third, the public policy exception in section 1506 ensures the parties will receive due process and fundamental fairness.

B. There is No Conflict Between Section 1509(b)(3) and Other Provisions of Chapter 15.

Unable to overcome the unambiguous text, Appellees urge the Court to invoke the surplusage canon to interpret section 1509(b)(3) in a manner that is contrary to that text. Specifically, the Receiver contends that the plain meaning of "comity" must be disregarded because it would undermine the discretion afforded to courts to grant appropriate relief, rendering sections 1521 to 1524 meaningless. Receiver's

Br. at 24–28. This argument fails for three reasons, each sufficient in its own right to overcome Appellees' argument.

First, because section 1509(b)(3) is unambiguous, the surplusage canon is inapplicable. *See Barton v. U.S. Attorney General*, 904 F.3d 1294, 1301 (11th Cir. 2018) (quoting *Lamie v. U.S. Trustee*, 540 U.S. 526, 536 (2004)) ("'[A]pplying the rule against surplusage is, absent other indications, inappropriate' when it would make an otherwise unambiguous statute ambiguous."). Although canons of statutory interpretation are "quite often useful in close cases, or when statutory language is ambiguous," they are not "a license for the judiciary to rewrite language enacted by the legislature." *United States v. Monsanto*, 491 U.S. 600, 611 (1989) (quoting *United States v. Albertini*, 472 U.S. 675, 680 (1985)).

Second, and in any event, there is no surplusage. *See Barton*, 904 F.3d at 1301. Appellees fail to show how mandatory comity, as required by section 1509(b)(3), "negates" the court's discretion to grant "additional assistance," § 1507, or "any appropriate relief." § 1521. To the contrary, the facts of this case illustrate that section 1509(b)(3) is not inimical to these "relief" sections: as set forth in more detail below, the Foreign Representatives did not request affirmative relief or additional assistance, and, as a result, the analysis set forth in sections 1507, 1521,

and 1522 is inapposite and no conflict exists.[12] In this case, comity—to which the Foreign Representatives are entitled under the clear mandatory language of section 1509(b)(3)—is not accompanied by a request for appropriate relief or additional assistance. Where such request is made, that section stands side-by-side with sections 1521 and 1507, which govern the right to such relief or assistance and hardly are mere statutory surplusage.

Third, Appellees' proposed interpretation fails to resolve any perceived surplusage, because that canon applies "only where a competing interpretation gives effect to every clause and word of a statute." *Microsoft Corp. v. i4i Ltd. P'ship*, 564 U.S. 91, 106 (2011) (internal quotation and citation omitted). Appellees' interpretation of comity—"access to proceedings in all U.S. courts"—necessarily fails because it does not give effect to "comity" and instead ascribes comity the same meaning (access) addressed in the preceding subsections. *See* §§ 1509(b)(1)–(b)(2).

[12] Moreover, to the extent that there may be a conflict under the unique facts of some future case (none of which have been articulated by Appellees), it does not amount to surplusage. *See United States v. Garcon*, 54 F.4th 1274 (11th Cir. 2022) (en banc) (rejecting argument that interpretation resulted in surplusage where there were "at least two circumstances" in which the interpretation did not render the competing provision superfluous).

C. As the Foreign Representatives Did Not Request Affirmative Relief From the District Court, Sections 1507, 1521, and 1522 are Inapplicable.

Appellees next attempt to pigeon-hole the Foreign Representatives into section 1521, contending without reference to any legal authority that the "argument that Cayman law governs the merits of the Receiver's Distribution Plan as a matter of international comity" is a "right to relief" that must be pursued under Section 1521. Receiver's Br. at 19. Appellees' argument is factually and legally incorrect. To be clear, the Foreign Representatives did not request any form of "appropriate" relief under section 1521 (nor "additional assistance" under section 1507), and the District Court did not consider their objections under those sections. Instead, adopting a purely defensive posture, the Foreign Representatives objected to the Receiver's proposed Distribution Plan on the basis that it violated principles of international comity that govern cross-border insolvency proceedings and are hard-wired into Chapter 15, and require that a distribution to stakeholders in a Cayman Islands company that is in liquidation in the Cayman Islands be governed by Cayman Islands law.

However convenient it may be for Appellees to saddle the Foreign Representatives with a burden that the law does not place upon them, nothing about the objection to the Receiver's proposed plan can be construed as a request for affirmative relief or additional assistance in a Chapter 15 case. *See, e.g.*, *In re*

Empire Coal Sales Corp., 45 F. Supp. 974, 976 (S.D.N.Y.), *aff'd sub nom. Kleid v. Ruthbell Coal Co.*, 131 F.2d 372 (2d Cir. 1942) ("The objection is merely an 'objection,' a defense; no affirmative relief is asked for."). Only where such relief or additional assistance is sought—and not in the circumstances presented here—would sections 1521, 1522, and/or 1507 have any bearing on the outcome. For this same reason, Appellees' reference to and reliance on case law analyzing requests for relief under section 1521 are unpersuasive and inapposite. *See* Receiver's Br. at 23–24 (collecting citations).

For example, in *Cozumel Caribe*, following recognition, the foreign representative sought an order staying a related adversary proceeding on the grounds of international comity, 482 B.R. at 99, contending that the court lacked discretion to deny his request because comity was mandatory under section 1509(b)(3). The court determined that subsection (b)(3) was not a self-executing provision for relief and could not be employed to limit a court's discretion to grant affirmative relief. Under those circumstances, the court said, although section 1509(b) "mandates courtesy and respect for the foreign proceeding, . . . [t]he foreign representative must still make a case that the relief it seeks is warranted." *Id.* at 109. Not only did the court acknowledge the mandatory nature of comity or cooperation, it made clear that "discretionary relief" consisted of affirmative relief under sections 1507, 1521, and 1522. *Id.* at 110.

In each of the cases upon which the Receiver relies, the foreign representatives sought affirmative relief and/or additional assistance under sections 1521 or 1507. In this case, it is *the Receiver* who sought relief from the District Court, requesting approval of his proposed Distribution Plan that violated the laws of the Cayman Islands and principles of international comity that are long-recognized and well-established in respect of foreign distribution schemes. To rely on the cases cited by the Receiver would reverse the positions of the parties—as if the Foreign Representatives were the ones seeking affirmative relief by proposing a distribution plan, which they most certainly did not.[13]

As a party in interest under the Intervention Order, ECF No. 147, the Foreign Representatives had the right to appear and be heard on any issue in the Receivership Case. Here, they exercised that right to object on principles of international comity to the affirmative relief sought by the Receiver —not to seek any relief of their own. Accordingly, sections 1507, 1521, or 1522 have absolutely no bearing on the outcome of this appeal; it is the legality and appropriateness of the *relief sought by the Receiver*—not any relief or additional assistance to the Foreign

[13] The orders issued by the District Court from the earliest stages of the Receivership Case make clear that only the Receiver has the authority to propose a distribution plan. *See* Appointment Order (ECF No. 5, No. 20-21964) at ¶¶ 6–7, 46; Recognition Order (ECF No. 8, No. 21-21905) at ¶¶ I, 8.

Representatives—that must be analyzed under applicable law and international comity under U.S. case law and the statutory dictates of Chapter 15.

The Receiver implicitly admits that his reliance on the affirmative relief cases is misplaced here, stating that "federal courts regularly have recognized a foreign proceeding and then, *in the context of relief or assistance sought by granted to* [(sic)] *the foreign representative*, have decided whether U.S. or foreign law applies." Receiver's Br. at 23 (emphasis added). *This case does not arise in that context.*

Nevertheless, the choice of law issue is exactly what Appellants present here: after first granting comity under section 1509(b)(3), the Court then should proceed to follow 140 years of unbroken U.S. case law since *Gebhard* that provides for distributions to stakeholders of a foreign company that is the subject of an insolvency proceeding in its country of organization to be made in accordance with the insolvency laws of that country. That is what these U.S. choice of law cases require, and neither the SEC nor the Receiver offers a single receivership or other case in which a U.S. court approved a distribution to such stakeholders under U.S. law or principles of equity over the objection of the foreign company or its fiduciaries appointed in the foreign insolvency proceeding to oversee or administer that proceeding.

D. The Statutory Interpretation Argument was Not Waived.

Given the Receiver's inability to deal effectively with the plain language and meaning of 1509(b)(3), he turns next to the flawed contention that the statutory interpretation argument was waived as not raised in the District Court. The Receiver's waiver argument is confounding (and untrue) for at least three reasons. First, the Foreign Representatives raised the argument before the District Court, in the body (rather than merely footnotes, as the Receiver alleges) of various filings. *See* ECF No. 240 at 12 (initial objection); ECF No. 268 at 5. Second, the District Court understood the argument to be part of the Foreign Representatives' position. ECF No. 284 at 16 (recognizing that the JOLs had "stress[ed] that under Chapter 15 of the Bankruptcy Code, 'a court in the United States shall grant comity or cooperation to the foreign representative' of a foreign proceeding that has been formally recognized" (quoting Objection ¶ 26)). Third, the District Court itself interpreted section 1509(b)(3) and based its ruling on that interpretation. Accordingly, the Foreign Representatives have every right to present this issue on appeal.

III. THE STIPULATED RECOGNITION OF THE CAYMAN ISLANDS LIQUIDATION PROCEEDING AS A FOREIGN NONMAIN PROCEEDING IS OF NO LEGAL SIGNIFICANCE.

The District Court's recognition of the Cayman Islands proceeding as a foreign nonmain proceeding rather than a foreign main proceeding is of no legal

significance in this case. Despite the agreement between the Foreign Representatives and the Receiver that the distinction would be irrelevant to any later disputes, and the clear language of the Recognition Order adopting that agreement, Appellees continue to force this narrative in yet another attempt to misdirect the Court's attention.

The District Court granted foreign nonmain recognition of the Cayman liquidation proceeding following a stipulation by the parties that was offered "in a mutual, cooperative effort to preserve and enhance the Debtor's receivership estate, and to avoid wasteful and expensive litigation over disputed issues"—specifically, the location of the Debtor's center of main interests ("COMI"). Recognition Order (ECF No. 8, No. 21-21905) at ¶ 12. As referenced in Chapter 15, the distinction between foreign main and foreign nonmain proceedings turns upon whether the debtor's COMI is in the jurisdiction where the foreign proceeding is pending.

There is a statutory presumption that the country of organization is the COMI, *see* 11 U.S.C. §§ 1502(4), 1516(c), subject to other factors that can affect that determination, as acknowledged in the Recognition Order. As the statutory presumption here is that the Debtor's COMI was the Cayman Islands, it would have been the Receiver's burden to come forward with "evidence to the contrary" to rebut that presumption. *Id.* The agreement of the parties to avoid costly and inefficient litigation over this issue and stipulate to foreign nonmain recognition relieved the

Receiver of that burden, on the express agreement and condition that the grant of foreign nonmain recognition would not be used to advance or limit the rights of either party or applicability of established principles of comity. *See* Recognition Order (ECF No. 8, No. 21-21905) at ¶ 12.[14]

The Receiver's effort to weaponize a feature of the Recognition Order *from which he benefited* is both troubling and contrary to the express language of the Recognition Order. That language is unequivocal, and Appellees' argument flies directly in its face. That the District Court ignored this language in the Distribution Order, drawing a false distinction based on the grant of foreign nonmain, rather than foreign main, recognition, was error in itself. *See* ECF No. 284 at 18–19.

Moreover, the predicate clause to 1509(b) refers only to a "grant [of] recognition under section 1517," without distinction between foreign main and foreign nonmain recognition, and thus eliminates any support for the artificial

[14] Specifically, the Recognition Order states, "nothing contained in the Stipulated Motion, nor in the grant of foreign nonmain recognition as provided in this Order (i) shall constitute a finding or adjudication on the issues of 'COMI' or 'establishment' in this case or any other case . . . ; (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 . . . ; 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.*" *Id.* (emphasis added).

dichotomy Appellees seek to draw. [15] Under both the Recognition Order and plain language of section 1509(b), the grant of foreign nonmain rather than foreign main recognition has no legal significance in this case.

CONCLUSION

For the foregoing reasons, Appellants respectfully request that this Court reverse the District Court's Order and remand for further proceedings consistent with the arguments articulated and authorities relied upon throughout their briefing on appeal.

Respectfully submitted this 28th day of July, 2023.

BAKER & McKENZIE LLP
Attorneys for the Appellants
Sabadell Financial Center
1111 Brickell Ave., 10th Floor
Miami, Florida 33131
Telephone: (305) 789-8900
Facsimile: (305) 789-8953

By: */s/ Mark D. Bloom*
Mark D. Bloom (Fla. Bar No. 303836)
John R. Dodd (Fla. Bar No. 38091)
Email: mark.bloom@bakermckenzie.com
john.dodd@bakermckenzie.com

[15] Even where a foreign representative does seek affirmative relief from the court under section 1521, recognition is recognition, and the scope of available relief is the same in either circumstance. *See In re Modern Land (China) Co., Ltd.*, 641 B.R. 768, 784 (Bankr. S.D.N.Y. 2022).

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT, TYPEFACE, AND TYPE-STYLE REQUIREMENTS

I certify that this document complies with the word limit of Fed. R. App. P. 32(a)(7)(B)(i) and 11th Cir. R. because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 6,492 words. This document also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6).

/s/ Mark D. Bloom
Mark D. Bloom

CERTIFICATE OF SERVICE

I certify that on July 28, 2023, I electronically filed the foregoing document with the Clerk of Court using CM/ECF, and entered the required information on the web-based CIP system on the Court's website. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

/s/ Mark D. Bloom
Mark D. Bloom