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Filed	Document Description	Page	Docket Text
12/13/2022	Appellants' Principal Brief (Corrected)	2	[10962109] Appellant/Petitioner's brief filed by Oleg Bakhmatyuk in 22−8063, Nicholas Piazza, SP Capital Management LLC, TNA Corporate Solutions LLC and Oleksandr Yaremenko in 22−8050. Served on 12/13/2022 by email. Oral argument requested? Yes. Word/page count: 10239. This pleading complies with all required privacy and virus certifications: Yes. [22−8063, 22−8050] CMJ
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Nos. 22-8063 and 22-8050

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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

Plaintiff-Appellees,

v.

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

Defendant-Appellants.

On appeal from the U.S. District Court for the District of Wyoming
Honorable Nancy D. Freudenthal
No. 21-CV-223-F

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Prior or Related Appeals

Pursuant to 10th Cir. R. 28.2(C)(3), Appellants state that there are no prior or related appeals other than the two that have been consolidated in this matter.

GLOSSARY

Pursuant to 10th Cir. R. 28.2(C)(4), Appellants provide the following Glossary:

	Description and Appendix Reference
Arbitration agreements	Provisions committing parties to arbitration included in: AVG notes (App'x Vol. VI, p. 1397 § 20.2); AVG trust deed (App'x Vol. V, p. 1353 § 29.1); ULF notes (App'x Vol. VI, p. 1544–1545 § 19.2.1); ULF trust deed (App'x Vol. VI, p. 1483 § 23.2.1)
AVG	Avangardco IPL, a Ukrainian company that produces eggs and egg products
AVG notes	Unsecured debt instrument notes issued by AVG in 2010 on London Stock Exchange, included in AVG trust deed
AVG prospectus	AVG prospectus dated October 27, 2010 (App'x Vol. IV, p. 878–Vol. V p. 1311)
AVG subscription agreement	AVG subscription agreement dated October 27, 2010 (App'x Vol. II, p. 290–322)
AVG trust deed	AVG trust deed dated October 29, 2010 (App'x Vol. V, p. 1321–Vol VI, p. 1434)
LCIA	London Court of International Arbitration
Noteholders	Holders of AVG notes or ULF notes
Notes	The AVG notes and the ULF notes
Relationship agreement	Relationship agreement between AVG and Oleg Bakhmatyuk dated April 30, 2010 (App'x Vol. XIII, pp. 3229–3240)
TNA	TNA Corporate Solutions, LLC, a Wyoming limited liability company
ULF	UkrLandFarming PLC, a Ukrainian company that produces grain, eggs, milk, and meat for human and animal consumption

ULF notes	Unsecured debt instrument notes issued by ULF in 2013 on Irish Stock Exchange, included in ULF trust deed
ULF prospectus	ULF prospectus dated June 28, 2013 (App'x Vol. II, pp. 359–Vol. IV, p. 846)
ULF subscription agreement	ULF subscription agreement dated May 16, 2013 (App'x Vol. I, pp. 213–282)
ULF trust deed	ULF trust deed dated March 26, 2013 (App'x Vol. VI, pp. 1451–1592)
Piazza Motion	MOTION to Dismiss Case, filed by Defendants Nicholas Piazza, SP Capital Management LLC, TNA Corporate Solutions LLC, Oleksandr Yaremenko and MEMORANDUM in Support of Motion to Dismiss Case filed by Defendants Nicholas Piazza, SP Capital Management LLC, TNA Corporate Solutions LLC, Oleksandr Yaremenko dated February 7, 2022 (App'x Vol. I, pp. 130 – 195)
Piazza Order	ORDER by the Senior District Judge Nancy D. Freudenthal granting in part and denying in part Motion to Dismiss Case dated July 7, 2022 (App'x Vol. XIII, pp. 3149–3189)
Bakhmatyuk Motion	MOTION to Dismiss Plaintiffs' Complaint filed by Defendant Oleg Bakhmatyuk and MEMORANDUM in Support of Motion to Dismiss filed by Defendant Oleg Bakhmatyuk dated July 15, 2022 (App'x Vol. XIII, pp. 3190–3226)
Bakhmatyuk Order	ORDER by the Senior District Judge Nancy D. Freudenthal denying Motion to Dismiss dated September 15, 2022 (App'x Vol. XIV, pp. 3513–3564)

JURISDICTIONAL STATEMENT

The district court had original jurisdiction under 28 U.S.C. § 1332 because the action exceeds the value of $75,000 and is between citizens of different States and of a foreign state. The district court also had original jurisdiction under 28 U.S.C. § 1331 because the action arises under the Constitution, laws, or treaties of the United States—namely, 18 U.S.C. § 1962.

This Court has jurisdiction under 9 U.S.C. § 16. Under the Federal Arbitration Act ("FAA"), a party may take an interlocutory appeal from "an order . . . refusing a stay of any action under section 3 of this title . . . ." 9 U.S.C. § 16(a)(1)(A). The FAA's mandate is clear: "[A]ny litigant who asks for a stay under § 3 is entitled to an immediate appeal from the denial of that motion . . . ." *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 627 (2009). The district court agreed, holding that Appellants "expressly argued for a stay under section 3 of the FAA." *See* App'x Vol. XIV, p. 3514.

The appeal is timely. As to Case No. 22-8050, the district court entered the order being appealed on July 7, 2022. Appellants' notice of appeal was filed on August 2, 2022. Vol. XIV, pp. 3513–3564. As to

Case No. 22-8063, the district court entered the order being appealed on September 15, 2022. Appellants' notice of appeal was filed on September 23, 2022. *Id*. at pp. 3565–3567.

STATEMENT OF THE ISSUES

i. Whether the Appellants are parties to the notes and trust deeds and can enforce their arbitration provisions against Appellees, who are parties to the notes and trust deeds, on that basis.

ii. Whether Appellees are equitably estopped from avoiding the arbitration provisions in the notes or trust deeds.

INTRODUCTION

Appellees are unsecured creditors hoping to cut the line ahead of secured creditors to recover on debt notes for two major Ukrainian agricultural companies, Avangardco IPL ("AVG") and UkrLandFarming PLC ("ULF"), that they purchased at an extreme discount. To do so, Appellees, sophisticated "vulture" investors, cast a claim that the companies breached their contractual obligations to all noteholders as a RICO case in an effort to avoid the arbitration agreements[1] in the investment terms. Unfortunately, the district court went along with their attempt, committing reversible errors in denying Appellants' motions to dismiss or stay the action based on the arbitration agreements.

AVG and ULF issued the unsecured notes that are the subject of this dispute on the London and Irish Stock Exchanges to raise capital in 2010 and 2013, respectively. Following Russia's 2014 invasion of Eastern Ukraine and devaluation of Ukrainian currency, AVG and ULF

[1] Arbitration agreements as used herein refers to the provisions committing parties to arbitration included in the AVG notes (App'x Vol. VI, p. 1397 § 20.2); AVG trust deed (App'x Vol. V, p. 1353 § 29.1); ULF notes (App'x Vol. VI, pp. 1544–1545 § 19.2.1); ULF trust deed (App'x Vol. VI, p. 1483 § 23.2.1).

lost almost half of their business assets and value. Appellees purchased unsecured notes in AVG and ULF both before and after this international crisis. As alleged in the complaint, Appellees have been negotiating with AVG and ULF to restructure the notes since 2015 due to the changed circumstances. The restructuring attempts have been unsuccessful.

The AVG notes and the ULF notes explicitly state that noteholders are bound by the terms of the notes—each of which contains a broad arbitration clause and incorporates the rules of the London Court of International Arbitration ("LCIA"), which provide that the arbitrator will decide issues about the scope of arbitrability. App'x Vol. VI, p. 1512; App'x Vol. V, p. 1363; App'x Vol. VI, pp. 1544–1545 § 19.2.1 (ULF notes arbitration clause stating "any dispute arising out of or in connection with the Notes, the Trust Deed, the Surety Deed and these Conditions . . . shall be referred to and finally resolved by arbitration under the LCIA Arbitration Rules[.]"); App'x Vol. VI, p. 1397 § 20 (AVG notes arbitration clause stating similar). The notes also explicitly bind noteholders to associated trust deeds, which are lengthy contractual documents that set out the terms and conditions of the

notes in more detail. Each of the AVG and ULF trust deeds also contains a broad arbitration clause and delegation provision through the incorporation of LCIA rules. App'x Vol. VI, p. 1397 § 20.2; *id.* at pp. 1544–1545 § 19.2.1.

Now, Appellees have chosen to pursue RICO litigation against the companies' majority shareholder, Oleg Bahkmatyuk, and other investors in the AVG and ULF in Wyoming for treble damages rather than arbitrate as required at the LCIA. Appellees' 105-page complaint offers a complex story of international transactions, multinational companies, and actors in various jurisdictions all over the world—all to distract from the plain reality that Appellees' claim is that AVG and ULF breached the trust deeds. While Appellants deny the allegations, the critical point in this posture is that this dispute belongs in arbitration, not federal district court in Wyoming.

The obvious and foundational element of arbitration is that it is rooted in consent to arbitrate. Here, the language of the arbitration agreements and underlying circumstances leave no doubt that the intent was a broad consent to arbitrate any and all disputes relating to the notes. The district court erred in its analysis in two ways: first, by

failing to recognize that all parties are bound to the arbitration agreements and, second, by improperly diverting to English law in order to avoid compelling arbitration through the principle of equitable estoppel. The district court's first error directly contradicts allegations within the complaint that leave no doubt that Appellants are noteholders and thus parties to, and bound by, the arbitration agreements. Moreover, Bakhmatyuk is a party to the trust deeds by way of being defined as a "Related Party" and several other direct references throughout the governing documents. Notwithstanding this error, the district court still should have compelled arbitration under federal or Wyoming law of equitable estoppel. Instead, the district court inexplicably turned to English law and interpreted it wrongly by adopting the out-of-court testimony of Appellee's expert. In doing so, the district court frustrated recent Supreme Court precedent, the federal policy in favor of arbitration, and need for uniform standards in United States treaty obligations.

The district court's contract interpretation and legal analysis are incorrect and its decisions must be reversed.

STATEMENT OF THE CASE

I. Background of the Parties, Notes, and Governing Documents

Appellees Gramercy Distressed Opportunity Fund II, L.P., Gramercy Distressed Opportunity Fund III, L.P., Gramercy Distressed Opportunity Fund III-A, L.P., Gramercy Funds Management LLC, Gramercy EM Credit Total Return Fund, and Roehampton Partners, LLC (collectively, "Gramercy" or "Appellees") are investment funds organized in the Cayman Islands that specialize in distressed assets in emerging markets. App'x Vol. I, p. 35 ¶ 14.

The Piazza Appellants, or Piazza Defendants as they were referred to below, are two business associates, Nicholas Piazza and Oleksandr Yaremenko, and two corporate entities, SP Capital Management and TNA Corporate Solutions, LLC, with shared ownership or management.

Appellant Piazza is a Wyoming resident and businessman who offers financial and consulting services to Ukrainian and Eastern European businesses. *Id.* at pp. 30, 36 ¶¶ 8, 17. Piazza and Appellant Yaremenko together "operate[] a number of companies … under the umbrella of [Appellant] SP Capital [Management LLC]" ("SP Capital").

Id. at p. 36 ¶ 17. While the complaint names only SP Capital, it refers throughout to SP Advisors, which it defines as "[]SP Capital[] . . . together with its subsidiaries." *Id.* at p. 28. Additionally, the complaint alleges that SP Advisors is "the registered trade name of SP Capital [that] also refers to the group of SP Capital subsidiaries through which it operates." *Id.* at pp. 36–37 ¶ 17. Specifically, Appellees allege that Piazza and Yaremenko formed at least seven "SP entities under the umbrella of SP Capital, which registered the trade name SP Advisors." *Id.* at pp. 37–38 ¶ 19. Throughout the complaint, Appellees make allegations as to "SP Advisors." Based on the varying definitions offered in the complaint, these allegations either refer to SP Capital or include SP Capital and any subsidiaries.

Appellees also allege that Piazza owns and manages Appellant TNA Corporate Solutions, LLC ("TNA"),a Wyoming LLC, with Yaremenko. *Id.* at p. 38 ¶ 20.

Appellees and Piazza Appellants are investors in assets of two Ukrainian companies, AVG and ULF. Appellant Oleg Bakhmatyuk founded AVG and ULF in the 2000s. *Id.* at pp. 38–39 ¶¶ 21–22. AVG produces eggs and egg products, and ULF produces grain, eggs, milk,

and meat for human and animal consumption. *Id.* at pp. 38–39 ¶¶ 21–22. AVG and ULF both sought capital in international financial markets through notes issued in London in 2010 for AVG and in Ireland in 2013 for ULF. *Id.* at pp. 44–49 ¶¶ 45–50. Appellees purchased AVG and ULF notes in the open market starting in 2011. *Id.* at p. 45, 47 ¶¶ 46, 48. Appellees received prospectuses associated with their purchases disclosing, among other things, various risks associated with these investments, including the existence of senior debt secured by company assets, App'x Vol. II, p. 423; App'x Vol. III, p. 608; App'x Vol. IV, pp. 860, 899, 930, 1092; that Ukrainian courts do not enforce foreign court judgments but do enforce arbitration decisions, App'x Vol. II, pp. 364–65; App'x Vol. IV, pp. 885–86; other risks inherent in investing in the notes, App'x Vol. II, pp. 414–19; App'x Vol. IV, pp. 921, 923–24; and risks associated with doing business in Ukraine in light of the potential threat of Russian aggression. App'x Vol. IV, p. 923; App'x Vol. II, p. 414. Indeed, these latter risks materialized when Russia invaded Crimea and other regions of Ukraine in 2014, causing AVG and ULF to experience collapsing commodity prices and disrupted operations. App'x Vol. I, pp. 28, 49–51 ¶¶ 2, 51, 53–54. In the face of such risks,

Appellees continued to purchase AVG and ULF notes well beyond 2014 and through 2017. *Id.* at pp. 45–49 ¶¶ 46–49.

In purchasing the notes, Appellees agreed to the terms set forth in the notes, the trust deeds, and various other documents governing the transactions, including: an agency agreement, relationship agreement, subscription agreement, and surety deeds. The notes themselves specifically state that noteholders are "entitled to the benefit of, are bound by, and are deemed to have notice of, all the provisions of the Trust Deed and the Surety Deed and are deemed to have notice of those provisions of the Agency Agreement applicable to them." App'x Vol. VI, p. 1512. All of these governing documents contain arbitration clauses.

In particular, the AVG note contains an arbitration clause stating that "[a]ny dispute arising out of or connected with the Notes, the Trust Deed or the Surety Agreement, … shall be resolved" by LCIA arbitration. App'x Vol. VI, p. 1397 § 20.2.[2] The AVG trust deed commits the parties to arbitration before the LCIA for "[a]ny dispute arising out of or connected with these presents[.]" App'x Vol. V, p. 1353

[2] The AVG trust deed reproduces the full form language of the AVG notes at Schedule 2.

§ 29.1.[3]

Similarly, the ULF note states that "any dispute arising out of or in connection with the Notes, the Trust Deed, the Surety Deed and these Conditions (including a dispute regarding the existence, validity or termination hereof or thereof and a dispute relating to non-contractual obligations arising out of or in connection herewith or therewith)" shall be referred to arbitration before the LCIA. App'x Vol. VI, p. 1544 § 19.2.1.[4] The ULF trust deed's arbitration clause requires arbitration before the LCIA for "any dispute arising out of or in connection with this Trust Deed … and a dispute relating to non-contractual obligations arising out of or in connection with this Trust Deed." *Id.* at p. 1483 § 23.2.1.[5] These arbitration agreements explicitly apply to non-contractual claims. In addition, the ULF trust deed

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[3] The arbitration clause in the AVG trust deed differs from the clause in the note only in referring to "these presents" (in the trust deed) or "the Notes, the Trust Deed or the Surety Agreement" (in the note at Schedule 2).

[4] The ULF trust deed reproduces the full form language of the ULF notes at Schedule 5.

[5] The arbitration clause in the ULF trust deed differs from the clause in the ULF note only in referring to "the Trust Deed" (in the ULF trust deed) or "the Notes, the Trust Deed or the Surety Agreement" (in the ULF note at Schedule 5).

provides no alternative forums, necessarily requiring arbitration.

In addition to the notes and trust deeds, Appellees are also parties to subscription agreements for the AVG and ULF notes that also provide for LCIA arbitration of disputes "arising out of or connected with" the agreements. App'x Vol. II, p. 313 §18.2; *see also* App'x Vol. I, p. 246 § 22.2(a). Bakhmatyuk is also party to a relationship agreement with AVG. App'x Vol XIII, p. 3229–40. The relationship agreement is explicitly referenced and incorporated into both the AVG and ULF prospectuses. App'x Vol. III, p. 582–85; App'x Vol. IV, pp. 896, 1073–77. Among other things, the relationship agreement serves to ensure to investors that Bakhmatyuk does not improperly deal with AVG, including by restricting the terms on which Bakhmatyuk can transact with AVG and affiliates. App'x Vol. XIII, pp. 3236–37 § 2.1. Like the subscription agreements and trust deeds, the relationship agreement has a provision requiring arbitration before the LCIA. App'x Vol. XIII, p. 3239 § 7.

In sum, *all* of the governance documents—the notes, the trust deed, the subscription agreements, and the relationship agreement—provide for arbitration.

II. Procedural History

A. Appellees' complaint

Appellees filed this case on December 7, 2021 in the District of Wyoming alleging violations of the Racketeer Influenced and Corrupt Organizations ("RICO") Act and state law claims for tortious interference with contract, civil conspiracy, and aiding and abetting (against different combinations of Appellants). The complaint, which totals 226 paragraphs and 102 pages, is replete with salacious language, including describing Bakhmatyuk as an "oligarch," "agriculture tycoon[]," and "'former' billionaire." App'x Vol. I, pp. 28–29, 36 ¶¶ 1, 3, 16.

The complaint tells the story of an unrelated Ukrainian company, Mriya, as a "cautionary tale" that spurred Appellants, including Bakhmatyuk, to engage in an intricate, multi-year scheme—all to avoid engaging in a debt restructuring process with Appellees. *Id.* at pp. 51–52 ¶ 56; *see also, e.g.*, *id.* at pp. 28–29, 56–57, 59 ¶¶ 2–3, 71, 76. Appellees allege "on information and belief," that Piazza convinced former colleagues at Concorde Capital, a Ukrainian investment company providing brokerage and investment banking services, to falsely disseminate negative information about AVG and ULF's

performance. *Id.* at pp. 39, 57, 103, 104 ¶¶ 23, 72, 178(1), 178(3). Appellees claim that Bakhmatyuk directed Piazza and others to purchase AVG and ULF notes for Bakhmatyuk to either reacquire or control through the purchasers. *Id.* at pp. 32–33 ¶ 10(b).

Specifically, Appellants allege that Piazza purchased AVG and ULF debt, including from Ashmore and Ukrsibank. *Id.* at pp. 32–33, 65, 71–72, 118–19, 121 ¶¶ 10(b), 93, 109, 112, 208(3), 208(5), 209(3). Ultimately, Appellees' core allegation is that Appellants violated the terms of the AVG and ULF notes and trust deeds by purportedly transferring AVG and ULF assets to the Cypriot entity Maltofex and to Appellant TNA, "fail[ing] to follow the terms of the asset sale restrictions ***in the Trust Deeds***" and without "giv[ing] notice to the Trustee of [these] affiliate transactions, ***as required under the Trust Deeds***." *Id.* at p. 79–80 ¶ 127; *see also id.* at p. 50 ¶ 124. This is the central theme of the complaint. *See, e.g.*, *id.* at p. 86 ¶ 145 ("[T]he Company did not disclose the change to the Trustee under the Notes or the Noteholders, ***despite being required to do so by the Trust Deeds***"); *id.* p. 86 ¶ 146 ("***[T]he terms of the Trust Deeds require*** the Company to report material dispositions or restructurings promptly and

to give notice of affiliate transactions over $5 million, but ULF never provided such a report about either the Maltofex or TNA Transfers") (emphases added to all). The complaint also alleges that Piazza purchased senior, secured debt for which the allegedly transferred assets are security. *Id.* at pp. 66, 87–88 ¶¶ 96, 150 (alleging that PS Capital and Piazza purchased Sberbank's debt).

Based on these allegations, Appellees assert three claims under RICO, including two claims against all Appellants under sections 1962(c) and (d) and one against Bakhmatyuk under section 1962(b). Appellees additionally assert common law claims for fraud against Bakhmatyuk and Piazza, tortious interference with contract against all Appellants except Yaremenko, and civil conspiracy and aiding and abetting against all Appellants.

B. Piazza Appellants' Motions to Dismiss

Appellants Piazza, Yaremenko, SP Capital, and TNA (the "Piazza Appellants") filed a motion to dismiss or alternatively stay the case pending arbitration (the "Piazza Motion") under the AVG and ULF notes and trust deeds. App'x Vol. I, p. 193. The Piazza Appellants asked that the district court permit them to enforce the arbitration

clauses by virtue of their status as noteholders or because Appellees are equitably estopped from avoiding their arbitration obligation.

First, the Piazza Appellants noted that Appellees argued in their complaint and opposition that certain Piazza Appellees were in fact AVG and ULF noteholders. App'x Vol. XII, p. 3007. As Piazza Appellants stated, accepting these allegations as true, SP Advisors, which, by the complaint's definitions, is either the same thing as or includes the Appellant SP Capital, "has the same rights and obligations under the Trust Deeds as Gramercy regarding the arbitration provisions." *Id.* at p. 3007.

Second, the Piazza Appellants argued that equitable estoppel prevents Appellees from avoiding the arbitration clauses because their claims are "so intertwined" with the terms of the AVG and ULF trust deeds "predicated upon the[ir] existence and validity." App'x Vol. I, p. 159.

In addition to the arbitration arguments, the Piazza Appellants also argued that (1) Appellees had not complied with the no-action clauses of the trust deeds requiring noteholders to petition the Trustee to bring an action on behalf of all noteholders before asserting claims

individually; (2) AVG and ULF were indispensable parties that could not be joined and their absence could subject them or the Appellants to inconsistent obligations; and (3) the district court should dismiss under *forum non conveniens*, since virtually all of the alleged facts relate to matters in Europe, the United Kingdom, and Ukraine; all of the witnesses and relevant documents are located in Ukraine and London; English law governs the trust deeds; Ukraine will *not enforce* judgments by a U.S. court but *will* enforce arbitral awards; and the LCIA is an adequate alternative forum. *See generally id*. at pp. 135–39.

The motion also argued that Gramercy's claims fail for a host of reasons, including that the RICO statute does not apply extraterritorially to the alleged conduct, and securities-related claims, like the allegations here, do not give rise to RICO claims, among others. *Id*. at pp. 177–89.

C. The District Court's Order on the Piazza Motion

The district court issued an order denying the motion (the "Piazza Order"), holding that Appellees were not signatories to the trust deeds and distinguishing the Piazza Appellants' equitable estoppel case law on that basis. App'x Vol. XIII, p. 3166. The court concluded that there

was no support for the argument that equitable estoppel would allow enforcement of the arbitration clause against a non-signatory plaintiff. *Id.* at pp. 3164–66. Based on that conclusion, the district court declined to address whether English, state, or federal law governed whether Appellees were equitably estopped from avoiding the agreement to arbitrate all disputes relating to the notes. *Id.* ("It is unnecessary for the Court to decide whether English or domestic law applies to [the issue of equitable estoppel] . . . . Nor does the present motion give any reason for the Court to conclude that English or Wyoming (or other domestic) law would extend equitable estoppel to compel a nonsignatory plaintiff to arbitrate in this case.").

Notably, the district court declined to consider the subscription agreements and prospectuses. *Id.* at pp. 3158–59 n.4. Although Appellees never objected to the district court's consideration of these documents, the district court ignored the fact that the notes, trust deeds, subscription agreements, and prospectuses, taken together, comprise the deal between the noteholders and AVG and ULF. *Id.* ("Defendants also argue that subscription agreements and Prospectuses govern the AVG and ULF Notes . . . Gramercy does not directly address

this point. The complaint does not appear to mention subscription agreements or Prospectuses.")

D. Appellant Bakhmatyuk's Motion to Dismiss

Bakhmatyuk, a Ukrainian citizen[6] residing in Austria, was served via the Hague Convention on June 17, 2022. App'x Vol. XII, p. 3136–39. A week after the district court's Piazza Order, Bakhmatyuk filed a separate motion to dismiss or request to stay pending arbitration (the "Bakhmatyuk Motion") on similar and additional grounds. App'x Vol. XIII, pp. 3190–92. For example, in addition to the complaint's allegations that he is a noteholder, Bakhmatyuk asserted his status as parties to the trust deeds and notes based on the express language of the trust deeds, which reference Bakhmatyuk as a "Related Party" and "Permitted Holder." App'x Vol. VI, p. 1409; *id.* at p. 1562 (defining related parties as Bakhmatyuk and his spouse or immediate family, or entities owned only by them); *id.* at p. 1406; *id.* at, p. 1558 (defining permitted holders as Bakhmatyuk and related parties). Bakhmatyuk

[6] Appellees characterize Bakhmatyuk as a Ukrainian "oligarch" in the Complaint, and the district court unfortunately adopted this pejorative term in its order. Bakhmatyuk is not an oligarch, and AVG and ULF were not built from Ukrainian state-owned assets, but from the efforts of Bakhmatyuk and his team.

also signed the Directors Certificate to the ULF trust deed. *Id.* at p. 1579. The motion also cited the relationship agreement between Bakhmatyuk and AVG, which has a provision requiring arbitration in London and is incorporated in the prospectuses, as evidence that he is a party to the arbitration agreement across all the documents. App'x Vol. XIII, pp. 3206–07.

E. The District Court's Order on the Bakhmatyuk Motion

In its order denying the Bakhmatyuk Motion (the "Bakhmatyuk Order"), the district court reversed course to find that "Plaintiffs are contract parties" even though not signatories (App'x Vol. XIV, p. 3532), but then erroneously held that Bakhmatyuk was not a party to the arbitration agreement and applied English law, rather than domestic equitable estoppel principles, to determine that Appellants could not enforce the arbitration provisions.

In doing so, the court unquestioningly adopted the opinion of Appellees' English law practitioner over Appellants' contrary view of English law, without a hearing or further submissions on the differing

English legal interpretations.[7] The district court simply concluded English law does not allow "nonsignatories to enforce arbitration clauses when a contract party brings tort claims that do not regard the same subject as the contract." *Id.* at p. 3539. Yet, the district court acknowledged that Appellees' tortious interference claim, for example, "relies on the incorporated Trust Deed provisions that restrict the Company's ability to transfer assets." *Id.* at p. 3538. The district court reasoned that the subject of the tort claim is distinguishable because Appellee must not only show that Appellants breached the trust deeds, but that Appellants also "engaged in tortious conduct." *Id.*

Once again, the district court misinterpreted the standard. Simply put, the subject of Appellees' tortious interference claim cannot be separated from the subject of the contract. The same applies to Appellees' civil conspiracy, aiding and abetting, and RICO claims, all of which inextricably rely upon Appellees' theory that Appellant violated the applicable provisions of the trust deed with respect to the alleged transfers of company assets. Thus, even if the district court were

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[7] The court held no hearings on the motions to dismiss or even a status conference in this action.

correct in its holding regarding whether Appellants are parties to the arbitration agreements in the notes and trust deeds (which it is not) the district court erred in applying English equitable estoppel law and in holding Appellees' claims are not inextricably intertwined with the notes.

F. Appellants Appealed Both District Court Decisions.

Appellants filed interlocutory appeals of both the Piazza Order and the Bakhmatyuk Order, as the FAA allows. Appellees moved to dismiss the Piazza Appellants' appeal, arguing a failure by Appellants to sufficiently invoke the FAA, thus depriving this Court of jurisdiction. Doc. No. 010110725549. In the Bakhmatyuk Order, the district court rejected this position by Appellees, noting Appellants' obvious right to interlocutory appeal of the order denying a stay pending arbitration. App'x Vol. XIV, p. 3514 ("Plaintiffs argue the appeal is frivolous . . . because the Piazza Defendants are not parties to the arbitration agreement. Regardless that the Court has found the Piazza Defendants are not parties to that agreement, they have the right to an interlocutory appeal from the Court's denial of the portion of their motion relating to arbitration.") This Court referred Appellees' motion

to dismiss the appeal and associated responses to the circuit panel that will consider the merits. Doc. No. 010110733252. The appeals were later consolidated. Doc. No. 010110755099.

SUMMARY OF THE ARGUMENT

The district court erred in failing to compel arbitration because: (1) Appellees and Appellants are parties to a valid arbitration agreement that delegates the scope of arbitrability to the arbitrator; and (2) equitable estoppel prevents Appellees from avoiding their arbitration agreements because their claims are so intertwined with the underlying contract.

The district court first erroneously held that none of the parties in the case were parties to the trust deeds issuing and governing the notes. In the Piazza Order, it decided that Gramercy was not a party because it did not actually sign the documents, an erroneous conclusion conflicting with the explicit language of the notes and governing law. App'x Vol. XIII, p. 3166. The district court reversed this finding in the Bakhmatyuk Order, but erroneously concluded in both orders that the Appellants are not noteholders (contrary to the allegations in the complaint) and that Bakhmatyuk is not a defined party under the trust

deeds and related documents. App'x Vol. XIV, p. 3532. The first conclusion conflicts directly with the allegations of the complaint that claim Appellant Piazza's purchase of the notes was part of the "scheme." App'x Vol. I, pp. 39, 57, 103–04 ¶¶ 23, 72, 178(1), 178(3). The second conclusion is inconsistent with the contract documents, which define Bakhmatyuk as a "Related Party," and the relationship agreement, which also contains an arbitration clause that investors may invoke against him. App'x Vol. XIII, p. 3239 § 7 ("The parties irrevocably agree that any dispute arising out of or connected with this Agreement . . . shall be resolved by arbitration in London, England."). Bakhmatyuk also signed the Directors Certificate to the ULF trust deed, which demonstrates his closeness to the transaction. App'x Vol. VI, p. 1579. In fact, the prospectuses and subscription agreements, which the district court declined to consider, state that directors are indemnified parties that the companies must defend in litigation. App'x Vol. II, pp. 240–41 § 11.2 ("If any proceeding (including a governmental investigation), claim or demand shall be instituted involving some or all of the Relevant Parties [defining directors as Relevant Parties] . . . it shall promptly notify the relevant party hereto against whom such

recovery is sought . . . in writing and the Indemnifying Party shall have the right to assume the defence thereof[.]"); *see also* App'x Vol. III, p. 580 ("Every director, managing director, agent, auditor, secretary or other person who holds office for the time being in the Issuer shall be indemnified out of the assets of the Issuer against any losses or liabilities which he may sustain or incur in or about the execution of his duties[.]") Further, the arbitration obligation is not limited to explicitly defined parties; it extends to any disputes (tort or contract) related to the notes. App'x Vol. VI, pp. 1544–45 § 19.2.1; *id.* at p. 1397 §§ 20.1, 20.2. This Court should correct this error and hold that all parties in this lawsuit agreed to the mandatory arbitration provision.

After reversing itself and concluding that Appellees are, in fact, parties to the notes and trust deeds (and thus negating the basis for distinguishing Appellants' equitable estoppel case law), the district court erred again in deciding which body of equitable estoppel law to apply: state contract law, federal common law, or English law based on the choice-of-law provision in the contract. The court chose English law—the option least consistent with precedent and least workable practically. The district court ignored Supreme Court precedent and

the growing trend among federal courts of applying federal common law on the issue. App'x Vol XIV, pp. 3543–44. It rejected Wyoming state contract law and federal common law in favor of selectively enforcing the contract's choice-of-law clause (but not the delegation provision or arbitration clause) against Appellants (whom the court erroneously characterized as non-parties). The district court then opined on English equitable estoppel law based solely on affidavits submitted by the parties. The court dismissed case law provided by Appellants' English law expert because he cited cases involving contract claims, ignoring that the arbitration provisions here encompass both tort and contract claims. *Id.* at p. 3538. This Court should find that federal common law applies to the issue of equitable estoppel and hold that Appellees are equitably estopped from avoiding the valid, enforceable arbitration agreements, which encompass all of Appellees' claims.

Nonetheless, if this Court holds that the choice-of-law provision in the contract should apply and English law should govern the question of equitable estoppel, it should also hold that the delegation provision in the contract leaves the question of whether equitable estoppel applies here to the arbitrator.

Standard of Review

The Court reviews *de novo* the district court's decision to deny a stay pending arbitration. *Reeves v. Enter. Prods. Partners, LP*, 17 F.4th 1008, 1011 (10th Cir. 2021). There is a "liberal federal policy favoring arbitration agreements." *Reeves*, 17 F.4th at 1011 (*quoting Nat'l Am. Ins. Co. v. SCOR Reinsurance Co.*, 362 F.3d 1288, 1290 (10th Cir. 2004). "[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Id.* (*quoting Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 24–25 (1983)). With respect to the equitable estoppel issue, the standard of review is likewise *de novo*. *Reeves*, 17 F.4th at 1011.

Argument

I. The District Court Erred Each Time It Held that Parties Here Are Not Parties to an Arbitration Agreement.

A. Appellees Are Bound by the Trust Deeds and Notes, including the Arbitration Clauses.

In the Piazza Order, the district court erred in holding that Appellees were not bound to the arbitration provisions because they did not physically sign the trust deeds. This holding is contrary to the Supreme Court's decision in *GE Energy Power Conversion France SAS, Corp. v. Outokumpu Stainless USA, LLC*, which held that the New York

Convention does not require that a party actually sign an agreement to arbitrate their disputes in order to compel arbitration. 140 S. Ct. 1637 (2020) ("*GE Energy I*").

And the trust deeds themselves state that:

> The Noteholders (as defined below) ***are entitled to the benefit of, are bound by, and are deemed to have notice of, all the provisions of the Trust Deed*** and the Surety Deed and are deemed to have notice of those provisions of the Agency Agreement applicable to them.

Vol. VI, p. 1512 (emphasis added); *see also* Vol. V, p. 1363. It is also contrary to the complaint allegations, in which Appellees admit they are parties to the trust deeds. App'x Vol. I, p. 124 ¶ 215 (claiming "Gramercy formed binding contracts with the Company, the terms of which are contained in the ULF Trust Deed and the AVG Trust Deed").

In the Bakhmatyuk Order, the district court ultimately acknowledged that Appellees, as noteholders, are bound by the trust deeds. App'x Vol. XIV, p. 3522. The conclusion is therefore inescapable—Appellees are parties to, and bound by, the trust deeds and notes, including their arbitration clauses.

B. Piazza Appellants Are Parties to the Trust Deeds.

The district court also erred in finding that the Piazza Appellants are not noteholders and thus parties to the arbitration agreements in

the notes and trust deeds. App'x Vol. XIII, p. 3161. This holding is inconsistent with the plain language of the complaint and must be corrected on appeal.

The complaint is replete with allegations that the Piazza Appellants also purchased notes. App'x Vol. I, pp. 32–33 ¶ 10(b) (alleging the scheme "involved straw purchasers like Piazza, who posed as an independent third party but actually held the debt on behalf of Bakhmatyuk"); *id.* at pp. 65, 72 ¶¶ 93, 112 (alleging Piazza and SP Advisors, which Appellees describe as the registered trade name of SP Capital, purchased AVG and ULF debt); *id.* at pp. 68, 118–21¶¶ 102, 208(3), 208(5), 209 (alleging Appellants SP Advisors and Piazza purchased Ashmore's ULF notes); *id.* at p. 71 ¶ 109; (alleging Appellant Piazza purchased Ukrsibank's AVG/ULF debt).[8] Based on Appellees' pleading alone, the very same provisions discussed above that bind Appellees as noteholders must equally apply to the Piazza Appellants as noteholders. In purchasing notes, the Piazza Appellants agreed to

[8] The complaint also alleges that Appellant Piazza purchased senior, secured debt for which the allegedly transferred assets are security. App'x Vol. I, pp. 66, 87–88 ¶¶ 96, 150 (alleging that PS Capital and Appellant Piazza purchased Sberbank's debt).

and intended to be bound by the notes and trust deeds. They are thus parties to the agreement to arbitrate and can assert their arbitration rights against Appellees.

The district court dodged this conclusion by reading the complaint through an overly technical, tortured lens. It focused on a single sentence of a single paragraph stating that an entity that is "part of SP Advisors, [Appellant] Piazza's network of related companies under the umbrella of [Appellant] SP Capital" bought AVG and ULF notes from another investor (*id.* at p. 68 ¶ 102), and concluding based on that single sentence, that "the Complaint does not allege that Defendants Piazza or SP Capital themselves are actually Noteholders." App'x Vol. XIII, p. 3169 n.11. The district court ignored the ***next*** sentence, which alleges that "[Appellant] Piazza, through [Appellant] SP Capital, holds roughly $200 million in the Company's secured and unsecured debt, which is consistent with Piazza . . . being the ultimate owner of the debt." App'x Vol. I, p. 67 ¶ 102. It also ignores the multiple complaint paragraphs cited above that unequivocally allege that Piazza and SP Capital purchased and own AVG and ULF notes. Indeed, Appellees claim the so-called "straw purchases" are one of "three phases of the

scheme" to try to make out a key element of continuity for Appellee's RICO claim. *Id.* at pp. 32 ¶ 10, 100 ¶ 172. In sum, Appellees themselves allege and do not dispute that Appellants are noteholders.

C. Bakhmatyuk Is Also a Party to the Trust Deeds.

The district court also erred in finding Bakhmatyuk is not a party to the trust deeds. This Court should follow the approach taken by the Eleventh Circuit on remand from the Supreme Court and find that Bakhmatyuk, who is referenced throughout the documents, is a party to the trust deeds. *Outokumpu Stainless USA, LLC v. Coverteam SAS*, 2022 WL 2643936, at *2–3 (11th Cir. July 8, 2022) ("*GE Energy II*"). In *GE Energy II*, the court held that a defendant was a party to an arbitration agreement it did not sign because the definition of Seller included subcontractors like the defendant. *Id.* at *3. Thus, to the extent that the district court's holding that Bakhmatyuk is not a party to the trust deeds relies on the fact that he did not physically sign them, the district court's ruling is flatly inconsistent with the Supreme Court's holding in *GE Energy I*. *Compare* App'x Vol. XIII, p. 3166, *with GE Energy I*, 140 S. Ct. at 1647–48, and *GE Energy II*, 2022 WL 2643936, at *1–2.

Like in *GE Energy II,* Bakhmatyuk is "a defined party covered by the arbitration clause" with the right to assert the arbitration clause therein, as demonstrated by the repeated references to him and his role in the trust deeds and other documents. *GE Energy II*, 2022 WL 2643936, at *3. Bakhmatyuk is *not* merely an unrelated third party, but instead CEO, Chairman of the Board, and controlling shareholder of ULF and AVG, as is stated plainly in the controlling documents governing the investment. He is referenced throughout the trust deeds setting forth his obligations and duties, and signed the applicable Directors' Certificate to the trust deed made part of the trust deed issuing documents. More specifically, the trust deeds, prospectuses, and relationship agreement require Bakhmatyuk to fulfill certain actions and refrain from making certain transfers of assets – the issues that Appellees cite that are accepted as true for purposes of a motion to dismiss but will be proven false in any arbitration. App'x Vol. V, p. 1372–73 § 5.6; App'x Vol. VI, pp. 1525–26 § 5.6; App'x Vol. IV, p. 896; App'x Vol. III, p. 582–85.

These governing agreements clearly bind Bakhmatyuk, including to their arbitration provisions. The district court attempted to

distinguish Bakhmatyuk's relationship to the trust deeds by virtue of his capacity as a director or officer, rather than an individual. This is a distinction without consequence because the trust deeds do not distinguish between Bakhmatyuk's individual versus official capacity in imposing the rights and restrictions discussed above.

Further, Appellees specifically allege that Bakhmatyuk purchased AVG and ULF debt through others, including Piazza, who "held the debt on behalf of Bakhmatyuk." App'x Vol. I, pp. 32–33 ¶ 19(b); *see also id.* at pp. 65, 72, 87–88, 113–14, 118–19 ¶¶ 93, 112, 150, 200, 208(3). Thus, in alleging that "straw purchasers, including Piazza himself, gave Bakhmatyuk the option to eventually acquire the debt himself, or . . . held the debt on Bakhmatyuk's behalf," Appellees plead that Bakhmatyuk is also a noteholder, and thus a party to the relevant arbitration provisions, just like the other Appellants.

* * *

Given that Appellees and Appellants are parties to the trust deeds and the arbitration clauses, the district court erred in refusing to compel arbitration. Federal law "strongly favors enforcement of agreements to arbitrate," *Hill v. Ricoh Ams. Corp.*, 603 F.3d 76, 777

(10th Cir. 2010), and if a court has any "doubts concerning the scope of arbitrable issues," it must resolve them "in favor of arbitration." *Nat'l Am. Ins. Co. v. SCOR Reinsurance Co.*, 362 F.3d 1288, 1290 (10th Cir. 2004). In this case, Appellees never even bothered to challenge the Appellants' argument that "[t]he arbitration agreements in the Trust Deeds are broad and encompass all of [Appellees'] claims." App'x Vol. I, p. 162. Rather, Appellees conceded that "whether [their] claims fall within the scope of the arbitration agreements would be a question for the arbitrator—not th[e] [c]ourt" because, as described further below, the arbitration agreements adopt the delegation provision in LCIA rules. App'x Vol. XI, p. 2688 n.5.

If this Court concluded that the arbitration clauses apply only to certain claims or fewer than all Appellees, the Court must stay the remaining claims pending the arbitration because the arbitrable claims in this matter predominate. *Riley Mfg. Co. Inc. v. Anchor Glass Co. Corp.*, 157 F.3d 775, 785 (10th Cir. 1998). Moreover, permitting any non-arbitrable claims to proceed before the district court would have a preclusive effect over the arbitrable claims. *Id.*

II. The District Court Erred in Failing to Order Arbitration Under Principles of Equitable Estoppel.

Even if this Court determines that Appellees are not parties to the trust deeds, it should still reverse the decision below. As this Court has repeatedly recognized, the doctrine of equitable estoppel allows a nonsignatory to enforce an arbitration agreement against a signatory in certain circumstances. *E.g.*, *Reeves v. Enter. Prods. Partners, LP*, 17 F.4th 1008, 1012 (10th Cir. 2021). The district court's refusal to apply equitable estoppel in this case constitutes reversible error for two independent reasons. *First*, the district court incorrectly applied English law, rather than federal common law or Wyoming state law, under both of which Appellees are equitably estopped from disclaiming the arbitration agreements. *Second*, even if English law applied to this issue, Appellees would still be required to arbitrate their claims.

A. The District Court Erred in Refusing to Apply Federal Common Law or Wyoming Law.

i. Either Federal Common Law or Wyoming Law Applies to the Equitable Estoppel Issue.

In *GE Energy I*, the Supreme Court acknowledged that the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("Convention") does not conflict "with domestic equitable

estoppel doctrines that permit the enforcement of arbitration agreements by nonsignatories." 140 S. Ct. 1637, 1642 (2020). At the same time, the Court left open the choice-of-law question. That is, it noted that "[b]ecause the Court of Appeals concluded that the Convention prohibits enforcement by nonsignatories, the court did not determine whether GE Energy could enforce the arbitration clauses under principles of equitable estoppel *or which body of law governs that determination*. Those questions can be addressed on remand." *Id.* at 1648 (emphasis added).

While neither the Supreme Court nor this Court has ever directly addressed the choice-of-law issue, a number of other circuits—including the First, Second, Ninth, and Eleventh—have concluded that they must apply federal common law when adjudicating an equitable estoppel claim under the Convention. *Setty v. Shrinivas Sugandhalaya LLP*, 3 F.4th 1166, 1168 (9th Cir. 2021) ("In cases involving the New York Convention, in determining the arbitrability of federal claims by or against non-signatories to an arbitration agreement, we apply 'federal substantive law,' for which we look to 'ordinary contract and agency principles.'") (quotation omitted); *Northrop & Johnson Yachts-Ships,*

Inc. v. Royal Van Lent Shipyard, B.V., 855 F. App'x. 468 n.4 (11th Cir. 2021) (applying federal common law version of equitable estoppel to a nonsignatory in a Convention case) (unpublished); *InterGen N.V. v. Grina*, 344 F.3d 134, 143 (1st Cir. 2003) ("As between state law and federal common law, we conclude that uniform federal standards are appropriate."); *Smith/Enron Cogeneration Ltd. P'shipv. Smith Cogeneration Int'l, Inc.*, 198 F.3d 88, 96 (2d Cir. 1999) ("When we exercise jurisdiction under Chapter Two of the FAA, we have compelling reasons to apply federal law, which is already well-developed, to the question of whether an agreement to arbitrate is enforceable.").

Below, the district court declined to apply federal common law. Instead, it held that the Supreme Court's decision in *Arthur Andersen L.L.P. v. Carlisle* "made plain that federal courts should not apply federal common law to this issue." App'x Vol. XIV, p. 2540 (quoting *Arthur Andersen L.L.P. v. Carlisle*, 556 U.S. 624, 630–31 (2009)). Certainly, if this case was governed by the domestic FAA, rather than the Convention, *Arthur Andersen* might require application of state law to the equitable estoppel issue. *Arthur Andersen*, 556 U.S. at 630–31

(state law applies to "determine which contracts are binding under § 2 and enforceable under § 3 'if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally.'"); *Reeves, LP*, 17 F.4th at 1011 (applying the *Arthur Anderson* choice-of-law rule to "[t]he scope of the arbitration agreement, including the question of who it binds"). And in fact, a number of circuit and district courts across the country have continued to apply federal common law to Convention cases *even after* the Supreme Court handed down its *Arthur Andersen* decision in 2009. *See, e.g.*, *Setty*, 3 F.4th 1166 at 1169; *Northrop & Johnson Yachts-Ships, Inc. v. Royal Van Lent Shipyard, B.V.*, 855 F. App'x. 468, at n.4 (11th Cir. 2021); *Cases Del Caffe Vergnano S.P.A. v. Italfavlros San Diego, LLC*, 816 F.3d 1208, 1211 (9th Cir. 2016); *Aggarao v. MOL Ship Mgmt. Co.*, 675 F.3d 355, 371–72 (4th Cir. 2012); *Bhandara Fam. Living Tr. v. Underwriters at Lloyd's, London, No. CV H-19-968, 2020 WL 1482559*, at *6 (S.D. Tex. Feb. 20, 2020); *Port Cargo Serv., LLC v. Certain Underwriters at Lloyd's London*, No. CV 18-6192, 2018 WL 4042874, at *6–8 (E.D. La. Aug. 24, 2018).

More importantly, if the district court had applied state law as *Arthur Andersen* suggests, it would not have committed reversible error. As explained below, under *either* federal common law or Wyoming law, Gramercy is equitably estopped from disclaiming the arbitration agreements in this case. *See infra* Section II.iii. Rather than following *Arthur Andersen*'s holding that "state law" applies, 556 U.S. at 631, the district court instead erroneously applied English law.

ii. The Choice-of-Law Provision Does Not Justify Application of English Law.

In the Bakhmatyuk Order, the district court justified its application of English law by relying on a choice-of-law provision in the trust deeds' arbitration agreements. App'x Vol. XIV, p. 2541 ("[T]he parties' choice of law governs equitable estoppel."). That decision was error. It is true that the trust deeds provide that disputes "arising out of or in connection with [the Notes, Trust Deeds, or Surety Agreement] are governed by and, and will be construed in accordance with, English law." App'x Vol. V, § 20.1 p. 1116; App'x Vol. VI, § 23.1 p. 1445. But for four distinct reasons, that choice-of-law provision doesn't apply to the equitable estoppel issue.

First, a number of federal courts have acknowledged the existence of a choice-of-law provision but nevertheless applied federal common law to the equitable estoppel question. For example, in *Aggarao v. MOL Ship Management Co.*, the Fourth Circuit noted that the operative agreement selected Philippian law, but it nevertheless applied federal common law to hold "that the doctrine of equitable estoppel applies, and that [one party] must arbitrate his claims against" signatories and nonsignatories alike. 675 F.3d 355, 371–72, 374–75 (4th Cir. 2012). Other courts have followed a similar path. *E.g.*, *Campaniello Imps., Ltd. v. Saporiti Italia S.p.A.*, 117 F.3d 655, 659 (2d Cir. 1997) (applying federal common law despite an Italian choice-of-law clause); *Bhandara Fam. Living Tr. v. Underwriters at Lloyd's, London*, No. CV H-19-968, 2020 WL 1482559, at *5–6 (S.D. Tex. Feb. 20, 2020) (applying federal common law to an equitable estoppel claim under the Convention. even with a choice-of-law provision in the contract); *Port Cargo Serv., LLC v. Certain Underwriters at Lloyd's London*, No. CV 18-6192, 2018 WL 4042874, at *6–8. (E.D. La. Aug. 24, 2018) (same).

Second, as a doctrinal matter, these decisions make sense. The equitable estoppel question is a "threshold" issue, and one that doesn't

depend on the terms of the agreement. As a result, the court must decide the issue *without* looking to the agreement itself. After all, the question is whether the arbitration agreement applies to the parties based on a legal principle that *isn't* grounded in the text of the agreement; holding litigants to the terms of the agreement to decide that issue puts the cart before the horse. The Ninth Circuit acknowledged as much in *Setty* when it held: "To argue that Indian law applies, SS Mumbai points to the Partnership Deed's arbitration provision [which contained an Indian choice-of-law provision]. But whether SS Mumbai may enforce the Partnership Deed as a non-signatory is a 'threshold issue' for which we do not look to the agreement itself." *Setty*, 3 F.4th at 1168 (citing *Casa Del Caffe*, 816 F.3d at 1211). Other circuit courts have likewise acknowledged this critical distinction between "threshold" and "merits" issues. *E.g.*, *Neb. Mach. Co. v. Cargotec Sols., LLC*, 762 F.3d 737, 741 n.2 (8th Cir. 2014) ("Cargotec relies on the disputed arbitration agreement itself in arguing that the parties intended to submit the present case to an arbitrator. . . . However, *Fallo* did not address the threshold question we now confront: whether the arbitration agreement itself is valid. Thus,

Cargotec's argument puts the cart before the horse, as it presumes the arbitration provision formed part of the contract at issue."); *Puleo v. Chase Bank USA, N.A.*, 605 F.3d 172, 181 (3d Cir. 2010) (acknowledging that courts must enforce arbitration agreements as written unless the issue involves "a threshold question regarding the validity of the arbitration agreement itself or the applicability of an arbitration agreement to a given dispute").[9]

Third, applying federal common law is consistent with the need for uniformity in international agreements. The Supreme Court has long recognized that the very purpose of the Convention is "to unify the standard by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries." *Scherk v. Alberto-*

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[9] For this same reason, the court's decision in *Yavuz v. 61MM Ltd.*, 465 F.3d 418 (10th Cir. 2006), is inapposite. In that case, the court held that a forum-selection clause in an arbitration agreement was subject to that agreement's choice-of-law provision. *Id.* at 428. But as the court acknowledged, its holding was predicated on an actual agreement the parties had signed about which law governs. *Id.* at 430. Here, in contrast, the "threshold" question of arbitrability doesn't depend on anything that the parties did or did not agree to, but instead on whether equitable principles prevent Gramercy from avoiding arbitration. Moreover, the *Yavuz* court took pains to acknowledge that even in the context of forum-selection clauses, "special circumstances" can defeat a choice-of-law provision. *Id.*

Culver Co., 417 U.S. 506, 520 n.15 (1974); *see also Setty*, 3 F.4th at 1169 ("The New York Convention and its implementing legislation emphasize the need for uniformity in the application of international arbitration agreements."). Thus, where "the federal statute in question demands national uniformity, federal common law provides the determinative rules of decision." *InterGen*, 344 F.3d at 143 (quoting *Bhd. of Locomotive Eng'rs v. Springfield Terminal Ry. Co.*, 210 F.3d 18, 26 (2000)); *see also Smith/Enron Cogeneration Ltd. P'ship v. Smith Cogeneration Int'l, Inc.*, 198 F.3d 88, 96 (2d Cir. 1999) ("When we exercise jurisdiction under Chapter Two of the FAA, we have compelling reasons to apply federal law, which is already well-developed, to the question of whether an agreement to arbitrate is enforceable. . . . [P]roceeding otherwise would introduce a degree of parochialism and uncertainty into international arbitration that would subvert the goal of simplifying and unifying international arbitration law.").

Notably, this is precisely the tack that Judge Tjoflat took in his concurrence in *GE Energy II*, the appellate decision that issued after the Supreme Court remanded *GE Energy I* back to the Eleventh Circuit.

There, Judge Tjoflat began by noting "that German law will govern the substantive issues in the case, as the choice of law provision in the contract . . . dictates." *Outokumpu Stainless USA, LLC v. CoverteamSAS*, 2022 WL 2643936 at *5 (11th Cir. July 8, 2022). "But we aren't dealing with the substantive issues in the appeal right now. We are dealing with the threshold inquiry of arbitrability[.]" *Id.* Judge Tjoflat went on to argue that, although the question was one "of first impression in our Circuit," the court should hold that "federal common law [governs] in determining whether equitable estoppel applies in New York Convention cases." *Id.* That conclusion was based on two factors. One, "we have a quintessential 'uniquely federal interest.'" *Id.* at *6 (quoting *Boyle v. United Techs. Corp.*, 487 U.S. 500, 507 (1988)). "The whole goal of the New York Convention is to standardize the enforcement of international arbitration agreements, and there is a strong federal interest in making sure that the United States lives up to its treaty obligations." *Id.* And two, "allowing each state or international law to impose its own test for threshold questions of arbitrability would create an unmanageable tangle of arbitration law in the United States, lead to forum shopping, and frustrate the uniform

standards the New York Convention and Chapter 2 of the FAA were enacted to create." *Id.*

Fourth and finally, in seeking to enforce the choice-of-law provision against Appellants, Gramercy is trying to have its cake and eat it too. In the district court below, Appellants argued that this lawsuit should be sent to arbitration for another, independent reason: the parties clearly and unmistakably expressed their intent to have the *arbitrator* decide any questions of arbitrability. Under long-established precedent, to delegate the question of arbitrability to an arbitrator, the parties must express their "clear and unmistakable" intent to do so. *Dish Network L.L.C. v. Ray*, 900 F.3d 1240, 1243–44 (10th Cir. 2018). Here, the arbitration agreement plainly evinces just such an intent. The trust deeds expressly incorporate the LCIA arbitration rules, and those rules provide that "[t]he Arbitral Tribunal shall have the power to rule upon its own jurisdiction and authority, including any objections to the initial or continuing existence, validity, effectiveness or scope of the Arbitration Agreement." App'x Vol I, p. 163. This Court has repeatedly held that when parties incorporate arbitration rules that delegate arbitrability questions to the arbitrator, they have satisfied the "clear

and unmistakable intent" requirement. *Goldgroup Res., Inc. v. DyanResource de Mexico, S.A. de C.V.*, 994 F.3d 1181, 1191 (10th Cir. 2021) (intent expressed via adoption of AAA Rules); *Belnap v. Iasis Healthcare*, 844 F.3d 1272, 1281 (10th Cir. 2017) (intent expressed via adoption of JAMS Rules).

The district court, however, rejected the argument that the arbitrator should determine arbitrability. It held that "[w]hen there is a nonsignatory involved, the Court independently determines arbitrability itself and does not defer to the contract's agreement to arbitrate arbitrability." App'x Vol. XIII, p. 3160. The lower court's order improperly uses Appellants' status as a nonsignatory as both a sword and shield: On the one hand, the trust deeds' choice-of-law provision *does* apply to the threshold question about whether this dispute is arbitrable. On the other hand, the trust deeds' choice-of-arbitration-rules provision *doesn't* apply to the threshold question about whether this dispute is arbitrable. Those two statements are mutually exclusive. Either the provisions in the trust deed apply to this dispute over arbitrability or they do not. The district court erred in selectively picking and choosing which contractual provisions it would enforce. Put

another way, there is no principled basis to say that the choice-of-law provision governs this dispute, but that the choice-of-arbitration rules do not.

iii. Under Either Federal or Wyoming Law, Appellees Are Equitably Estopped From Disclaiming the Arbitration Agreements.

If the district court had correctly applied *either* federal common law or Wyoming law, it would have ordered the parties to arbitrate. In *Reeves v. Enterprise Products Partners, LP*, this Court held that equitable estoppel permits a nonsignatory to compel arbitration in two independent circumstances: (1) where the signatory must "rely on the terms of the written agreement containing the arbitration clause" and (2) when the signatory raises allegations of "substantially interdependent and concerted misconduct by both the nonsignatory and one or more of the signatories to the contract." 17 F.4th 1008, 1010 (10th Cir. 2021); *see also id.* at 12 ("Many other states and circuits have adopted th[is] . . . understanding of equitable estoppel").

As to the first prong, there is no question that Gramercy relied on the trust deeds' terms in asserting its claims. Indeed, the entire crux of Gramercy's allegations is that Appellants carried out a scheme to

prevent Gramercy from exercising its rights under the trust deeds that contain the arbitration agreements. *See, e.g.*, App'x Vol. I, p. 94 ¶ 168 (alleging that aim of RICO enterprise was to prevent Gramercy "[f]rom exercising its contractual rights under the Notes"); *id.* at p. 123 ¶ 212 (alleging that Appellants "fraudulently induced Gramercy to forego enforcement of its contractual rights"); *id.* at pp. 123– 125 ¶¶ 214–18 (alleging "Gramercy formed binding contracts with the Company, the terms of which are contained in the ULF Trust Deed and the AVG Trust Deed"); *id.* at p. 125 ¶ 220 (alleging Appellants "combined and agreed to participate in a scheme designed to defraud Gramercy and deprive it of its contractual rights").

As to the second prong, Gramercy's complaint alleges concerted misconduct by both signatories (Appellants) and nonsignatories (AVG and ULF). As noted above, Gramercy's claims are entirely dependent on AVG's and ULF's obligations to Gramercy under the trust deeds—so much so that Gramercy devotes an entire section of the complaint to listing those obligations so it can allege how Appellants allegedly interfered with the ability to enforce them. *Id.* at pp. 44–49 ¶¶ 45–50. "The purpose of the doctrine of equitable estoppel is to prevent parties

playing fast and loose with the courts and also to protect[] the judicial system." *Reeves*, 17 F.4th at 1014. Gramercy cannot avoid enforcement of an arbitration agreement by "simply plead[ing] around" signatories "who would have to become crucial parties to the litigation." *Id.*

B. The Court Erred in Holding that English Law Would Not Permit Appellants to Enforce the Arbitration Clause.

Even if this Court determines that English law applies, reversal is still compelled. English law, like federal common law and Wyoming law, equitably estops Gramercy from disclaiming the arbitration agreements.

The district court wholly adopted the opinion of Appellees' expert on English equitable estoppel law, without a hearing or consideration of Appellants' criticism of the interpretation of English law. In fact, both Appellants' English law expert, Dr. Dracos, and Appellees' English law expert, Mr. Valentin, agree that it would be inequitable to permit a party who seeks to enforce a contract to disregard the arbitration provision contained within the same agreement. App'x Vol. XIV, p. 3492 ¶ 5; *see also id.* at p. 3441 ¶ 32 ("[W]here a party to a contract seeks to enforce the terms of that contract against a non-party, it would be inequitable for the enforcing party to be allowed to disregard the

jurisdiction or arbitration clause also contained within that same contract.”).

As Dr. Dracos explained, English law recognizes equitable estoppel. *Id.* at p. 3492 (“[I]t may be inequitable for a party to an arbitration clause to act contrary to it, and the court can provide redress for that inequitable conduct not only at the request of a party to the agreement (which will be enforcing a contractual right) but also of a non-party.”). English courts, like their American counterparts, retain “the general power … to prevent inequitable conduct” that underlies the equitable estoppel doctrine. App’x Vol. XIII, p. 3378. Pursuant to that authority, they have allowed nonsignatories to invoke arbitration and jurisdiction agreements when those agreements “covered claims asserted by the claimant, which was a party to those agreements” to prevent “inequitable, unconscionable, vexatious and or/oppressive” results. *Id.* at pp. 3370–71. The district court dismissed this case law off-hand because the parties in the cited cases were litigating contract claims, disregarding the general principles for which the cases stand (App’x Vol. XIV, p. 3538) and, again, ignoring that the arbitration clause in this case expressly covers tort claims, as well as contract

claims (App'x Vol. XIII, p. 3158–3160) ("The definition of 'dispute' in the Trust Deeds is quite broad, particularly as to any dispute connected with 'these presents' or in connection with the Trust Deed."). This fact undermines fatally the district court's effort to distinguish them and showing there was no proper basis to credit Appellees' expert and discredit Appellants' expert.

Finally, even if this Court decides the district court was correct to hold a nonparty to the choice-of-law clause in a contract on the question of equitable estoppel, this Court should then enforce the contract's delegation of the question of arbitrability to the arbitrator.[10] Further, the district court acknowledged that the incorporation of the LCIA Rules in the trust deeds included "vest[ing] the authority to determine arbitrability in the arbitrator." *Id.* at p. 3160. However, the district court declined to apply the provision because the case involved a nonsignatory. *See id.* (citing *Belnap v. Iasis Healthcare*, 844 F.3d 1272,

[10] If foreign law applies to the equitable estoppel question based on the contract's choice-of-law clause, presumably, the court would have to also apply the foreign body of law to the question of who is a party (which the district court here did not). This would leave courts in an unenviable position of independently determining how foreign law applies or choosing between competing party submissions offering "expert" interpretations.

1284 (10th Cir. 2017)). But, if the choice-of-law provision is to be applied against a nonsignatory to govern the equitable doctrine of estoppel, there is no reasoned distinction between enforcing that clause and enforcing the delegation provision. And honoring the delegation provision would eliminate the practical difficulties placed upon the courts here of determining the appropriate application of foreign law.

CONCLUSION

For the foregoing reasons, the Court should reverse the district court's orders declining to stay the action and refusing to compel arbitration.

ORAL ARGUMENT STATEMENT

Pursuant to Fed. R. App. P. 34(a)(1) and 10th Cir. R. 28.2(C)(2), Appellants state that oral argument would assist the Court in adjudicating this case, which presents several unresolved legal questions.

DATE: December 12, 2022

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CERTIFICATE OF COMPLIANCE

1. This document complies with the word limit of Fed. R. App. P. 28.1(e)(2)(i) and 32(a)(7)(B) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) and 10th Cir. R. 32(B), this document contains 10,239 words.

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Certificate of Service

I certify that on December 12, 2022, I electronically transmitted the foregoing Principal Brief to the clerk of the Court using the ECF system. The clerk will transmit a notice of electronic filing to the following attorneys:

/s/ Kathleen O'Riley
Kathleen O'Riley

ATTACHMENT 1

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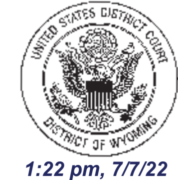

1:22 pm, 7/7/22

Margaret Botkins
Clerk of Court

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

GRAMERCY DISTRESSED OPPORTUNITY FUND II, L.P., GRAMERCY DISTRESSED OPPORTUNITY FUND III, L.P., GRAMERCY DISTRESSED OPPORTUNITY FUND III-A, L.P., GRAMERCY FUNDS MANAGEMENT LLC, GRAMERCY EM CREDIT TOTAL RETURN FUND, AND ROEHAMPTON PARTNERS LLC, Plaintiffs, vs. OLEG BAKHMATYUK, NICHOLAS PIAZZA, SP CAPITAL MANAGEMENT, LLC, OLEKSANDR YAREMENKO AND TNA CORPORATE SOLUTIONS, LLC, Defendants.	Case No. 21-CV-223-F

ORDER ON THE PIAZZA DEFENDANTS' MOTION TO DISMISS

Defendants Nicholas Piazza, SP Capital Management, LLC, Oleksandr Yaremenko, and TNA Corporate Solutions, LLC (the "Defendants") move to dismiss the complaint on several theories.[1] ECF No. 43, 44 (Memorandum and Exhibits). At the parties' requests, the Court granted extensions of time on the briefing of this motion. Plaintiffs have

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

ATTACHMENT 1

responded (ECF No. 50), and Defendants filed their reply. ECF No. 53.[2] For the reasons that follow, the Court denies the great bulk of the motion, dismissing only Count 1 as to Yaremenko and granting leave to amend.

I. Fact Allegations

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

The complaint runs 105 pages. ECF No. 1 (filed December 7, 2021). The Court does not attempt to comprehensively summarize all the allegations. In a nutshell, Gramercy alleges that Bakhmatyuk and the Defendants together engaged in a multi-year pattern of racketeering activity to defraud Gramercy of the value of notes it holds from non-parties UkrLandFarming PLC ("ULF") and its subsidiary Avangardco IPL ("AVG," together with ULF, the "Company"), which are Ukrainian agricultural companies that Bakhmatyuk controls. Gramercy brings three claims for civil liability under the federal Racketeer Influenced and Corrupt Organizations ("RICO") laws, 18 U.S.C. § 1961 *et al*. The RICO claims are the basis of the Court's subject-matter jurisdiction. Gramercy also

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

brings state law claims for fraud, tortious interference with contract (*i.e.,* the ULF and AVG notes), civil conspiracy and aiding and abetting.

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

Since October 2015, Gramercy has held more than 25% of AVG's notes (hereafter, the "AVG Notes"). The AVG Notes are governed by the AVG Trust Deed. ECF No. 1 ¶¶ 46, 47; ECF No. 44-19 (Def. Ex. 5, excerpts), ECF Nos. 44-20 through 44-23 (Def. Ex. 5A, complete copy).[3] The AVG Trust Deed gives certain rights to Noteholders above 25%. Since 2017, Gramercy has held roughly 41% of the AVG Notes.

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

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

[3] The complaint alleges the Trust Deeds but does not attach them. On Rule 12(b)(6) motions, the Court is generally constrained to the substance of the complaint and documents attached to it unless the motion is converted to summary judgment. *Gee v. Pacheco,* 627 F.3d 1178, 1186 (10th Cir. 2010) (citing *Tellabs, Inc. v. Makor Issues & Rights, Ltd.,* 551 U.S. 308, 322 (2007)). However, the Court can consider documents which are referred to in and central to the allegations and whose authenticity is not disputed. *Gee,* 627 F.3d at 1186 (citing *Jacobson v. Deseret Book Co.,* 287 F.3d 936, 941 (10th Cir. 2002)). Gramercy's response does not challenge the authenticity of the Trust Deeds attached to Defendants' motion. The Court therefore considers the Trust Deeds.

chest and frustrate Gramercy's right to recover on the Notes.

Gramercy—one of the largest creditors of the Company and the largest single Noteholder—had blocking rights under the Notes that made it the only meaningful check on Bakhmatyuk's control. At some point after the annexation of Crimea by Russia, Bakhmatyuk became the target of an investigation by the Ukrainian authorities for embezzlement of government relief funds from a Ukrainian bank he owned. By 2016, Bakhmatyuk's reign as one of Ukraine's leading agriculture tycoons was under siege, eventually leading him to embark on the scheme described herein.

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

Bakhmatyuk first bought up chunks of the Company's secured and unsecured debt at artificially reduced prices through straw purchasers and reached preferential deals with the Company's institutional lenders (such as state-owned Ukrainian banks). He then

eventually effectuated the surreptitious transfer of more than a billion dollars of Company assets to dummy companies created to preserve his stronghold.

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

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

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

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

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

II. Analysis

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

A. Defendant Yaremenko's Personal Jurisdiction Argument

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

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

"The allegations in the complaint must be taken as true to the extent they are uncontroverted by the defendant's affidavits. ... If conflicting affidavits of the parties collide, the Court will resolve all factual disputes in the plaintiff's favor." *Eleutian Tech., LLC v. Global Educ. Techs., LLC,* Civ. 07–181–J, 2009 WL 10672360, *3 (D. Wyo. Jan.

23, 2009) (quoting *Behagen v. Amateur Basketball Ass'n of U.S.A.,* 744 F.2d 731, 733 (10th Cir. 1984)). In this case, Yaremenko does not supply an affidavit. The Court accordingly takes as true the Complaint's allegations regarding Yaremenko's involvement in the alleged scheme.

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

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

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

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

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

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

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

2. The Court Has Specific Jurisdiction Over Yaremenko

In this case, the Complaint alleges that Yaremenko made several, purposeful contacts with the State of Wyoming and the claims arise from those contacts. *See, e.g.,* ECF No. 1 ¶¶ 18, 20, 34, 70, 84, 138. Gramercy alleges among other things that in 2011, Yaremenko formed SP Advisors with Piazza. SP Advisors is a group of companies that they later consolidated under the ownership of SP Capital, a Wyoming LLC that Piazza operates from offices in Wyoming and that does business under the name SP Advisors. Yaremenko signs the annual reports of SP Advisors. In 2017, along with Piazza, Yaremenko organized TNA, the Wyoming shell company into which Bakhmatyuk allegedly wrongfully transferred the Company's assets, for the purpose of facilitating those

transfers. Yaremenko signs the annual reports for TNA. In addition, Yaremenko gave a webinar for SP Advisors discussing the virtues of forming entities in Wyoming because the state's laws do not require disclosure of owners or directors.

These contacts satisfy the purposeful direction to the forum and the claims against Yaremenko arise out of them. Plaintiffs are also correct that Yaremenko cannot slough off these personal contacts onto any corporate entity. At the very least, Yaremenko acted personally in forming TNA and SP Advisors, if not also the rest of the conduct that Gramercy alleges with respect to him.

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

B. Motion to Stay or Dismiss Based on Arbitration Clauses

The Defendants argue an arbitration clause in the Trust Deeds[4] requires Gramercy to arbitrate, and on this basis, Defendants argue the case must be stayed or dismissed.

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

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

Specifically, the AVG Trust Deed reads:

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

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

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

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motion to summary judgment and excludes the subscription agreements and prospectuses. Fed. R. Civ. P. 12(d).

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

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

1. Arbitration of Arbitrability?

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

But here, neither Plaintiffs nor Defendants are parties to the Trust Deeds. The parties to this case did not agree to arbitrate anything amongst themselves. When there is a nonsignatory involved, the Court independently determines arbitrability itself and does not defer to the contract's agreement to arbitrate arbitrability. *See, e.g., Belnap,* 844 F.3d at 1293 (finding under Utah law the signatory plaintiff was not required to arbitrate his claims against a nonsignatory defendant, regardless that he agreed to arbitrate arbitrability as to the signatory defendant). *See also Mars, Inc. v. Szarzynski*, No. CV 20-01344 (RJL),

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

2021 WL 2809539, at *5 (D.D.C. July 6, 2021). Accordingly, the Court will not stay or dismiss this action in order to leave this question to an arbitrator.

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

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

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

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

ULF Trust Deed § 1.6. *See also id.,* Schedule 5, Terms and Conditions of the Notes at 90 § 18 (similar provision). Noteholders are not identified as parties to the ULF Trust Deed.

It expressly addresses Noteholders in numerous other provisions, but not in the arbitration clause.

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

In English common law, a contract cannot confer rights on third parties. Valentin Dec. ¶ 18. Thus, in general, "only the contracting parties are entitled to enforce the provisions of a contract," including an agreement to arbitrate. *Id.* There is an exception under the Contracts (Rights of Third Parties) Act of 1999 ("CRTPA"), if the contract expressly provides that non-parties can enforce its terms or if it purports to confer a benefit on the non-party. *Id.* ¶¶ 19-20. But the Trust Deeds do not do either. Rather, they expressly provide that non-parties have no rights under them except if expressly stated therein. The Trust Deeds do not expressly give third parties such as Defendants a right to enforce the arbitration clause. Under English law, "[w]here the parties have used unambiguous language, the court must apply it." ECF No. 50-2 Valentin Dec. ¶ 40(4) (citing *Rainy Sky*

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

SA v Kookmin Bank [2011] 1 WLR 2900, per Lord Clarke JSC, at [23] (UK Supreme Court)). In their reply, Defendants do not dispute these points of law. The Court finds that under English law, Defendants cannot enforce the arbitration clause against Plaintiffs.

3. Equitable Estoppel

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

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

Although not mentioned in the Supreme Court's opinion, *GE Energy* involved a contract that chose German law. *Outokumpu Stainless USA LLC v. Converteam SAS,* No. CV 16-00378-KD-C, 2017 WL 401951, at *2 (S.D. Ala. Jan. 30, 2017). The Supreme

Court appears to have referred to "domestic" equitable estoppel doctrines because that is how the issue was framed in the lower courts. *GE Energy* cites *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 630 (2009) for the arbitrability of a dispute being an issue of state law. The issue in *Arthur Andersen* was whether state contract law or federal law of arbitration governed arbitrability of disputes; the Court made plain that between those two bodies of law, state law of contract governed. *Id.* at 630-31. But there was no issue of foreign law in that case. Meanwhile, *GE Energy* expressly leaves the question of which body of law governed the equitable estoppel in that case to the remand. *Id.* at 1648.[8] Plaintiffs also cite the Second Circuit's decision in *Motorola Credit Corp. v. Uzan,* 388 F.3d 39 (2d Cir. 2004), holding that "where the parties have chosen the governing body of law, honoring their choice [in determining arbitrability] is necessary to ensure uniform interpretation and enforcement of that agreement and to avoid forum shopping." *Id.* at 51 (determining arbitrability under Swiss law as chosen in the contract and distinguishing cases that did not raise choice-of-law).

It is unnecessary for the Court to decide whether English or domestic law applies to this issue, because Defendants have not cited any domestic law that extends equitable estoppel to a nonsignatory plaintiff. In *GE Energy,* the Court noted that "[g]enerally, in the arbitration context, equitable estoppel allows a nonsignatory to a written agreement containing an arbitration clause to compel arbitration where a *signatory* to the written

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

agreement must rely on the terms of that agreement in asserting its claims against the nonsignatory." *Id.* at 1644 (emphasis added; internal quotation marks omitted).

The other cases on which Defendants rely for this issue likewise discuss enforcement of an arbitration agreement only against a signatory plaintiff. ECF No. 44 at 14-19, citing *Lenox MacLaren Surgical Corp. v. Medtronic, Inc.,* 449 F. App'x 704, 705, 708 (10th Cir. 2011) (noting the plaintiff entered the agreement containing an arbitration clause and framing the issue as "concerning the application of estoppel to permit a nonsignatory to compel a signatory to arbitrate"); *Reeves v. Enter. Prods. Partners, LP,* 17 F.4th 1008, 1009, 1013 (10th Cir. 2021) (noting the plaintiffs signed contracts containing the arbitration clauses, and discussing Oklahoma law regarding equitable estoppel against signatories); *Weller v. HSBC Mortg. Servs., Inc.,* 971 F. Supp. 2d 1072, 1076, 1082 (D. Colo. 2013) (noting the plaintiff executed a note, deed of trust, and arbitration agreement with the defendant, discussing equitable estoppel against signatory plaintiff, following *Lenox MacLaren*); *Roe v. Gray,* 165 F. Supp. 2d 1164, 1165–66 (D. Colo. 2001) (noting the plaintiff signed the membership agreement that was later amended to require arbitration); *Belnap v. Iasis Healthcare,* 844 F.3d 1272, 1293 (10th Cir. 2017) (applying Utah law and language of the arbitration clause, nonsignatory defendants could not compel signatory plaintiff to arbitrate).

Plaintiffs cite a case that compelled a nonsignatory plaintiff to arbitrate, but it is distinguishable here. *Mars, Inc. v. Szarzynski,* CV 20-01344 (RJL), 2021 WL 2809539 (D.D.C. July 6, 2021). The court applied the law of Belgium, which permits compelling a third-party beneficiary to arbitrate when it consciously participated in the performance of

the contract. The plaintiff in that case was the parent of a signatory (the former employer of the defendant), and the alleged facts showed the parent met the standard. *Id.* at *7-8.[9]

Here, it is clear that Plaintiffs are not signatories. They assert claims based in part on provisions of the Trust Deeds, but it is undisputed that they did not sign and are not identified as parties in the Trust Deeds. The only signatories to the Trust Deeds are AVG, ULF, the trustees, and the Surety Providers. ECF Nos. 44-20 at 1, 44-23 at 99-104; ECF Nos. 44-25 at 1, 44-26 at 58-71 (of the pdf).

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

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

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

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

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

1. Standard of Review

Under Rule 12(b)(6), the Court should dismiss a claim if it fails as a matter of law. *See supra*, note 1. The interpretation of an unambiguous contract is a matter of law that can be resolved on such a motion. *See, e.g.,* ECF No. 50-2 Valentin Dec. ¶¶ 44(4) (English law of contract); *Applied Predictive Techs., Inc. v. MarketDial, Inc.,* No. 2:19-CV-00496-JNP-CMR, 2022 WL 1063204, at *9, n.6 (D. Utah Apr. 8, 2022) (applying Utah law); *McCollam v. Sunflower Bank, N.A.,* No. 21-CV-1484-WJM-SKC, 2022 WL 1134276, at *3 (D. Colo. Apr. 15, 2022), (applying Colorado law), *appeal pending*.

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

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

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

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

> *Only the Trustee may enforce the provisions of these presents.* No Noteholder shall be entitled (i) to take any steps or action against the Issuer or the Surety

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

> Provider to enforce the performance of any of the provisions of these presents and/or the Surety Agreement or (ii) take any other proceedings (including lodging an appeal in any proceedings) in respect of or concerning the Issuer or the Surety Providers, in each case unless the Trustee having become bound as aforesaid to take any such action, steps or proceedings fails to do so within a reasonable period and such failure is continuing.

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

This argument fares no better for Defendants than the arbitration clause. Defendants are not parties to the Trust Deed to be able to enforce the No-Action clauses. Defendants do not point to any language in the No-Action clauses that would give them the right to enforce those provisions. Nor does the Court see any.

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

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

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

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

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

Notes through SP Capital. *Id.* ¶¶ 96, 102. But the Complaint does not allege that Defendants Piazza or SP Capital themselves are actually Noteholders.

Defendants further cite the U.K. Companies Act 2006, Part 11, "Derivative claims and proceedings by members." ECF No. 44-45. But the statute limits its application to the United Kingdom. Chapter 1 applies only to "proceedings in England and Wales or Northern Ireland." Chapter 1 § 260(1).[12] In addition, this chapter regards only shareholders of a company, not debt holders. It regards causes of action "vested in the company, and seeking relief on behalf of the company." *Id.* Part 11, Chapter 1 § 260(1)(a), (b). Even assuming arguendo Plaintiffs' claims were vested in the Company, they do not seek relief on its behalf. Rather, Plaintiffs seek damages for themselves. Their damages are a loss in value of the Notes they hold, but they allege that Defendant Bakhmatyuk uniquely targeted his scheme against Plaintiffs (and perhaps for a time, Ashmore) to suffer greater losses than other Noteholders. The U.K. Companies Act 2006 does not support Defendants' argument.

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

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

because the trust deed contained a no-action clause,[13] and although styled as a tort, the Florida action alleged only conduct that would equally affect all bondholders.

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

However, Vivendi's claims were in substance class claims because the only loss it asserted was a contractual benefit ("contingent payment/equity kicker") that applied equally to all bondholders. ECF No. 44-46 ¶ 102. The allegedly fraudulent conduct was also not unique to Vivendi: "if Elektrim defrauded or deceived anybody by the … press release, then it was the entire class of bondholders. The statements in the press release were not made to … [Vivendi] alone in some private capacity." *Id.* ¶ 103. On these facts, *Elektrim* is easily distinguishable from this case. Again, Plaintiffs allege that Bakhmatyuk

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

singled them out (and perhaps one other investor, Ashmore) among the Noteholders.[14]

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

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

D. Failure to Join Indispensable Parties

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

Federal Rule of Civil Procedure 19 provides:

(a) Persons Required to Be Joined if Feasible.

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

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

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

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

this likewise asks the Court to disbelieve Plaintiffs' allegations that Defendants have in effect covertly taken control of the Company.

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

Defendants also ignore the practical reality that is reasonably inferred from Plaintiffs' allegations. Plaintiffs allege that Bakhmatyuk and Defendants have left the Company an empty shell with "little or no value." Complaint ¶ 10(c). At the time the complaint was filed (December 7, 2021), the Company apparently continued operations.[15] But having no significant assets to fund litigation costs, practically speaking the Company would not be able to pursue or defend litigation. And having no significant assets from which to collect a judgment against the Company, it is also difficult to imagine the Trustee deciding to pursue any legal action against the Company on behalf of the Noteholders. The Trustee has the right to demand adequate pre-suit funding before bringing any litigation.

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

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

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

Defendants argue that preclusive effect is not required to show an interest is impaired or impeded, citing a case from the District of Puerto Rico. *Puerto Rico Med. Emergency Grp., Inc. v. Iglesia Episcopal Puertorriquena, Inc.,* 321 F.R.D. 475, 480 (D.P.R. 2017). In that case, the court found all claims (including a RICO claim) stemmed from a contract between the plaintiff ("PRMEG") and a hospital, Saint Luke's. The allegations surrounding the contract are complex and involve several defendants but regard double-billing of insurance companies in violation of the contract. Saint Luke's was not a party to the action. The court found that it could "potentially [be] prejudice[d] in future litigation" if the court found it had breached the contract, apparently because the insurance companies might then sue St. Luke's regarding the same set of transactions. But again, in this case, there is no suggestion that future litigation regarding these claims is actually likely against the Company.

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

In their reply, Defendants also argue prejudice to holders of senior debt and to other Noteholders because Plaintiffs are attempting to obtain a judgment ahead of them. ECF No. 53 at 14. But again, Plaintiffs are not suing the Company. They're suing Defendants, who are nonsignatories to the Trust Deeds, and they're suing them for unique damages. Nor do Defendants indicate that other Noteholders have sued Defendants for the same conduct, or are likely to do so in the future. Accordingly, the Court finds AVG and ULF are not required parties under Rule 19(a). The motion to dismiss on this basis is denied.

E. Forum Non Conveniens

Defendants next argue the case must be dismissed under the doctrine of forum non-conveniens in favor of the London Court of International Arbitration ("LCIA"). They argue there are only two threshold requirements. First, there must be an "adequate alternative forum where the defendant is amenable to process." *Archangel Diamond Corp. Liquidating Trust v. Lukoil,* 812 F.3d 799, 804 (10th Cir. 2016) (quoting *Fireman's Fund Ins. Co. v. Thyssen Mining Constr. of Can., Ltd.,* 703 F.3d 488, 495 (10th Cir. 2012)).

"Second, 'the court must confirm that foreign law is applicable.'" *Id.* "[I]f both threshold requirements are met, the court weighs the private and public interests to determine whether to dismiss" the case. *Id.*

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

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

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

Even if Defendants are correct in interpreting the English rules of civil procedure and practice direction, the Court is not persuaded. Defendants contend that the LCIA is the adequate alternative forum. ECF No. 44 at 29. They do not explain, however, whether the English civil procedure rules or practice direction even apply in the LCIA. Nothing in the exhibits that Defendants attach suggests that they do.[16] LCIA presents itself as a non-

[16] Rule 6.36 states: "In any proceedings to which rule 6.32 [service in Scotland and Northern Ireland] or 6.33 [service in the United Kingdom] does not apply, the claimant may serve a claim form out of the jurisdiction with the permission of the court if any of the grounds set out in paragraph 3.1 of Practice

profit company, not part of the Ministry of Justice. *See, e.g.,* https://www.lcia.org/LCIA/organisation.aspx.

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

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

1. Standard of Review

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

Thus, "the pleading standard Rule 8 announces does not require 'detailed factual allegations,' but it demands more than an unadorned, the-defendant-unlawfully-harmed-

Direction 6B apply." Practice Direction 6B(3.1) provides a "claimant may serve a claim form out of the jurisdiction with the permission of the court under rule 6.36 where" certain conditions are met. Most of those conditions plainly would not apply to Defendants if Plaintiffs attempted to arbitrate or sue them in England, and none appear certain.

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

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

2. Elements of Civil RICO

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

predicates." *RJR Nabisco, Inc. v. European Community,* 579 U.S. 325, 329–30 (2016). Interstate mail fraud (18 U.S.C. § 1341), interstate or foreign wire fraud (18 U.S.C. § 1343) and inducing interstate or foreign travel (18 U.S.C. § 2314) are among them. 18 U.S.C. § 1961(1)(B).

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

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

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

3. Extraterritorial Application of RICO

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

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

579 U.S. at 337 (following *Morrison v. Nat'l Austl. Bank Ltd.,* 561 U.S. 247 (2010) and *Kiobel v. Royal Dutch Petroleum Co.,* 569 U.S. 108 (2013)).

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

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

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

It appears the Tenth Circuit has not yet decided after *RJR Nabisco* whether any of these predicates are extraterritorial. Cases outside this circuit reflect a growing consensus that they are not. *See, e.g., United States v. Elbaz,* -- F.4th ---, 2022 WL 2348691 (4th Cir. June 30, 2022) (wire fraud); *United States v. Napout,* 963 F.3d 163, 178 (2d Cir. 2020); *Skillern v. United States*, No. 20-13380-H, 2021 WL 3047004, at *7-8 (11th Cir. Apr. 16, 2021) (mail and wire fraud); *United States v. All Assets Held at Bank Julius, Baer & Co.,* 251 F. Supp. 3d 82, 98-99 (D.D.C. 2017) (Section 2314 transportation of goods), *recon. in*

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

part on other issues, 315 F. Supp. 3d 90 (D.D.C. 2018). Thus, the Court looks to the second step – the "focus" of each predicate and whether Plaintiffs allege a domestic violation thereunder. The circuits that have addressed the focus of mail and wire fraud appear to agree that it is the misuse of the instrumentality – domestic mails and domestic wires, respectively. *See, e.g., United States v. Hussain,* 972 F.3d 1138, 1143–44 (9th Cir. 2020) (misuse of the instrumentality in furtherance of the scheme to defraud); *Elbaz,* 2022 WL 2348691, at *1. "Wires" include the internet. *United States v. Kieffer,* 681 F.3d 1143, 1153–54 (10th Cir. 2012). Therefore, "a claim predicated on mail or wire fraud involves sufficient domestic conduct when (1) the defendant used domestic mail or wires in furtherance of a scheme to defraud, and (2) the use of the mail or wires was a core component of the scheme." *Bascuñán v. Elsaca,* 927 F.3d 108, 122 (2d Cir. 2019).

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

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

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

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

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

4. Are the RICO Claims Barred as Securities Fraud?

Defendants next argue that Plaintiffs RICO claims are barred because "any conduct that would have been actionable as fraud in the purchase or sale of securities" is excluded from the RICO private right of action. ECF No. 44 at 37 (citing the Private Securities

Litigation Reform Act 1995 amendment of RICO, Pub. L. No. 104–67 § 107, 109 Stat. 737, 758 (1995)).

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

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

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

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

5. Pattern of Racketeering Activity

Defendants next challenge the RICO claims because in their view, Plaintiffs do not allege a pattern of racketeering activity inferring continuing criminal activity but just "past transfers of corporate assets in violation of corporate documents." ECF No. 44 at 40-41. As noted above, a "'pattern of racketeering activity" requires at least two predicates committed within 10 years of each other. 18 U.S.C. § 1961(5). It also requires at least two "related predicates that together demonstrate the existence or threat of continued criminal activity." *RJR Nabisco,* 579 U.S. at 330. This "continuity" requirement precludes claims that regard only "closed-ended" conduct, a single scheme to accomplish a discrete goal directed at a finite group of individuals, in which there is not even a potential to extend to other persons nor threat of future criminal conduct. *See, e.g., Boone v. Carlsbad Bancorporation, Inc.,* 972 F.2d 1545, 1556 (10th Cir. 1992).

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

6. RICO Damages and Fraud Allegations

Finally, Defendants argue that Plaintiffs' "RICO damages are unworkable and unprovable because Gramercy could still recover on its Notes," and that they fail to allege fraud with particularity. Both arguments either ignore or misconstrue the allegations. Plaintiffs allege that Defendants have left the Company with little to no value for paying amounts due on the Notes, having purposefully transferred all assets to SP Capital and TNA to avoid paying Plaintiffs on the Notes. The allegations leave no room for doubt that Plaintiffs plausibly allege damages resulting from the alleged scheme to defraud under RICO.[18]

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

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

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

Id. ¶¶ 170(5), 176. These allegations support Plaintiffs' claims that Piazza, SP Advisors and TNA committed RICO predicate acts.

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

III. Conclusion

Consistent with the foregoing, Defendants' Piazza, Yaremenko, SP Capital, and TNA's motion to dismiss (ECF No. 43) is DENIED IN PART and GRANTED IN PART. Count 1 is dismissed with respect to Yaremenko only. If they can remedy the deficiency

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

noted on that claim, Plaintiffs may amend the complaint by **August 5, 2022**. Absent a timely amended claim, the dismissal of Count 1 as to Yaremenko will become with prejudice without further action by the Court.

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

Nancy D Freudenthal

NANCY D. FREUDENTHAL
UNITED STATES SENIOR DISTRICT JUDGE

ATTACHMENT 2

FILED

1:09 pm, 9/15/22

Margaret Botkins
Clerk of Court

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

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

Plaintiffs,

vs.

OLEG BAKHMATYUK, *et al.*,

Defendants.

Case No. 21-CV-223-F

ORDER ON DEFENDANT OLEG BAKHMATYUK'S MOTION TO DISMISS

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

I. Jurisdiction to Hear the Motion

As a preliminary issue, all other Defendants – Nicholas Piazza, SP Capital Management, LLC ("SP Capital"), TNA Corporate Solutions, LLC ("TNA") and Oleksander Yaremenko, collectively the "Piazza Defendants" – have filed an interlocutory

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

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

ATTACHMENT 2

appeal pursuant to 9 U.S.C. § 16 of the Federal Arbitration Act ("FAA"). ECF 85 (Piazza Defendants' Notice of Appeal). Specifically, they appeal from the portion of the Court's July 7, 2022 order (ECF 67) denying their motion to dismiss or stay in favor of arbitration.

"The filing of a notice of appeal … confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." *Griggs v. Provident Consumer Disc. Co.,* 459 U.S. 56, 58 (1982). Plaintiffs argue the appeal is frivolous (and thus the Court should disregard it) because the Piazza Defendants are not parties to the arbitration agreement. Regardless that the Court has found the Piazza Defendants are not parties to that agreement, they have the right to an interlocutory appeal from the Court's denial of the portion of their motion relating to arbitration. *Arthur Anderson LLP v. Carlisle,* 556 U.S. 624, 628–29 (2009). "The jurisdictional statute here unambiguously makes the underlying merits irrelevant, for even utter frivolousness of the underlying request for a § 3 stay cannot turn a denial into something other than "[a]n order ... refusing a stay of any action under section 3.'" *Id.* Plaintiffs also note the Piazza Defendants did not label their motion to stay or dismiss as one under the FAA, but the title is not important. The Piazza Defendants expressly argued for a stay under section 3 of the FAA. ECF 44 at 14. The Court accordingly cannot conclude that the appeal is frivolous.

Nonetheless, the Court has jurisdiction to hear Bakhmatyuk's motion because the order on appeal does not decide any claims or issues as to him.[3] The claims against him are therefore not involved in the appeal. In the alternative, if the Tenth Circuit later

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

concludes that Bakhmatyuk's motion is "involved in the appeal" because the issues overlap, the Court is authorized to deny a motion "for relief that the court lacks authority to grant because of an appeal that has been docketed and is pending." Fed. R. Civ. P. 62.1. Thus, the Court proceeds to rule on Bakhmatyuk's motion.

II. Background

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

In a nutshell, Gramercy alleges that Bakhmatyuk and the Piazza Defendants together engaged in a multi-year pattern of racketeering activity to defraud Gramercy of the value of Notes it holds from non-parties UkrLandFarming PLC ("ULF") and its subsidiary Avangardco IPL ("AVG," together with ULF, the "Company"), which are Ukrainian agricultural companies that Bakhmatyuk controls. The Notes were issued under Trust Deeds. ECF 44-20 through 44-23 (AVG); ECF 44-25 and 44-26 (ULF).[4]

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

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

AVG, both of which are owned and controlled by Bakhmatyuk, are referred to herein as the Company." *Id.* ¶ 22.

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

III. Analysis

A. Personal Jurisdiction

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

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

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

accordingly takes as true the Complaint's allegations regarding his involvement in the alleged scheme.

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

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

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

State's regulation." *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011) (internal quotation marks omitted). When a court has specific jurisdiction, it is "confined to adjudication of issues deriving from, or connected with, the very controversy that establishes jurisdiction." *Id.*

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

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

"The purposeful direction requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of random, fortuitous, or attenuated contacts, . . . or of the unilateral activity of another party or a third person." *Old Republic,* 877 F.3d at 904

(citations and quotation marks omitted). "Mere foreseeability of causing injury in another state is insufficient to establish purposeful direction." *Id.* (citation omitted). But "where the defendant deliberately has engaged in significant activities within a State, ... he manifestly has availed himself of the privilege of conducting business there." *Id*. (citations and quotation marks omitted).

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

2. The Court Has Specific Jurisdiction Over Bakhmatyuk

Plaintiffs allege that Bakhmatyuk made several, purposeful contacts with the State of Wyoming and the claims arise from those contacts. Gramercy alleges among other things that Bakhmatyuk has had a business relationship with Piazza since 2008. ECF 1 ¶¶ 27, 29. During that entire time period, Piazza has been a resident of Wyoming and also based his relevant businesses (SP Capital, d/b/a SP Advisors and TNA) in the state. Bakhmatyuk caused ULF to enter a "cooperation agreement" with SP Advisors in 2014, which was announced as appointing SP Advisors as ULF's investment relations advisor and corporate broker. SP Advisors was involved in Bakhmatyuk's sale of five per cent of ULF to Cargill in 2014. *Id.* ¶ 31. Bakhmatyuk directed Piazza to use his connections with a purportedly independent analyst, Concorde, to spread false information (*Id.* ¶ 72); he also directed Piazza and Yaremenko to form TNA in Wyoming, as a backup plan if Plaintiffs did not agree to his proposal for restructuring the Company's debt. *Id.* ¶ 84.

Bakhmatyuk had Piazza and SP Advisors act (either directly or through a company partly owned by SP Capital) as straw purchasers to acquire the Company's debt from Noteholders other than Plaintiffs and attempt to acquire the Notes from Plaintiffs as well. *Id.* ¶¶ 93, 102, 109, 112. When it was clear Plaintiffs would not accept Bakhmatyuk's restructuring or straw purchases, he directed Piazza and SP Advisors (and Yaremenko, but he is not directly pertinent here because he was not located in Wyoming) to "plan and orchestrate a complex set of transactions through which the Company's assets could be isolated from creditors – at this point, ostensibly Gramercy – by transferring them to a number of newly-formed shell companies." *Id.* ¶ 123. The shell companies included those "organized under the umbrella of TNA, which is nominally owned by Piazza, but, upon information and belief, is actually under Bakhmatyuk's control." *Id.* Plaintiffs allege Bakhmatyuk had Piazza and SP Advisors (and Yaremenko) proceed with transfers of at least 100 subsidiaries of ULF to TNA in Wyoming, so that he could continue to maintain his control of those businesses away from ULF's creditors, such as Plaintiffs. *Id*. ¶¶ 138-144. Plaintiffs' claims regard those very asset transfers.

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

Moreover, exercising jurisdiction over Bakhmatyuk does not offend traditional notions of fair play and substantial justice. He has maintained significant business contact with Wyoming since at least 2016, when he allegedly began to plan the asset transfers.

Again, the claims against him arise from those contacts with the state. It is not unfair for him to defend the claims here. Accordingly, Bakhmatyuk's motion to dismiss for lack of personal jurisdiction is denied.

B. Motion to Stay or Dismiss Based on Arbitration Clauses

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

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

As the July 7 order held, although the arbitration clauses agree to arbitrate arbitrability, when there is a nonsignatory involved (here, Bakhmatyuk), the Court independently determines arbitrability itself and does not defer to the contract's agreement to arbitrate arbitrability. *See, e.g., Belnap v. Iasis Healthcare,* 844 F.3d 1272, 1293 (10th Cir. 2017) (finding under Utah law the signatory plaintiff was not required to arbitrate his claims against a nonsignatory defendant, regardless that he agreed to arbitrate arbitrability

as to the signatory defendant). *See also Mars, Inc. v. Szarzynski*, No. CV 20-01344 (RJL), 2021 WL 2809539, at *5 (D.D.C. July 6, 2021).

1. The Arbitration Clauses in the Notes

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

> [T]he ULF and AVG Trust Deeds contain Schedules showing the form language for the Notes, including their terms and conditions. Ex. 5A; Ex. 6A. These terms and conditions state unequivocally that Noteholders are bound by the Trust Deeds' and Notes' terms. See Ex. 6A at Schedule 5, pg. 58; Ex. 5A at Part 2, pg. 42. Each Trust Deed also contains two arbitration clauses: one in the Trust Deed portion, and one in the Schedules showing the form of the Notes.

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

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

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

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

(3) The Schedules in the Trust Deeds that set forth the form terms and conditions of the Notes. ULF Trust Deed, Schedule 5 at 58; AVG Trust Deed, Schedule 2, Part 2 at 42.

Those conditions state that the Notes are subject to the terms of the Trust Deeds, and they contain arbitration clauses. AVG Trust Deed, Schedule 2, Part 2 at 68 § 20.2; ULF Trust Deed, Schedule 5 at 90 § 19.2.

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

It thus appears Plaintiffs allege *the Notes* are the contracts to which they are parties, regardless that the form Notes do not have a signature blank for the Noteholder. This is consistent with the rest of the complaint, in which Plaintiffs' allegations of "contractual

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

rights" consistently refer to rights under the Notes.[6] It is also consistent with the opinions of both sides' experts on English law, noted above. Thus, Plaintiffs are parties to the Notes and are subject to the arbitration clauses therein – both those stated directly and incorporated from the Trust Deeds.

However, Bakhmatyuk's further arguments – that Plaintiffs are parties to the *Trust Deeds,* and that he himself is a party to the Trust Deeds – are incorrect. He points to the Eleventh Circuit's opinion on remand from *GE Energy Power Conversion France SAS, Corp. v. Outokumpu Stainless USA, LLC,* 140 S. Ct. 1637 (2020), *Outokumpu Stainless USA, LLC v. Coverteam SAS,* No. 17-10944, 2022 WL 2643936 (11th Cir. July 8, 2022) ("*GE Energy II*"). The remand opinion issued the day after the July 7 order; Bakhmatyuk contends it shows the June 7 order is inconsistent with *GE Energy* because this Court found Plaintiffs were not parties to the Trust Deeds simply because they did not sign them. ECF 76 at 8. He further argues that his status as a corporate insider (and related facts) make it appropriate to consider him a party to the Trust Deeds as well.

In *GE Energy,* the Supreme Court held that the "[New York] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, … [does not] conflict[] with domestic *equitable estoppel doctrines* that permit the enforcement of arbitration

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

agreements by nonsignatories." *GE Energy,* 140 S. Ct. at 1642 (emphasis added).[7] The Court remanded for the Eleventh Circuit to determine which body of law applied to this issue and whether equitable estoppel was available to the defendant.

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

The only aspect of this case that bears similarity to *GE Energy II* is that Plaintiffs are contract parties to *the Notes* despite being nonsignatories. Nothing in *GE Energy* or *GE Energy II* suggests that Plaintiffs are parties to the *Trust Deeds* – which expressly define the parties entering into them as the Issuers, the Trustee, and the Surety Providers. ECF 44-20 at 2, 4 (AVG); ECF 44-25 at 2, 5 (ULF). Nor do those opinions suggest any reason to find that Bakhmatyuk is a party to the Trust Deeds or Notes. Unlike GE Energy – whose name in the list expressly made it a contract party under the contract's definition of "Seller" – Bakhmatyuk is mentioned in the Trust Deeds only in defining "Permitted Holders" and "Related Parties." ULF Trust Deed at 104; AVG Trust Deed at 77, 80.

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

"Permitted Holders" are pertinent only to "Redemption at the Option of the Holders upon a Change of Control." ULF Trust Deed at 81 (Schedule 5, form Note) § 7.2; AVG Trust Deed at 80 (Schedule 2, form Note) § 8.2. As for "Related Parties," it is not plain to the Court what Trust Deed or form Note provisions, if any, rely on that definition. Plaintiffs' English law expert, Ben Valentin Q.C., confirms that mentioning a nonsignatory in a contract does not make the person a contract party. ECF 94-1 at 7 ¶ 16. The Trust Deeds or Notes would have to expressly define Bakhmatyuk as a party, and they do not do so. They also do not otherwise give him a right to enforce the arbitration clauses.

Nor does Bakhmatyuk's status as a corporate insider of the Issuers – CEO, Chairman of the Board, and controlling shareholder – make him a party to the Trust Deeds or Notes. He asserts that he signed the Directors' Certificates to the Trust Deeds. The present record includes only the unsigned forms for those documents. AVG Trust Deed at 95 (form of directors' certificate); ULF Trust Deed at 123 (form of officers' certificate). But even assuming in his favor that he signed those certificates, by definition Bakhmatyuk signed them in his capacity as a director or officer, not as an individual.

Bakhmatyuk does not cite any law – foreign or domestic – that treats a nonsignatory owner, director or officer as though he or she is a party to a company's contracts, absent some inequity to a third person that would result from continuing to recognize the company's separate existence. It is black-letter American law that corporate entities are legally distinct from their individual owners, officers and directors. *See, e.g.,* 1 *Fletcher Cyc. Corp.* § 25 (Sep. 2021 update); *Ridgerunner LLC v. Meisinger,* 297 P.3d 110, 115 (Wyo. 2013); *ARW Expl. Corp. v. Aguirre,* 45 F.3d 1455, 1460–61 (10th Cir. 1995). Even

when an individual defendant is the sole shareholder of a corporate defendant, that "is generally insufficient in itself to warrant disregarding separate corporate existence. Courts do not lightly pierce the corporate veil, even in deference to the strong policy favoring arbitration." *Id.* at 1460-61 (internal quotation marks and citations omitted). Rather, corporate veil piercing requires showing the corporate form has been abused and continuing to recognize it would result in fraud or inequity to another person. *See, e.g.,* 1 *Fletcher Cyc. Corp.* § 41; *Ridgerunner*, 297 P.3d at 115-16. Unsurprisingly, Bakhmatyuk does not argue such facts here. In short, Bakhmatyuk has not shown that being a corporate insider makes him a party to the Company's contracts, unless the contract expressly includes him as an individual as a party – and the Trust Deeds and Notes do not.

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

2. Additional Issuance Documents and Bakhmatyuk's Relationship Agreement

Bakhmatyuk also argues Plaintiffs' claims are based on all "issuance documents," which in his view includes not only the Trust Deeds, Notes, prospectuses and subscription agreements but also his April 2010 "Relationship Agreement" with AVG. The

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

Relationship Agreement predates the issuances, but it is the only one of these documents that Bakhmatyuk signed. He asserts that it governs his transactions with AVG and has an arbitration clause which the Court should apply against Plaintiffs. Of course, Plaintiffs are not parties to the Relationship Agreement. Bakhmatyuk also does not appear to cite where the Notes or Trust Deeds even mention the Relationship Agreement, if at all. His argument instead hinges on the notion that all of these separate documents must not only be construed together but in effect form one contract, so that he can enforce his arbitration clause with AVG against Plaintiffs.

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

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

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

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

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

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

Bakhmatyuk does not otherwise explain how or why the prospectuses, subscription agreements, or Relationship Agreement are central to Plaintiffs' claims. Plaintiffs state they are "not suing to enforce the terms of any of the documents submitted by Bakhmatyuk." ECF 94 at 12, n.8. The prospectuses, subscription agreements, and Relationship Agreement may be pertinent to Bakhmatyuk's defenses, but this does not make them central to Plaintiffs' claims for purposes of the exceptions to Rule 12(d).

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

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

Id. (emphasis added).

It makes no sense for the form Note to refer to itself as "this Prospectus." The document is electronically searchable, and this is the only occurrence of the word "prospectus" located in the entire ULF Trust Deed. There is also no section in the ULF Trust Deed (including the form Note) entitled "Management's Discussion and Analysis…." The reference appears to be a drafting error, an unintentional holdover from copying the provision from a prospectus.

Bakhmatyuk also argues the Court can take judicial notice of the prospectuses because "when issued, [they] were governed by the EU Prospectus Directive (2003/71/EC), which imposes a uniform obligation to file and publish the prospectus." ECF 76 at 4. The EU directive requires approved prospectuses to be filed with "the competent authority of the home Member State," and that authority "shall publish [the approved prospectuses or a list of them] on its website *over a period of 12 months*." https://eur-lex.europa.eu/legal-

content/EN/TXT/?uri=celex%3A32003L0071, at Chapter III, Art. 14, §§ 1, 4 (emphasis added). The prospectuses identify the authorities that approved them (respectively, the Central Bank of Ireland and the UK Financial Services Authority), but Bakhmatyuk does not point to any public office where the prospectuses remain available now. Although the Court is not required to search the Internet on this issue, in this instance the Court exercised its discretion to do so. Neither the Central Bank of Ireland nor the UK Financial Conduct Authority list any prospectuses from UKL or AVG. https://www.centralbank.ie/regulation/industry-market-sectors/securities-markets/prospectus-regulation/prospectuses; https://marketsecurities.fca.org.uk/.

In the case Bakhmatyuk cites, *Slater v. A.G. Edwards & Sons, Inc.,* 719 F.3d 1190 (10th Cir. 2013), the documents judicially noticed were filed with the U.S. Securities and Exchange Commission. *Id.* at 1196, 1198-1206. Once a document is filed with the SEC, it remains publicly available, absent special circumstances. Merely pointing to a document's statement that it was published when issued several years ago – without also showing it remains available at a public office today – is insufficient for judicial notice. In short, Bakhmatyuk has not shown that the subscription agreements, prospectuses, or Relationship Agreement fall within any exception from Rule 12(d).

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

other "issuance documents." Thus, converting to summary judgment is unlikely to change the outcome on his motion to stay or dismiss for arbitration.

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

3. Equitable Estoppel?

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

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

Bakhmatyuk argues two bodies of equitable estoppel give him the right to require Plaintiffs to arbitrate their claims: English law and federal common law. As to English law, Bakhmatyuk presents the opinions of an expert, Dr. Marcos Gregorios Dracos. ECF 76-5 (Dracos First Legal Memorandum), ECF 96-2 (Dracos Second Legal Memorandum). *See* Fed. R. Civ. P. 44.1 ("Determining Foreign Law"). Dr. Dracos is a barrister practicing

law in England and Wales.[9] He was called to the English Bar in 2005 and has been a member of the Chambers of Lord Grabiner Q.C., One Essex Court, since 2006. *Id.* ¶ 3. His "practice focuses on international commercial dispute resolution, with particular emphasis on arbitration and private international law." *Id.* ¶ 4. He has a Ph.D. in law from Cambridge University in English contract law. *Id.* ¶ 5. Dr. Dracos is qualified to opine on English contract law and its application to arbitration clauses.

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

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

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

the circumstances." ECF 76-5, ¶ 59. He bases this opinion on the authorities he discusses therein. *Id.* ¶ 60.

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

The second reason Dr. Dracos' opinion is not persuasive is that the authorities he discusses do not address equitable estoppel as to tort claims (whether statutory or common law) brought against a non-contract party. Specifically, he discusses two English cases: *Sea Premium Shipping Ltd. v. Sea Consortium Pte Ltd.* (Unreported, High Court of Justice of England and Wales, David Steel J, 11 April 2001); *Dell Emerging Markets (EMEA) Ltd v. IB Maroc.com SA* [2017] EWHC 2397 (Comm). ECF 76-5 ¶¶ 34-51. Dr. Dracos further cites for the same proposition a treatise by Dicey, Morris & Collins, *The Conflict of Laws,* 15th ed. (to which he refers as "Dicey & Morris"), an Australian case cited therein

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

involving a jurisdiction clause governed by English law, *Global Partners Fund Ltd v. Babcock & Brown Ltd (In Liquidation)* [2010] NSWCA 196, and *VTB Capital v. Nutritek* [2013] UKSC 5, at [106], for citing *Global Partners Fund* with approval. *Id.* ¶¶ 52-57.

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

Bakhmatyuk did not provide copies of Dr. Dracos' authorities,[12] but his discussion reflects these cases involved claims to enforce contracts and promises. *See, e.g.,* ECF 76-5 at 12 ¶ 45 (quoting *Dell*, """it would be inequitable or oppressive and vexatious for a party to a contract … to seek to enforce *a contractual claim* arising out of that contract without respecting the jurisdiction clause within that contract," emphasis added). The same is true of the English law treatise. *Id.* ¶ 53 (quoting Dicey & Morris's discussion of claims "seek[ing] to enforce the promise," and "a clear statement on which reliance has been

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

placed"). He attempts to extend his cited authorities beyond contractual and quasi-contractual[13] claims by opining that while the claims in *Sea Premium* and *Dell* "were characterized as contractual in nature, the legal bases of the claims were statutes or legal rules dehors [*i.e.,* outside of] the contract." ECF 76-5, ¶ 48. What Dr. Dracos means by this is left opaque. If he means "legal bases" in the sense of statutes or rules providing a vehicle for bringing the claim (the underlying case in *Dell* was brought in Dubai, for example), this would not change the subject of the claims.

Dr. Dracos also does not address the difference between non-contractual claims that regard the same subject as a contract at issue *versus* claims that do not. He refers to "non-contractual claims" in three cases, the first of which is *Fiona Trust v. Privalov* [2007] UKHL 40, but does not explain what the claims were. ECF 76-5 ¶ 49, nn. 22, 23. In the Court's research, the claims included alleged invalidity of the contract due to bribery and fraud in its inducement. *Fiona Trust* [2007] UKHL 40, 2007 WL 2944855 (a case summary; the opinion itself was not available to the Court in Westlaw or Lexis).[14] However, that case involved only contract parties. It is not on point for a non-contract party requesting equitable estoppel.

Dr. Dracos also refers to claims for "tort[ious duty] and … breach of fiduciary duty" in *Global Partners Fund.* ECF 96-2, ¶ 25. He is persuasive that this Australian case

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

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

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

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

Times Trading regarded coal that was misdelivered without its original bills of lading. National Bank held bills of lading on the coal and first sued the vessel's owner,

[15] *Global Partner Funds* also held the Indemnified Persons were bound under the principle of assuming reasonable businessmen would not want litigation relating to the LPA pending in two places, because they were "so closely connected with the implementation of the" LPA. *Id.* ¶ 79. However, this reasoning does not actually appear to be a separate basis for the holding. Presumably these nonparties were indemnified in the LPA because of their close involvement in implementing it.

Rosalind. Rosalind later asserted the vessel was "bareboat chartered" to Times, and it was Times that had issued the bills of lading (thus, if anyone was liable, it was Times). National Bank then sued Times in Singapore on the bills of lading. Times sought to enjoin that action in favor of the arbitration clause incorporated in the bills of lading from the charterparty. National Bank asserted to the contrary that the charterparty was a sham, and thus there was no arbitration clause between them. The court held that "[h]ere (although the pleaded case encompasses bailment and tort) *it has never been said that the real nature of the claim is noncontractual;* the dispute is all about the contract – the issue is whether the contract Times asserts is real, or a sham." *Times Trading*, 1 C.L.C. at 808. *I.e.,* the bailment and tort claims regarded only the same subject as the contract. In that context, the court treated the case as contractual and quasi-contractual. *Id.*

But here, Plaintiffs' claims cannot be construed as quasi-contractual. The claims do not regard only the same subject as the Notes (or through them, the Trust Deeds). While the tortious interference claim relies on the incorporated Trust Deed provisions that restrict the Company's ability to transfer assets, that claim is against nonparties to the Notes and Trust Deeds. It also requires Plaintiffs to show not only that the Company breached the incorporated Trust Deed terms but also that the Defendants engaged in tortious conduct that caused or induced those breaches. The other claims (civil conspiracy, aiding and abetting, and RICO) have even less direct connection to the Notes and incorporated provisions of the Trust Deeds. Each of those claims require proof of an underlying tort (for the RICO claims, more specifically a RICO predicate act), not just a breach of the

Trust Deed terms. Thus none of Plaintiffs' claims regard only the same subject as a contractual or quasi-contractual claim.

And finally, Dr. Dracos relies on Dicey & Morris's statement that a non-contract party can seek to enforce an arbitration clause based on the judicial proceeding being "vexatious or oppressive" or a forum non conveniens. ECF 76-5, ¶ 53 (quoting the treatise); ECF 96-2, ¶¶ 37-41. But as the Court notes above, Dicey & Morris' entire discussion of this issue assumes "*A promises B* that all disputes connected with a contract, *including disputes against C, a non-party,* will be resolved in a particular way." ECF 76-5 ¶ 52 (emphasis added, citing Dicey & Morris ¶ 12-111). This assumption carries through all of the treatise's conclusions on which Dr. Dracos relies:

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

Id. ¶ 53 (emphasis added).[16] In short, Bakhmatyuk does not show that English law allows nonsignatories to enforce arbitration clauses when a contract party brings tort claims that do not regard the same subject as the contract.

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

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

b. The Choice of Law for Equitable Estoppel

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

However, *Arthur Anderson LLP v. Carlisle,* 556 U.S. 624 (2009) made plain that federal courts should not apply federal common law to this issue. The Court held that Sections 2 and 3 of the FAA do not "purport[] to alter background principles of state contract law regarding the scope of agreements (including the question of who is bound by them) … *if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally." *Id.* at 630-31 (internal quotation marks omitted). States cannot enact anti-arbitration laws, but they otherwise provide the underlying law of contract that applies to domestic arbitration clauses. *Arthur Andersen* involved a domestic arbitration agreement. There was no issue of whether a foreign jurisdiction's law governed. In that context, the Court's reference to "state law" as controlling is reasonably understood

to mean that the "relevant law of contract" that governs the contract – whether it be foreign or domestic– also governs the question of who is bound by arbitration clauses. Thus, in the Tenth Circuit, *Arthur Andersen* made clear that federal common law does not govern who may be bound by an arbitration clause. *Lenox MacLaren Surgical Corp. v. Medtronic,* 449 F. App'x 704, n.2 (10th Cir. 2011).[17]

GE Energy does not change *Arthur Andersen's* reasoning. It cites *Arthur Andersen* for that proposition, determines the New York Convention does not bar its application, and does not reach whether the governing law was that chosen in the contract or otherwise. Nor is *Reeves* contrary. The contract in that case was domestic, and the Tenth Circuit expressly recognized that the question was governed by state contract law. *Reeves*, 17 F.4th at 1011. It refers to the "general weight and trend of authority" only as a factor for making an *Erie* guess, which again was appropriate because the contract was not international. *Id.* at 1012.

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

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

accordance with the law chosen by the contracting parties." *Id.* (citing the Restatement (2d) of Conflict of Laws § 204 (1971)).[18]

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

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

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

Bakhmatyuk argues to the contrary *Yavuz I* is inapposite because it does not regard an arbitration clause, has only a "limited" discussion thereof, and predates *GE Energy I*. ECF 96 at 6. Yet *Yavuz I* spends over a page discussing Supreme Court cases on arbitration clauses. It quotes *Scherk v. Alberto-Culver Co.,* 417 U.S. 506, 519 (1974) as treating "[a]n agreement to arbitrate before a specified tribunal [as], in effect, a specialized kind of forum-selection clause." *Yavuz I,* 465 F.3d at 429. It quotes at some length from *Scherk* and *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth,* 473 U.S. 614, 629 (1985), another case regarding an international arbitration clause. The Tenth Circuit recognized that "[t]o

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

be sure, [those] opinions did not address the choice of law issue presented here … [b]ut *the same reasoning applies*." *Yavuz I,* 465 F.3d at 430 (emphasis added). Indeed, Bakhmatyuk himself points to *Scherk* for support. ECF 96 at 6, n.7.[19] *GE Energy I* did not change the law with regard to honoring contractual choices of law, so the fact that *Yavuz I* and citations therein predate *GE Energy I* is irrelevant. They remain good law on this point.

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

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

Id. "Furthermore, respecting the parties' choice of law is fully consistent with the purposes of the FAA." *Id.* The point of the FAA is to honor the parties' intentions regarding arbitration. *See, e.g., Arthur Anderson,* 556 U.S. at 630-31 ("to place such agreements upon the same footing as other contracts").

The concurring opinion in *GE Energy II* on which Bakhmatyuk relies does not discuss *Arthur Andersen*, and all but one of the cases cited therein on this issue predate that opinion. The one case it cites post-dating *Arthur Andersen* is from the Ninth Circuit and

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

therefore is not binding here. *Setty v. Shrinivas Sugandhalaya LLP*, 3 F.4th 1166 (9th Cir. 2021).[20]

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

C. The "No-Action" Clauses

Bakhmatyuk repeats the Piazza Defendants' arguments on the "No-Action" clauses of the Trust Deeds. In support, Bakhmatyuk contends that Plaintiffs' claims are really "about a breach of the contract" and have only been masked as RICO and tort claims to get around these clauses. He does not, however, challenge the common law tort claims under Rule 12(b)(6), and his argument against the RICO claims fails as will be seen below. Bakhmatyuk also argues that Plaintiffs have no allegations of actual, unique targeting of Plaintiffs, as necessary to defeat the No-Action clauses. He argues the alleged targeting amounts only to a lack of good faith in negotiating with Plaintiffs. ECF 76 at 16. But he does not explain why, if true, that would not constitute conduct uniquely directed to and injuring Plaintiffs, given their unique position among Noteholders alleged in the complaint.

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

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

D. Forum Non Conveniens

Bakhmatyuk next argues the case must be dismissed under the doctrine of forum non conveniens in favor of the London Court of International Arbitration ("LCIA") or a judicial court in London. As the July 7 order notes, there are two threshold requirements. First, there must be an "adequate alternative forum where the defendant is amenable to process." *Archangel Diamond Corp. Liquidating Trust v. Lukoil,* 812 F.3d 799, 804 (10th Cir. 2016). "Second, 'the court must confirm that foreign law is applicable.'" *Id.* "[I]f both threshold requirements are met, the court weighs the private and public interests to determine whether to dismiss" the case. *Id.* More specifically, the Court must confirm whether foreign law applies to a majority of the issues. *Id.* at 805-806. Bakhmatyuk bears the burden of showing forum non conveniens dismissal is appropriate. *Rivendell Forest Prods., Ltd. v. Canadian Pac. Ltd.,* 2 F.3d 990, 993 (10th Cir. 1993).

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

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

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

Bakhmatyuk largely repeats the Piazza Defendants' arguments, which remain unpersuasive. He also argues that by purchasing the Notes containing arbitration clauses specifying LCIA, Plaintiffs agreed the LCIA is an "adequate alternative forum" because it is the forum chosen in the arbitration clauses. This argument ignores that the Notes expressly provide that third-parties do not have rights thereunder. Plaintiffs' purchase of the Notes therefore did not constitute acceptance of LCIA as an adequate forum for claims against third-parties such as Bakhmatyuk.

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

Bakhmatyuk further argues the Court can and should condition dismissal on the Defendants agreeing to jurisdiction in LCIA. He cites *Yavuz II,* 576 F.3d at 1182. On remand from *Yavuz I*, the district court conditioned dismissal on two things: (1) that the

American defendants – who the plaintiff believed were not amenable to service in the forum chosen by the plaintiff and an international defendant – enter a written agreement to jurisdiction there, and (2) that the forum's courts accept jurisdiction. Otherwise, the action in the district court could be reinstated. *Id.* at 1182. The Tenth Circuit found this was not an abuse of discretion and therefore affirmed.

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

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

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

2. *Does Foreign Law Apply?*

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

The Notes' choice of law provisions are broad, but again Plaintiffs are suing non-parties to those contracts. *The Angelic Grace* involved only parties to the contract at issue. Bakhmatyuk does not cite any authority – foreign or domestic – extending a contractual choice of law provision to non-contract parties, particularly when the claims are torts. Accordingly, he does not show that the Notes' choice of law clauses (or those of the other "issuance documents") govern any issues other than the interpretation of those contracts.

As to the RICO claims, the question is not so much a choice of law as whether Plaintiffs could bring those claims at all in LCIA or a judicial court in London (or whether

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

English law has an analogue). The briefing leaves this issue unclear. The unavailability of RICO claims abroad is not sufficient, standing alone, to make forum non conveniens inappropriate. *Archangel Diamond,* 812 F.3d at 805-06; *Yavuz II,* 576 F.3d at 1177 n.6 (collecting cases). For present purposes, it suffices to say that the RICO claims are governed by American law.

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

> The Second Restatement enumerates specific factors that identify the state with the most significant contacts to an issue, and the relevant factors differ according to the area of substantive law governing the issue and … the nature of the issue itself. *See, e.g.,* Restatement (Second) at §§ 6, 145, 188. To properly apply the Second Restatement method, a court must begin its choice of law analysis with a characterization of the issue at hand in terms of substantive law. *Id*. at § 7.

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

Bakhmatyuk argues the choice is between English and Ukrainian law because (a) the Notes were issued on England and Irish market exchanges; (b) the negotiations (in which he and his agents allegedly made fraudulent misrepresentations and omissions) to restructure the Notes were held in London; and (c) the Company's physical assets were and still are in Ukraine – regardless that Defendants allegedly transferred legal ownership

to shell companies in Wyoming (SP Capital and/or TNA), where Bakhmatyuk continues to have beneficial ownership. Thus, Bakhmatyuk focuses on the international locations where Defendants' conduct occurred *before* the alleged unlawful transfers, and the location of the physical assets as opposed to the ownership of those assets. He does not appear to address where he and his agents initiated the allegedly fraudulent telephone calls and emails, where Plaintiffs received them, or where their injury is felt.

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

a. Fraud (Fourth Cause of Action).

For choice of law on a fraud claim,

[w]hen a defendant's representations and a plaintiff's reliance take place in different

> states, the Second Restatement prescribes the following factors to consider in making a choice of law determination on a fraud or misrepresentation claim:
>
> > (a) the place, or places, where the plaintiff acted in reliance upon the defendant's representations,
> > (b) the place where the plaintiff received the representations,
> > (c) the place where the defendant made the representations, [and]
> > (d) the domicile, residence, nationality, place of incorporation and place of business of the parties,

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

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

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

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

The places where Plaintiffs received the fraudulent statements are Connecticut and London. They acted in reliance in at least Connecticut by not seeking to sell the Notes at fair market value. London is the place where Bakhmatyuk made some of the

misrepresentations and omissions. It appears that he or his agents (at his direction) made other misrepresentations and omissions from Ukraine. "The place where the defendant made his false representations … is as important a contact in the selection of the law governing actions for fraud and misrepresentation as is the place of the defendant's conduct in the case of injuries to persons or to tangible things." Restatement § 148, cmt. c.

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

Finally, there is no tangible thing that is the subject of a transaction between the parties. The closest this case comes to such a tangible thing is the Notes that Plaintiffs hold, which originally issued in Ireland and London. Plaintiffs allege their holdings grew over time, but neither side briefs whether they purchased all of those holdings on the Ireland and/or London exchanges, or through private transactions. And as the Court held above that Bakhmatyuk cannot enforce the Notes' choice of law clauses, that does not factor into this analysis. The "tangible thing" factor carries no weight in this instance.

Overall, the choice between Connecticut and English law is a close one on the fraud claim. Plaintiffs allege Bakhmatyuk and the Piazza Defendants singled out Plaintiffs in the alleged fraudulent scheme. The parties met in London, but Defendants knew that Plaintiffs' representatives traveled there from Connecticut, where Plaintiffs were

headquartered. Bakhmatyuk does not assert that Plaintiffs have an office in London. In the end, the Court finds the Restatement Section 148 factors weigh in favor of Connecticut having the most significant relationship to the fraud claim.

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

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

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

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

Restatement (Second) of Conflict of Laws § 145. These factors are quite similar to those

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

analyzed above on the fraud claim.

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

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

Turning to the Restatement Section 145 factors, the place where the injury occurred is Connecticut – the place where Plaintiffs hold the Notes and feel the damages from

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

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

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

c. Conspiracy and Aiding and Abetting

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

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

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

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

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

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

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

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

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

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

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

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

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

Bakhmatyuk relies in part like the Piazza Defendants on *Bixler,* 596 F.3d at 760, which applied the PSLRA bar against a RICO claim brought by shareholders of Mineral Energy and Technology Corp. (METCO). But the July 7 order already distinguishes that case because the alleged fraud occurred in the transaction in which the plaintiffs were supposed to receive stock, *i.e.,* in the purchase of a security. *Bixler* does not involve purchases of securities allegedly independent of the fraud but occurring concurrently with it, such as Plaintiffs allege here. *Bixler* does not support Bakhmatyuk's argument.

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

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

> the grievance underlying the [complaint] is in substance securities fraud. In their characterization, the solicitation (which began in late 2015), stock purchases (which ran simultaneously with the solicitations through 2016 and into early 2017), and

> actions contrary to the investment entity's interests (which began around the same time) are one unified fraud scheme.

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

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

Id. The plaintiffs were not persuasive in that case because

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

Id. at 1269 (emphasis added).

Here, unlike *Sensoria,* Plaintiffs could not state a claim for securities fraud. They bought many of their Notes years before the scheme began. As to the Notes they purchased in 2016-17, they could not show loss causation, *i.e.,* fraud in connection with the purchase of those Notes. They allege Bakhmatyuk depressed the price of Notes in 2016-17; therefore, the inference is that the Notes Plaintiffs bought during that time frame were a bargain at the time. Plaintiffs do not allege a loss on those purchases until the 2019-20 asset transfers three years later. And unlike *Sensoria*, Plaintiffs do not allege a "unified scheme" of fraud, such that the 2019-2020 asset transfers could serve as fraud in connection with those purchases three years earlier. Plaintiffs here allege two fraudulent schemes: the first (and earliest) was to create pressure for Plaintiffs to sell or restructure at steep discounts in value while also stringing them along with representations of negotiating in

good faith. The asset transfers were a second scheme that Bakhmatyuk did not conceive until January 2017 as a "backup plan" in case the first scheme did not work. ECF 1 ¶ 84. The asset transfers remained a "backup plan" until early 2019. *Id.* ¶¶ 122-123. This was approximately two years after Plaintiffs stopped purchasing Notes.

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

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

misrepresentations or omissions directed at Gramercy," citing *Johnson v. KB Home,* 720 F. Supp. 2d 1109, 1117 (D. Ariz. 2010).

Even in their reply, the Piazza Defendants did not explain how they believed the "actionable-by-anyone" theory applied on Plaintiffs' allegations, and they do not cite a Tenth Circuit or Supreme Court case addressing this issue. Rather, they cite *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit,* 547 U.S. 71, 85 (2006), which held that for purposes of securities fraud claims, fraud "coincides" with a securities transaction regardless of whether the plaintiff himself made the transaction, or someone else did (with fraudulent intent), citing *inter alia Zandford*. *Dabit* does not add anything significant here to *Zandford* regarding the meaning of "coincide" or "in connection with" a purchase or sale of a security.

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

Plaintiffs argue that their RICO claims are not barred because they do not allege any other investor relied on the misrepresentations and omissions directed to Plaintiffs, i.e., in their negotiations with Bakhmatyuk and his agents to restructure the debts. That is accurate as far as it goes, but it does not address the First Concorde Report, which they allege

Concorde sent "to investors, including Gramercy, via electronic mail." ECF 1 at ¶ 72. Concorde's email sending that report to Plaintiffs is among the communications that Plaintiffs allege as wire fraud in the RICO claims. The inference from their allegations is that the First Concorde Report is fraud in connection with other investors' sales of their Notes. Thus, if the PSLRA bar extends as far as the Defendants argue, the email sending the First Concorde Report would be barred.

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

The Seventh Circuit appears to disagree with *MLSMK. Menzies v. Seyfarth Shaw LLP,* 943 F.3d 328, 333–35 (7th Cir. 2019) analyzed only whether the plaintiff could bring securities fraud, not whether the allegations would be "actionable-by-anyone," a theory the defendant raised at least in the case below. This holding is arguably *dicta* because although the RICO claim was not barred, the plaintiff also failed to state a claim based on the

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

Several courts notes that Congress intended the PSLRA bar to "eliminate securities fraud as a predicate offense in a civil RICO action." *Bald Eagle,* 189 F.3d at 327 (citing H.R. Conf. Rep. No. 104–369, at 47 (1995)). This, however, does not answer whether Congress intended to bar a RICO claim even when there was no actual possibility of a securities fraud action on the facts. Doing so would conflict with Section 1964(c)'s own reference to the PSLRA bar as an "exception;" as a matter of logic, exceptions are not broader than the general rule. It also would not be consonant with other statements in the legislative history that "[t]he 'focus' of the Amendment was on 'completely eliminating the so-called 'treble damage blunderbuss of RICO' in securities fraud cases.'" *Bald Eagle,* 189 F.3d at 327-28 (quoting 141 Cong. Rec. H2771, daily ed. Mar. 7, 1995) (statement of Rep. Cox)). If the plaintiff cannot bring a securities fraud claim, there is no securities fraud action from which to remove treble damages.

In short, the Court finds the interpretation that stays closest to the statutory text of § 1964(c) and the legislative history is that the PSLRA bar regards only RICO claims for

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

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

IV. Conclusion

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

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

Nancy D Freudenthal

NANCY D. FREUDENTHAL
UNITED STATES SENIOR DISTRICT JUDGE

ORAL ARGUMENT REQUESTED

Nos. 22-8050, 22-8063

IN THE

United States Court of Appeals for the Tenth Circuit

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

Plaintiffs - Appellees,

v.

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

Defendants - Appellants,

and

OLEG BAKHMATYUK,

Defendant - Appellant.

On Appeal from the United States District Court
for the District of Wyoming
No. 21-cv-00223-NDF; Hon. Nancy D. Freudenthal

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GLOSSARY

AVG:	Avangardco
The "Companies":	Avangardco and UkrLandFarming
Gramercy:	Unless otherwise specified, Gramercy Funds Management LLC together with all plaintiff funds and accounts in this case
The "Notes":	The unsecured Notes governed by the particular Trust Deeds at issue in this case
Piazza Defendants:	Nicholas Piazza, Oleksandr Yaremenko, SP Capital Management LLC, and TNA Corporate Solutions LLC
RICO:	The federal Racketeering Influenced and Corrupt Organizations Act
The "Trust Deeds":	Trust deeds issued by the Companies in 2010 and 2013 governing the unsecured Notes at issue in this case
ULF:	UkrLandFarming

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PRIOR OR RELATED APPEALS

Appellees state that there are no prior or related appeals other than those consolidated in this matter.

INTRODUCTION

This case involves a fraudulent scheme perpetrated by Defendant Oleg Bakhmatyuk, a Ukrainian oligarch who controls two of Ukraine's largest agricultural companies, Avangardco (AVG) and UkrLandFarming (ULF) (the "Companies"). With the aid of the other Defendants, Bakhmatyuk formed dummy companies in the United States to hide the surreptitious transfer of more than $800 million in assets. Plaintiffs, the targets and victims of this scheme, are investment funds managed by Gramercy Funds Management LLC (together with the investment funds, "Gramercy"). A substantial portion of Gramercy's clients comprise U.S.-based institutional investors, such as public pension plans.

The sole issue presented on appeal is whether the District Court was required to dismiss this action in favor of arbitration. The answer is no, for a simple reason: "Arbitration is strictly a matter of consent, and thus is a way to resolve those disputes—*but only those disputes*—that the parties have agreed to submit to arbitration." *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 299 (2010) (cleaned up). Gramercy and Defendants are not parties to any agreement, and thus have not agreed to arbitrate. Nor is there any other basis for requiring arbitration in this case.

In 2010 and 2013, AVG and ULF, respectively, issued unsecured notes. Gramercy became the largest holder of those notes, obtaining significant rights as a

result. Bakhmatyuk viewed Gramercy and the power it had amassed as a threat to his control of the Companies. Those fears grew after another Ukrainian agricultural company was seized by its creditors, exposing widespread fraud and mismanagement. Shortly thereafter, Bakhmatyuk became the target of an ongoing corruption investigation by the Ukrainian government—one that prompted him to flee Ukraine altogether.

Seeking to preserve his personal empire and exploit the Companies' assets to fortify his position, Bakhmatyuk embarked on a fraudulent scheme to frustrate Gramercy's years-long efforts to promote a transparent, fair, and collective debt restructuring process. Defendants' scheme involved at least three phases: (1) spreading misinformation to pressure Gramercy into accepting an unfavorable restructuring; (2) acquiring other creditors' debt positions through straw purchasers to further marginalize and isolate Gramercy; and (3) transferring the Companies' significant assets to entities in Wyoming, as well as Cyprus, leaving little or no value in the Companies and shielding Bakhmatyuk's assets from an enforcement action led by Gramercy.

In response, Gramercy filed suit, asserting claims under the federal Racketeering and Corrupt Influenced Organizations Act (RICO) and state-tort claims, including fraud. Gramercy does not allege Defendants owed it any

contractual obligations and thus does not assert any contract claims against Defendants.

Defendants sought to dismiss Gramercy's suit, claiming the arbitration agreements in Gramercy's debt contracts with *the Companies* require arbitration. But Defendants are not parties to those agreements, and the District Court properly rejected their arguments that they may enforce them as *non*-parties to the agreements.

On appeal, Defendants seek a mulligan, leading with an argument they never raised in the District Court. According to Defendants' new theory, some but not all Defendants are "noteholders" and thus parties to agreements containing arbitration clauses between Gramercy and the Companies. Because they did not raise this argument below, they are barred from pursuing it now. It is also meritless. Defendants cannot point to any documentation showing that they are "noteholders"—much less that they own the same notes as Gramercy—because they never introduced any below. Defendants claim that the complaint implies that they are "noteholders," but that simply is not the case. Bakhmatyuk also argues, as he did below, that he is somehow a party to the arbitration agreements as a result of his corporate roles, but he cites no legal authority to support that claim.

Defendants thus retreat to the notion that they are entitled to require arbitration under the doctrine of equitable estoppel. The relevant arbitration agreements, however, specify that they are governed by English law. "[I]f defendants wish to

invoke the arbitration clauses in the agreements at issue, they must also accept the . . . choice-of-law clauses that govern those agreements." *Motorola Credit Corp. v. Uzan*, 388 F.3d 39, 51 (2d Cir. 2004). English law does not recognize equitable estoppel—and here the agreements include provisions *expressly disclaiming* third-party rights.

To avoid the result mandated by the contracts, Defendants focus on an argument that they made in a cursory manner, at best, below—that federal common law governs whether equitable estoppel applies. But that argument cannot be reconciled with controlling Supreme Court precedent and has been soundly rejected by two other circuits. Indeed, the Supreme Court has twice reversed lower courts for devising federal common-law rules to govern whether non-parties may claim the benefit of contractual arbitration clauses. *See GE Energy Power Conversion France SAS, Corp. v. Outokumpu Stainless USA, LLC*, 140 S. Ct. 1637, 1645 (2020) ("*GE Energy I*"); *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 630-631 (2009).

But even if the Court adopts Defendants' preferred legal test for estoppel, they are still not entitled to arbitration. The critical question under Defendants' test is whether the contract is the legal basis for Gramercy's claims. Here, the essence of Gramercy's claims is fraud, not contract. Gramercy does not allege that Defendants breached any contractual obligation to Gramercy because—to reiterate—Defendants

are not parties to the contracts. Defendants thus are not entitled to enforce the arbitration agreements, regardless of what law applies.

JURISDICTIONAL STATEMENT

The District Court has jurisdiction under 28 U.S.C. § 1331 to resolve Gramercy's allegations arising under RICO, 18 U.S.C. § 1961 *et seq.*, and supplemental jurisdiction under 28 U.S.C. § 1367 to resolve Gramercy's state-law claims.

For the reasons stated in Gramercy's pending motion to dismiss, this Court lacks appellate jurisdiction over the District Court's interlocutory orders denying Defendants' motions to dismiss. This Court has articulated a "bright-line approach" for invoking jurisdiction under the Federal Arbitration Act, *Conrad v. Phone Directories Co.*, 585 F.3d 1376, 1383 (10th Cir. 2009), and Defendants' motions in the District Court flunk that test, 1-JA 130-134; 13-JA 3190-3193.[1]

STATEMENT OF THE CASE

1. Plaintiff Gramercy Funds Management LLC is a Connecticut-based investment fund that provides management and advisory services to the other plaintiff funds and accounts in this case. 1-JA 34-36 ¶¶ 13-15. Gramercy focuses on investment opportunities in emerging markets. 1-JA 34 ¶ 13. A substantial portion

[1] The number preceding "JA" is the volume number.

of the assets Gramercy manages belong to government and public pension plans in the United States. 1-JA 35 ¶ 14.

Consistent with its emerging-markets focus, between 2010 and 2013, Gramercy began purchasing notes issued by ULF (one of Ukraine's largest agricultural conglomerates) and AVG (a subsidiary of ULF). The specific series of notes acquired by Gramercy are collectively referred to as the "Notes." AVG and ULF are both owned and controlled by Bakhmatyuk. 1-JA 38-39 ¶ 22. Through its acquisition of the Notes, Gramercy became one of the Companies' largest unsecured creditors. 1-JA 49 ¶ 50. The Notes are governed by two specific trust deeds (the "Trust Deeds"), which govern only those Notes and not other debt issued by the Companies. 1-JA 45-49 ¶¶ 46-49. The Companies have issued other debt as well, including secured debt. *See* 1-JA 55 ¶ 66 (describing at least four separate categories of debt).[2]

[2] Defendants also allude to "subscription agreements" and "prospectuses." The subscription agreements constituted part of the original issuance of the debt that Gramercy did not execute, *see* 1-JA 216-219; 2-JA 292-295, and the prospectuses are not contractual documents but disclosure documents for potential investors, *see, e.g.*, 2-JA 325-326. The District Court held that these documents could not be considered in the motion-to-dismiss posture as they are neither attached to nor referenced in the complaint, 13-JA 3158 n.4, and Defendants do not seriously challenge that determination on appeal. In any event, Defendants do not argue that the arbitration provisions in the subscription agreements differ materially from those in the Trust Deeds and Notes. *See* Opening Br. 4 n.1, 13. Defendants also mention "surety deeds," *id.* at 11, but no such documents are in the record and Defendants never explain how they might be relevant to this case.

The parties to the Trust Deeds are AVG and ULF, the trustees representing the noteholders, as well as the surety providers—*i.e.*, a number of AVG and ULF affiliates whose assets guarantee the Companies' repayment obligations under the Notes. *See* 5-JA 1324; 6-JA 1455, 1426-1427, 1571-1576. Defendants are not parties to the Trust Deeds, or to any other agreement to which Gramercy is a party.

The Trust Deeds contain arbitration clauses that apply to actions "arising out of or connected with" the Trust Deeds. 5-JA 1353; 6-JA 1483. The Notes themselves are not in the record, but the "form of the notes" attached to the Trust Deeds indicates that they contain substantially similar arbitration clauses. 6-JA 1397, 1544. The Trust Deeds and Notes also each contain a choice-of-law provision stating that the contractual agreements and "any non-contractual obligations arising out of or in connection with them are governed by, and shall be construed in accordance with, English law." 5-JA 1352; 6-JA 1397, 1483, 1544. And each specifies that third-parties have no rights to enforce the contractual terms under English law. 5-JA 1354; 6-JA 1398, 1459, 1544.

The Trust Deeds provide that noteholders with at least 25% of the principal amount are entitled to certain rights and powers, including to direct the trustee to enforce the terms of the Trust Deeds and Notes and to block certain noteholder resolutions (including in relation to debt restructuring). 1-JA 45, 47 ¶¶ 47, 49. The complaint does not allege that Gramercy held debt other than the Notes, nor does it

allege what agreements, if any, govern other debt issued by the Companies, or whether such agreements contain arbitration provisions.

2. In early 2014, Russia annexed Crimea, causing significant turmoil in Ukraine and destabilizing the Companies' operations. 1-JA 50 ¶ 53. In the aftermath, Bakhmatyuk watched as another closely held, debt-laden Ukrainian agricultural company defaulted and was effectively taken over by creditors. 1-JA 51 ¶ 55. Bakhmatyuk approached Gramercy and others to request a restructuring of the AVG and ULF Notes. 1-JA 52 ¶¶ 57-58. Gramercy agreed to a short-term restructuring, but recognized a more comprehensive restructuring was necessary. *Id.* The Ukrainian government subsequently launched an investigation into Bakhmatyuk concerning a loan to a bank Bakhmatyuk owned. 1-JA 53 ¶ 59. That ongoing investigation eventually prompted Bakhmatyuk to flee Ukraine altogether. 1-JA 54 ¶ 64.

Against this backdrop, Bakhmatyuk attempted a blunt-force restructuring of all the Companies' debt without having to make substantial concessions to any creditors. 1-JA 54-55 ¶ 65. However, Bakhmatyuk was unable to cajole Gramercy into restructuring on his terms, and thus launched the multi-faceted scheme that is the subject of this case. 1-JA 56 ¶ 70.

For help, Bakhmatyuk turned to the other named Defendants—including Nicholas Piazza, a Wyoming-based businessman with deep ties to Ukraine. 1-JA 36

¶ 17. Piazza specializes in leveraging the state's secrecy laws for the purposes of diverting and sheltering foreign assets. Piazza and his partner Oleksandr Yaremenko control "SP Advisors," a name they use to refer to a group of related companies that includes SP Capital Management, LLC, which is based in Wyoming. 1-JA 36-38 ¶¶ 17-19.

Defendants' scheme had three phases. In the first, Bakhmatyuk worked with Piazza to disseminate false information regarding the Companies' financial performance, putting pressure on Gramercy to accept a restructuring of its Notes. 1-JA 31-32 ¶ 10(a). Meanwhile, Bakhmatyuk maintained a façade that he was willing to engage in good-faith restructuring discussions in order to string Gramercy along and forestall any actions that might threaten his control. *Id.*

In the second phase, Bakhmatyuk identified purchasers to acquire debt held by other Company creditors with whom Gramercy sought to unite in comprehensive, multilateral restructuring negotiations. 1-JA 32-33 ¶ 10(b). At least some of these debt purchases involved arrangements where the purchaser gave Bakhmatyuk the option to re-acquire the debt himself, but the complaint does not allege Bakhmatyuk ever exercised such an option. *See id.* These debt purchases isolated Gramercy by substituting independent creditors—with whom Gramercy was collaborating in restructuring negotiations—with Bakhmatyuk loyalists and surrogates. *Id.*

The third phase was the *coup de grace*. From November 2019 until at least May 2020, Bakhmatyuk—with Piazza's help—transferred at least 100 of the Companies' subsidiaries to a newly formed Wyoming corporation, Defendant TNA Corporation Solutions, and the value of the transferred entities and other assets was approximately $872.5 million. 1-JA 83-85 ¶¶ 138-144.[3] This final phase left the Companies essentially bereft of valuable assets, all while preserving Bakhmatyuk's control. 1-JA 33, 85 ¶ 10(c), 141-144.

3. Gramercy sued, alleging RICO violations, along with state-tort fraud and tortious interference claims. 1-JA 92-125 ¶¶ 161-218. Gramercy does not allege that Defendants had any contractual obligations to Gramercy and thus did not assert any breach of contract claims.

Gramercy promptly served the "Piazza Defendants"—comprising all Defendants except Bakhmatyuk—who filed a motion to dismiss. *See* 1-JA 18-20. That motion raised a host of merits issues but also argued that the arbitration clauses in the Trust Deeds required dismissal. 1-JA 144-146. The Piazza Defendants conceded that they were "not parties" to the Trust Deeds, but claimed that equitable

[3] A similar series of transfers occurred to Cyprus corporations, bringing the total amount transferred to over $1 billion. *See* 1-JA 30, 50 ¶¶ 6, 124. Those transfers are the subject of a separate litigation in Cyprus and are not at issue here.

estoppel principles under Wyoming law entitled them to arbitration. 1-JA 157-158. The District Court rejected these arguments. 13-JA 3164-3166.[4]

Meanwhile, the District Court concluded "there [was] reason to believe [Bakhmatyuk was] evading service" in Austria and authorized alternative service by publication. 12-JA 3132-3133. After that order, Bakhmatyuk finally appeared, represented by the same counsel that had been representing the Piazza Defendants throughout the case. *See* 13-JA 3194.

Just ten days after the District Court's order denying the Piazza Defendants' motion to dismiss, Bakhmatyuk filed his own motion to dismiss. 1-JA 22.[5] Despite being represented by the same counsel, Bakhmatyuk made different arguments regarding arbitration. First, he claimed he was a party to the Trust Deeds for either of two reasons: (1) his separate agreement governing his relationship with AVG; or (2) references to him as a "Related Party" in the Trust Deeds. 13-JA 3210-3211. Bakhmatyuk did not claim he was a noteholder. *See id.* Bakhmatyuk then argued that, even if he is not a party to the arbitration agreement, equitable estoppel would apply to him, but he did not clearly state whether he thought this result flowed from

[4] Strangely, Defendants repeatedly fault the District Court for failing to conduct a hearing, *see* Opening Br. 21, 22 n.7, 50, apparently forgetting that *they* opposed Gramercy's request for oral argument. ECF 52 at 2.

[5] The Piazza Defendants initially filed a motion to reconsider the District Court's ruling on their motion, but later withdrew it. *See* 1-JA 22.

"the general weight and trend of federal law" or "Wyoming law." *See* 13-JA 3211-3212. Unlike the Piazza Defendants, Bakhmatyuk also presented a declaration on equitable estoppel under English law to contest Gramercy's English-law analysis. 13-JA 3212.

The District Court denied Bakhmatyuk's motion. 14-JA 3513. The court first found it "clear that Bakhmatyuk is not a party to the Notes or the Trust Deeds." 14-JA 3527. It then determined English law applied to the equitable estoppel question, and under English law a non-party would not be permitted to enforce the arbitration clauses in the Notes and Trust Deeds. 14-JA 3539-3544.

Defendants appealed. Gramercy filed a motion to dismiss, which the Clerk referred to the merits panel.

SUMMARY OF ARGUMENT

I. Defendants' main argument on appeal is one they did not raise before the District Court. Defendants now claim they are parties to the arbitration agreement because they are noteholders, and that they are thus entitled to enforce the arbitration provisions in the Notes and Trust Deeds. *See* Opening Br. 29-34. But the Piazza Defendants expressly waived this argument below, conceding that they are "not parties to the Trust Deeds." 1-JA 157. And Bakhmatyuk forfeited this point: He never argued in the District Court that he is a noteholder. *See* 13-JA 3210-3211; 14-

JA 3477-3480. This Court should thus decline to reach Defendants' belated argument.

If this Court reaches the issue, however, it should reject Defendants' position. There is no evidence Defendants are noteholders. Defendants attached thousands of pages of documents to their motions, but they did not attach any evidence demonstrating that they are noteholders, much less that they own the same Notes as Gramercy. Defendants instead assert that the *complaint* alleges they are noteholders. But the complaint does not allege that any Defendant owns the debt at issue. Bakhmatyuk also claims that he is party to the Trust Deeds even if he is not a noteholder, *see* Opening Br. 25, 32, but he cites no legal authority supporting that argument.

II. In the alternative, Defendants claim that they can enforce the arbitration provisions under the principle of equitable estoppel, which allows a non-party to enforce a contractual arbitration provision in limited circumstances. To address that question, this Court should apply Wyoming choice-of-law principles, which follow the Restatement (Second) of Conflict of Laws. *See Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 630-631 (2009); *Elworthy v. First Tenn. Bank*, 391 P.3d 1113, 1120 (Wyo. 2017). Under the Second Restatement, the contractual choice-of-law provision governs. *See Motorola Credit Corp. v. Uzan*, 388 F.3d 39, 50-51 (2d Cir. 2004); *Belnap v. Iasis Healthcare*, 844 F.3d 1272, 1293 (10th Cir. 2017). Here, the

relevant contractual provisions require applying English law. *See* 5-JA 1352; 6-JA 1397, 1483, 1544. And under English law, Defendants cannot prevail.

Defendants therefore resist English law, claiming that federal common law applies. *See* Opening Br. 36-40. But the Piazza Defendants did not raise that argument below, *see* 1-JA 158, and Bakhmatyuk did not clearly argue for federal common law either, 13-JA 3211-3212. Defendants are also wrong: In *Arthur Andersen*, the Supreme Court held that whether non-parties are entitled to invoke an arbitration provision is a matter of local contract law, not federal common law. *See* 556 U.S. at 632. Multiple circuits have rejected Defendants' position that federal common law governs equitable estoppel in cases like this one. *See AtriCure, Inc. v. Meng*, 12 F.4th 516, 524 (6th Cir. 2021); *Motorola*, 388 F.3d at 51. Although the Ninth Circuit has taken a different approach, *see Setty v. Shrinivas Sugandhalaya LLP*, 3 F.4th 1166, 1169 (9th Cir. 2021), its position is contrary to *Arthur Andersen* and more recent Supreme Court precedent.

III. No matter what jurisdiction's law this Court ultimately applies, Defendants are not entitled to arbitration. Under English law, a non-party is "not entitled to invoke an arbitration agreement in a contract to which he is not party," with limited exceptions not relevant here. 11-JA 2735 ¶ 29(1); 11-JA 2733-2734 ¶¶ 22-24. Indeed, the contractual provisions at issue *expressly disclaim* that third-parties have any rights under English law. These contractual provisions make clear

that non-parties, including Defendants, are not entitled to enforce the contractual arbitration provisions. *See* 5-JA 1354; 6-JA 1398, 1459, 1544.

Under Wyoming law—which Defendants primarily urged below—there is also no basis to apply equitable estoppel in this case. Wyoming law requires a party invoking equitable estoppel to show detrimental reliance, *see Birt v. Wells Fargo Home Mortg., Inc.*, 75 P.3d 640, 653-654 (Wyo. 2003)—which Defendants do not claim. Defendants point to nothing in Wyoming law suggesting the state would recognize the much broader theory of estoppel that Defendants advance.

Even if this Court applies Defendants' preferred legal test, however, it should still conclude that equitable estoppel does not apply. Under that test, Defendants must show that Gramercy's claims rely on the terms of the written agreement containing the arbitration clause or that Gramercy alleges substantially interdependent misconduct by a non-party and one or more parties to the contract. *See* Opening Br. 48. Defendants do not meet either requirement. There is no allegation the Companies—the relevant contracting parties—participated in Defendants' scheme. And this is not a case where Gramercy must rely on the terms of the Trust Deeds or the Notes, because the legal bases of Gramercy's claims are the federal RICO statute and state tort law. *See* 1-JA 92-125. Equitable estoppel thus does not apply. *See AtriCure*, 12 F.4th at 529.

STANDARD OF REVIEW

As a general matter, this Court reviews an order on a motion to dismiss *de novo*. *See VDARE Found. v. City of Colorado Springs*, 11 F.4th 1151, 1158 (10th Cir. 2021). The Court accepts "the factual allegations in the complaint as true" and resolves "all reasonable inferences in the plaintiff's favor." *Morse v. Regents of Univ. of Colo.*, 154 F.3d 1124, 1126-1127 (10th Cir. 1998).

If the Court treats Defendants' motions as arising under the Federal Arbitration Act, this Court's review is still *de novo*. *Reeves v. Enterprise Prods. Partners, LP*, 17 F.4th 1008, 1011 (10th Cir. 2021). Defendants bear the burden of proving that an agreement to arbitrate exists, or that they are entitled as non-parties to enforce such an agreement. *BOSC, Inc. v. Board of Cty. Comm'rs of Cty. of Bernalillo*, 853 F.3d 1165, 1177 (10th Cir. 2017); *Jacks v. CMH Homes, Inc.*, 856 F.3d 1301, 1305 (10th Cir. 2017). Where, as here, the parties dispute whether such an agreement exists, this Court gives "the party opposing arbitration the benefit of all reasonable doubts and inferences that may arise." *BOSC,* 853 F.3d at 1177 (quotation marks omitted).

ARGUMENT

I. NO DEFENDANT IS PARTY TO THE ARBITRATION AGREEMENTS.

Defendants' primary argument on appeal is one they failed to raise—indeed, all but Bakhmatyuk conceded—below. Defendants now contend that they are

themselves parties to the arbitration agreements because they are noteholders, and thus entitled to enforce the terms of the Notes, including the arbitration clauses in the Trust Deeds. This argument is wrong, but the Court should not even consider it. The Piazza Defendants waived this argument below by conceding that they are "not parties." 1-JA 157. And, although Bakhmatyuk argued he was a party to the Trust Deeds, he never argued that he was a noteholder, much less introduced proof that he owns the same Notes owned by Gramercy.

A. Defendants Did Not Preserve The Argument That They Are Noteholders.

Defendants' leading theory on appeal is that they are noteholders and therefore parties to the arbitration agreements. *See* Opening Br. 29-34. But in the District Court, none of them argued that they are noteholders, and the Piazza Defendants conceded they are not. Defendants are therefore barred under this Court's well-settled rules on preservation and waiver from raising this argument.

The "adversarial system endows the parties with the opportunity—and duty—to craft their own legal theories for relief in the district court." *Richison v. Ernest Grp., Inc.*, 634 F.3d 1123, 1130 (10th Cir. 2011) (Gorsuch, J.). Attempts to raise "new arguments on appeal" undermine "important judicial values," and this Court "should not be considered a 'second-shot' forum." *Tele-Communications, Inc. v. Commissioner*, 104 F.3d 1229, 1233 (10th Cir. 1997). "Thus, an issue must be presented to, considered and decided by the trial court before it can be raised on

appeal." *Id.* (cleaned up). Otherwise, an argument is forfeited and plain error review applies, which in civil cases "proves to be an extraordinary, nearly insurmountable burden." *Richison*, 634 F.3d at 1130 (quotation marks omitted).

These principles are particularly powerful when a party "directly contradicts the argument they made in their . . . brief before the district court." *Taylor v. U.S. Air Force*, 173 F.3d 489, *2 (10th Cir. 1999) (unpublished table disposition). Intentionally relinquishing an argument constitutes "waiver"—as opposed to forfeiture—and not even plain error review applies. *McKissick v. Yuen*, 618 F.3d 1177, 1189 (10th Cir. 2010) (Gorsuch, J.); *accord Richison*, 634 F.3d at 1130.

The Piazza Defendants waived the argument that they are noteholders when they stated below that "[w]hile Moving Defendants *are not parties to the* Trust Deeds, equitable estoppel prevents [Gramercy] from avoiding arbitration of their claims under those agreements." 1-JA 157 (emphasis added). The District Court relied on this representation, stating without further analysis that "Defendants are [not] parties to the Trust Deeds." 13-JA 3160. The Piazza Defendants cannot reverse this concession on appeal.

Defendants only glancingly acknowledge their preservation problem on appeal. In their statement of the case, the Piazza Defendants claim they "noted" their contention that they are noteholders for the District Court. Opening Br. 17. Hardly. The citation they give is to the *reply brief* supporting their motion to dismiss. *See*

id. (citing 12-JA 3007). A party cannot raise new arguments in a reply brief. *Bird v. Easton*, 859 F. App'x 299, 303 (10th Cir. 2021); *accord FDIC v. Kansas Bankers Sur. Co.*, 840 F.3d 1167, 1173 (10th Cir. 2016).

In any event, Defendants did not argue even in their reply below that they are noteholders. They instead contended that *Gramercy* had made contradictory arguments by "affirmatively alleging that Defendants bought Notes as part of a scheme, while arguing that" the Piazza Defendants "cannot invoke the" Trust Deeds. 12-JA 3007.[6] Attacking one of Gramercy's arguments as inconsistent is not the same as advancing an affirmative argument that the Piazza Defendants are noteholders, and such a "vague, arguable reference[] to a point in the district court proceedings do[es] not preserve the issue on appeal." *Tele-Communications*, 104 F.3d at 1233 (cleaned up).[7]

Bakhmatyuk's problem is not waiver but forfeiture. Despite generally arguing that he was party to the arbitration agreements, Bakhmatyuk did not suggest

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[6] There is no contradiction in Gramercy's allegations, as the next section explains in greater detail. *See infra* pp. 20-25.

[7] In the same reply brief, the Piazza Defendants repeated the claim that Gramercy's allegations were inconsistent to support a merits argument, *see* 12-JA 3007, and the District Court addressed the argument in that context in a footnote. *See* 13-JA 3168 n.11. The District Court agreed that "the Complaint does not allege that Defendants Piazza or SP Capital themselves are actually Noteholders." 13-JA 3168 n.11; *see infra* pp. 20-25.

anywhere in his District Court briefing that he is a noteholder. *See* 13-JA 3210-3211; 14-JA 3477-3480. It is therefore no surprise that the District Court did not consider this argument, either. *See* 14-JA 3524-3532. Defendants' opening brief does not even acknowledge that Bakhmatyuk failed to preserve this issue, much less show plain error.

B. The Allegations In The Complaint Do Not Establish That Any Named Defendant Holds The Same Notes As Gramercy.

Besides being unpreserved, Defendants' argument that they are noteholders is meritless. As the parties seeking arbitration, Defendants bear the burden of establishing that they are parties to a valid arbitration agreement. *See BOSC*, 853 F.3d at 1177. If Defendants truly held the same Notes as Gramercy, they could have introduced their Notes into the record. But, despite introducing thousands of pages of exhibits, Defendants did not include any documents suggesting they are noteholders. Their failure to take this basic step strongly reinforces that they did not make this argument below and casts substantial doubt about its accuracy.

Even on appeal, Defendants carefully avoid saying that they *are in fact* noteholders. Instead, they contend that certain allegations in the complaint must mean they are noteholders. *See, e.g.*, Opening Br. 30 (framing the argument around "Appellees' pleading alone"). But even this roundabout effort to satisfy their burden fails. Defendants ignore critical distinctions concerning *which* debt was purchased

and *who* purchased it. In fact, the complaint never alleges that any named Defendant holds the same Notes, governed by the same Trust Deeds, as Gramercy.

The complaint alleges that the Companies had many different forms of debt. 1-JA 55 ¶¶ 66-67. The Notes Gramercy held were just one form of that debt. *Id.* The company also issued secured debt and other types of debt held by other creditors. *Id.* The complaint does not allege that Gramercy held any of this other debt.

The arbitration agreements that Defendants invoke apply exclusively to the Notes held by Gramercy and governed by the specific Trust Deeds discussed in the complaint. *See, e.g.*, Opening Br. 28-30. But several allegations Defendants cite when contending they are noteholders refer to purchases of unspecified "debt." *See* 1-JA 32-33, 65, 71, 103 ¶¶ 10(b), 93, 109, 178(1).[8] Given the many kinds of debt the Companies issued, there is no basis for assuming that generic references to "debt" in the complaint are to the same Notes—governed by the same Trust Deeds—that Gramercy holds. *See BOSC*, 853 F.3d at 1177 (all reasonable inferences must be drawn in Gramercy's favor).

On the contrary, the thrust of Gramercy's allegations is that Bakhmatyuk sought for his allies to purchase other debt issued by the Company to undermine Gramercy's efforts to achieve a *global* restructuring involving *all* the Companies'

[8] Other cited paragraphs appear irrelevant to this issue. *See* 1-JA 39, 57, 100, 104 ¶¶ 23, 72, 172, 178(3).

creditors. *See, e.g.*, 1-JA 75 ¶ 119. In fact, several allegations expressly discuss acquisitions of secured debt and could not possibly be governed by the arbitration provisions here, which govern the *unsecured* Notes. *See, e.g.*, 1-JA 65-67 ¶¶ 94-99. Defendants appear to recognize that their argument cannot succeed with respect to the allegations that refer to secured debt. *See* Opening Br. 30 n.8. The same logic means that Defendants cannot rely on allegations that refer to generic "debt" to meet their burden of establishing the existence of any agreement between Defendants and Gramercy.

Only one relevant transaction discussed in the complaint specifically refers to the same "Notes" held by Gramercy—the acquisition of the debt formerly held by Ashmore. *See* 1-JA 67 ¶ 100. But the complaint does not allege that any *Defendant* acquired the Notes held by Ashmore; rather, it specifies that an entity called "Beaufort" acquired those Notes. 1-JA 68 ¶ 102. Beaufort is not a Defendant. Although the complaint suggests Beaufort may be within Piazza's broader corporate family, that is not enough. Defendants have offered no evidence regarding the ownership of Beaufort, or in any way asserted that Beaufort's separate corporate existence should be disregarded.

Defendants point to a handful of instances where the complaint refers back to the Ashmore acquisition and colloquially refers to "Piazza" or "SP Advisors" acquiring the debt. 1-JA 32-33, 118-119, 121 ¶¶ 10(b), 208(3), 208(5), 209(3). But,

when discussing the transaction in detail, the complaint is very clear that *Beaufort* acquired Ashmore's position, not Piazza personally or SP Advisors. 1-JA 68 ¶ 102.[9] The shorthand used elsewhere in the complaint cannot be fairly read to suggest otherwise.

This shorthand exposes a separate flaw in Defendants' argument: Allegations referring to "Piazza" or "SP Advisors" cannot necessarily be construed as referring to the named Defendants. The complaint often uses "Piazza" to refer to Piazza *in his capacity* as a director or agent of one of the many corporate entities he controls, not in his individual capacity. To the extent non-defendant entities like Beaufort under Piazza's control were used to acquire notes, that does not support Defendants' argument. "SP Advisors" is not a defendant at all, and although the complaint specifies that various distinct legal entities sometimes use the trade name "SP Advisors," 1-JA 37-38 ¶¶ 17, 19, Defendants have introduced no evidence indicating that a named Defendant in this case acquired debt—much less debt governed by the same Trust Deeds at issue here. Defendants' request to have these allegations construed in their favor contravenes the standard of review, which requires the Court to draw permissible inferences in *Gramercy's* favor. *BOSC*, 853 F.3d at 1177.

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[9] The complaint alleges that Piazza and SP Advisors may be indirect owners of Beaufort, *see* 1-JA 68 ¶ 102, but Defendants do not argue that mere ownership of an entity would make them party to that entity's agreements. Such an argument would violate elementary principles of corporate and agency law. *See Domino's Pizza v. McDonald*, 546 U.S. 470, 477 (2006); *see also infra pp.* 28-30.

Defendants highlight one allegation that they claim suggests that "SP Capital" acquired debt in its own name. Opening Br. 31 (quoting 1-JA 68 ¶ 102). But that is only because Defendants truncate a critical piece of the allegation. *See id.* In full, the quoted sentence reads: "The Business Council Letter further suggested that Piazza, through SP Capital, controlled Ashmore's former position by stating that SP Capital holds roughly $200 million in the Company's secured and unsecured debt, which is consistent with Piazza having orchestrated the Ashmore Debt Purchase and being the ultimate owner of the debt." 1-JA 68 ¶ 102. This allegation, which refers to a third-party publication, focuses on "control" rather than ownership and discusses *Beaufort's* acquisition of Ashmore's position. The allegation that Piazza was the "ultimate" owner of the debt merely reflects that he is the beneficial owner of the corporations under his control, not that he or any Defendant actually holds the positions acquired from Ashmore. *Id.* At minimum, it is a plausible inference that the cited third-party publication was speaking imprecisely and none of the Defendants actually hold the Notes, and Gramercy is entitled to that inference at this stage of the litigation. *See BOSC*, 853 F.3d at 1177.

Bakhmatyuk's argument that he is a noteholder is also unsupported by the complaint. His claim rests on allegations that *other* people or entities held debt on his behalf. *See* Opening Br. 34 (citing 1-JA 65, 72, 114, 118-119 ¶¶ 93, 112, 200, 208(3)). But he cites no authority that someone holding a note on his behalf would

make him personally a party to its terms. Bakhmatyuk also highlights an allegation that he has arrangements with some straw purchasers "to *eventually* acquire the debt himself," 1-JA 114 ¶ 200 (emphasis added); *see also* 1-JA 88 ¶ 150, but the complaint never alleges Bakhmatyuk took advantage of that option—nor does Bakhmatyuk, *see* Opening Br. 34.

In short, Defendants did not argue to the District Court that they are noteholders, and they have not even squarely made that argument to this Court—instead, Defendants attempt to twist the complaint's allegations into doing the job for them. Their efforts rely on mischaracterizations of the relevant allegations. Should the Court reach this unpreserved argument at all, it should conclude that no Defendant has carried its burden to establish that it is a noteholder.

C. Bakhmatyuk Is Not Party To The Arbitration Agreements.

Bakhmatyuk alone raises a second argument that he is party to the Trust Deeds, contending that the Trust Deeds define him as a "Related Party" and, more generally, that he has important roles in the Companies. Opening Br. 25, 32. The first argument rests on a significant mischaracterization of the documents. The latter has no basis in the law, and Bakhmatyuk does not even attempt to argue otherwise.

The Trust Deeds lay out the original parties—that is, the entities who formed the contract and are bound by the agreements—at the very front of the documents. *See* 5-JA 1324; 6-JA 1455. They are the Companies, the entities acting as trustees

for the noteholders, and the surety providers. Bakhmatyuk is none of these. *See* 5-JA 1324; 6-JA 1455, 1426-1427, 1571-1576. Nor is he a noteholder. *Supra* pp. 24-31.

Bakhmatyuk instead attempts to invoke the "express language of the trust deeds," which he says "reference[s] Bakhmatyuk as a 'Related Party.'" Opening Br. 20. But the "Related Party" definition does not appear in the list of contracting parties to the Trust Deeds—far from it. *See* 5-JA 1324; 6-JA 1455. Instead, the "Related Party" definition appears in attachments to the Trust Deeds setting out the conditions of the Notes. *See* 5-JA 1363; 6-JA 1409, 1512, 1562. The terms of the definition certainly do not suggest in any way Bakhmatyuk is a party bound by the Trust Deeds. On the contrary, as the District Court pointed out, the definition of "Related Party" never appears in any operative provision of the Trust Deeds or Notes. *See* 14-JA 3526 (District Court holding that "it is not plain . . . what Trust Deed or form Note provisions, if any, rely on that definition.").[10]

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[10] In the statement of the case—but not the argument—Bakhmatyuk alludes to provisions in the terms and conditions of the Notes referring to him as a "Permitted Holder." Opening Br. 20. Bakhmatyuk therefore forfeited any argument based on those provisions. Regardless, these provisions do not alter the analysis. The term "Permitted Holder" appears only in the context of a "change of control" event that might allow the noteholders to redeem the Notes at their option. *See* 5-JA 1381; 6-JA 1535-1536; 14-JA 3526. Nothing about this term suggests Bakhmatyuk is a party.

Bakhmatyuk relies heavily on the Eleventh Circuit's decision in *Outokumpu Stainless USA, LLC v. Coverteam SAS*, No. 17-10944, 2022 WL 2643936 (11th Cir. July 8, 2022) ("*GE Energy II*"). In *GE Energy II*, the contract provided for the sale of industrial equipment and referred to the "Buyer" and "Seller" "collectively as 'Parties.'" *Id.* at *1 (quotation marks omitted). But the contract also contained a clause specifying that "[w]hen Seller is mentioned it shall be understood as Sub-contractors included, except if expressly stated otherwise," and further included a list identifying GE Energy as one such subcontractor. *Id.* (quotation marks omitted). Thus, the Eleventh Circuit adopted a straightforward analysis: Because the arbitration clause "broadly covers '[a]ll disputes arising between both parties . . . ' without expressly excluding sub-contractors," the contract therefore extended to disputes "that arise with [the seller] *and* sub-contractors." *Id.* at *3 (quotation marks and first alteration in original).

The contract in *GE Energy II* in no way resembles the Trust Deeds and Notes here. The "Related Party" definition never appears in any operative provision of the Trust Deeds or Notes, much less in a provision suggesting that a "Related Party" agrees to be bound by the arbitration provision. The District Court properly rejected Bakhmatyuk's efforts to find support for his argument in *GE Energy II*. *See* 14-JA 3524-3526.

Bakhmatyuk's secondary argument is that he is "referenced throughout the trust deeds" and has "obligations and duties" under them. Opening Br. 33. This is not correct. Bakhmatyuk cites exactly one provision from each document. *See* Opening Br. 33 (citing 5-JA 1372-1373; 6-JA 1525-1526). The cited provisions contain promises that the "Issuer[s]"—that is, the *Companies*—will not convey "substantially all" of their assets except under certain conditions (and similar promises by the "Surety Provider[s]"). 5-JA 1372-1373; 6-JA 1525-1526. This obligation does not bind Bakhmatyuk *personally*; it is an obligation undertaken by the Companies.

For similar reasons, Bakhmatyuk's insistence that he is "CEO, Chairman of the Board," and "controlling shareholder" of the Companies is irrelevant and does not make him personally a party to the Trust Deeds or the Notes. Opening Br. 33.[11] The only way Bakhmatyuk could become personally a party by virtue of his role as an officer of the Companies would be for the Court to disregard the separate corporate form of the entities he controls—something Bakhmatyuk does not request and presumably would strenuously oppose. After all, "it is fundamental corporation and agency law—indeed, it can be said to be the whole purpose of corporation and

[11] Bakhmatyuk's observation that he signed the "Director's Certificate" to one of the Trust Deeds is simply a more specific version of this argument. *See* Opening Br. 20-21.

agency law—that the shareholder and contracting officer of a corporation has no rights and is exposed to no liability under the corporation's contracts." *Domino's Pizza v. McDonald*, 546 U.S. 470, 477 (2006). But, regardless, as the District Court also pointed out, Bakhmatyuk "does not cite any law" suggesting the Court should so fundamentally depart from corporate basics. 14-JA 3526. And the Supreme Court rejected a very similar argument in *Domino's Pizza*—concluding "the sole shareholder and president" of a corporation was not party to that corporation's contracts even though "he 'negotiated, signed, performed, and sought to enforce the contract' " in his capacity as a corporate agent. 546 U.S. at 472, 477.[12]

Grasping still further, Bakhmatyuk cites portions of the prospectuses that describe his role in the Companies. *See* Opening Br. 33 (citing 3-JA 582-585; 4-JA 896). But the prospectuses, which the District Court properly disregarded, *supra* p. 6 n.2, are not binding agreements; they are disclosure documents prepared for potential investors. *See, e.g.*, 2-JA 325-326 (describing function of prospectus); *accord Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995) (prospectus historically understood as "a document soliciting the public"); *Prospectus*, *Black's Law Dictionary* (11th ed. 2019). Factual information about a CEO in a disclosure

[12] Defendants' argument summary points out that, in certain circumstances, directors "are indemnified parties that the companies must defend in litigation." Opening Br. 25. Bakhmatyuk does not explain why this might be relevant, and it is not.

document does not make the CEO party to the company's contracts. *Domino's Pizza*, 546 U.S. at 477.

Notably, Bakhmatyuk has abandoned on appeal his argument that the "Relationship Agreement" he signed with AVG—but not, apparently, with ULF—independently makes him party to the Trust Deeds. *Compare* Opening Br. 32-34, *with* 13-JA 3206-3207. This retreat is wise. That Relationship Agreement is separate from the contracts at issue here—it was signed months before any relevant debt issued—and merely sets out the terms under which Bakhmatyuk acts as AVG's controlling shareholder. *See* 3-JA 582-583 (summarizing this agreement and its terms).[13] Bakhmatyuk does not become party to the Trust Deeds merely by signing an entirely separate agreement with one of the two issuing companies.

Finally, a single sentence in the argument summary states that "the arbitration obligation is not limited to explicitly defined parties," conveying the radical suggestion that anyone might be able to enforce the Trust Deeds' arbitration clauses regardless of whether they are a party. Opening Br. 26. Bakhmatyuk does not further develop this argument, which in any event he did not present to the District

[13] In one sentence in the argument summary, Bakhmatyuk states that the "relationship agreement . . . contains an arbitration clause that investors may invoke against him." Opening Br. 25. By its terms, that agreement applies only to "the parties," which are AVG and Bakhmatyuk. 13-JA 3232, 3239. Regardless, Bakhmatyuk does not argue that this arbitration agreement binds Gramercy.

Court, making the argument doubly forfeited. *See Tele-Communications*, 104 F.3d at 1232-1233. It also rests on an incorrect reading of the Trust Deeds and Notes, which expressly preclude third-parties from enforcing their terms under English law. *See* 5-JA 1354; 6-JA 1398, 1459, 1544. Because Bakhmatyuk and the Piazza Defendants are not parties to the arbitration agreements in question, they cannot enforce them.

II. ENGLISH LAW GOVERNS WHETHER EQUITABLE ESTOPPEL APPLIES, NOT FEDERAL COMMON LAW.

Defendants cannot demonstrate that they are parties to any arbitration agreement with Gramercy, so they fall back on a theory of equitable estoppel. Defendants claim that even if they are not parties to any arbitration agreements—and even though the arbitration agreements expressly disclaim third-party rights—Gramercy is equitably estopped from opposing arbitration.

Under ordinary principles of contract law, this argument fails. The Trust Deeds and Notes all specify that English law governs, and those provisions apply to whether a non-party may assert equitable estoppel to enforce the arbitration provisions within the contracts. *See Belnap v. Iasis Healthcare*, 844 F.3d 1272, 1293 (10th Cir. 2017) (citing contractual choice-of-law provision when analyzing whether non-party defendants could compel a party to arbitrate); *accord Motorola Credit Corp. v. Uzan*, 388 F.3d 39, 50-51 (2d Cir. 2004). Under English law, there is no applicable basis for a non-party to a contract to compel arbitration.

As a result, Defendants spend a substantial part of their brief trying to escape the conclusion that English law applies. They primarily rely on the theory that "federal common law" governs. This is, once again, a brand new argument for the Piazza Defendants, who argued below that "state contract law" applied and asked the District Court to predict what "the Wyoming Supreme Court" would do. 1-JA 158 (quotation marks omitted). Their failure to raise federal common law in the District Court forfeits the argument on appeal. *See Richison*, 634 F.3d at 1130. And even Bakhmatyuk was highly equivocal about what body of law he thought applied, *compare* 13-JA 3211 (asking to "apply U.S. equitable estoppel principles"), *with* 13-JA 3212 (arguing that "Wyoming would recognize equitable estoppel here"), and he did not present more than a "fleeting contention" for federal common law, meaning he failed to preserve the argument as well. *Tele-Communications*, 104 F.3d at 1233-1234.

Regardless, there is no merit to the argument. Historically, to prove equitable estoppel, a party was required to establish "proof of misrepresentation" and detrimental reliance on that representation. *Birt v. Wells Fargo Home Mortg., Inc.*, 75 P.3d 640, 653 (Wyo. 2003); *accord Santich v. VCG Holding Corp.*, 443 P.3d 62, 65-66 (Colo. 2019). But, years ago, federal courts developed a different version of equitable estoppel that they applied exclusively in the context of arbitration agreements. *See AtriCure, Inc. v. Meng*, 12 F.4th 523-524 (6th Cir. 2021).

Subsequently, the Supreme Court clarified that federal courts do not have common-law authority to "devise novel rules to favor arbitration." *Morgan v. Sundance, Inc.*, 142 S. Ct. 1708, 1713 (2022). And the Court has twice reversed lower courts that attempted to apply a federal rule of decision to an arbitration agreement, concluding that neither the Federal Arbitration Act nor its international equivalent, the New York Convention, creates a "comprehensive regime that displaces" ordinary principles of local contract law. *GE Energy Power Conversion France SAS, Corp. v. Outokumpu Stainless USA, LLC*, 140 S. Ct. 1637, 1645 (2020) ("*GE Energy I*"); *see also Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 630-631 (2009).

This Court should follow the Supreme Court's clear direction and apply ordinary principles of contract law to determine whether equitable estoppel applies. Those principles give effect to the contractual choice-of-law provisions designating English law.

A. English Law Applies To The Equitable Estoppel Issue.

Defendants have never purported to identify what jurisdiction's choice-of-law rules apply to the estoppel issue. Although Gramercy's underlying claims arise under both federal and state law, the arbitration question is governed by ordinary principles of contract law unless the FAA specifically provides otherwise. *Arthur Andersen*, 556 U.S. at 630-631; *see infra* pp. 38-45 (explaining why federal common

law does not apply). And, when assessing rights created by contract, federal courts generally apply the choice-of-law rules of the forum state. *See* Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 4520; *Gay v. CreditInform*, 511 F.3d 369, 389 (3d Cir. 2007) (applying forum-state choice-of-law principles to claim that arbitration agreement was unconscionable). Wyoming follows the Restatement (Second) of Conflict of Laws, *Elworthy v. First Tenn. Bank*, 391 P.3d 1113, 1120 (Wyo. 2017), and Defendants have not attempted to argue that any other choice-of-law principles govern.

Under the Restatement, contractual choice-of-law provisions are enforceable. Restatement (Second) of Conflict of Laws § 187 (1971). Importantly, with limited exceptions not relevant here, the Restatement applies such provisions even to threshold questions such as the validity of the contract. *See id.* § 200; *see also Commodities & Mins. Enter. Ltd. v. CVG Ferrominera Orinoco, C.A.*, 49 F.4th 802, 816-817 (2d Cir. 2022). This rule holds for arbitration contracts, which are just "one kind of contract." Restatement (Second) of Conflict of Laws § 218 cmt. a.

These principles mean that a contractual choice-of-law provision also governs whether a non-party may enforce an arbitration clause against a party. *Motorola Credit Corp. v. Uzan*, 388 F.3d 39, 50-51 (2d Cir. 2004); *Mars Inc. v. Szarzynski*,

No. CV 20-01344 (RJL), 2021 WL 2809539, at *6 (D.D.C. July 6, 2021).[14] The underlying principle is simple: "if defendants wish to invoke the arbitration clauses in the agreements at issue" despite being non-parties, "they must also accept the [contractual] choice-of-law clauses that govern those agreements." *Motorola*, 388 F.3d at 51. This Court recognized as much in *Belnap*: Applying Utah law—which, like Wyoming, treats choice-of-law provisions as enforceable, *see Innerlight, Inc. v. Matrix Grp., LLC*, 214 P.3d 854, 857 (Utah 2009)—the Court looked to the law specified by a choice-of-law provision when assessing equitable estoppel arguments. *Belnap*, 844 F.3d at 1293. Applying the same principles here, the English choice-of-law provisions in the Trust Deeds and Notes governs whether equitable estoppel applies.

Defendants seek to avoid this result by claiming equitable estoppel is a "threshold" issue. Opening Br. 42 (quotation marks omitted). But that gets things backward: Estoppel is not a "threshold" argument—it is a last resort for a litigant that seeks to invoke a contractual provision despite its non-party status. A litigant seeking to invoke equitable estoppel is not trying to *invalidate* a contractual provision; it is seeking to *enforce* the provision. It makes no sense, and would

[14] The *Mars* court applied Belgian law to assess estoppel according to the applicable choice-of-law provision. 2021 WL 2809539, at *6. It then *assumed* that Belgian law recognized "equitable principles equivalent to estoppel" under U.S. law before holding that they would not apply. *Id.* at *8.

frustrate the contracting parties' intentions and reasonable expectations, to apply a body of law other than the body of law specified in a contract to enforce a provision in that same contract. *Motorola*, 388 F.3d at 51.

Moreover, the logic behind Defendants' "threshold" argument would apply even more squarely when a contract's validity is challenged. After all, under those circumstances the parties dispute whether a contract exists at all, yet courts consistently apply choice-of-law provisions in that context. *Commodities & Minerals Enter.*, 49 F.4th at 816-817; *Motorola*, 388 F.3d at 50; *see Cagle v. The James Street Grp.*, 400 F. App'x 348, 355 (10th Cir. 2010) (Oklahoma law); *Carr v. Stryker Corp.*, 28 F.3d 112, at *2 (10th Cir. 1994) (unpublished table decision) (Nevada law); Restatement (Second) of Conflict of Laws § 218 & cmt. a. In a similar vein, this Court has held that choice-of-law provisions are enforceable when determining whether a forum-selection clause applies, emphasizing that "a court can effectuate the parties' agreement . . . only if it interprets the forum clause under the chosen law." *Yavuz v. 61 MM, Ltd.*, 465 F.3d 418, 428 (10th Cir. 2006).

The cases cited by Defendants are not to the contrary. *See* Opening Br. 42-43. With the exception of the Ninth Circuit—which has taken a different and misguided approach, *see infra* pp. 44-45—those cases merely stand for the proposition that the question of arbitrability is, by default, one for the court rather than the arbitrator unless the parties have reached a different agreement. *See*

Nebraska Mach. Co. v. Cargotec Sols., LLC, 762 F.3d 737, 740-741 & n.2 (8th Cir. 2014); *Puleo v. Chase Bank USA, N.A.*, 605 F.3d 172, 178 (3d Cir. 2010). Those cases do not address choice-of-law at all, and they do not suggest equitable estoppel is a "threshold" question.

Defendants also assert that if the choice-of-law provisions govern, then the incorporation of rules delegating arbitrability to the arbitrator must too. *See* Opening Br. 46-47, 52-53. That is wrong. As Defendants appear to recognize, *see id.* at 52, *Belnap* took the opposite approach. There, this Court decided estoppel issues for itself even after it concluded that the arbitration clause in question delegated arbitrability to the arbitrator. 844 F.3d at 1283, 1293. That approach is correct: Courts decide questions of arbitrability unless there is a "clear and unmistakable evidence" of an agreement to delegate questions of what is arbitrable to the arbitrator. *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) (cleaned up). But the premise of equitable estoppel is that the parties never reached *any* agreement to arbitrate, much less an agreement to arbitrate arbitrability. *Mars, Inc.*, 2021 WL 2809539, at *6; *cf. Motorola*, 388 F.3d at 53 n.11.

There is no contradiction between this argument and Gramercy's contention that the choice-of-law provision *does* govern. It is *Defendants* who seek to have the arbitration clause applied against Gramercy even though they are not parties; Gramercy is not attempting to apply any provision of the contracts to Defendants.

See AtriCure, 12 F.4th at 529 ("How has a plaintiff sought to inequitably 'have it both ways' . . . if the plaintiff does not seek to enforce the contract?"). If Defendants seek to apply the contractual arbitration provision, they must accept the law that governs it. *Motorola*, 388 F.3d at 51.

B. Federal Common Law Does Not Apply.

Defendants attempt to bypass the choice-of-law question altogether by claiming on appeal that federal common law applies. Opening Br. 36-40. Even assuming Defendants adequately preserved this argument, *but see supra* p. 32, Defendants are mistaken. "The cases in which federal courts may engage in common lawmaking are few and far between." *Rodriguez v. FDIC*, 140 S. Ct. 713, 716 (2020). Courts do "not have creative power akin to that vested in Congress." *American Elec. Power Co. v. Connecticut*, 564 U.S. 410, 422 (2011). Here, the FAA prescribes that ordinary principles of local contract law govern equitable estoppel in the arbitration context, and the Supreme Court has made clear that there is no contrary principle of federal common law.

To be sure, courts once treated the question of "whether an arbitration contract may be enforced by or against non-parties" as "one of federal arbitration law divorced from any state's contract law." *AtriCure*, 12 F.4th at 523. They developed "expansive readings of common-law concepts like equitable estoppel or agency law"

that often made it easier to compel arbitration, citing a "strong federal policy favoring arbitration." *Id.* (quotation marks omitted).

The Supreme Court disapproved this practice in *Arthur Andersen*. The Court held that whether non-parties are entitled to invoke an arbitration provision is a matter of state law, not federal common law. 556 U.S. at 632. Since *Arthur Andersen*, "circuit courts have recognized that they now must look to the relevant state's common law to decide when non-parties may enforce (or be bound by) an arbitration agreement." *AtriCure*, 12 F.4th at 524. And, indeed, Defendants appear to concede that—if this case involved purely domestic parties—their federal common law argument would be doomed. Opening Br. 38.

Defendants therefore fall back on the notion there is something unique about the New York Convention that requires applying federal common law to arbitration motions brought by *non*-U.S. parties. But the Supreme Court has similarly debunked this notion, which contravenes the text of the FAA provisions implementing the Convention. *See GE Energy Power Conversion France SAS, Corp. v. Outokumpu Stainless USA, LLC*, 140 S. Ct. 1637, 1645 (2020) ("*GE Energy I*").

The New York Convention—properly, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards—"is a multilateral treaty that addresses international arbitration." *Id.* at 1644. As relevant here, the treaty requires contracting states to "recognize an agreement *in writing* under which the parties

undertake to submit to arbitration all or any differences which have arisen" between them and to provide for a judicial forum for enforcing "said agreement." *Id.* (quoting New York Convention Article II, 21 U.S.T. 2517, 2519) (emphasis added). The United States has implemented the Convention in Chapter 2 of the FAA, 9 U.S.C. §§ 201-208, which applies when disputes are not "entirely between citizens of the United States," *id.* § 202. Even under the Convention, ordinary domestic FAA rules of decision apply unless they are "in conflict with this chapter or the Convention." *GE Energy I*, 140 S. Ct. at 1644 (quoting 9 U.S.C. § 208).

In *GE Energy I*, the Eleventh Circuit read the Convention to specifically require a written agreement and therefore held that equitable estoppel could never be invoked in a case governed by the Convention. *Id.* at 1643. The Supreme Court reversed. Finding the Convention's text "is simply silent on the issue of nonsignatory enforcement," the Court held that there was no conflict with "the application of domestic equitable estoppel doctrines permitted *under Chapter 1* of the FAA." *Id.* at 1645 (emphasis added). Instead, like the domestic side of the FAA, "the Convention requires courts to rely on domestic law to fill the gaps; it does not set out a comprehensive regime that displaces domestic law." *Id.*[15]

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[15] *GE Energy I* refers to "domestic law" to distinguish between the law of particular nation-states and "international law," which refers to treaties and customary international law. *See, e.g.*, *Zicherman v. Korean Air Lines Co.*, 516 U.S. 217, 227-228 (1996).

GE Energy I therefore reaffirmed that, as 9 U.S.C. § 208 expressly states, the rules of decision in Convention cases are the same as those in fully domestic FAA cases governed by Chapter 1 unless the Convention expressly provides to the contrary. 140 S. Ct. at 1645. *Arthur Andersen* held that, under Chapter 1 of the FAA, ordinary principles of contract law govern equitable estoppel, not federal common law. 556 U.S. at 632. And *GE Energy I* confirmed that the Convention is "simply silent on the issue of nonsignatory enforcement," meaning there can be no conflict between the Convention and FAA Chapter 1 as interpreted in *Arthur Andersen.* 140 S. Ct. at 1645. After these two decisions, there are no "statutory interstices" for federal common law to fill. *American Elec. Power*, 564 U.S. at 421 (quotation marks omitted). A federal statute, 9 U.S.C. § 208, supplies the rule of decision and the Supreme Court has authoritatively held that this rule of decision is not federal common law but ordinary contract law. *Arthur Andersen*, 556 U.S. at 632.

Defendants protest that there is a "need for uniformity in international agreements." Opening Br. 43. But the Supreme Court rejected that logic in *GE Energy I*, when it held that "the Convention requires courts to rely on domestic law" and "does not set out a comprehensive regime that displaces domestic law." 140 S. Ct. at 1645. Besides, Defendants mistake the *kind* of uniformity that is important to the Convention. The goal is to "unify *the standards* by which agreements to arbitrate

are observed," *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 n.15 (1974) (emphasis added)—that is, to ensure agreements are enforced uniformly throughout the signatory countries. It undermines that goal if U.S. federal courts ignore standard contracting principles—including choice-of-law provisions—in favor of their own unique estoppel doctrines. *See Motorola*, 388 F.3d at 51 ("where the parties have chosen the governing body of law, honoring their choice is necessary to ensure uniform interpretation and enforcement").

Defendants also repeatedly invoke a general federal policy favoring arbitration, *see* Opening Br. 7, 28, 34-35, but that policy has no application here. "Because the federal policy favoring arbitration applies only when both parties have consented to and are bound by the arbitration clause, courts"—including this Court—"have refused to apply it to arbitration claims by or against nonparties." *AtriCure*, 12 F.4th at 525 (quotation marks omitted); *see Jacks v. CMH Homes, Inc.*, 856 F.3d 1301, 1304 (10th Cir. 2017). The purpose of the federal "policy is to make arbitration agreements as enforceable as other contracts, but not more so," meaning it does not give courts license to "devise novel rules to favor arbitration over litigation." *Morgan*, 142 S. Ct. at 1713 (quotation marks omitted).

Defendants are simply wrong when they claim that there is a consensus among the Circuits that federal common law governs equitable estoppel in New York Convention cases. *See* Opening Br. 37-41. Although this Court has not yet taken a

position, the Second and Sixth Circuits have rejected that argument. *AtriCure*, 12 F.4th at 524;[16] *Motorola*, 388 F.3d at 51. Defendants claim the Second Circuit supports their position, but in *Motorola*, the Second Circuit recognized that the decision Defendants cite—*Smith/Enron Congeneration Ltd. P'ship v. Smith Congeneration Int'l, Inc.*, 198 F.3d 88, 96 (2d Cir. 1999)—is simply a case "where neither party raised the choice-of-law issue." *Motorola*, 388 F.3d at 51. The same is true of the Fourth and Eleventh Circuit decisions cited by Defendants—the courts simply bypass the choice-of-law question altogether. *See Aggarao v. MOL Ship Mgmt. Co.*, 675 F.3d 355, 373-375 (4th Cir. 2012); *Northrop & Johnson Yachts-Ships, Inc. v. Royal Van Lent Shipyard, B.V.*, 855 F. App'x 468, 474 n.4 (11th Cir. 2021).[17] And the two district court decisions cited by Defendants expressly refused to resolve the choice-of-law question, finding it unnecessary. *See Bhandara Fam. Living Tr. v. Underwriters at Lloyd's, London*, No. CV H-19-968, 2020 WL 1482559, at *5 n.17 (S.D. Tex. Feb. 20, 2020); *Port Cargo Serv., LLC v. Certain*

[16] *AtriCure* does not separately discuss the New York Convention, but the Convention applied in that case because the litigants seeking arbitration were Chinese. *See* 9 U.S.C. § 202; *AtriCure*, 12 F.4th at 520-522.

[17] In *Northrop*, the Eleventh Circuit stated that it was applying "domestic" equitable estoppel doctrine in line with *GE Energy I*, and then cited a prior Eleventh Circuit decision adopting the pre-*Arthur Andersen* federal common law test without analyzing whether it remained good law. *See Northrop*, 855 F. App'x at 474 n.4 (citing *Lavigne v. Herbalife, Ltd.*, 967 F.3d 1110, 1118-1119 (11th Cir. 2020)).

Underwriters at Lloyd's London, No. CV 18-6192, 2018 WL 4042874, at *3 (E.D. La. Aug. 24, 2018). Notably, no party in those two cases argued for federal common law.

The First Circuit once embraced a federal common law rule before *Arthur Andersen*, but it has since twice recognized that *Arthur Andersen* calls into question its earlier precedent. *Compare InterGen N.V. v. Grina*, 344 F.3d 134, 143 (1st Cir. 2003) (applying federal common law), *with Grand Wireless, Inc. v. Verizon Wireless, Inc.*, 748 F.3d 1-11-12 (1st Cir. 2014) ("The Supreme Court's decision in *Arthur Andersen* . . . calls into some question the propriety of relying on a rule based on federal law in this situation."), *and Hogan v. SPAR Grp., Inc.*, 914 F.3d 34, 39 n.5 (1st Cir. 2019) (noting this observation in *Grand Wireless*).

In sum, since *Arthur Andersen*, only the Ninth Circuit has adopted the federal common law rule that Defendants advocate. *See Setty v. Shrinivas Sugandhalaya LLP*, 3 F.4th 1166, 1169 (9th Cir. 2021). The Ninth Circuit's opinion attempted to reconcile its holding with *GE Energy I* by claiming the Supreme Court left open "which body of law governs" the estoppel issue. *Id.* at 1168 (quoting *GE Energy I*, 140 S. Ct. at 1648). But that sentence cannot be read to suggest that federal common law was a possibility—particularly when the Court specifically held that the Convention "does not set out a comprehensive regime that displaces domestic law." *GE Energy I*, 140 S. Ct. at 1645. As Judge Bea pointed out in dissent, the majority's

decision to employ federal common law is simply incompatible with the logic underlying *Arthur Andersen* and *GE Energy I* and will often yield counterintuitive results. *See Setty*, 3 F.4th at 1169, 1173 (Bea, J., dissenting).

Defendants also invoke the separate opinion of Judge Tjoflat in *GE Energy II*. *See* 2022 WL 2643936, at *6. But his analysis—which the panel declined to adopt—is even less persuasive. Judge Tjoflat does not ground his decision in the text of the FAA or its provisions implementing the Convention, and relies entirely on the notion that there is a freestanding policy supporting federal common law, without acknowledging the Supreme Court's contrary holdings in *Arthur Andersen* and *GE Energy I*. Remarkably, he acknowledges that *Arthur Andersen* "abrogated" the Eleventh Circuit decision that is the source of the federal common law test that Defendants seek to invoke without apparently realizing that it abrogated that decision precisely *because* it applied federal common law. *See id.* at *7 (citing *MS Dealer Serv. Corp. v. Franklin*, 177 F.3d 942 (11th Cir. 1999)). This Court should reject this thin analysis in favor of the well-reasoned positions of the Second and Sixth Circuits.

III. UNDER ANY POTENTIALLY APPLICABLE LEGAL STANDARD, EQUITABLE ESTOPPEL DOES NOT APPLY.

Under English law, the contracts expressly disclaim the only conceivable basis that a non-party might have to enforce the arbitration clauses in the Notes and Trust Deeds. The Piazza Defendants did not seriously dispute this conclusion in the

District Court. And, although Bakhmatyuk attempted to, the District Court rightly rejected his efforts after thoroughly surveying, and rejecting, the English-law analysis he offered.

But even if this Court concludes that U.S. law governs, Defendants are still not entitled to invoke equitable estoppel. Below, Defendants relied primarily on Wyoming law, but they candidly admitted that Wyoming has never applied the estoppel doctrine that they invoke. They therefore cannot make the necessary "strong showing" that it would adopt the doctrine they propose. Even under that doctrine, however, Defendants' arguments fail: They cannot make the critical showing that Gramercy's federal statutory and state-tort claims rely on the Trust Deeds or Notes.

A. Under English Law, Non-Parties Cannot Enforce The Arbitration Clauses In The Trust Deeds And Notes.

English law does not recognize any equitable estoppel principles that would allow Defendants to compel arbitration here. As Gramercy's expert explained, under English law a non-party is generally "not entitled to invoke an arbitration agreement in a contract to which he is not party." 11-JA 2735 ¶ 29(1). There are statutory exceptions to this policy under the Contracts (Rights of Third Parties) Act 1999, but the arbitration agreements expressly disclaim that third-parties have any rights under that statute, and English law enforces such disclaimers. *See* 11-JA

2733-2734 ¶¶ 22-24.[18] There are no other potentially applicable "estoppel" doctrines in English law that would allow for enforcing the arbitration agreements. *See* 11-JA 2735-2736 ¶¶ 28-31.

The Piazza Defendants did not meaningfully dispute this analysis of English law in the District Court—submitting no legal analysis of their own and confining their only challenge to a single footnote—and have therefore forfeited any contrary argument. *See* 12-JA 3006 n.3; *Stender v. Archstone-Smith Operating Tr.*, 910 F.3d 1107, 1117 (10th Cir. 2018). Bakhmatyuk purported to attach his own expert's opinion, but that opinion did not identify any doctrine of "equitable estoppel" in English law. It cited two English decisions that stand *at most* for the "limited principle" that a non-party may potentially enforce an arbitration clause when the party "seeks to enforce the terms of [the] contract against" the non-party. 14-JA 3441; *see also* 14-JA 3535-3540. That exception clearly does not cover the statutory and tort claims asserted by Gramercy. *See* 14-JA 3538-3540. It therefore makes no difference whether "the arbitration clause in this case expressly covers tort claims" between parties, Opening Br. 51; even if that were true, English law at most allows a non-party to enforce an arbitration provision when the claims *against the non-party*

[18] In any event, the statutory exceptions are also inapplicable by their terms. *See* 11-JA 2731-2733 ¶¶ 19-21.

"seek[] to enforce the terms of [the] contract." 14-JA 3441, 3535-3540.[19] Faithfully applying that rule here, the District Court properly rejected Defendants' argument that English law would allow them to enforce the arbitration clauses in this case. 14-JA 3536-3537.

B. Even Under U.S. Law, There Is No Basis to Compel Arbitration.

Defendants would not be entitled to arbitration even if Wyoming or federal common law applied. The equitable estoppel test Defendants seek to apply has never been recognized by Wyoming courts and is untethered from the historical requirements of the doctrine. But, even assuming Defendants have correctly articulated the legal test, they cannot satisfy it because the claims here sound in tort, not contract.

1. Wyoming would not recognize Defendants' theory of equitable estoppel.

In the District Court, Defendants' primary argument was that Wyoming law rather than federal common law supplies the rule of decision for whether equitable estoppel applies. But, as Defendants acknowledged, Wyoming courts have never

[19] Defendants identified exactly one English law case suggesting that English law might characterize a narrow category of non-contractual claims as "quasi-contractual," *see* 14-JA 3537-3538, but on appeal Defendants do not argue that the claims here would fall within this narrow category, *see* Opening Br. 50-52. And, regardless, the claims here sound purely in federal statutory obligations and tort. *See infra* pp. 50-55.

adopted the theory of equitable estoppel that Defendants propose. *See* 1-JA 158 (admitting that "neither the Wyoming Supreme Court nor any other Wyoming state court or any federal court interpreting Wyoming law has yet to address the circumstances under which a nonsignatory may enforce an arbitration clause").

This Court has long held that, "[a]bsent a strong showing," it is "disinclined to" expand "state law beyond the bounds set by the" state's "highest court." *Belnap*, 844 F.3d at 1295 (quotation marks omitted). In *Belnap*, it applied that principle in the specific context of "nonsignatory estoppel," refusing to "predict that the Utah Supreme Court would recognize another variety" of estoppel without the necessary "strong showing." *Id.* at 1295-1296.

That principle is fatal to Defendants' argument under Wyoming law. State courts—even within this Circuit—are deeply divided about whether to recognize the unique form of equitable estoppel that Defendants proffer here. *Compare Reeves*, 17 F.4th at 1012 (finding support in Oklahoma law), *with Santich*, 443 P.3d at 66 (Colorado Supreme Court finding "no compelling reason to depart from our traditionally defined elements of equitable estoppel to craft an arbitration-specific rule"). The "outdated . . . federal decisions invoking estoppel whenever a claim relates to a contract do not ground this test in anything resembling traditional estoppel at common law." *AtriCure*, 12 F.4th at 520, 529. Thus, a number of states have refused to adopt Defendants' test. *See, e.g.*, *Santich*, 443 P.3d at 66; *Harvey ex*

rel. Gladden v. Cumberland Tr. & Inv. Co., 532 S.W.3d 243, 271 (Tenn. 2017); *Hirsch v. Amper Fin. Servs., LLC*, 71 A.3d 849, 189-194 (N.J. 2013); *B.C. Rogers Poultry, Inc. v. Wedgeworth*, 911 So. 2d 483, 491-493 (Miss. 2005); *Ervin v. Nokia, Inc.*, 812 N.E.2d 534, 541-543 (Ill. Ct. App. 2004).

Wyoming would likely join those states that have rejected the expansion of equitable estoppel in the arbitration context. In Wyoming, equitable estoppel requires good-faith detrimental reliance. *See Birt v. Wells Fargo Home Mortg., Inc.*, 75 P.3d 640, 653-654 (Wyo. 2003) (describing equitable estoppel as requiring detrimental reliance). "Equitable estoppel arises *only* when a party, by acts, conduct, or acquiescence causes another to change his position." *Id.* (quotation marks omitted) (emphasis added). Defendants have pointed to nothing suggesting Wyoming would recognize an exception to its detrimental-reliance requirement in the arbitration context, much less made the necessary "strong showing." *Belnap*, 844 F.3d at 1295. And, because Defendants have not even attempted to argue that they justifiably relied on the arbitration agreements in any way, they cannot succeed under Wyoming's existing equitable estoppel law.

2. *Under Defendants' preferred legal test, arbitration is not required.*

If this Court adopts Defendants' preferred legal test for equitable estoppel—whether as a matter of federal common law or Wyoming law—they are still not entitled to arbitration. Defendants rely on the Oklahoma-law formulation this Court

employed in *Reeves*, which would require arbitration: "(1) where the signatory must 'rely on the terms of the written agreement containing the arbitration clause' and (2) when the signatory raises allegations of 'substantially interdependent and concerted misconduct by both the nonsignatory and one or more signatories to the contract.'" Opening Br. 48 (quoting *Reeves*, 17 F.4th at 1010).

Defendants make virtually no argument that this case falls in the second category. *See id.* at 49-50. They state in a conclusory fashion that the complaint "alleges concerted misconduct by both" Defendants and the Companies, but cite only a handful of paragraphs from the complaint as support. *Id.* at 49.[20] But the cited paragraphs simply outline the terms of the Notes and Trust Deeds purchased by Gramercy; they do not allege *any* conduct by the Companies, much less that the Companies participated in Defendants' fraudulent scheme (which they are not alleged to have done). *See* 1-JA 44-49 ¶¶ 45-50.

Defendants similarly fail to establish that this is a case where Gramercy must "rely on the terms of" the Trust Deeds or the Notes. *Reeves*, 17 F.4th at 1010. For this argument to succeed, Defendants must show that the Trust Deeds or Notes form the "legal basis" for Gramercy's claims; "it is not enough that the contract is factually significant to the plaintiff's claims or has a 'but-for' relationship with

[20] In what appears to be a typographical error, Defendants refer to themselves as "signatories" and the Companies as "nonsignatories." Opening Br. 49.

them." *Lenox MacLaren Surgical Corp. v. Medtronic, Inc.*, 449 F. App'x 704, 709 (10th Cir. 2011).[21] The question is whether the claims "seek to enforce duties that arise from the contract containing the arbitration clause, not from other legal sources (such as a statute or tort law)." *AtriCure*, 12 F.4th at 527 (applying a similar doctrine under Ohio law).

Gramercy does not allege the Defendants have any contractual obligations to Gramercy, and thus does not assert any breach of contract claims. The complaint includes three federal RICO counts and state tort claims for fraud and tortious interference with contract. 1-JA 92-125 ¶¶ 191-218. The first two categories—RICO and fraud—have no legal relationship to the contract; indeed, those claims do not even require alleging the existence of a contract because the RICO predicate offenses are all forms of fraud. 1-JA 92-117 ¶¶ 161-206.

The Trust Deeds and Notes may be "factually significant" context for a tortious interference claim, *Lenox*, 449 F. App'x at 709, because a party must establish the existence of a contract to succeed. *See Rammell v. Mountainaire Animal Clinic, P.C.*, 442 P.3d 41, 49 (Wyo. 2019). But the whole premise of tortious interference is that a *stranger* to the contract has wrongfully interfered with it. *See*

[21] In *Lenox*, the Court applied the same legal test—derived from the pre-*Arthur Andersen* body of case law—that Defendants invoke in *Reeves*. *See Lenox*, 449 F. App'x at 708.

id. It is a "tort action" and cannot be maintained against one who "was a party to the contract she is alleged to have interfered with." *Kvenild v. Taylor*, 594 P.2d 972, 977 (Wyo. 1979). Thus, although the contracts may have a "but-for" relationship to the tortious-interference claim, they are not the "legal basis" of the claim as required to invoke equitable estoppel. *Lenox*, 449 F. App'x at 709. Rather, the basis of the claim is "a standalone duty grounded in tort law." *AtriCure*, 12 F.4th at 528. Thus, courts have rejected arguments that tortious-interference claims "rely on" a contract in a legally significant way. *See id.*

The complaint also references Gramercy's rights under the Notes to provide relevant factual background for its allegations that Defendants specifically targeted Gramercy in part because of its blocking rights, and generally alleges that Gramercy was deprived of the value of those Notes by Defendants' scheme. *See, e.g.*, 1-JA 44-49, 94-95 ¶¶ 45-50, 168. The existence and value of the Notes to Gramercy is thus "factually significant" to this case. *Lenox*, 449 F. App'x at 709. But the "legal basis" of the claims—which is what matters for estoppel purposes, *id.*—remains firmly grounded in federal RICO and state tort law, not contractual obligations.

Defendants also do not cite any cases authorizing equitable estoppel under analogous circumstances. *See id.* Indeed, the only case they cite—*Reeves*—highlights the impropriety of estoppel here. In *Reeves*, the Court held that employees of a staffing company could not avoid arbitration provisions in their contracts with

their employers by suing the staffing company's clients. 17 F.4th at 1009, 1013, 1015. Their claims centered on whether they were entitled to overtime wages under the terms of their employment agreements. *Id.* The situation here is not remotely comparable. Gramercy never entered into a contractual arrangement with any of the Defendants. Defendants' legal obligations to Gramercy have no basis in the Trust Deeds or the Notes; they are creatures of federal statutory and state tort law. There is, in short, nothing inequitable about "raising a tort claim relating to a contract" that contains an arbitration agreement in court "if the plaintiff does not seek to enforce the contract." *AtriCure*, 12 F.4th at 529.

If this Court disagrees and concludes that some subset of claims should be sent to arbitration, it certainly should not order that the remainder of the claims be stayed, as Defendants briefly suggest. *See* Opening Br. 35. As this Court has recognized, when claims are split, "courts have held that arbitration should proceed in tandem with non-arbitrable litigation." *Coors Brewing Co. v. Molson Breweries*, 51 F.3d 1511, 1518 (10th Cir. 1995). At minimum, the decision whether to grant a stay should be remanded to the District Court. Whether to grant such a stay is firmly within that court's discretion given "the district court's control of its docket" and the need to balance "considerations of judicial efficiency." *Id.*

Moreover, Defendants have already secured at least a six-month delay by filing this appeal and should not be allowed to achieve further delay during

arbitration. Throughout their pitch for arbitration, Defendants have moved the goalposts—consistently raising new arguments when Gramercy or the District Court has identified flaws in their old ones. The Court should reject their latest efforts and affirm the District Court's sound conclusion that arbitration is not required. And, to avoid further delay, Gramercy respectfully requests that the Court resolve this appeal as expeditiously as possible.

CONCLUSION

For all the foregoing reasons, the District Court's orders should be affirmed or, alternatively, these appeals should be dismissed for lack of jurisdiction.

January 25, 2023

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I HEREBY CERTIFY that on this 25th day of January, 2023, I served a true and correct copy of this document on all counsel of record via electronic filing through the Court's ECF system. I certify that all participants in the case are registered CM/ECF users.

/s/ Ryan M. Philp

Nos. 22-8050 and 22-8063

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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

Plaintiff-Appellees,

v.

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

Defendant-Appellants.

On appeal from the U.S. District Court for the District of Wyoming
Honorable Nancy D. Freudenthal
No. 21-CV-223-F

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INTRODUCTION

In this appeal, the Court must determine whether the parties are required to arbitrate their dispute. For two independent reasons, they are. First, all of the litigants are parties to a binding arbitration agreement.

Second, even if some of the Appellants aren't parties to those agreements, arbitration is still appropriate under the doctrine of equitable estoppel. Gramercy spends most of its brief arguing about choice of law, but its position is internally inconsistent and self-defeating. On the one hand, Gramercy says that the Court should enforce the English-choice-of-law provision, while on the other, it claims that the Court should *not* enforce the arbitrator-decides-arbitrability provision. Gramercy cannot have it both ways. If the Court enforces the terms of the agreement as Gramercy demands, then it must send the parties to London to arbitrate arbitrability.

In any event, whichever law this Court applies, Gramercy is equitably estopped from disclaiming the arbitration agreement. Under both federal common and Wyoming state law, a party is prohibited from "pleading around" its contractual duty to arbitrate—and that is

precisely what Gramercy did. Even English law recognizes this basic principle. Gramercy's own expert acknowledges that a party cannot do precisely what Gramercy has done: seek to enforce the terms of a contract against a nonparty while disregarding an arbitration clause contained within that same contract.

The Court should reverse the decisions below and order the parties to arbitration.

Argument

I. The District Court Erred Each Time It Held that the Parties Here Are Not Parties to an Arbitration Agreement.

Gramercy doesn't dispute that if the Appellants are parties to one of the arbitration agreements, the Court must compel arbitration. Instead, Gramercy argues that this issue was not preserved and that none of the Appellants is a party to any such agreement. Both arguments fail.

A. The Issue Was Preserved.

Gramercy first contends that Appellants waived the argument that they are parties to the arbitration agreements. In support, Gramercy focuses on one phrase that says the Piazza Appellants "are not parties to the Trust Deeds." Appellees' Br. at 18. That comment,

while inartfully worded, was intended only to emphasize that the Piazza Appellants are not AVG or ULF (the companies that issued the Trust Deeds). But even if the Court treated this incidental phrase as a concession, that does not waive the issue for two reasons.

First, this alleged concession extends only to the Trust Deeds, and *not* to the Notes. That fact is critical because—as Gramercy admits—*both* the Trust Deeds and the Notes contain arbitration clauses. App'x Vol. V, p. 1353; App'x Vol. VI, pp. 1397, 1483, 1544; Appellees' Br. at 7. Gramercy elides this distinction when it claims that "the Piazza Defendants waived the argument *that they are noteholders* when they stated below that 'while Moving Defendants are not parties to the *Trust Deeds*,' . . . ." Appellees' Br. at 18 (emphases altered). The Trust Deeds and the Notes are two different—albeit interconnected—contracts, and both contain an arbitration term. Gramercy's waiver argument gets nowhere against the claim that the Piazza Appellants are *noteholders* and can enforce the arbitration agreement contained in the Notes.

Second, Gramercy concedes that its waiver argument gets no traction at all as to Bakhmatyuk. *Id.* at 19 ("Bakhmatyuk's problem is not waiver but forfeiture."). At the same time, Gramercy is simply

wrong in asserting that Bakhmatyuk forfeited the argument that he was a party to the Trust Deeds. To the contrary, Bakhmatyuk expressly raised the point below: he argued that the district court should "find that Mr. Bakhmatyuk is a party to the arbitration agreements. . . . He is referenced throughout the Trust Deeds and signed the applicable Directors' Certificate to the Trust Deed." App'x Vol. XIII, pp. 3210–11; *see also id.* at 3210 ("Plaintiffs are bound by the Trust Deeds, and the form Notes included therein, which contain arbitration provisions . . . ."). These arguments preserved the issue for appeal. *In re Rumsey Land Co., LLC*, 944 F.3d 1259, 1274 (10th Cir. 2019) (in assessing preservation, "[p]leadings and motions in the trial court will be given a liberal reading").

Thus, Gramercy is left at best with *only* the doctrine of forfeiture, and *only* as to the Piazza Appellants. Gramercy argues that forfeiture precludes this Court from taking up this question because "'an issue must be presented to, considered and decided by the trial court before it can be raised on appeal.'" Appellees' Br. at 17–18 (quoting *Tele-Comm'ns, Inc. v. C.I.R.*, 104 F.3d 1229, 1233 (10th Cir. 1997)). But even that limited argument doesn't get off the ground because the Piazza

Appellants presented the issue to the district court and the court actually "considered and decided" the issue.

The Piazza Appellants raised this argument before the district court twice, first arguing that Appellees "affirmatively alleg[e] that Defendants bought Notes as part of a scheme, while arguing that Moving Defendants cannot invoke the ULF and AVG Trust Deeds. If their allegations are accepted as true, SP Advisors has the same rights and obligations under the Trust Deeds as Gramercy regarding the arbitration provisions." App'x Vol. XII, p. 3007. The argument was raised again when the motion argued that "[a]s a Noteholder, SP Capital shares the same rights and interests under the no-action clause . . . . SP Capital, like other Noteholders, has a right to a single, unified determination on the future of the Notes . . . ." App'x Vol. XII, pp. 3007–08. These two paragraphs on the topic were more than sufficient to preserve the issue for appeal. *See Rumsey*, 944 F.3d at 1274.

Moreover, the district court, understanding that Appellants argued they are noteholders, decided the issue. In its order on the Bakhmatyuk motion, the district court held, "[W]hile it is clear that Plaintiffs, are subject to the arbitration clauses in the Notes – including

those incorporated therein from the Trust Deeds – it is equally clear that *Bakhmatyuk is not a party to the Notes or the Trust Deeds*." App'x Vol. XIV, p. 3527 (emphasis added). Likewise, in its order on the Piazza Appellants' motion, the court held that "the Complaint does not allege that Defendants Piazza or SP Capital themselves are actually Noteholders." App'x Vol. XIII, pp. 3168–69 n.11; *see also id.* ("Defendants also overstate Plaintiffs' argument. Plaintiffs argue Defendant SP Capital was directly involved in the fraudulent scheme, but they do not allege it is a Noteholder."); *id.* at 3160 ("But here, neither Plaintiffs nor Defendants are parties to the Trust Deeds.").

The fact that Appellants raised this argument before the district court, which actually passed upon this issue, is fatal to Gramercy's forfeiture argument. That is because the "forfeiture rule does not apply when the district court explicitly considers and resolves an issue of law on the merits." *Tesone v. Empire Mktg. Strategies*, 942 F.3d 979, 991–92 (10th Cir. 2019).

In sum, Gramercy's argument is that the Court should draw a distinction between two similarly situated parties within a single, consolidated appeal and forbid some—but not all—of them from

appealing an issue that was affirmatively addressed by the district court. This makes no sense, which is why "the decision regarding what issues are appropriate to entertain on appeal in instances of lack of preservation is discretionary." *Abernathy v. Wandes*, 713 F.3d 538, 552 (10th Cir. 2013). Even assuming failure to preserve, the Court should exercise its discretion here.

B. The Piazza Appellants Are Parties to the Arbitration Agreements.

The Complaint claims that several of the Piazza Appellants purchased Notes and are therefore noteholders. Appellants' Br. at 20–32 (citing App'x Vol. I, pp. 32–33, 65, 68, 71–72, 118–19). Indeed, one of the Complaint's central theories—constituting one of the three "phases" of the alleged scheme—is that Piazza and SP Advisors acted as "straw purchasers" who acquired AGV and ULF debt on behalf of Bakhmatyuk. App'x Vol. 1, pp. 32–33. This isn't some passing claim, but the crux of the alleged conspiracy, and the Complaint makes this allegation over and over. *E.g.*, *id.* ("[S]ome of these debt purchases . . . involved straw purchasers like Piazza . . . ."); *id.* at 65 ("Bakhmatyuk enlisted Pi[a]zza, SP Advisors, and others to act as straw purchasers to buy up Company debt . . ."); *id.* at 71 ("Upon information and belief,

Piazza bough Ukrsibank's debt in this transaction."). The claim, in other words, is that Piazza and SP Advisors *actually held the Notes* but did so under Bakhmatyuk's direction and control.

In its brief, Gramercy's lead-off argument is that the Piazza Appellants didn't introduce evidence affirmatively proving that they acquired Notes. Appellees' Br. at 20–21. That argument is non-responsive to the Appellants' point that the Complaint itself makes those allegations. In light of that fact, there was no need to submit evidence.[1]

Next, Gramercy acknowledges that the Piazza Appellants might hold AVG and ULF debt, but claims that the "the Companies had many different forms of debt" and "there is no basis for assuming that generic references to 'debt' in the complaint are to the same Notes . . . Gramercy holds." Appellees' Br. at 21. That effort to obfuscate the clarity of the debt instruments misses the mark. To begin with, it ignores the Complaint's allegation cited above and the fact that the Complaint only contemplates one type of unsecured Notes.

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[1] If the Court wanted evidence of this fact or were to rule that the Complaint's allegations are insufficient, Appellants could move to compel arbitration on remand. None of this serves judicial efficiency.

More importantly, the Complaint's allegations about the Notes held by Ashmore conclusively disprove Gramercy's assertion. The Complaint alleges that a company called Ashmore Investment Management Limited held the same Notes as Gramercy. App'x Vol. I, p. 55 (referencing "unsecured noteholders such as Gramercy and Ashmore"); *id.* at 67 ("Ashmore had held a material amount of the Notes"); Appellees' Br. at 22 (admitting this fact). The Complaint then alleges that both Piazza and SP Capital acquired those Notes from Ashmore. *Id.* at 68 ("The Business Council Letter further suggests that *Piazza*, *through SP Capital, controlled Ashmore's former position* by stating that SP Capital holds roughly $200 million in the Company's secured and unsecured debt, which is consistent with *Piazza* having orchestrated the Ashmore Debt Purchase and *being the ultimate owner of the debt*.") (emphasis added); *id.* at 82 ("Piazza was using *his* newly acquired debt, *which included the debt formerly held by Ashmore* . . . .") (emphasis added); *id.* at 115 ("Piazza, through SP Advisors, did in fact purchase Ashmore's debt position."). Thus, Piazza and SP Capital held the same Notes as Gramercy.

In response, Gramercy claims that "the complaint does not allege that any *Defendant* acquired the Notes held by Ashmore," Appellees' Br. at 22, but in fact, that is precisely what the Complaint alleges. Faced with those allegations, Gramercy asserts that the Complaint only "colloquially refers to 'Piazza' or 'SP Advisors' acquiring the debt" and that "[a]llegations referring to 'Piazza' or 'SP Advisors' cannot necessarily be construed as referring to the named Defendants." *Id.* at 22–23. Again, that isn't consistent with the Complaint's plain language. The term "Piazza" is used throughout to refer to Nicholas Piazza, and only to Nicholas Piazza. *E.g.*, App'x Vol. I, p. 30 ("Piazza, a US citizen with deep ties and property interests in Wyoming . . . ."); *id.* at 36 ("Defendant Nicholas Piazza is a United States citizen . . . . Piazza is a business man . . . ."). Likewise, the Complaint expressly defines the term "SP Advisors" as "SP Capital Management LLC . . . together with its subsidiaries." *Id.* at 28.

C. Bakhmatyuk Is a Party to the Arbitration Agreements.

The Trust Deeds establish that Bakhmatyuk is a party who may compel arbitration. Under the Trust Deeds, Bakhmatyuk is both a "Related Party" and a "Permitted Holder." App'x Vol. V, pp. 1406, 1409;

App'x Vol. VI, pp. 1559, 1562. The Trust Deeds, along with their corresponding prospectuses and relationship agreement, form part of a *single* transaction, and they lay out in detail Bakhmatyuk's contractual obligations. App'x Vol. V, pp. 1372–73 (§ 5.6 covers limitations on mergers, consolidations, and asset sales); App'x Vol. VII, pp. 1525–26 (same); App'x Vol. IV, p. 896 (Bakhmatyuk "and the Issuer have entered into a relationship agreement aimed at . . . protecting the Issuer's interests in the case of conflicts of interests . . . ."); App'x Vol. II, pp. 582–85 (duties imposed by relationship agreement). Thus, the Trust Deeds and corresponding documents establish that Bakhmatyuk is obligated to play a role in the execution of the contracts.

Gramercy argues that the Court cannot consider the prospectuses because they are "disclosure documents prepared for initial investors" that "do[] not make [a corporate officer] party to a company's contracts." Appellees' Br. at 29–30. Notably, the only case Gramercy cites doesn't reference disclosure documents nor any other analogous materials. *See Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 477 (2006). And in fact, courts may consider a prospectus when attempting to determine parties' contractual intentions. *E.g.*, *Harris v. Union Elec. Co.*, 787 F.2d

355, 364 (8th Cir. 1986) (relying in part on prospectus to interpret contract); *Ambac Assur. Corp. v. U.S. Bank Nat'l Ass'n*, 2020 WL 7211217, at *11 (S.D.N.Y. Dec. 7, 2020) (under New York law, the prospectus must be considered in interpreting a contract). That is because these interrelated documents—the Trust Deeds, the Notes, the prospectuses, and the relationship agreement—together constitute a single commercial transaction.

Gramercy next claims that this argument has been abandoned or waived. Appellees' Br. at 30. Not so. Appellants' principal brief argues that Bakhmatyuk is a party to the relationship agreement with AVG and that the relationship agreement is incorporated into the AVG and ULF prospectuses. Appellants' Br. at 13, 25, 33.

In a similar vein, Appellees' argument that Bakhmatyuk relates to the Trust Deeds only in his capacity as a corporate officer is misplaced. To prop up this theory, Gramercy dives into arguments about corporate formalities and piercing the corporate veil. Appellees' Brief at 28–29. Though it is normally true that "the shareholder and contracting officer of a corporation has no rights and is exposed to no liability under the corporation's contracts," *Domino's Pizza*, 546 U.S. at

477, Bakhmatyuk is not just a shareholder or contracting officer. He has both rights and obligations arising from the Trust Deeds and other relevant agreements. *See* App'x Vol. XIV, p. 3525 ("Permitted Holder" is pertinent to "Redemption at the Option of the Holders upon a Change of Control."); Appellants' Br. at 33 (listing provisions in the Trust Deeds, prospectuses, and relationship agreement that require Bakhmatyuk to take certain actions). Along the same lines, the Complaint implicitly acknowledges that Bakhmatyuk's relationship with the Notes and Trust Deeds goes beyond merely being the CEO of AVG and ULF: the Complaint's tort claims are expressly predicated on the Trust Deeds. App's Vol. I, p. 118.

II. The District Court Erred in Failing to Order Arbitration Under Principles of Equitable Estoppel.

This Court only needs to reach the equitable estoppel question if it determines that—contrary to the Complaint's plain wording—the Appellants aren't parties to the arbitration agreements. But if it does, the Court should apply federal common or Wyoming law to the equitable estoppel issue, and under either framework, Gramercy must arbitrate. Even if the Court applied English law, the result is the same.

At the same time, the Court need not resolve the choice-of-law question because Gramercy loses on the merits for a much simpler reason: it cannot have its cake and eat it, too. That is, Gramercy cannot claim that the English choice-of-law provision applies to the equitable estoppel issue but that the arbitrator-decides-arbitrability question does not. Appellants' Br. at 46–48, 52–53. As a result, no matter which way the Court decides the choice-of-law issue, the outcome is the same: the Court should send the parties to London to arbitrate.

A. Gramercy's Choice-of-Law Argument Implicitly Concedes that the Parties Must Arbitrate.

Both of the Trust Deeds—including the form of the Notes that the Trust Deeds require—provide for binding arbitration in accordance with LCIA Rules. App'x Vol. V, p. 1353; *id.* at 1397; App'x Vol. VI, p. 1482; *id.* at 1545. The LCIA Rules, in turn, provide that the arbitration tribunal must decide "its own jurisdiction and authority, including" any issues related to "the initial or continuing existence, validity, effectiveness or scope of the Arbitration Agreement." App'x Vol. I, p. 163. The incorporation of this rule conclusively proves the parties' "clear and unmistakable intent" to delegate arbitrability to the arbitrator—and therefore requires Gramercy to arbitrate. *Goldgroup*

Res., Inc. v. DynaResource de Mexico, S.A. de C.V., 994 F.3d 1181, 1191 (10th Cir. 2021) (AAA Rules); *Belnap v. Iasis Healthcare*, 844 F.3d 1272, 1281 (10th Cir. 2017) (JAMS Rules); *OI Props. Inc. v. Burford Cap. Ltd.*, 2019 WL 1359254, at *4 (D. Ariz. Jan. 14, 2019) (LCIA Rules); *SteppeChange LLC v. VEON Ltd.*, 354 F. Supp. 3d 1033, 1043 (N.D. Cal. 2018) (LCIA Rules); *Innospec Ltd. v. Ethyl Corp.*, 2014 WL 5460413, at *3 (E.D. Va. Oct. 27, 2014) (LCIA Rules).

Gramercy raises three arguments in response, each unpersuasive. First, Gramercy claims that "*Belnap* took the opposite approach" and "decided estoppel issues for itself even after it concluded that the arbitration clause in question delegated arbitrability to the arbitrator." Appellees' Br. at 37. That is wrong. *Belnap* specifically declined to consider this argument:

> In their reply brief, Defendants argue for the first time . . . that "given the parties' 'clear and unmistakable' intent to arbitrate arbitrability, the question of who was covered by the arbitration provision, along with who was entitled to invoke it, were questions for the arbitrator, not the court." Because Defendants raised this argument for the first time in their reply brief, *we consider it waived and decline to address it*.

Belnap, 844 F.3d at 1293 n.16 (emphasis added).[2]

Second, Gramercy claims that "the premise of equitable estoppel is that the parties never reached *any* agreement to arbitrate, much less an agreement to arbitrate arbitrability," and therefore, the Court cannot enforce the agreement. Appellees' Br. at 37. But if Gramercy is right, *the same is true for the English choice-of-law provision*. That is, the parties never reached an agreement that English law would govern their dispute, and so Gramercy cannot enforce it. In fact, the argument about the choice-of-law provision is substantially weaker: According to Gramercy, the Appellants aren't parties to any contract that selected English as the governing law. In contrast, Gramercy indisputably is a party to the Trust Deeds and the Notes, and those contracts indisputably contain an arbitration clause.

Third and finally, Gramercy says it isn't taking an inconsistent position because "Gramercy is not attempting to apply any provision of the contracts to Defendants." Appellees' Br. at 37. Again, this is just

[2] Gramercy cites *Belnap* over and over again for the proposition that a choice-of-law provision trumps an agreement to arbitrate arbitrability. Appellees' Br. at 13, 31, 35, 37. But as the block quote above demonstrates, *Belnap* did not rule on that issue.

wrong. Gramercy is attempting to apply the *English choice-of-law provision* of the contracts to Defendants.

B. The District Court Erred in Refusing to Apply Federal Common Law or Wyoming Law.

If this Court reaches the choice-of-law issue, it should hold that the district court erred in applying English law.

i. Either Federal Common Law or Wyoming Law Applies to the Equitable Estoppel Issue.

Gramercy resists application of federal common law first by asserting that Appellants forfeited the argument. Appellees' Br. at 32, 38. But Bakhmatyuk argued below that the district court "should apply U.S. equitable estoppel principles" and follow the reasoning in Judge Tjoflat's *GE Energy II* concurrence "where he opined that federal common law should govern whether equitable estoppel applies in cases involving international arbitration . . . ." App'x Vol. XIII, p. 3211. The Piazza Appellants did indicate that state contract law governs, but they then immediately turned to federal authorities, noting that "[t]he Tenth Circuit, like others, has held that equitable estoppel permits a nonsignatory to compel arbitration in two, independent circumstances . . . ." App'x Vol. I, p. 158. Moreover, the Piazza Appellants' motion cites to *both* federal and Wyoming authorities, *id.* at 156–62, and for good

reason: Appellants have always maintained that the substantive rule is the same under both federal common and Wyoming law, and it therefore doesn't matter which one the Court applies. Appellants' Br. at 36–40. Ultimately, however, it doesn't matter because the district court affirmatively addressed the question. App'x Vol. XIV, p. 3532 ("[W]ith this posture the Court must now decide the choice of law for equitable estoppel."); *id.* at 3540 ("*Arthur Anderson* . . . made plain that federal courts should not apply federal common law to this issue."). That is enough to defeat forfeiture. *Tesone*, 942 F.3d at 991–92.

Turning to the merits, Gramercy contends that federal common law cannot govern the equitable estoppel question in a Convention case. As both parties acknowledge, this is an open question in the Tenth Circuit. But contrary to Gramercy's arguments, the weight of authority is firmly on the side of federal common law. As Appellants explained in their principal brief, courts across the country have continued to apply federal common law to Convention cases even after the *Arthur Andersen* decision. Appellants' Br. at 39 (citing cases in the 4th, 5th, 9th, and 11th Circuits). Moreover, only three circuit-court decisions have expressly addressed the question since *Arthur Andersen*—one

published, one unpublished, and one unpublished concurrence—and all three adopted federal common law. *Setty v. Shrinivas Sugandhalaya LLP*, 3 F.4th 1166, 1168 (9th Cir. 2021); *Northrop & Johnson Yachts-Ships, Inc. v. Royal Van Lent Shipyard, B.V.*, 855 F. App'x 468, 474 n.4 (11th Cir. 2021); *Outokumpu Stainless USA, LLC v. CoverteamSAS*, 2022 WL 2643936 at *5 (11th Cir. July 8, 2022) (Tjoflat, J., concurring). Only one circuit court has arguably adopted Gramercy's view: the Second, but it did so in a decision that predated *Arthur Andersen*. *Motorola Credit Corp. v. Uzan*, 388 F.3d 39, 51 (2d Cir. 2004).[3]

In any event, this debate is largely beside the point. Federal and Wyoming law would apply the same test, *infra* Section II.B.iv, and the district court erred in applying English law instead.

ii. The Choice-of-Law Provision Does Not Justify Application of English Law.

Gramercy makes a brand-new argument in its appellate brief, claiming that Wyoming choice-of-law rules govern and that Wyoming

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[3] Gramercy claims that the Sixth Circuit did as well, but that isn't correct. *AtriCure* wasn't a Convention case—a fact Gramercy tries to avoid by claiming that even though the opinion doesn't reference the Convention at all, "the Convention applied . . . because the litigants seeking arbitration were Chinese." Appellees' Br. at 43 n.16 (citing *AtriCure, Inc. v. Meng*, 12 F.4th 516, 520–22 (6th Cir. 2021)).

would enforce the English choice-of-law provision. Appellees' Br. at 33–35. "[A]ffirming on legal grounds not considered by the trial court is disfavored." *Rimbert v. Eli Lily & Co.*, 647 F.3d 1247, 1256 (10th Cir. 2011). Moreover, Gramercy doesn't make any argument that "the ground was fully briefed and argued here and below," that the parties "had a fair opportunity to develop the factual record," or that the "decision would involve only questions of law." *Stewart v. City of Okla. City*, 47 F.4th 1125, 1132 n.5 (10th Cir. 2022). Because it cannot make that showing, the Court shouldn't consider this issue.

In any event, Gramercy's argument lacks merit for three distinct reasons. *First*, when this Court has applied state law to equitable estoppel, it has applied *substantive* state law, not conflict-of-law principles. *Reeves v. Enter. Prods. Partners, LP*, 17 F.4th 1008 (10th Cir. 2021); *Belnap*, 844 F.3d at 1293; *Lenox MacLaren Surgical Corp. v. Medtronic, Inc.*, 449 F. App'x 704, 705, 708 (10th Cir. 2011).[4]

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[4] Gramercy claims that *Belnap* applied a choice-of-law contractual term, Appellees' Br. at 35, but *Belnap* cited *Arthur Andersen* for the proposition that "[t]o determine whether these Defendants can compel [arbitration based on the Agreement]—an agreement that they never signed—we looked to Utah law." *Belnap*, 844 F.3d at 1293. The Court only noted in a "see also" citation that the contract also had a Utah choice-of-law provision.

Second, the Wyoming Supreme Court has already rejected this argument. In *Ecocards v. Tekstir, Inc.*, the court took up a dispute about the validity of a contract. 459 P.3d 1111, 1117 (Wyo. 2020). The court noted that the contract contained a California choice-of-law clause, but refused to apply it: "The Tenth Circuit . . . recognized there is a 'logical flaw inherent in applying a contractual choice of law provision before determining whether the underlying contract is valid.' We agree. Therefore, we will apply Wyoming law to determine whether the [Agreement] is a valid contract." *Id.* at 1117 n.5 (citation omitted).

Third, Gramercy doesn't cite to any authorities even suggesting a different rule. Instead, Gramercy points to Wyoming cases indicating that the state follows the *Restatement (Second) of Conflict of Laws* and asserts that choice-of-law terms are generally enforceable under the *Restatement*. Appellees' Br. at 33–34. But Gramercy doesn't cite to any authority indicating that the *Restatement* recommends enforcing contractual choice-of-law provisions to an equitable claim brought by a nonparty.

Moving on from their argument about Wyoming law, Gramercy responds to the four reasons Appellants gave as to why the English

choice-of-law provision is inapplicable. Gramercy doesn't make any headway.

First, a number of courts have applied federal common law even though the operative contract contained a choice-of-law provision. Appellants' Br. at 41 (citing cases from the Second, Fourth, and Fifth Circuits). Gramercy claims that these cases "bypass the choice-of-law question," Appellees' Br. at 43, but does not dispute that those courts did in fact apply federal common law in the face of a choice-of-law clause.

Second, those decisions make sense because equitable estoppel is a "threshold" issue, and one that isn't grounded in contract law. Appellants' Br. at 42. Gramercy responds by claiming that "the logic behind [Appellants'] argument would apply even more squarely when a contract's validity is challenged," yet "courts consistently apply choice-of-law provisions in that context." Appellees' Br. at 36. Not only is that an incorrect statement of the law (the Wyoming Supreme Court specifically rejected it in *Ecocards*), but the argument also misses the point. Equitable estoppel is a "threshold" issue in two distinct ways: (i) it's about whether the parties should be bound to an agreement in the

first place (and therefore, applying a contractual term to that question puts the cart before the horse) and (ii) it *isn't grounded in contract law*; equitable estoppel is a doctrine sounding in equity, and a court doesn't apply any contractual terms to make that determination. *See Reeves*, 17 F.4th at 1014 ("The linchpin for equitable estoppel is equity—fairness."). The Third, Eighth, and Ninth Circuits have adopted the same principle. *Setty*, 3 F.4th at 1168 ("[W]hether SS Mumbai may enforce the Partnership Deed as a nonsignatory is a 'threshold issue' for which we do not look to the agreement itself."); *Neb. Mach. Co. v. Cargotec Sols., LLC*, 762 F.3d 737, 741 n.2 (8th Cir. 2014) ("Cargotec's argument puts the cart before the horse, as it presumes the arbitration provision formed part of the contract at issue."); *Puleo v. Chase Bank USA, N.A.*, 605 F.3d 172, 181 (3d Cir. 2010) (courts don't enforce arbitration agreements as written if issue involves "a threshold question regarding the validity of the arbitration agreement itself").

Third, applying federal common law is consistent with the need for uniformity in international agreements. Appellants' Br. at 43. Gramercy claims that "the Supreme Court rejected that logic in *GE Energy I* . . . ." Appellees' Br. at 41. But *GE Energy I* never challenged

the long-held understanding that the purpose of the Convention was to impose uniformity on international arbitrations. Appellants' Br. at 43–44. Gramercy implicitly acknowledges this fact, but says that Appellants "mistake the *kind* of uniformity that is important to the Convention;" Gramercy argues that the goal is "to ensure agreements are enforced uniformly throughout the signatory countries" and that "it undermines that goal if U.S. federal courts ignore standard contracting principles . . . in favor of their own unique estoppel doctrines." *Id.* at 41–42. This argument only reinforces Appellants' position: the goal of uniformity is better served by adopting a single national rule through federal common law instead of having parties fight over the choice-of-law principles and substantive law of whichever forum the plaintiff happened to file in.

Fourth and finally, Gramercy cannot use the Appellants' status as a nonsignatory as both a sword and a shield. If the choice-of-law provision is enforceable, then the arbitrator-decides-arbitrability provision is enforceable as well. *See supra* Section II.A.

iii. Under Federal Law, Appellees Are Equitably Estopped from Disclaiming the Arbitration Agreements

Equitable estoppel requires parties to arbitrate in two independent circumstances: (1) where the signatory must "rely on the terms of the written agreement containing the arbitration clause" and (2) when the signatory raises allegations of "substantially interdependent and concerted misconduct by both the nonsignatory and one or more of the signatories . . . ." *Reeves*, 17 F.4th at 1010.

***a. Relying on the terms of the written agreements*.**

The Complaint plainly relies on the terms of the Trust Deeds and the Notes. The crux of Gramercy's action is that AVG and ULF wrongfully transferred away assets in violation of those agreements. Specifically, Gramercy alleges that the Appellants engaged in a wide-ranging conspiracy "to restructure the Company Notes" and "force Gramercy to accept an unfair deal" because Gramercy "had blocking rights under the Notes that made it the only meaningful check on Bakhmatyuk's control." App'x Vol. I, pp. 28, 29. This alleged campaign "diminished the value of the Notes (and Gramercy's associated rights), deprived Gramercy of the opportunity to sell the Notes at fair value, . . . [and delayed] adopting a more aggressive approach . . . including

enforcement of the Notes" via rights granted by the Trust Deeds. *Id.* at 31; *see also id.* at 34 ("Through the foregoing pattern of racketeering activity, Bakhmatyuk . . . obliterate[ed] the value of Gramercy's Notes."); *id.* at 80 (alleging Appellants "failed to follow the terms of the asset sale restrictions in the Trust Deeds").

Gramercy works hard to sidestep these allegations by claiming that Appellants haven't "show[n] that the Trust Deeds or Notes form the 'legal basis' for Gramercy's claims . . . ." Appellees' Br. at 51. That isn't the right test. This Court has held that "equitable estoppel applies when the signatory . . . must rely on the terms of the written agreement in asserting its claims against the nonsignatory." *Reeves*, 17 F.4th at 1013. But even under Gramercy's cramped interpretation, the Complaint easily passes muster. To begin with, one of Gramercy's counts is for tortious interference with contract—to wit, "the ULF Trust Deed and the AVG Trust Deed." App'x Vol. I, pp. 123–24. All of Gramercy's other counts likewise rely on the agreements. *Id.* at 94 (first RICO claim alleging an enterprise designed to "prevent Gramercy . . . from exercising its contractual rights under the Notes . . . ."); *id.* at 84–85 (second RICO claim reciting same allegations); *id.* at 89 (third

RICO claim alleging Appellants' participation was "necessary to allow the commission of the pattern of racketeering activity described in Count 1"); *id.* at 123 (fraud claim alleging that but for the misrepresentations, "Gramercy would have sought to enforce its rights under the Notes" and "sold its Notes at fair value and reinvested the money"); *id.* at 125 (conspiracy claim alleging "Defendants knowingly and intentionally conspired to defraud Gramercy and to tortiously interfere with the Company's contracts with Gramercy.").

b. Substantially interdependent and concerted misconduct.

The Complaint also alleges concerted misconduct by both Appellants (alleged nonsignatories) and AVG and ULF (signatories). Specifically, it alleges that Bakhmatyuk, as CEO of AVG and ULF, engaged in a conspiracy "to effectuate a blunt-force restructuring of all of the Company's debt," and did so by engaging in a "campaign of misinformation" about the two companies and effect "straw purchases" to buy up the companies' debt. App'x Vol. I, pp. 31–32, 54–55.

If Gramercy believes that it has been deprived of its rights under the Trust Deeds and the Notes, it could have—and should have—named AVG and ULF as defendants. It declined to do so in the hope of

avoiding arbitration. But "[t]he purpose of the doctrine of equitable estoppel is to prevent parties 'playing fast and loose with the courts' and also to 'protect the judicial system." *Reeves*, 17 F.4th at 1014. Gramercy "cannot simply plead around" AVG and ULF, "who would have to become crucial parties to the litigation." *Id.*

iv. Under Wyoming Law, Appellees Are Equitably Estopped from Disclaiming the Arbitration Agreements.

Applying Wyoming law wouldn't change the analysis because Wyoming applies the same legal test.

On appeal, Gramercy argues for the first time that Wyoming law would require the Appellants to prove "good-faith detrimental reliance." Appellees' Br. at 48–50. Gramercy further claims that "because Defendants have not even attempted to argue that they justifiably relied on the arbitration agreements in any way, they cannot succeed . . . ." *Id.* at 50. This argument is wrong on a number of fronts.

To begin with, Gramercy never raised this issue in the district court, and as noted above, affirming on legal grounds not raised below "is disfavored." *Rimbert*, 647 F.3d at 1256. Gramercy did not contend that this argument "was fully briefed and argued here and below," that

"the parties have had a fair opportunity to develop the factual record," or that the "decision would involve only questions of law." *Stewart*, 47 F.4th at 1132 n.5. Nor could it. Gramercy's position is that Appellants should be faulted for not proving detrimental reliance when no party put forward that legal theory until Appellees' principal brief.

On the merits, Gramercy's argument doesn't do any better. The Wyoming Supreme Court would do what federal courts across the country have done for decades: adopt the same equitable estoppel doctrine in light of a public policy favoring arbitration.

Wyoming law—just like federal law—has a strong policy in favor of arbitration. *Skaf v. Wyo. Cardiopulmonary Servs., P.C.,* 495 P.3d 887, 898 (Wyo. 2021) ("[A]rbitration is embedded in the public policy of Wyoming and is favored by this court.").[5] As Gramercy acknowledges, before *Arthur Andersen*, federal courts "regularly enforced arbitration contracts in favor of or against nonparties based on expansive readings of common-law concepts like equitable estoppel or agency law. Why did

[5] The Wyoming Supreme Court has made similar pronouncements dating back nearly 50 years. *Stewart Title Guar. Co. v. Tilden*, 64 P.3d 739, 742 (Wyo. 2003); *T&M Properties v. ZVFK Architects & Planners*, 661 P.2d 1040, 1043 (Wyo. 1983); *Am. Nat'l Bank v. Cheyenne Housing Auth.*, 562 P.2d 1017, 1020 (Wyo. 1977).

courts read these common-law concepts broadly? They believed that the 'strong federal policy favoring arbitration' should influence the question whether an arbitration contract covered nonparties." *AtriCure*, 12 F.4th at 523–24 (citing Fifth, Sixth, Ninth, and Eleventh Circuit cases); *Letizia v. Prudential Bache Secur., Inc.*, 802 F.2d 1185, 1187–88 (9th Cir. 1986) (citing Second, Third, Seventh, and Ninth Circuit cases). Put another way, before *Arthur Andersen*, federal courts unwaveringly applied the same pro-arbitration version of equitable estoppel. There is therefore every reason to conclude that Wyoming—which has the same pro-arbitration bias—would adopt the same rule.

The Tenth Circuit recently applied precisely this reasoning in interpreting Oklahoma law. In *Reeves,* the Court took up a domestic FAA case and first found that Oklahoma law governed. 17 F.4th 1008, 1010. It then had to determine what Oklahoma law would say about equitable estoppel. *Id.* at 1010–13. The Court acknowledged that it "may seek guidance from decisions rendered by lower courts in the relevant state, *appellate decisions in other states with similar legal principles*, district court decisions in interpreting the law of the state in question, and *the general weight and trend of authority in the relevant*

area of law." *Id.* at 1012 (quotations & citations omitted) (emphasis added). In that case, Reeves argued—just as Gramercy does—"that the federal court should be 'reticent to expand state law without clear guidance from its highest court,'" but the Court rejected that argument. *Id.* at 1012. It noted that "[m]any other states and circuits have adopted the Eleventh Circuit's understanding of equitable estoppel and nonsignatory parties." *Id.* (citing cases from Alabama, Georgia, Hawaii, Mississippi, Nevada, Texas, and South Dakota, but noting that other jurisdictions have adopted a different rule). The Court also cited decisions from Oklahoma's intermediate appellate court and several federal authorities, and it ultimately applied traditional equitable estoppel. *Id.* at 1013–14. The Court should do the same here.

Finally, if the Court does decide to impose a "good-faith detrimental reliance" element, it shouldn't affirm, but instead remand the case to the district court and allow the parties to fully brief the issue.

C. The Court Erred in Holding that English Law Would Not Permit Appellants to Enforce the Arbitration Clause.

Even if this Court applied English law, it should still hold that Gramercy is estopped from disclaiming the arbitration agreements.

In its principal brief, Gramercy devotes less than two pages to the application of English law, primarily reciting its expert's opinions. Appellees' Br. at 46–48. In its only substantive response, Gramercy claims that Appellants' expert report "stand[s] *at most* for the 'limited principle' that a non-party may potentially enforce an arbitration clause when the party 'seeks to enforce the terms of the contract against' the non-party." *Id.* at 47. To the contrary, Appellants' expert opined that English law recognizes equitable estoppel, and not just in that limited case. App'x Vol. XIII, pp. 3378; App'x Vol. XIV, p. 3492. Indeed, Gramercy's own expert acknowledged that this "limited principle" is a correct statement of English law. App'x Vol. XX, p. 3441. And here, Gramercy *is* in fact "seek[ing] to enforce the terms of the contract against the non-party." Specifically, it's seeking to enforce the English choice-of-law provision. *See supra* Section II.A.

As Gramercy's expert notes, if "a party to a contract seeks to enforce the terms of that contract against a non-party, it would be inequitable for the enforcing party to be allowed to disregard the jurisdiction or arbitration clause also contained within that same

contract." App'x Vol. XX, p. 3441. Applying English law therefore leads to the same result—arbitration in London.

CONCLUSION

The Court should reverse the decisions below and remand for an order compelling arbitration.

DATE: February 15, 2023

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CERTIFICATE OF SERVICE

I certify that on February 15, 2023, I served the foregoing Reply Brief on all counsel of record through electronic filing using the Court's ECF system.

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