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Manuel Farach

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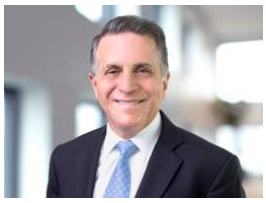

Manuel Farach
member > fort lauderdale

T (954) 356-2528
mfarach@mcglinchey.com

Syllabus

SUPREME COURT OF THE UNITED STATES

Syllabus

GE ENERGY POWER CONVERSION FRANCE SAS, CORP., FKA CONVERTEAM SAS *v.* OUTOKUMPU STAINLESS USA, LLC, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 18–1048. Argued January 21, 2020—Decided June 1, 2020

ThyssenKrupp Stainless USA, LLC, entered into three contracts with F. L. Industries, Inc., for the construction of cold rolling mills at ThyssenKrupp's steel manufacturing plant in Alabama. Each contract contained a clause requiring arbitration of any contract dispute. F. L. Industries then entered into a subcontractor agreement with petitioner (GE Energy) for the provision of nine motors to power the cold rolling mills. After the motors for the cold rolling mills allegedly failed, Outokumpu Stainless USA, LLC (which acquired ownership of the plant), and its insurers sued GE Energy in Alabama state court. GE Energy removed the case to federal court under 9 U. S. C. §205. It then moved to dismiss and compel arbitration, relying on the arbitration clauses in the F. L. Industries and ThyssenKrupp contracts. The District Court granted the motion, concluding that both Outokumpu and GE Energy were parties to the agreement. The Eleventh Circuit reversed. It concluded that the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention or Convention) allows enforcement of an arbitration agreement only by the parties that actually signed the agreement and that GE Energy was a nonsignatory. It also held that allowing GE Energy to rely on state-law equitable estoppel doctrines to enforce the arbitration agreement would conflict with the Convention's signatory requirement.

Held: The New York Convention does not conflict with domestic equitable estoppel doctrines that permit the enforcement of arbitration agreements by nonsignatories. Pp. 3–12.

(a) Chapter 1 of the Federal Arbitration Act (FAA) does not "alter

background principles of state contract law regarding the scope of agreements (including the question of who is bound by them)." *Arthur Andersen LLP* v. *Carlisle*, 556 U. S. 624, 630. The "'traditional principles' of state law" that apply under Chapter 1 include doctrines, like equitable estoppel, authorizing contract enforcement by a nonsignatory. *Id.*, at 631–632.

The New York Convention is a multilateral treaty addressing international arbitration. One Article of the Convention addresses arbitration agreements—Article II—and one provision of Article II addresses the enforcement of those agreements—Article II(3). Article II(3) provides that courts of a contracting state "shall . . . refer the parties to arbitration" when the parties to an action entered into a written agreement to arbitrate and one of the parties requests such a referral.

Chapter 2 of the FAA grants federal courts jurisdiction over actions governed by the Convention. As relevant here, Chapter 2 provides that "Chapter 1 applies to actions and proceedings brought under this chapter to the extent that [Chapter 1] is not in conflict with this chapter or the Convention." 9 U. S. C. §208. Pp. 3–6.

(b) The application of familiar tools of treaty interpretation establishes that the state-law equitable estoppel doctrines permitted under Chapter 1 do not "conflict with . . . the Convention." §208. Pp. 6–11.

(1) The text of the New York Convention does not address whether nonsignatories may enforce arbitration agreements under domestic doctrines such as equitable estoppel. The Convention is simply silent on the issue of nonsignatory enforcement. This silence is dispositive because nothing in the Convention's text could be read to conflict with the application of domestic equitable estoppel doctrines. Article II(3)—the only provision in the Convention addressing the enforcement of arbitration agreements—contains no exclusionary language; it does not state that arbitration agreements shall be enforced *only* in the identified circumstances. Given that the Convention was drafted against the backdrop of domestic law, it would be unnatural to read Article II(3) to displace domestic doctrines in the absence of such language. This interpretation is especially appropriate because Article II contemplates using domestic doctrines to fill gaps in the Convention. Pp. 6–7.

(2) This interpretation is confirmed by the Convention's negotiation and drafting history as well as "'the postratification understanding' of signatory nations," *Medellín* v. *Texas*, 552 U. S. 491, 507.

Cherry-picked generalizations from the negotiating and drafting history cannot be used to create a rule that finds no support in the treaty's text. Here, to the extent that the Convention's drafting history sheds any light on the treaty's meaning, it shows only that the drafters sought to impose baseline requirements on contracting states so that

signatories would "not be permitted to decline enforcement of such agreements on the basis of parochial views of their desirability or in a manner that would diminish the mutually binding nature of the agreements." *Scherk* v. *Alberto-Culver Co.*, 417 U. S. 506, 520, n. 15.

The postratification understanding of other contracting states—as evidenced by the "[d]ecisions of the courts of other Convention signatories," *El Al Israel Airlines, Ltd.* v. *Tsui Yuan Tseng*, 525 U. S. 155, 175, and the "postratification conduct" of contracting state governments, *Zicherman* v. *Korean Air Lines Co.*, 516 U. S. 217, 227—may also serve as an aid to this Court's interpretation. Here, numerous sources indicate that the New York Convention does not prohibit the application of domestic law addressing the enforcement of arbitration agreements. These sources, however, are from decades after the finalization of the New York Convention's text in 1958. This diminishes their value as evidence of the original understanding of the treaty's meaning.

Finally, because the Court's textual analysis and the Executive's interpretation of the Convention align here, there is no need to determine whether the Executive's understanding is entitled to "weight" or "deference." Cf. *Edelman* v. *Lynchburg College*, 535 U. S. 106, 114–115, n. 8. Pp. 7–11.

(c) The Court of Appeals may address on remand whether GE Energy can enforce the arbitration clauses under equitable estoppel principles and which body of law governs that determination. Pp. 11–12.

902 F. 3d 1316, reversed and remanded.

THOMAS, J., delivered the opinion for a unanimous Court. SOTOMAYOR, J., filed a concurring opinion.

SUPREME COURT OF THE UNITED STATES

No. 18–1048

GE ENERGY POWER CONVERSION FRANCE SAS, CORP., FKA CONVERTEAM SAS, PETITIONER *v.* OUTOKUMPU STAINLESS USA, LLC, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[June 1, 2020]

JUSTICE THOMAS delivered the opinion of the Court.

The question in this case is whether 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, conflicts with domestic equitable estoppel doctrines that permit the enforcement of arbitration agreements by nonsignatories. We hold that it does not.

I

In 2007, ThyssenKrupp Stainless USA, LLC, entered into three contracts with F. L. Industries, Inc., for the construction of cold rolling mills at ThyssenKrupp's steel manufacturing plant in Alabama. Each of the contracts contained an identical arbitration clause. The clause provided that "[a]ll disputes arising between both parties in connection with or in the performances of the Contract . . . shall be submitted to arbitration for settlement." App. 171.

After executing these agreements, F. L. Industries, Inc., entered into a subcontractor agreement with petitioner GE Energy Power Conversion France SAS, Corp. (GE Energy), then known as Converteam SAS. Under that agreement,

GE Energy agreed to design, manufacture, and supply motors for the cold rolling mills. Between 2011 and 2012, GE Energy delivered nine motors to the Alabama plant for installation. Soon thereafter, respondent Outokumpu Stainless USA, LLC, acquired ownership of the plant from ThyssenKrupp.

According to Outokumpu, GE Energy's motors failed by the summer of 2015, resulting in substantial damages. In 2016, Outokumpu and its insurers filed suit against GE Energy in Alabama state court. GE Energy removed the case to federal court under 9 U. S. C. §205, which authorizes the removal of an action from state to federal court if the action "relates to an arbitration agreement . . . falling under the Convention [on the Recognition and Enforcement of Foreign Arbitral Awards]." GE Energy then moved to dismiss and compel arbitration, relying on the arbitration clauses in the contracts between F. L. Industries, Inc., and ThyssenKrupp.

The District Court granted GE Energy's motion to dismiss and compel arbitration with Outokumpu and Sompo Japan Insurance Company of America. *Outokumpu Stainless USA LLC* v. *Converteam SAS*, 2017 WL 401951 (SD Ala., Jan. 30, 2017).[1] The court held that GE Energy qualified as a party under the arbitration clauses because the contracts defined the terms "Seller" and "Parties" to include subcontractors. *Id.*, at *4. Because the court concluded that both Outokumpu and GE Energy were parties to the agreements, it declined to address GE Energy's argument that the agreement was enforceable under equitable estoppel. *Id.*, at *1, n. 1.

The Eleventh Circuit reversed the District Court's order compelling arbitration. *Outokumpu Stainless USA, LLC* v.

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[1] The District Court later granted GE Energy's motion to compel arbitration with additional insurers. *Outokumpu Stainless USA LLC* v. *Converteam SAS*, 2017 WL 480716 (SD Ala., Feb. 3, 2017).

Converteam SAS, 902 F. 3d 1316 (2018). The court interpreted the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention or Convention) to include a "requirement that the parties *actually sign* an agreement to arbitrate their disputes in order to compel arbitration." *Id.*, at 1326 (emphasis in original). The court concluded that this requirement was not satisfied because "GE Energy is undeniably not a signatory to the Contracts." *Ibid.* It then held that GE Energy could not rely on state-law equitable estoppel doctrines to enforce the arbitration agreement as a nonsignatory because, in the court's view, equitable estoppel conflicts with the Convention's signatory requirement. *Id.*, at 1326–1327.

Given a conflict between the Courts of Appeals on this question,[2] we granted certiorari. 588 U. S. ___ (2019).

II

A

Chapter 1 of the Federal Arbitration Act (FAA) permits courts to apply state-law doctrines related to the enforcement of arbitration agreements. Section 2 of that chapter provides that an arbitration agreement in writing "shall be . . . enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U. S. C. §2. As we have explained, this provision requires federal courts to "place [arbitration] agreements '"upon the same footing as other contracts."'" *Volt Information Sciences, Inc.* v. *Board of Trustees of Leland Stanford Junior Univ.*, 489 U. S. 468, 474 (1989) (quoting *Scherk* v. *Alberto-Culver Co.*, 417 U. S. 506, 511 (1974)). But it does not "alter background principles of state contract law regarding the scope of agreements (including the question of who is bound by

[2] Compare 902 F. 3d 1316, 1326 (CA11 2018), and *Yang* v. *Majestic Blue Fisheries, LLC*, 876 F. 3d 996, 1001–1002 (CA9 2017), with *Aggarao* v. *MOL Ship Mgmt. Co.*, 675 F. 3d 355, 375 (CA4 2012), and *Sourcing Unlimited, Inc.* v. *Asimco Int'l, Inc.*, 526 F. 3d 38, 48 (CA1 2008).

them)." *Arthur Andersen LLP* v. *Carlisle*, 556 U. S. 624, 630 (2009).

The "traditional principles of state law" that apply under Chapter 1 include doctrines that authorize the enforcement of a contract by a nonsignatory. *Id.*, at 631 (internal quotation marks omitted). For example, we have recognized that arbitration agreements may be enforced by nonsignatories through "'assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver and estoppel.'" *Ibid.* (quoting 21 R. Lord, Williston on Contracts §57:19, p. 183 (4th ed. 2001)).

This case implicates domestic equitable estoppel doctrines. Generally, 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 agreement must rely on the terms of that agreement in asserting its claims against the nonsignatory." *Id.*, at 200 (2017). In *Arthur Andersen*, we recognized that Chapter 1 of the FAA permits a nonsignatory to rely on state-law equitable estoppel doctrines to enforce an arbitration agreement. 556 U. S., at 631–632.

B

The New York Convention is a multilateral treaty that addresses international arbitration. 21 U. S. T. 2517, T. I. A. S. No. 6997. It focuses almost entirely on arbitral awards. Article I(1) describes the Convention as applying only to "the recognition and enforcement of arbitral awards." *Id.,* at 2519. Articles III, IV, and V contain recognition and enforcement obligations related to arbitral awards for contracting states and for parties seeking the enforcement of arbitral awards. *Id.,* at 2519–2520. Article VI addresses when an award can be set aside or suspended. *Id.,* at 2520. And Article VII(1) states that the "Convention shall not . . . deprive any interested party of any right he

may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon." *Id.,* at 2520–2521.

Only one article of the Convention addresses arbitration agreements—Article II. That article contains only three provisions, each one sentence long. Article II(1) requires "[e]ach Contracting State [to] recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration." *Id.,* at 2519. Article II(2) provides that "[t]he term 'agreement in writing' shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams." *Ibid.* Finally, Article II(3) states that "[t]he court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed." *Ibid.*

C

In 1970, the United States acceded to the New York Convention, and Congress enacted implementing legislation in Chapter 2 of the FAA. See 84 Stat. 692, 9 U. S. C. §§201–208. Chapter 2 grants federal courts jurisdiction over actions governed by the Convention, §203; establishes venue for such actions, §204; authorizes removal from state court, §205; and empowers courts to compel arbitration, §206. Chapter 2 also states that "Chapter 1 applies to actions and proceedings brought under this chapter to the extent that

[Chapter 1] is not in conflict with this chapter or the Convention." §208.

III

We must determine whether the equitable estoppel doctrines permitted under Chapter 1 of the FAA, see *supra,* at 3–4, "conflict with . . . the Convention." §208. Applying familiar tools of treaty interpretation, we conclude that they do not conflict.

A

"The interpretation of a treaty, like the interpretation of a statute, begins with its text." *Medellín* v. *Texas*, 552 U. S. 491, 506 (2008). The text of the New York Convention does not address whether nonsignatories may enforce arbitration agreements under domestic doctrines such as equitable estoppel. The Convention is simply silent on the issue of nonsignatory enforcement, and in general, "a matter not covered is to be treated as not covered"—a principle "so obvious that it seems absurd to recite it," A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 93 (2012).

This silence is dispositive here because nothing in the text of the Convention could be read to otherwise prohibit the application of domestic equitable estoppel doctrines. Only one Article of the Convention addresses arbitration agreements—Article II—and only one provision of Article II addresses the enforcement of those agreements—Article II(3). The text of Article II(3) states that courts of a contracting state "shall . . . refer the parties to arbitration" when the parties to an action entered into a written agreement to arbitrate and one of the parties requests referral to arbitration. The provision, however, does not restrict contracting states from applying domestic law to refer parties to arbitration in other circumstances. That is, Article II(3) provides that arbitration agreements must be enforced in

certain circumstances, but it does not prevent the application of domestic laws that are more generous in enforcing arbitration agreements. Article II(3) contains no exclusionary language; it does not state that arbitration agreements shall be enforced *only* in the identified circumstances. Given that the Convention was drafted against the backdrop of domestic law, it would be unnatural to read Article II(3) to displace domestic doctrines in the absence of exclusionary language. Cf. *Marx* v. *General Revenue Corp.*, 568 U. S. 371, 380–384 (2013).

This interpretation is especially appropriate in the context of Article II. Far from displacing domestic law, the provisions of Article II contemplate the use of domestic doctrines to fill gaps in the Convention. For example, Article II(1) refers to disputes "capable of settlement by arbitration," but it does not identify what disputes are arbitrable, leaving that matter to domestic law. *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth*, *Inc.*, 473 U. S. 614, 639, n. 21 (1985). Similarly, Article II(3) states that it does not apply to agreements that are "null and void, inoperative or incapable of being performed," but it fails to define those terms. Again, 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.

In sum, the only provision of the Convention that addresses the enforcement of arbitration agreements is Article II(3). We do not read the nonexclusive language of that provision to set a ceiling that tacitly precludes the use of domestic law to enforce arbitration agreements. Thus, nothing in the text of the Convention "conflict[s] with" the application of domestic equitable estoppel doctrines permitted under Chapter 1 of the FAA. 9 U. S. C. §208.

B

"Because a treaty ratified by the United States is 'an

agreement among sovereign powers,' we have also considered as 'aids to its interpretation' the negotiation and drafting history of the treaty as well as 'the postratification understanding' of signatory nations." *Medellín*, 552 U. S., at 507 (quoting *Zicherman* v. *Korean Air Lines Co.*, 516 U. S. 217, 226 (1996)). These aids confirm our interpretation of the Convention's text.

1

Our precedents have looked to the "negotiating and drafting history" of a treaty as an aid in determining the shared understanding of the treaty. *Id.*, at 226. Invoking this interpretive aid, Outokumpu argues that the Convention's drafting history establishes a "rule of consent" that "displace[s] varying local laws." Brief for Respondents 27. We are unpersuaded. For one, nothing in the text of the Convention imposes a "rule of consent" that displaces domestic law—let alone a rule that allows some domestic-law doctrines and not others, as Outokumpu proposes. The only time the Convention uses the word "consent" is in Article X(3), which addresses ratification and accession procedures. Moreover, the statements relied on by Outokumpu do not address the specific question whether the Convention prohibits the application of domestic law that would allow nonsignatories to compel arbitration. Cherry-picked "generalization[s]" from the negotiating and drafting history cannot be used to create a rule that finds no support in the treaty's text. *Zicherman*, 516 U. S., at 227.

To the extent the drafting history sheds any light on the meaning of the Convention, it shows only that the drafters sought to impose baseline requirements on contracting states. As this Court has recognized, "[i]n their discussion of [Article II], the delegates to the Convention voiced frequent concern that courts of signatory countries . . . should not be permitted to decline enforcement of such agreements on the basis of parochial views of their desirability or in a

manner that would diminish the mutually binding nature of the agreements." *Scherk*, 417 U. S., at 520, n. 15 (citing G. Haight, Convention on the Recognition and Enforcement of Foreign Arbitral Awards: Summary Analysis of Record of United Nations Conference, May/June 1958, pp. 24–28 (1958)). Nothing in the drafting history suggests that the Convention sought to prevent contracting states from applying domestic law that permits nonsignatories to enforce arbitration agreements in additional circumstances.

2

"[T]he postratification understanding" of other contracting states may also serve as an aid to our interpretation of a treaty's meaning. *Medellín*, 552 U. S., at 507 (internal quotation marks omitted). To discern this understanding, we have looked to the "[d]ecisions of the courts of other Convention signatories," *El Al Israel Airlines*, *Ltd.* v. *Tsui Yuan Tseng*, 525 U. S. 155, 175 (1999), as well as the "postratification conduct" of the governments of contracting states, *Zicherman*, 516 U. S., at 227.

Here, the weight of authority from contracting states indicates that the New York Convention does not prohibit the application of domestic law addressing the enforcement of arbitration agreements. The courts of numerous contracting states permit enforcement of arbitration agreements by entities who did not sign an agreement. See 1 G. Born, International Commercial Arbitration §10.02, pp. 1418–1484 (2d ed. 2014) (compiling cases). The United States identifies at least one contracting state with domestic legislation illustrating a similar understanding. See Brief for United States as *Amicus Curiae* 28 (discussing Peru's national legislation). And GE Energy points to a recommendation issued by the United Nations Commission on International Trade Law that, although not directly addressing Article II(3), adopts a nonexclusive interpretation of Article II(1)

and (2). Report of the United Nations Commission on International Trade Law on the Work of Its Thirty-Ninth Session, Recommendation Regarding the Interpretation of Article II, Paragraph 2, and Article VII, Paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ¶¶1, 2, U. N. Doc. A/61/17, annex II (July 7, 2006) (UN recommendation).

These sources, while generally pointing in one direction, are not without their faults. The court decisions, domestic legislation, and UN recommendation relied on by the parties occurred decades after the finalization of the New York Convention's text in 1958. This diminishes the value of these sources as evidence of the original shared understanding of the treaty's meaning. Moreover, unlike the actions and decisions of signatory nations, we have not previously relied on UN recommendations to discern the meaning of treaties. See also *Yang* v. *Majestic Blue Fisheries, LLC*, 876 F. 3d 996, 1000–1001 (CA9 2017) (declining to give weight to the 2006 UN recommendation). But to the extent this evidence is given any weight, it confirms our interpretation of the Convention's text.

3

Finally, the parties dispute whether the Executive's interpretation of the New York Convention should affect our analysis. The United States claims that we should apply a "'canon of deference'" and give "'"great weight"'" to an interpretation set forth by the Executive in an *amicus* brief submitted to the D. C. Circuit in 2014. Brief for United States as *Amicus Curiae* 30 (quoting *Abbott* v. *Abbott*, 560 U. S. 1, 15 (2010)); see also Brief for United States as *Amicus Curiae* in No. 13–7004 (CADC), pp. 7, 9. GE Energy echoes this request. Outokumpu, on the other hand, argues that the Executive's noncontemporaneous interpretation sheds no light on the meaning of the treaty, asserting that the Executive expressed the "opposite . . . view at the time

of the Convention's adoption." Brief for Respondents 33. Outokumpu asserts that this Court has repeatedly rejected executive interpretations that contradict the treaty's text or the political branches' previous understanding of a treaty. *Id.*, at 34–35 (citing, *e.g., Chan* v. *Korean Air Lines*, *Ltd.*, 490 U. S. 122, 136 (1989) (Brennan, J., concurring in judgment); *Perkins* v. *Elg*, 307 U. S. 325, 328, 337–349 (1939)).

We have never provided a full explanation of the basis for our practice of giving weight to the Executive's interpretation of a treaty. Nor have we delineated the limitations of this practice, if any. But we need not resolve these issues today. Our textual analysis aligns with the Executive's interpretation so there is no need to determine whether the Executive's understanding is entitled to "weight" or "deference." Cf. *Edelman* v. *Lynchburg College*, 535 U. S. 106, 114–115, n. 8 (2002) ("[T]here is no need to resolve deference issues when there is no need for deference").

IV

The Court of Appeals did not analyze whether Article II(3) of the New York Convention conflicts with equitable estoppel. Instead, the court held that Article II(1) and (2) include a "requirement that the parties *actually sign* an agreement to arbitrate their disputes in order to compel arbitration." 902 F. 3d, at 1326. But those provisions address the recognition of arbitration agreements, not who is bound by a recognized agreement. Article II(1) simply requires contracting states to "recognize an agreement in writing," and Article II(2) defines the term "agreement in writing." Here, the three agreements at issue were both written and signed.[3] Only Article II(3) speaks to who may request referral under those agreements, and it does not prohibit the application of domestic law. See *supra,* at 6–7.

[3] We do not address whether Article II(2) requires a signed agreement.

Because 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. We hold only that the New York Convention does not conflict with the enforcement of arbitration agreements by nonsignatories under domestic-law equitable estoppel doctrines.

* * *

For the foregoing reasons, we reverse the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 18–1048

GE ENERGY POWER CONVERSION FRANCE SAS, CORP., FKA CONVERTEAM SAS, PETITIONER *v.* OUTOKUMPU STAINLESS USA, LLC, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[June 1, 2020]

JUSTICE SOTOMAYOR, concurring.

I agree with the Court 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 (New York Convention), does not categorically prohibit the application of domestic doctrines, such as equitable estoppel, that may permit nonsignatories to enforce arbitration agreements. I note, however, that the application of such domestic doctrines is subject to an important limitation: Any applicable domestic doctrines must be rooted in the principle of consent to arbitrate.

This limitation is part and parcel of the Federal Arbitration Act (FAA) itself. It is a "basic precept," *Stolt-Nielsen S. A.* v. *AnimalFeeds Int'l Corp.*, 559 U. S. 662, 681 (2010), that "[a]rbitration under the [FAA] is a matter of consent, not coercion," *Volt Information Sciences, Inc.* v. *Board of Trustees of Leland Stanford Junior Univ.*, 489 U. S. 468, 479 (1989); see also, *e.g.*, *Lamps Plus, Inc.* v. *Varela*, 587 U. S. ___, ___ (2019) (slip op., at 7) ("Consent is essential under the FAA"); *Granite Rock Co.* v. *Teamsters*, 561 U. S. 287, 299 (2010) ("[T]he first principle that underscores all of our arbitration decisions" is that "[a]rbitration is strictly 'a matter of consent'"). "We have emphasized th[is] 'foundational FAA principle' many times," *Lamps Plus*, 587

U. S., at ___ (slip op., at 7) (quoting *Stolt-Nielsen*, 559 U. S., at 684) (citing cases), and even the parties find common ground on the point, see Tr. of Oral Arg. 7, 49; Brief for Respondents 2.

Because this consent principle governs the FAA on the whole, it constrains any domestic doctrines under Chapter 1 of the FAA that might "appl[y]" to Convention proceedings (to the extent they do not "conflict with" the Convention). 9 U. S. C. §208; cf. *ante*, at 5–6. Parties seeking to enforce arbitration agreements under Article II of the Convention thus may not rely on domestic nonsignatory doctrines that fail to reflect consent to arbitrate.

While the FAA's consent principle itself is crystalline, it is admittedly difficult to articulate a bright-line test for determining whether a particular domestic nonsignatory doctrine reflects consent to arbitrate. That is in no small part because some domestic nonsignatory doctrines vary from jurisdiction to jurisdiction. With equitable estoppel, for instance, one formulation of the doctrine may account for a party's consent to arbitrate while another does not. Cf. Brief for Respondents 45 (maintaining that courts have applied at least "three different versions" of GE Energy's equitable-estoppel theory, including one that allegedly "allows a non-party to force arbitration even of claims wholly unconnected to the agreement"). Lower courts must therefore determine, on a case-by-case basis, whether applying a domestic nonsignatory doctrine would violate the FAA's inherent consent restriction.*

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*In this case, however, I am skeptical that any domestic nonsignatory doctrines need come into play at all, because Outokumpu appears to have expressly agreed to arbitrate disputes under the relevant contract with subcontractors like GE Energy. The contract provided that disputes arising between the buyer and seller in connection with the contract were subject to arbitration. App. 171. It also specified that the seller in the contract "shall be understood" to include "[s]ub-contractors." Id., at 88–89. And it appended a list of potential subcontractors, one of which was

Article II of the Convention leaves much to the contracting states to resolve on their own, and the FAA imposes few restrictions. Nevertheless, courts applying domestic nonsignatory doctrines to enforce arbitration agreements under the Convention must strictly adhere to "the foundational FAA principle that arbitration is a matter of consent." *Stolt-Nielsen*, 559 U. S., at 684. Because the Court's opinion is consistent with this limitation, I join it in full.

GE Energy's predecessor, Converteam. Id., at 184–185.

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-15585

D.C. Docket No. 1:16-cv-21771-JEM

AMIR ISAIAH,
as court-appointed Receiver of Coravca Distributions, LLC; Timeline Trading Corp.; Edgewater Technologies, CA, Corp.; and Edgewater Technologies, S.A.

Plaintiff – Appellant,

versus

JPMORGAN CHASE BANK, N.A.,

Defendant – Appellee.

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

(June 1, 2020)

Before ROSENBAUM and TJOFLAT, Circuit Judges, and PAULEY,* District Judge.

TJOFLAT, Circuit Judge:

This appeal arises out of a Ponzi scheme executed by the principals of two entities, Coravca Distributions, LLC and Timeline Trading Corp. (the "Receivership Entities"). Amir Isaiah, the court-appointed receiver for the Receivership Entities, sued JPMorgan Chase Bank, N.A. ("JPMC"), seeking to recover funds that were fraudulently diverted from the Receivership Entities' bank accounts in connection with that Ponzi scheme. His complaint sought to avoid the fraudulent transfers and recover the diverted funds on behalf of the Receivership Entities under the Florida Uniform Fraudulent Transfer Act ("FUFTA"), and to collect damages from JPMC for JPMC's alleged aiding and abetting of three torts: breach of fiduciary duty, conversion, and fraud. Isaiah claimed that JPMC helped facilitate the Ponzi scheme by transferring funds into, out of, and among the Receivership Entities' bank accounts, despite its alleged awareness of suspicious banking activity on those accounts. The District Court dismissed the complaint under Federal Rule of Civil Procedure 12(b)(6), holding that Isaiah failed to allege an applicable conveyance or fraudulent transfer for purposes of his FUFTA claim, and failed to sufficiently allege that JPMC had actual knowledge of the underlying

* Honorable William H. Pauley, III, Senior United States District Judge, Southern District of New York, sitting by designation.

Ponzi scheme for purposes of his aiding and abetting claims. After careful review, and with the benefit of oral argument, we affirm.

I.

Because this case was dismissed on a Rule 12(b)(6) motion to dismiss, we restate the following facts as alleged by Isaiah in his complaint. A Florida state court appointed Isaiah receiver of the Receivership Entities in September 2010, after finding that the principals of the Receivership Entities, Rosa Aguirre (a/k/a Rosa Villarroel) and Diego Corado (the "Ponzi schemers"), had been using the Entities to perpetrate a Ponzi scheme against investors. In this classic Ponzi scheme, the Ponzi schemers solicited investors by promising astronomical returns on investments supposedly involving the trade of Venezuelan and U.S. currency. As proof that the investments were generating returns, the Ponzi schemers would send "distributions" to the investors through the Receivership Entities. In reality, the "distributions" consisted merely of money invested by other duped investors instead of actual gains on legitimate investments. Through this charade, the Ponzi schemers ultimately defrauded more than 2,000 investors and pilfered millions of dollars from the Receivership Entities.

The Ponzi schemers operated this fraudulent scheme, in part, by depositing investments into and making "distributions" from several JPMC bank accounts belonging to the Receivership Entities. Until early 2010, the Receivership Entities

had only one corporate account at JPMC, and for the first twenty-eight months of their banking relationship with JPMC, the account activity was fairly normal. But in January 2010 the total amount of monthly deposits and withdrawals skyrocketed, and in February the Receivership Entities opened a second bank account at JPMC. The Receivership Entities continued to make substantial deposits into and withdrawals from these accounts in rapid succession and corresponding amounts until, in May 2010, JPMC's internal anti-money laundering section detected suspicious activity on the accounts and unilaterally closed both bank accounts. Almost immediately after JPMC detected fraud on the two accounts—indeed, less than a day after closing each account—JPMC allowed the Receivership Entities to open two new JPMC bank accounts. This, the complaint alleges, allowed the Ponzi schemers to "wind down their affairs" and transfer the funds from the Receivership Entities' JPMC accounts to new bank accounts at Bank of America and Wachovia Bank, where the Ponzi schemers continued their fraudulent scheme over the next several months.

Isaiah, now the court-appointed receiver of the Receivership Entities, filed this suit against JPMC in state court based on JPMC's handling of the Receivership Entities' accounts. He sought (1) avoidance and recovery of certain fraudulent transfers allegedly made to JPMC under the FUFTA, Fla Stat. § 726.105(1)(a), and (2) damages for JPMC's aiding and abetting the Ponzi schemers' breach of their

fiduciary duties, conversion of the Receivership Entities' funds, and fraud. Specifically, the complaint seeks to recover from JPMC, on behalf of the Receivership Entities, funds that were fraudulently deposited into, withdrawn from, and transferred among the Receivership Entities' bank accounts because JPMC was an "actual recipient[] of the transfers and [a] bad faith commercial conduit[]" that "acted in bad faith in processing bank transactions for and/or on behalf of the Receivership Entities." Compl. ¶ 51. As to the aiding and abetting claims, the complaint alleges that JPMC failed to follow sound banking practices and willfully ignored suspicious banking activity, and thus knowingly encouraged the Ponzi schemers' tortious conduct by providing a platform for them to carry out their illicit scheme.

JPMC removed the state-court complaint to federal court pursuant to 28 U.S.C. § 1441, and the District Court properly exercised diversity jurisdiction under 28 U.S.C. § 1332. JPMC then filed a motion to dismiss the complaint in its entirety under Rule 12(b)(6) of the Federal Rules of Civil Procedure, which the District Court granted.[1] The District Court reasoned that Isaiah's complaint failed to allege an applicable conveyance or fraudulent transfer for purposes of FUFTA liability because it alleged nothing more than routine banking activity by JPMC;

[1] The District Court also granted JPMC's motion to stay discovery pending resolution of the motion to dismiss.

the Ponzi schemers never departed with the assets in the bank accounts, but merely transferred the funds between themselves. *Isaiah v. JPMorgan Chase Bank, N.A.*, No. 16-CIV-21771-MARTINEZ, 2017 WL 5514370, at *2 (S.D. Fla. Nov. 15, 2017). The District Court also held that the complaint failed to adequately allege that JPMC had actual knowledge of the underlying tortious conduct—the Ponzi scheme—as required for aiding and abetting liability. *Id.* at *4. This appeal followed. We review the District Court's ruling on JPMC's motion to dismiss *de novo*, accepting the above allegations as true and construing them in the light most favorable to Isaiah. *See Lamm v. State St. Bank & Tr.*, 749 F.3d 938, 942 (11th Cir. 2014).

II.

The FUFTA provides generally that a creditor may avoid a debtor's fraudulent transfer to the extent necessary to satisfy the creditor's claim. Fla. Stat. § 726.108(1)(a). Under the FUFTA, "[a] transfer made . . . by a debtor is fraudulent as to a creditor . . . if the debtor made the transfer . . . [w]ith actual intent to hinder, delay, or defraud any creditor of the debtor." *Id.* § 726.105(1)(a). To prevail on a fraudulent transfer claim, a creditor must demonstrate (1) there was a creditor to be defrauded, (2) a debtor intending fraud, and (3) a conveyance—i.e.,

a "transfer"—of property which could have been applicable to the payment of the debt due. *Wiand v. Lee*, 753 F.3d 1194, 1199–1200 (11th Cir. 2014).[2]

The FUFTA defines a "transfer" as "every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset." Fla. Stat. § 726.102(14). While the definition of transfer is broad, the statute plainly requires a plaintiff to show that the debtor either disposed of his asset or relinquished some interest in that asset. *Nationsbank, N.A. v. Coastal Utilities, Inc.*, 814 So. 2d 1227, 1230 (Fla. Dist. Ct. App. 2002). As long as the debtor relinquishes some interest in or control over the asset a FUFTA transfer has occurred, even if he remains the technical owner of the asset. *In re Levine*, 134 F.3d 1046, 1050 (11th Cir. 1998). Accordingly, in *Levine* we held that the debtor's purchase of an annuity constituted a FUFTA transfer because, by purchasing an annuity, the debtor limited his ability to withdraw his money to the terms of the annuity contract, thereby relinquishing some interest in that money. *Id.* at 1049–50. The debtor no longer retained total control over or unfettered access to the full amount of his "property." *Id.* at 1050.

Isaiah's complaint identifies three types of banking transactions that he alleges constitute fraudulent transfers under the FUFTA: deposits into the

[2] Isaiah, as receiver of the Receivership Entities, has standing to pursue this clawback action on behalf of the Receivership Entities under the FUFTA. *See id.* at 1203; *see also infra* pp. 16–17.

Receivership Entities' JPMC bank accounts, withdrawals from the Receivership Entities' JPMC bank accounts, and so-called "Intercompany Transfers" among those JPMC bank accounts. Isaiah's primary argument on appeal is that when the Ponzi schemers deposited money into the Receivership Entities' bank accounts, they "transferred" that money to JPMC within the meaning of the FUFTA. He argues that when an accountholder deposits money into his bank account, the bank takes title to the money and then owes a debt to the accountholder, creating a debtor-creditor relationship between the accountholder and the bank. Thus, a deposit represents the accountholder's conditional parting with his property, subject to his right to later withdraw the deposited funds.

We disagree that a routine bank deposit constitutes a transfer to the bank within the meaning of the FUFTA. To be sure, when an accountholder deposits money into his bank account, the bank takes title to the money and has certain legal rights to put the deposited funds to its own use. *See, e.g.*, *In re Custom Contractors, LLC*, 745 F.3d 1342, 1350 (11th Cir. 2014). For example, banks regularly use deposited funds by distributing them to others in the form of loans. *See id.* But the bank's right to use those funds is subject always to its obligation to the accountholder to return the funds upon request. *Id.*

In *Levine*, we made clear that in determining whether a FUFTA transfer occurred, the relevant inquiry is not one of ownership or title but of control. 134

F.3d at 1050. While an accountholder may transfer title of funds to the bank when he makes a routine deposit into his bank account, the accountholder can still call upon the bank to return those funds on demand, simply by initiating a withdrawal from his account. The accountholder thus never relinquishes his interest in or control over the funds deposited into his bank account; rather he "retain[s] total control over" and has "unfettered access to" the full amount of his money in his account and can withdraw those funds at will. *See id.*

As the complaint makes clear, the Ponzi schemers retained full access to and control over the funds in the Receivership Entities' JPMC bank accounts: they withdrew funds, wrote countless checks, made several purchases, and initiated wire and other transfers at will. They did not "dispos[e] of or part[] with an asset or an interest in an asset" when they deposited money into the Receivership Entities' own bank accounts. *See* Fla. Stat. § 726.102(14). Thus, they did not transfer that money to JPMC within the meaning of the FUFTA. *Accord In re Whitley*, 848 F.3d 205, 208–10 (4th Cir. 2017) (holding that regular deposits into a customer's unrestricted bank account did not constitute transfers to the bank under § 101(54) of the Bankruptcy Code, which defines a "transfer" in substantially similar terms as the FUFTA).[3] Isaiah's allegations regarding routine deposits into the

[3] This is not to say that banks may never be held liable as the recipient of a fraudulent transfer under the FUFTA. In the analogous bankruptcy context, we have acknowledged that a bank can be held liable as the recipient, or "initial transferee," of a fraudulent transfer under the

Receivership Entities' own bank accounts are thus insufficient to state a FUFTA claim against JPMC.

As a fallback, Isaiah argues that the complaint adequately alleges that the Ponzi schemers relinquished dominion and control over the funds in the Receivership Entities' bank accounts when they withdrew money from those accounts and transferred those funds to *third-party* accounts at JPMC. But we can find no such allegation in Isaiah's complaint. The complaint alleges generally that the Ponzi schemers withdrew money and made other wire transfers, and that the Ponzi schemers made payments to certain unidentified "Group Leaders" who contributed to the scheme. Compl. ¶¶ 21–26, 38. But it contains no allegation that those Group Leaders—or any other third party, for that matter—deposited funds received from the Receivership Entities into bank accounts *at JPMC*. And the nearly 100 pages of exhibits appended to the complaint—spreadsheets detailing the activity on the Receivership Entities' JPMC bank accounts—show only the

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Bankruptcy Code—which provides for the avoidance of fraudulent transfers in substantially similar terms as the FUFTA—if it received the funds as payment of an existing debt, such as a mortgage payment, or as compensation for services rendered. *See Custom Contractors*, 745 F.3d at 1350 (explaining that, when the transferor transfers money to the bank in payment of a debt, he retains no rights to the funds and the bank receives the money with "no strings attached"); *In re Pony Express Delivery Servs., Inc.*, 440 F.3d 1296, 1301 (11th Cir. 2006) (explaining that while banks do not ordinarily exercise legal control over funds deposited in their clients' bank accounts, when a bank receives assets from a debtor as payment of a genuine debt, those assets "immediately become [the bank's] own assets and are not simply held for its client's purposes"); *In re Chase & Sanborn Corp.*, 904 F.2d 588, 599–600 (11th Cir. 1990) (finding a bank to be the initial transferee of a fraudulent transfer where the funds were transferred to the bank to pay off part of a loan).

movement of money into, out of, and among the Receivership Entities' own bank accounts. Put simply, there is no allegation that money was transferred from the Receivership Entities' bank accounts into any other JPMC accounts except their own.[4] Because Isaiah's FUFTA claims against JPMC are based only on the Receivership Entities' movement of funds into and among their own bank accounts, the District Court correctly determined that the complaint failed to allege a fraudulent transfer to JPMC within the meaning of the FUFTA.[5]

Finally, Isaiah argues that the District Court erred by applying a bright-line rule that a defendant can avoid FUFTA liability solely by showing that it lacked control over the funds at issue, and without any consideration of the defendant's good faith. In so arguing, Isaiah apparently construes the District Court's opinion as holding that JPMC was entitled to avail itself of the "mere conduit" affirmative defense. The mere conduit defense allows defendants to avoid liability as the recipient of a fraudulent transfer if they can show "(1) that they did not have

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[4] Even if the complaint could be construed to contain such an allegation, we doubt that the mere movement of money into a third party's bank account at JPMC, without more, *see supra* note 3, would be enough to establish FUFTA liability against *JPMC* as opposed to the third party accountholder. As explained above, the routine deposit of money into an unrestricted bank account does not constitute a transfer to the bank within the meaning of the FUFTA. So, any transfer that the Receivership Entities made to a third-party bank account at JPMC would likely constitute a transfer to the third party that owns the account, not to JPMC.

[5] Put differently, because the Receivership Entities at all times retained access to and control over the funds in their own bank accounts, the Entities have not suffered any loss to be recouped in a clawback action under the FUFTA.

control over the assets received, i.e., that they merely served as a conduit for the assets that were under the actual control of the debtor-transferor *and* (2) that they acted in good faith and as an innocent participant in the fraudulent transfer." *In re Harwell*, 628 F.3d 1312, 1323 (11th Cir. 2010) (emphasis in original). To be clear, the District Court did not apply the mere conduit defense in dismissing Isaiah's FUFTA claim, and neither do we. Rather, the District Court did not need to reach that question because it held, as we do here, that Isaiah failed to allege any applicable FUFTA transfer and so, as a threshold matter, failed to even state a FUFTA claim. To illustrate why we have no need to reach the issue that Isaiah prompts us to address, we pause here to briefly explain the differences between our holding and the application of the mere conduit defense. Though the inquiries may be semantically similar, they are conceptually distinct.

First, the mere conduit defense is an affirmative defense that must be proved by the defendant seeking its protection. A complaint need not anticipate and negate affirmative defenses and should not ordinarily be dismissed based on an affirmative defense unless the defense is apparent on the face of the complaint. *Bingham v. Thomas*, 654 F.3d 1171, 1175 (11th Cir. 2011) (citing *Jones v. Bock*, 549 U.S. 199, 215, 127 S. Ct. 910, 921 (2007)).

Second, although the mere conduit defense, like the question whether a FUFTA transfer has occurred, requires us to ask whether a particular party had

legal control over the assets allegedly transferred, the two concepts involve slightly different inquiries. To establish that a FUFTA transfer occurred, a plaintiff must show that the debtor *relinquished* control over the property such that he can be said to have disposed of or parted with an interest in it. *See* Fla. Stat. § 726.102(14). For a defendant to avail itself of the mere conduit defense, it must show that it did not *gain* sufficient legal control over the property disposed of by the debtor such that it should be held liable as a recipient of that fraudulently transferred property. *See, e.g.*, *Harwell*, 628 F.3d at 1323. In other words, the mere conduit defense presupposes that a transfer has occurred—that the debtor has disposed of or parted with an interest in some asset—and asks whether the defendant was the true recipient of the transferred asset.

Third, and perhaps most importantly, the mere conduit affirmative defense is a judicially created exception grounded in the equitable powers of the bankruptcy courts. *Id.* at 1322. It arose not under FUFTA, but in the context of an analogous fraudulent transfer provision in the Bankruptcy Code, which allows a bankruptcy trustee to avoid certain fraudulent transfers similar to those avoidable under the FUFTA and to recover the value of the transfers from the "initial transferee of such transfer." *See* 11 U.S.C. §§ 548(a)(1), 550(a)(1). Recognizing the inequity that would result if the court adopted a literal interpretation of the term "initial

transferee,"[6] we crafted this equitable exception to exclude mere conduits or intermediaries who might otherwise be deemed "initial transferees" from being held liable for funds they never actually controlled or benefitted from. *Custom Contractors*, 745 F.3d at 1349, 1352; *Harwell*, 628 F.3d at 1322.

Neither this Circuit nor the Florida courts have decided whether this equitable defense should also apply in statutory actions under FUFTA, and for the reasons set forth above we need not decide that question either. Nor must we decide whether JPMC would be entitled to the mere conduit affirmative defense if it did apply. Because Isaiah's complaint fails to allege an applicable FUFTA transfer, his complaint fails, as an initial matter, to state a claim of FUFTA liability. The District Court therefore did not err in dismissing his complaint under Rule 12(b)(6) on that basis.

III.

The District Court also dismissed Isaiah's aiding and abetting claims against JPMC because it found that the complaint did not adequately allege that JPMC had actual knowledge of the underlying Ponzi scheme to support his claims that JPMC aided and abetted the Ponzi schemers' torts. *Isaiah*, 2017 WL 5514370, at *4. At oral argument, we raised the additional concern that because Isaiah, as receiver of

[6] The Bankruptcy Code does not define the term "transferee" and there is no legislative history on the term. *Harwell*, 628 F.3d at 1317 (citing *Bonded Fin. Servs., Inc. v. European Am. Bank*, 838 F.2d 890, 893 (7th Cir. 1988)).

the Receivership Entities, stands in the shoes of those Entities, and because the Entities are in turn tarred by the fraudulent acts of the Ponzi schemers, Isaiah could not bring tort claims against JPMC for aiding and abetting the Receivership Entities' own torts. We asked the parties to file supplemental letter briefs addressing whether the fraudulent acts of the Receivership Entities, as the principals of the Ponzi scheme, are imputed to Isaiah for purposes of his tort claims under Florida law. We find that they are, and thus that Isaiah lacks standing to bring these aiding and abetting claims against JPMC.[7]

It is axiomatic that a receiver obtains only the rights of action and remedies that were possessed by the person or corporation in receivership. *Freeman v. Dean Witter Reynolds, Inc.*, 865 So. 2d 543, 550 (Fla. Dist. Ct. App. 2003). Although a receivership is typically created to protect the rights of creditors, the receiver is not the class representative for creditors and cannot pursue claims owned directly by the creditors. *Id.* Rather, he is limited to bringing only those actions previously owned by the party in receivership. *Id.* For purposes of this appeal, then, we must determine whether the Receivership Entities would have had a claim against JPMC for aiding and abetting the Ponzi scheme executed through the Receivership

[7] "We can affirm on any basis supported by the record, regardless of whether the district court decided the case on that basis." *Martin v. United States*, 949 F.3d 662, 667 (11th Cir. 2020).

Entities. That question in turn depends on whether the Ponzi schemers' fraudulent acts are imputed to the Receivership Entities.

Florida's Second District Court of Appeal addressed this exact question in *Freeman v. Dean Witter Reynolds*. In that case, the court explained that while a receiver receives his claims from the entities in receivership, he "does not always inherit the sins of his predecessor." *Id.* There are certain circumstances in which defenses such as unclean hands or *in pari delicto* would not apply to claims brought by a receiver, even if they would have applied against the entity in receivership. *Id.* The court differentiated between two types of cases. On the one hand, "there are actions that the corporation, which has been 'cleansed' through receivership, may bring directly against the principals or the recipients of fraudulent transfers of corporate funds to recover assets rightfully belonging to the corporation and taken prior to the receivership." *Id.* at 551. We addressed these types of actions in *Wiand v. Lee*. There, we explained that even where a corporation is operated by a Ponzi schemer, it is still in the eyes of the law a separate legal entity with rights and duties. *Wiand*, 753 F.3d at 1202 (quoting *Scholes v. Lehmann*, 56 F.3d 750, 754 (7th Cir. 1995)). The money it receives from investors should be used for the corporation's stated purpose, and so when assets are transferred for an unauthorized purpose to the detriment of the defrauded investors, who are tort creditors of the corporation, the corporation itself is harmed.

Id. Although the corporation may have participated in the fraudulent transfers prior to receivership, once the individual tortfeasor is removed and a receiver is appointed, the corporation becomes entitled to the return of its assets that had been diverted for unauthorized purposes, e.g., to perpetrate a Ponzi scheme. *Id.* For that reason, we held that the receiver for the corporation has standing to sue the recipients of fraudulent transfers under the FUFTA. *Id.* at 1203.

On the other hand, however, are common law tort claims against third parties to recover damages for the fraud perpetrated by the corporation's own insiders. *See Freeman*, 865 So. 2d at 551. With respect to these claims, *Freeman* held that unless the corporation in receivership has at least one honest member of the board of directors or an innocent stockholder, the fraud and intentional torts of the insiders cannot be separated from those of the corporation itself and the corporation cannot be said to be an entity separate and distinct from the individual tortfeasors. *Id.* The corporation—and the receiver who stands in the shoes of the corporation—lacks standing to pursue such tort claims because the corporation, "whose primary existence was as a perpetrator of the Ponzi scheme, cannot be said to have suffered injury from the scheme it perpetrated." *O'Halloran v. First Union Nat'l Bank of Fla.*, 350 F.3d 1197, 1203 (11th Cir. 2003).[8] *Freeman* thus

[8] *O'Halloran* was a bankruptcy case in which the bankrupt entity had operated a vast Ponzi scheme. The trustee of the bankrupt entity, along with two individual investors who were defrauded by the Ponzi scheme, sued the bank at which the entity maintained some of its bank

distinguished "between an honest corporation with rogue employees, which can pursue claims for the fraud or intentional torts of third parties while in receivership, and a sham corporation created as the centerpiece of a Ponzi scheme, which cannot pursue such claims." 865 So. 2d at 552.

Applying these legal principles, the court in *Freeman* found that the receiver lacked standing to pursue aiding and abetting claims against third parties because the entity in receivership itself could not pursue those claims:

> [The entity] was controlled exclusively by persons engaging in its fraudulent scheme and benefitting from it. [It] was not a large corporation with an honest board of directors and multiple shareholders, suffering from the criminal acts of a few rogue employees in a regional office. It is clear from the allegations of the amended complaint that it was created by the Grazianos to dupe the customers. This corporation was entirely the robot or the evil zombie of the corporate insiders.

Id. at 551. As such, it was not the corporation but the individual customers who suffered injury as a result of the Ponzi scheme, and who may have rights to pursue

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accounts for aiding and abetting certain crimes and torts, assisting in the breach of fiduciary duties, breaching its own duties to warn and to control, and negligence. *Id.* at 1200–01. We agreed with the trustee that he lacked standing to bring any claims against the bank related to the Ponzi scheme because based on the allegations of the complaint, which described the entity as an organization whose sole purpose was to perpetrate a Ponzi scheme, the entity was one of the principal culprits in the Ponzi scheme, and so neither the entity nor the trustee in bankruptcy could sue for the Ponzi-scheme-related torts. *Id.* at 1202–03 (citing 11 U.S.C. §§ 541–42) ("A bankruptcy trustee stands in the shoes of the debtor and has standing to bring any suit that the debtor could have instituted had it not been thrown into bankruptcy."). But we held that the trustee did have standing to pursue claims against the bank arising from the alleged embezzlement of funds from the entity's bank account. *Id.* at 1204. As the holder of voidable title to the funds in its bank account, the entity could have been legally injured when one of its officers wrongfully embezzled money from the entity's accounts. *Id.*

claims against third parties that allegedly aided and abetted that scheme. *Id.* at 553.

This case is indistinguishable from *Freeman*. Isaiah's complaint depicts the Receivership Entities as the robotic tools of the Ponzi schemers, alleging that the Ponzi schemers "asserted complete control over the Receivership Entities in operating the Ponzi Scheme and improperly diverting funds from the bank accounts of the Receivership Entities." Compl. ¶ 20. The complaint itself shows that the Receivership Entities were wholly dominated by persons engaged in wrongdoing and is devoid of any allegation that the Receivership Entities engaged in any legitimate activities or had "at least one honest member of the board of directors or an innocent stockholder" such that the fraudulent acts of its principals, the Ponzi schemers, should not be imputed to the Entities themselves. *Freeman*, 865 So. 2d at 551. At least on the basis of this complaint, the Ponzi schemers' torts cannot properly be separated from the Receivership Entities, and the Receivership Entities cannot be said to have suffered any injury from the Ponzi scheme that the Entities themselves perpetrated. As in *Freeman*, any claims for aiding and abetting the torts of the Receivership Entities' corporate insiders belong to the investors who suffered losses from this Ponzi scheme, not the Receivership Entities. The Receivership Entities thus cannot assert tort claims against third parties like JPMC for aiding and abetting the Ponzi scheme. Because Isaiah, as

receiver, stands in the shoes of the Receivership Entities, he too lacks standing to bring these aiding and abetting claims against JPMC.

Contrary to Isaiah's contention, our holding is entirely consistent with the state court's order appointing Isaiah receiver of the Receivership Entities. The state court order "specifically authorized and empowered [Isaiah] to file suit against any person(s) or entity(s) [sic] to recover property of the Receivership Entities including, but not limited to, fraudulent conveyances and other claims and causes of actions [sic] *otherwise belonging to the Receivership Entities*." Compl. Ex. 1 at 8 (emphasis added). The receivership order makes clear that Isaiah may bring only those claims that would otherwise belong to the Receivership Entities. As we have explained, any claims for aiding and abetting the Ponzi scheme do not belong to the Receivership Entities; they belong to the defrauded investors, whom Isaiah does not represent.

In sum, we hold that Isaiah lacks standing to assert, on behalf of the Receivership Entities, claims against JPMC for allegedly aiding and abetting the Ponzi schemers' breach of fiduciary duties, conversion, and fraud. Like in *Freeman*, Isaiah's ability to pursue these claims is barred not by the doctrine of *in pari delicto*, but by the fact that the Receivership Entities were controlled exclusively by persons engaging in and benefitting from the Ponzi scheme, and so the Receivership Entities were not injured by that scheme. 865 So. 2d at 550–51.

In the absence of any allegation in the complaint that the Receivership Entities had at least one innocent officer or director and were thus honest corporations injured by the actions of a few corrupt employees, the Receivership Entities—and in turn, Isaiah—lack standing to pursue claims against JPMC for aiding and abetting the Ponzi scheme.[9]

IV.

Finally, we note that the District Court did not abuse its discretion in staying discovery pending resolution of JPMC's motion to dismiss. We review a district court's decision to stay discovery for an abuse of discretion. *See Patterson v. U.S. Postal Serv.*, 901 F.2d 927, 929 (11th Cir. 1990). A district court abuses its discretion if it applies an incorrect legal standard, applies the law in an unreasonable or incorrect manner, or follows improper procedures in making its decision. *Kolawole v. Sellers*, 863 F.3d 1361, 1366 (11th Cir. 2017).

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[9] The District Court dismissed Isaiah's complaint with prejudice without first giving Isaiah a chance to amend his complaint to properly state a claim. We have held that "[a] district court is not required to grant a plaintiff leave to amend his complaint sua sponte when the plaintiff, who is represented by counsel, never filed a motion to amend nor requested leave to amend before the district court." *Wagner v. Daewoo Heavy Indus. Am. Corp.*, 314 F.3d 541, 542 (11th Cir. 2002) (en banc) (overruling our precedent requiring that a plaintiff be given at least one chance to amend his complaint before the district court dismisses the action with prejudice). Isaiah, who is represented by counsel, never moved or otherwise sought leave to amend his complaint below. To the contrary, he has maintained throughout that his complaint is sufficient as it presently stands. Only after we ordered supplemental briefing on the standing issue did Isaiah suggest that he should be permitted to amend his complaint to assert additional facts to avoid dismissal. For that reason, we cannot say that the District Court erred in dismissing his complaint with prejudice.

"Facial challenges to the legal sufficiency of a claim or defense, such as a motion to dismiss based on failure to state a claim for relief, should . . . be resolved before discovery begins." *Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353, 1367 (11th Cir. 1997). Indeed, the failure to consider and rule on these potentially dispositive pretrial motions can be an abuse of discretion. *Id.* In determining whether JPMC's motion to dismiss was likely to be dispositive of this case, the District Court had the benefit of a previous court's review of Isaiah's nearly identical claims against a different bank. In that previous suit, the state court dismissed Isaiah's complaint against another bank that alleged virtually the same claims based on similar facts. *See Isaiah v. Wells Fargo Bank, N.A.*, No. 14-15246-CA-40, 2015 WL 7912778 (Fla. Cir. Ct. Feb. 6, 2015). The District Court therefore did not abuse its discretion in staying discovery pending resolution of JPMC's 12(b)(6) motion to dismiss challenging the legal sufficiency of Isaiah's claims.

V.

The vice in this case is that even if Isaiah ended up recovering damages in his suit against JPMC, the defrauded investors—the individuals actually injured by the Ponzi scheme—would be no better off. As the state court's order and the filings made in support of that order make clear, Isaiah has never represented the defrauded investors. Rather, it has always been understood that Isaiah's role as

receiver is to protect the Receivership Entities' assets, which consist of "investments" made by the Ponzi scheme victims, from being dissipated by the Ponzi schemers.

Indeed, the defrauded investors who sought the appointment of a receiver in this case asked the state court in their complaint to appoint Isaiah receiver "for the property, assets, and business [of] all Defendants named herein," including the Receivership Entities and the individual Ponzi schemers, to "receive, preserve, and protect" those assets. Emergency Compl. at 15, *P & M Bus. Sys., Corp. v. Coravca Distributions, LLC*, No. 10-49586-CA-40 (Fla. Cir. Ct. Sept. 13, 2010). They likewise explained in their motion filed along with the complaint that they sought "the appointment of a Receiver and injunctive relief to prevent [the] Defendants . . . and any of their agents, from continuing to engage in the deceptive practices as alleged" in the complaint. Pls.' Emergency Ex-Parte Mot. for Appointment of Receiver and Inj. Relief Without Notice at 1, *P & M Bus. Sys., Corp. v. Coravca Distributions, LLC*, No. 10-49586-CA-40 (Fla. Cir. Ct. Sept. 13, 2010). Moreover, in their brief in support of that motion, the investor-plaintiffs recognized that "a temporary receiver is appointed only to preserve the property and to protect the rights of all parties therein," i.e., to protect the investor-plaintiffs' rights to the funds swindled from them by the Ponzi schemers and currently in the hands of the Receivership Entities. Mem. of Law in Supp. of Pls.'

Emergency Ex Parte Mot. for the Appointment of Receiver and Inj. Relief Without Notice at 5, *P & M Bus. Sys., Corp. v. Coravca Distributions, LLC*, No. 10-49586-CA-40 (Fla. Cir. Ct. Sept. 13, 2010).

Consistent with these filings, the state court appointed Isaiah receiver of the Receivership Entities "to protect the assets of [the Receivership Entities] . . . from being sold, transferred, alienated or otherwise dissipated until the resolution of the instant [state court] proceeding." Isaiah Compl. Ex. 1 at 3. For that purpose, the receivership order provided that "[t]he Receiver shall marshal, preserve, protect, maintain, manage and safeguard the [Receivership Entities'] Property in a reasonable, prudent, diligent, and efficient manner." *Id.* at 6. In other words, the receivership order imposed an obligation on Isaiah to collect and preserve the assets of the Receivership Entities to prevent dissipation of those assets by the Ponzi schemers.

While collecting damages from third parties may indirectly benefit the defrauded investors and other creditors of the Receivership Entities—e.g., by enlarging the "pie" from which the creditors may ultimately recover—the receiver does not pursue such actions *on behalf of* the creditors because he does not represent those creditors. In fact, the receivership order contemplates that any creditors of the Receivership Entities would have to file claims against the Entities—i.e., against Isaiah—in order to secure their slice of the pie. *See id.* at 8

(providing that "[t]he Receiver shall establish a procedure for creditors of the Receivership Entities to file claims"). And by the terms of the receivership order, Isaiah does not simply turn over the funds he collects to the Entities' creditors, but instead must "examine the validity and priority of all claims against the Receivership Entities, which claims shall be finally determined by th[e] Court." *Id.* Thus, any money that Isaiah may recover in this lawsuit is not really money in the creditors' pockets, but instead is the property of the Receivership Entities. Whether or not the investors receive any of that money will depend on the outcome of additional proceedings that they must initiate against the Receivership Entities.[10]

To allow receivers to bring these types of lawsuits purportedly for the benefit of the entities' creditors is really to usurp the claims that properly belong to those creditors. And while the receiver continues to litigate these claims in his own suit, the statute of limitations may be running on those claims that the creditors actually possess and for which, if enough time has passed, they may lose the ability to recover.

* * *

[10] Not only would Isaiah be pitted against some of the investors or creditors in this sense, but the investors themselves may also be pitted against one another or, at the very least, may have interests adverse to one another. After all, not all investors lost money in this scheme; at least some of the investors earned a profit on their initial investment. A review of the state court docket in this case reveals that Isaiah has in fact filed unjust enrichment and restitution claims against certain investors who were net-winners in the Ponzi scheme, alleging that they received an unfair benefit at the expense of other defrauded investors. *See, e.g.*, Compl., *Isaiah v. High Quality Finish Carpentry Corp.*, No. 13-031130-CA-01 (Fla. Cir. Ct. Sept. 30, 2013).

With that final thought, the District Court's orders staying discovery and granting JPMC's Rule 12(b)(6) motion to dismiss are

AFFIRMED.

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-12088

D.C. Docket No. 5:18-cv-00449-TES

In re: PAUL L. CUMBESS,

Debtor.

MICROF LLC,

Plaintiff - Appellant,

versus

PAUL L. CUMBESS,
CAMILLE HOPE,

Defendants - Appellees.

Appeal from the United States District Court
for the Middle District of Georgia

(June 3, 2020)

Before MARTIN, NEWSOM and JULIE CARNES, Circuit Judges.

NEWSOM, Circuit Judge:

Stripped to its bare essence, this bankruptcy appeal presents the question whether the word "trustee" means "trustee." We hold that it does.

I

In June 2015, Paul Cumbess began leasing an HVAC unit from Microf LLC for use at his residence. Somewhere during the ensuing two years, however, Cumbess found himself unable to meet all of his financial obligations—including the lease payments he owed to Microf—and in August 2017, he filed a Chapter 13 bankruptcy petition in the U.S. Bankruptcy Court for the Middle District of Georgia. Cumbess's Chapter 13 reorganization plan stated that his "pre-petition arrears" on the Microf lease—*i.e.*, the money he already owed on it—would be "disbursed by the [Chapter 13] trustee pro rata." (If you're already confused, don't worry, a Chapter 13 primer is just around the corner.) Importantly, Cumbess's plan also provided (1) that "[t]he lease to Microf is assumed"—which, as we'll explain, is just a fancy way of saying that Cumbess intended to continue to perform his obligations under the lease—and (2) that Cumbess would "be the disbursing agent" on the Microf lease going forward—which, effectively, meant that Cumbess intended to handle the future lease payments himself. Also importantly, however—and for reasons that will become clear it's a big "however"—the

Chapter 13 trustee assigned to Cumbess's case did *not* separately "assume" the Microf lease before the bankruptcy court confirmed Cumbess's plan.

Following his plan's confirmation, Cumbess consistently failed to make the required monthly payments on his Microf lease, and by July 2018, he owed Microf $1,763.95. Microf turned to the bankruptcy court for help, asking it to deem the missed payments "necessary costs and expenses of preserving the estate," and thus "administrative expenses" within the meaning of 11 U.S.C. § 503(b)(1)(A), and to authorize that they be paid with second priority under 11 U.S.C. § 507(a)(2). (Again, we'll explain this in due course, but essentially Microf asked to have its claim bumped up the creditor food chain). The Chapter 13 trustee opposed Microf's motion on the ground that the missed lease payments weren't "necessary costs and expenses of preserving the estate"—and therefore couldn't be considered administrative expenses within the meaning of § 503(b)(1)(A).

After conducting a hearing on the issue, the bankruptcy court denied Microf's motion. The court first held, contrary to Microf's assertion, that an administrative claim "d[id] not arise automatically from [Cumbess's] default" on the Microf lease. Central to the bankruptcy court's decision in that respect was 11 U.S.C. § 365(p)(1), which states that "[i]f a lease of personal property is rejected or not timely assumed by the trustee . . . the leased property is no longer property of the estate." Because the Chapter 13 trustee had not assumed the Microf lease, the

court reasoned, the lease was "exclu[ded] from the bankruptcy estate" by dint of § 365(p)(1). Accordingly, the bankruptcy court held, Microf was not automatically entitled to an administrative-expense claim because there was "no reason to presume a benefit to the estate by a debtor's assumption of a lease of property explicitly determined not to be property of the estate." Second, and separately, the bankruptcy court held that, even setting aside the lease's exclusion from the estate, Microf hadn't met its burden of proving that the lease payments were "actual, necessary costs and expenses of preserving the estate" and thus "administrative expenses" within the meaning of § 503(b)(1)(A). In particular, the court stated that although Cumbess admitted that he had personally benefitted from the ongoing use of the HVAC unit, there was no evidence that the equipment provided "an actual, concrete benefit" to the estate. The bankruptcy court thus denied Microf's claim, and Microf appealed to the U.S. District Court for the Middle District of Georgia.

The district court affirmed. Like the bankruptcy court, the district court relied principally on the plain language of 11 U.S.C. § 365(p)(1). The district court held that "the only reasonable interpretation" of § 365(p)(1) is that it "vests the trustee—not the debtor—with the sole power to obligate the bankruptcy estate on an unexpired lease in chapter 13 cases." Thus, the district court held that because it is "undisputed in this case the [t]rustee did not timely assume [Cumbess's] HVAC lease with Microf," the HVAC unit was "excluded from the

bankruptcy estate on the day [Cumbess's] plan was confirmed by the bankruptcy court." Finding that Microf's administrative-expense claim "depend[ed] solely upon a finding that the HVAC unit did not exit the estate," the district court rejected it.

Microf then appealed to this Court.

II

A

Before we dive into the details of this case, a bit of Chapter 13 background is in order. First, let's talk mechanics. A Chapter 13 bankruptcy—sometimes called a "wage earners plan"—enables a debtor with a regular income to repay all or part of his debts, typically over a three- to five-year period. After the debtor initiates a Chapter 13 case by filing a petition, he must then—within 14 days—file a proposed plan of reorganization, which provides that he will make certain fixed payments over time. The bankruptcy court then determines whether the proposed plan conforms to the Bankruptcy Code. If it does, the court confirms the plan, which then becomes binding on the debtor, the creditors, and the Chapter 13 trustee, whose job it is to assist with the plan's administration. In a Chapter 13 proceeding, the bankruptcy estate—the pool of property from which the debtor's creditors are paid—comprises all of the debtor's legal and equitable interests in property at the time of the filing of the case, as well as those that he acquires after

the filing. *See* 11 U.S.C. §§ 541, 1306(a). Unlike in a Chapter 7 "liquidation" proceeding, however, a Chapter 13 debtor can maintain possession of some or all of his assets throughout the bankruptcy; the debtor's plan payments (and thus the payments to his creditors) typically come from his future earnings.

Generally speaking, there are two types of claims in a Chapter 13 case: secured and unsecured. Importantly for our purposes, the Bankruptcy Code treats different kinds of unsecured claims, well, differently. A typical unsecured claim—also called a "general unsecured claim"—needn't be paid in full. The Code requires only that creditors holding general unsecured claims receive what they would under a Chapter 7 liquidation. 11 U.S.C. § 1325(a)(4). The Code also provides, though, that some unsecured claims are entitled to "priority," such that they have to be paid in full unless the creditor agrees otherwise. 11 U.S.C. § 1322(a)(2). Examples of claims entitled to priority include domestic-support obligations, certain taxes, and—as particularly relevant here—"administrative expenses" associated with the proceeding, including the "actual, necessary costs and expenses of preserving the estate." 11 U.S.C. §§ 503(b)(1)(A), 507.

Now, the players. First, of course, there's the debtor—he initiates the Chapter 13 proceeding, proposes the reorganization plan, and (if all goes well) makes payments in accordance with it. Within the Chapter 13 process, the debtor's objective is to "obtain court approval . . . of a plan that provides for the payment of

as little as possible to creditors and to emerge at the end of the process with as much property and as little debt as possible." Hon. W. Homer Drake, Jr., et al., Chapter 13 Practice and Procedure § 1:1 (2019). Then, there are the creditors—the people or entities who have claims against the debtor. Predictably, the creditors' incentives run counter to the debtor's: Their aim is to "maximize their recoveries by having the debtor pay as much as possible." *Id.* Finally, there's the trustee, who is appointed by the bankruptcy court after the debtor files a Chapter 13 petition to assist with the case's administration. The Chapter 13 trustee is a "representative of the bankruptcy estate," *id.* at § 17:1, and her "primary purpose . . . is . . . to serve the interests of all the creditors," *Hope v. Acorn Fin., Inc.*, 731 F.3d 1189, 1193 (11th Cir. 2013). Although a Chapter 13 trustee has many statutory rights and responsibilities, *see* 11 U.S.C. § 1302(b), she plays a particularly important role in connection with the debtor's plan: She must appear and be heard at any hearing regarding plan confirmation or modification, advise and assist the debtor in his performance under the plan, ensure that the debtor makes timely payments under the plan, and disburse those payments to creditors in accordance with the plan. *See* Hon. W. Homer Drake, Jr., et al., *supra*, at § 17:3.

There's one last piece of introductory ground we need to cover: executory contracts. At the time a debtor files a Chapter 13 petition, he may be subject to the ongoing benefits and burdens of an unexpired executory contract—such as, in this

case, a lease. When this happens, the debtor has three choices going forward: he can "assume" the contract (*i.e.*, commit to performing its obligations), "reject" the contract (*i.e.*, commit to breaching its obligations), or "assign" the contract (*i.e.*, provide that a third party will perform its obligations). 11 U.S.C. § 1322(b). Less clear, however—and the issue at the center of this appeal—is the effect that the debtor's assumption-rejection-assignment election has on the bankruptcy estate and whether, for instance, the debtor's decision to assume a lease obligates the bankruptcy estate independent of any action by the Chapter 13 trustee.

B

With the benefit of that background, we're ready to confront the issue presented in this appeal. Microf, again, contends that it is entitled to an administrative-expense claim on Cumbess's unpaid post-petition lease payments. Essentially, Microf wants to re-classify the missed payments from the general unsecured-debt category to the administrative-expense category, and thereby gain the benefits of the priority provided by 11 U.S.C. § 507.

Under 11 U.S.C. § 503(b)(1)(A), administrative expenses include the "actual, necessary costs and expenses of preserving the estate." Microf argues that when Cumbess "assumed" the HVAC lease in his Chapter 13 plan, he did so on behalf of the estate—such that the lease remained property of the estate after his Chapter 13 plan was confirmed. And, Microf contends, because the lease

remained part of the estate, the post-petition lease payments are automatically "actual, necessary costs and expenses of preserving the estate" within the meaning of § 503(b)(1)(A). The bankruptcy court and the district court both disagreed, finding it dispositive that because the *trustee* never "assumed" the lease in accordance with 11 U.S.C. § 365(p)(1), the Microf lease dropped out of the estate upon confirmation of Cumbess's Chapter 13 plan.[1]

* * *

To assess the lower courts' decisions—and in particular their reliance on § 365(p)(1)—we need to back up just a bit. Under 11 U.S.C. § 1322(b)(7), a Chapter 13 debtor's repayment plan "may . . . subject to section 365 . . . provide for the assumption, rejection, or assignment of any executory contract or unexpired lease of the debtor not previously rejected under such section." Section 1322(b)(7) tells us little more than what we already know: that the debtor can assume an unexpired lease—"subject," anyway, to § 365. The real question here is whether by assuming the lease as part of his Chapter 13 plan, the debtor can—singlehandedly and, in particular, without any action by the trustee—obligate the bankruptcy estate. Section 1322(b)(7) doesn't answer that question. What, then, about the provision to which § 1322(b)(7) points, § 365?

[1] "[W]e examine the bankruptcy court's order independently of the district court." *In re Int'l Pharm. & Disc. II, Inc.*, 443 F.3d 767, 770 (11th Cir. 2005). In doing so, we review the bankruptcy court's legal conclusions de novo and its factual findings for clear error. *Id.*

Section 365's very first subsection demonstrates that the trustee plays an important role in the assumption of unexpired leases: it states that "the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor." 11 U.S.C. § 365(a). And a provision that follows shortly thereafter, § 365(d)(2) likewise explains that—

> In a case under [Chapter 13] the trustee may assume or reject an executory contract or unexpired lease of residential real property or of personal property of the debtor at any time before the confirmation of a plan but the court, on the request of any party to such contract or lease, may order the trustee to determine within a specified period of time whether to assume or reject such contract or lease.

So under § 1322(b)(7), the debtor can "provide for the assumption" of a lease in his proposed Chapter 13 plan—again, at least "subject to" § 365. And under § 365(a) and (d)(2), the trustee can "assume" a lease as well.

So much for the "who"—both the debtor and the trustee have authority to assume an unexpired lease. Now for the "to what effect." Enter § 365(p)(1), which speaks directly—and we think conclusively—to the question that we face in this appeal. In relevant part, that provision states that "[i]f a lease of personal property is rejected or not timely assumed by the trustee . . . the leased property is no longer property of the estate." *Id.* at § 365(p)(1). Section 365(p)(1)'s plain language answers the question that we are principally tasked with deciding: Where (as here) the trustee does not assume an unexpired lease, it drops out of the estate.

Done and done.

Not so fast, says Microf. To combat § 365(p)'s seemingly unambiguous text, Microf raises three arguments. In the end, though, none of them warrants ignoring what the Bankruptcy Code so clearly says.

1

Microf initially argues that "within the context of § 365," the term "trustee" should be (and has been) understood "to refer to the Chapter 13 debtor and plan." Br. of Appellant at 13. In other words—and as Microf explicitly stated at oral argument—"trustee," at least in these circumstances, doesn't mean "trustee" at all—it means "debtor." Oral Argument at 6:40–6:50. We reject Microf's countertextual position for several reasons.

First, and most obviously, accepting Microf's argument would require us to excise the word that Congress used—"trustee"—and replace it with an altogether different word—"debtor." That, it should go without saying, we cannot do. *See Dean v. United States*, 556 U.S. 568, 572 (2009) ("[W]e ordinarily resist reading words or elements into a statute that do not appear on its face." (quotation omitted)); *see also* Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 93–94 (2012) (stating that the "judicial power" should not be used "to supply words . . . that have been omitted").

Second, and relatedly, the term that § 365(p)(1) uses—"trustee"—and the term that it omits—"debtor"—are well understood in bankruptcy law, and they are

well understood to refer to different people (or entities, as the case may be). As we have explained, the trustee and the debtor are two of the central players in a Chapter 13 case, and they each have their own unique roles, interests, and responsibilities. Accordingly, it seems to us exceedingly unlikely that Congress would have used the term "trustee" in § 365(p)(1) to mean "debtor." And that is all the more true given that eleven of § 365's sixteen subsections use the terms simultaneously—and thus clearly to refer to different people (or again, entities). *See, e.g.*, 11 U.S.C. § 365(a)–(f), (h)–(i), (n)–(p).[2]

Third, other provisions of the Bankruptcy Code confirm that reading "trustee" to mean "debtor" in § 365(p)(1) wouldn't make sense. Under the whole-text canon, courts should "'consider the entire text [of a statute], in view of its structure and of the physical and logical relation of its many parts,' when interpreting any particular part of the text." *Regions Bank v. Legal Outsource PA*, 936 F.3d 1184, 1192 (11th Cir. 2019) (quoting Scalia & Garner, *supra*, at 167). This means that, "typically . . . only one of the possible meanings that a word or phrase can bear is compatible with use of the same word or phrase elsewhere in the statute." *Id.* (quoting Scalia & Garner, *supra*, at 168). Tellingly, Microf hasn't pointed to *any* provision of the Bankruptcy Code outside § 365 in which it claims

[2] The surest proof, it seems to us, that two people are not the same is that they've been seen in the same room(s) together.

Congress used the word "trustee" to mean "debtor," or vice versa. Microf appears to concede, therefore, that elsewhere in the statute those words mean exactly what they say—a concession that substantially undermines its argument that "trustee" bears some idiosyncratic, sui generis meaning in § 365(p)(1). *Cf. Hall v. United States*, 566 U.S. 506, 519 (2012) ("At bottom, identical words and phrases within the same statute should normally be given the same meaning." (quotation omitted)).

Finally, a capper: 11 U.S.C. § 1303 provides that "the debtor shall have, exclusive of the trustee, the powers of a trustee under sections 363(b), 363(d), 363(e), 363(f), and 363(l), of this title." This provision of the Bankruptcy Code is doubly devastating to Microf's position. For one thing, it shows (once again) that Congress appreciates the important distinction between the "trustee" and the "debtor"—and that it doesn't use one of those terms to signify the other. And second, it makes clear that there are a few specific provisions in which Congress intended the debtor to have powers assigned to the trustee—and, significantly, that § 365(p)(1) is *not* one of them. *Expresio unius est exclusio alterius*. *See Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003) (holding that, "when the items expressed are members of an associated group or series," the *expresio unius* canon

"justif[ies] the inference that items not mentioned were excluded by choice, not inadvertence" (quotation omitted)).[3]

To summarize, then, as a matter of interpretation, there is simply no way around the fact that when § 365(p)(1) refers to the "trustee," it means the trustee—and, accordingly, that if the *trustee* does not assume an unexpired lease, it drops out of the debtor's bankruptcy estate.

2

Even so, Microf contends that interpreting the word "trustee" in § 365(p)(1) to mean "trustee" will "actively thwart" Congress's intent. Br. of Appellant at 15. For support, Microf points to 11 U.S.C. § 365(p)(3), which states that "in a case under chapter 13, if the debtor is the lessee with respect to personal property and the lease is not assumed in the plan confirmed by the court, the lease is deemed rejected as of the conclusion of the hearing on confirmation." From that, Microf argues that the inverse "logically follows"—*i.e.*, that "if the lease *is* assumed in the confirmed plan, the lease is *not* rejected and the stay is *not* automatically terminated." Br. of Appellant at 16 (emphasis added). In other words, so long as

[3] Citing to cases like *In re Michalek*, 393 B.R. 642 (Bankr. E.D. Wis. 2008), Microf argues that "the same principles of liability for assumed lease defaults [should be] applied in Chapter 13 as in Chapter 11." Br. of Appellant at 12 n.33. We disagree. Section 1303—which addresses the "[r]ights and powers of [the] debtor" in a Chapter 13 case—is subtly, but importantly, different from § 1107(a)—which addresses the "rights . . . of a debtor in possession" in a Chapter 11 case. Under § 1107, Chapter 11 debtors are generally given "all the rights . . . of [the Chapter 11] trustee," subject to only a few exceptions. As explained in text, § 1303 is stingier: It gives the Chapter 13 debtor the trustee's authority only in a few, carefully delineated instances.

the lease is assumed in the plan, it remains part of the estate. We disagree for at least three reasons.

First, and most fundamentally, to the extent that Microf asserts that an unarticulated "inten[t]" can prevail over a statute's enacted text, it is just wrong. Following the Supreme Court, we have consistently held that the enacted text is the best (and often the only relevant) indication of legislative intent. *See, e.g.*, *Shotz v. Am. Airlines, Inc.*, 420 F.3d 1332, 1336 (11th Cir. 2005) ("[U]pon 'find[ing] the terms of a statute unambiguous, judicial inquiry is complete.'" (quoting *Burlington N. R.R. Co. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 461 (1987))); *see also Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992) ("[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there.").

Second, and in any event, Microf's logic is faulty. Not only does Microf's conclusion not "logically follow" from the text of § 365(p)(3), there's actually a name for the logical trap-door through which Microf has fallen—it's called the fallacy of "denying the antecedent," and it refers to "the incorrect assumption that if P implies Q then not-P implies not-Q," *NLRB v. Noel Canning*, 573 U.S. 513, 589 (2014) (Scalia, J., concurring). Section 365(p)(3) simply states that, in the event a lease is not assumed in the debtor's plan, the lease is deemed rejected. Contrary to Microf's assertion, the provision says nothing—one way or the other—

about what happens in the event that the debtor *does* assume the lease in his plan. Assumption in the plan, therefore, is a necessary condition to the lease remaining in the estate, but it is not alone sufficient.

Finally, a closer look at § 365(p)(3)—and its relation to § 365(p)(1)—confirms that even aside from its atextualism, Microf's trustee-doesn't-mean-trustee interpretation of § 365(p)(1) can't be right. According to Microf, § 365(p)(1) says that if the debtor (remember, Microf insists that "trustee" means the debtor) doesn't timely assume the lease, the lease is deemed rejected; and then § 365(p)(3) just goes on to repeat the exact same thing—that if the debtor doesn't timely assume the lease, the lease is rejected. We decline to accept such a strained—and needlessly repetitive—interpretation. *See In re Shek*, 947 F.3d 770, 778 (11th Cir. 2020) ("Th[e] surplusage canon obliges us, whenever possible, to disfavor an interpretation when that interpretation would render a 'clause, sentence, or word . . . superfluous, void, or insignificant.'" (quoting *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001)). It makes much more sense—and gives meaning to each of the words that Congress used—to interpret § 365(p)(1) as addressing the trustee's (as in the *trustee's*) authority to assume a lease on behalf of the estate and § 365(p)(3) as addressing the debtor's ability to assume the lease on behalf of

himself.[4] *See In re Ruiz*, 2012 WL 5305741 at *3 n.5 (Bankr. S.D. Fla., Feb. 15, 2012) ("[T]he only logical interpretation of section 365(p)(1) and section 365(p)(3) is that the chapter 13 debtor has a right to assume an executory contract separate from the estate's rights and obligations—similar to reaffirmation in chapter 7.").

3

Lastly, Microf argues consequences—in particular, it says that interpreting "trustee" to mean "trustee" in § 365(p) will create a "seismic shift" in bankruptcy law. Br. of Appellant at 9. Relying on the principle that courts "will not read the Bankruptcy Code to erode past bankruptcy practice absent a clear indication that Congress intended such a departure," *Cohen v. De La Cruz*, 523 U.S. 213, 221 (1998) (quotation omitted), Microf argues that if Congress had intended § 365(p)(1) to depart from what it calls the "decades of Chapter 13 practice and case law" permitting debtors to obligate the estate through their assumption of an unexpired lease, it would have done so more explicitly. Br. of Appellant at 7. In the same vein, Microf also asserts that a plain-text interpretation will "wreak

[4] Microf opposes this reading by pointing to § 365(p)(2)—which provides for personal lease assumption on behalf of a debtor in a Chapter 7 case—and arguing that if Congress had meant to provide for personal lease assumption in Chapter 13 cases, it would have done so through language similar to that found in § 365(p)(2). Again, we disagree. Unlike a Chapter 13 bankruptcy, a Chapter 7 bankruptcy doesn't involve a bankruptcy plan. So if Congress wanted (as we think it did) to allow a Chapter 13 debtor to personally assume a lease *through his bankruptcy plan*, it would make sense (as we think it does) for the Chapter 13 personal-lease-assumption provision's phrasing to diverge from § 365(p)(2)'s.

procedural havoc" in Chapter 13 cases. Br. of Appellant at 17. Again, we are unconvinced.

First off, we reject Microf's baseline premise that reading § 365(p)(1) in accordance with its plain language effects a "fundamental change" in Chapter 13 practice. Br. of Appellant at 29. Based on our review, few federal courts—and no courts of appeals—have been asked to interpret § 365(p)(1) directly.[5] And the scant precedent Microf cites in support of its interpretation of § 365(p)(1) is hardly definitive: The decisions on which it relies aren't directly applicable, don't bind us, and contravene other (equally non-binding) caselaw[6]—hardly the stuff of which well-established bankruptcy practice is made. To be fair, as Microf points out, some commentators appear to agree with its contention that a Chapter 13 debtor

[5] As Microf notes, a number of courts have tackled the big-picture question we face here—whether a debtor can obligate the estate through the Chapter 13 plan alone—without considering the effect of § 365(p)(1). We think that Microf is wrong, however, to suggest (Br. of Appellant at 22) that those courts' decisions can be characterized as "consistent[]." *Compare, e.g.*, *In re Parmenter*, 527 F.3d 606, 610 (6th Cir. 2008) ("Whereas a Chapter 11 debtor-in-possession acts on behalf of the estate when it assumes a lease and thus creates a legal obligation on the estate, a Chapter 13 debtor who assumes and pays for a lease outside of the plan does not." (citation omitted)), *with, e.g.*, *In re Wells*, 378 B.R. 557, 561 (Bankr. S.D. Ohio 2007) ("Even if a [Chapter 13] plan requires a debtor to make direct payments to a lessor outside the plan, the assumption of the lease obligates the estate as a guarantor.").

[6] Microf cites *In re Jack*, 579 B.R. 627, 629–30 (Bankr. M.D. Fla. 2017), and *In re Johnson*, 203 B.R. 498, 503 (Bankr. S.D. Ga. 1996), both of which suggest that a Chapter 13 *debtor* can satisfy the requirements of § 365(d)—which, like the text of § 365(p)(1) appears to apply only to the "trustee." Compare those cases, however—which, because they don't interpret § 365(p)(1), provide only indirect support for Microf's interpretation—with *In re Ruiz*, 2012 WL 5305741 at *3 (Bankr. S.D. Fla. Feb. 15, 2012), which rejects Microf's § 365(p)(1) interpretation head-on. *See id.* ("Section 365(p) . . . clearly distinguishes between assumption by the trustee on behalf of the estate and assumption by the debtor. In this case, since the chapter 13 trustee did not assume the . . . [l]ease, it ceased to be property of the estate under section 365(p)(1).").

has the power, on his own, to assume a lease on behalf of the bankruptcy estate. *See, e.g.*, Collier on Bankruptcy ¶ 1322.11 (Richard Levin & Henry J. Sommer eds., 16th ed. 2020) ("Ordinarily, the chapter 13 debtor exercises the estate's power to assume or reject a lease through a provision in the chapter 13 plan, which only a debtor may file."). Others, though, recognize the interpretation that we adopt here. *See* Chapter 13 Practice and Procedure, *supra*, at § 6:10 (stating that under one view of § 365, even "[i]f a Chapter 13 debtor assumes a lease . . . it is no longer property of the estate" as long as "the trustee has not assumed it"). At the very least, most commentators agree that the issue—As between the debtor and the trustee, who has the authority to obligate the bankruptcy estate by assuming a lease?—is unresolved. *See* 7 Norton Bankruptcy Law & Practice (3d ed.) § 149:12 (stating that, when it comes to lease assumption, the roles played by the debtor and the trustee are "still somewhat confused" and that "[i]t is not clear whether Congress intended both the Chapter 13 trustee and the Chapter 13 debtor to independently possess the assumption, rejection, or assignment powers described in Code § 365."). We are confident, therefore, that bankruptcy law and practice—at least insofar as debtors, trustees, and lease assumption are concerned—are far less settled than Microf claims and, accordingly, that the clear-statement-like canon that it invokes is irrelevant.

We hasten to add, though, that even if Microf were right about the state of the law—and that, prior to § 365(p)'s enactment in 2005, courts had consistently held that the debtor has the independent power to assume an unexpired lease on behalf of the bankruptcy estate—it wouldn't change our decision. It's certainly true that courts are reticent to disrupt the established bankruptcy landscape without clear evidence of congressional intent to do so. *See Hall*, 566 U.S. at 518. But it's hard for us to imagine a clearer directive than the one Congress provided in § 365(p)(1). Even assuming it once existed, the principle of bankruptcy law that Microf touts—that a Chapter 13 debtor can unilaterally obligate his bankruptcy estate by assuming an unexpired lease in his plan—was upended, and is now foreclosed, by § 365(p)(1), which states unambiguously that "[i]f a lease of personal property is . . . not timely assumed by the trustee . . . the leased property is no longer property of the estate." If a clear statement was necessary, § 365(p)(1), it seems to us, provides it.

We also reject Microf's related assertion that interpreting "trustee" in § 365(p)(1) to mean "trustee" will "wreak procedural havoc" in Chapter 13 cases "by necessitating the needless filing of thousands upon thousands of motions each year." Br. of Appellant at 8. Essentially, Microf contends that reading § 365(p)(1) to mean what it says will "require[] that the trustee file a motion prior to plan confirmation every time that the bankruptcy estate assumes a lease"—a

requirement, it says, that will cause "judicial waste and a lack of clarity as to the rights of the parties." *Id.* at 17. We disagree.

As an initial matter, it's not at all clear that the filings to which Microf objects would be "needless." Whether an assumed, unexpired lease obligates the bankruptcy estate is a big deal—not just for the lessor seeking overdue post-petition lease payments, but also for the other creditors, whose claims the lessor is trying to leapfrog. *See In re Parmenter*, 527 F.3d 606, 608 (6th Cir. 2008). We think it makes good sense to require the trustee—the representative of the Chapter 13 estate, as well as *all* creditors—to affirmatively assume an unexpired lease as a precondition to obligating the estate, especially given that the bankruptcy court is under no obligation to scrutinize the wisdom of a debtor's decision to assume an unexpired lease. *See In re Rosenhouse*, 453 B.R. 50, 56 (Bankr. E.D.N.Y. 2011) ("Unlike in a chapter 11 case, the Bankruptcy Code and Rules do not establish any requirement that the court approve a chapter 13 debtor's assumption of a personal property lease as being in the best interests of creditors or the bankruptcy estate, or even as a proper exercise by the debtor of his or her business judgment."); *see also In re Juvennelliano*, 464 B.R. 651, 654 (Bankr. D. Del. 2011) (noting that, because "[t]he assumption of an unexpired lease under chapter 13 is typically not subject to the same level of scrutiny as in a chapter 11 case . . . it is perhaps less appropriate

to burden the creditors of a chapter 13 debtor with the economic consequences of an improvident lease assumption").

But even if it *didn't* make good sense to us—even if we thought it inefficient to require a Chapter 13 trustee to affirmatively assume an unexpired lease as a precondition to obligating the estate—it wouldn't much matter. In the end, our job isn't to decide which reading of § 365(p)(1) produces the best bankruptcy-law system; rather, our job is to determine what the text of § 365(p)(1) requires. *See Puerto Rico v. Franklin California Tax-Free Trust*, 136 S. Ct. 1938, 1946 (2016) ("The plain text of the Bankruptcy Code begins and ends our analysis.").

* * *

It is of course possible that Microf is right, and that when Congress drafted 11 U.S.C. § 365(p)(1) it just whiffed—it said "trustee" when what it really meant was "debtor." That possibility, though, cannot control our disposition. *See CRI-Leslie v. Comm'r of Internal Revenue*, 882 F.3d 1026, 1033 (11th Cir. 2018) ("Perhaps . . . Congress just stubbed its toe between the hearing room and the House and Senate floors. Even so, it's not our place or prerogative to bandage the resulting wound."). For both formal and practical reasons, which occasionally bear repeating—perhaps particularly in a case like this—our loyalty must lie with the text that Congress enacted. As a formal matter, it is only the enacted text that was introduced, agreed to, and passed by both houses of Congress and then presented to

and signed by the President in accordance with the Constitution. *See* U.S. Const. art. I, § 7. As a practical matter, hewing closely to the enacted text serves multiple important (and complimentary) interests: (1) it gives the citizenry clear notice of what the law requires; (2) it requires Congress to exercise caution when drafting statutes; and (3) it ensures that courts adhere to their designated—and limited—role.

III

The language of 11 U.S.C. § 365(p)(1) is crystal clear: "If a lease of personal property is rejected or not timely assumed by the trustee . . . the leased property is no longer property of the estate." That provision means what it says, and so here—where it's undisputed that the trustee did *not* assume the Microf lease—it means that the Microf lease dropped out of the bankruptcy estate upon confirmation of Cumbess's Chapter 13 plan. Accordingly, and because Microf has not otherwise shown that the lease confers a benefit on the estate,[7] its claim for administrative-expense priority was properly denied.

AFFIRMED.

[7] There is one loose end: Microf seems to assume that its claim turns entirely on the estate-asset issue—*i.e.*, whether the lease remained in the estate after confirmation of Cumbess's Chapter 13 plan. Indeed, Microf doesn't offer any argument why, even if the lease dropped out of the estate after confirmation, it might *still* be entitled to an administrative-expense claim. *See* Br. of Appellant at 9, 19, 27. Microf seems to concede, therefore, that if it loses on the estate-asset issue (which we've held it does), its claim fails.

Third District Court of Appeal

State of Florida

Opinion filed June 3, 2020.
Not final until disposition of timely filed motion for rehearing.

Nos. 3D18-1989 & 3D18-620
Lower Tribunal No. 15-23985

Diageo Dominicana, S.R.L., et al.,
Appellants/Cross-Appellees,

vs.

United Brands, S.A.,
Appellee/Cross-Appellant.

Appeals from the Circuit Court for Miami-Dade County, William Thomas, Judge.

Hunton Andrews Kurth LLP, and Samuel A. Danon, Gustavo J. Membiela, María Castellanos Alvarado, and Elbert Lin (Richmond, VA), for appellants/cross-appellees.

Akerman LLP, and Gerald B. Cope, Jr., Francisco A. Rodriguez, and Andrew J. Dominguez, for appellee/cross-appellant.

Before SALTER, LINDSEY, and HENDON, JJ.

HENDON, J.

Diageo Dominicana, S.R.L., Diageo plc, Diageo Brands, B.V., and Ketel One Worldwide, B.V. (collectively, "Diageo"), appeals from a final judgment arising out of United Brands' Corrected Amended Counterclaim, in which the jury found in Count IV that Diageo breached the implied covenant of good faith and fair dealing in its agreement with United Brands, S.A. ("United Brands."). United Brands cross-appeals from the final judgment regarding its fraud and punitive damages claim. We reverse that part of the final judgment finding Diageo liable on Count IV of United Brands' Corrected Amended Counterclaim. We affirm the remainder of the final judgment.

I. Background

Diageo is one of the largest producers of alcoholic beverages worldwide. Beginning in 2009, United Brands became Diageo's exclusive distributor in the Dominican Republic. The parties executed a Resale Agreement that memorialized their respective duties, expectations, and obligations under their working agreement. The Resale Agreement also memorialized the terms under which the venture could be terminated, and included a provision excluding implied warranties. Both parties agreed to be bound by the Resale Agreement. From 2009 through 2013, United Brands managed five key accounts for Diageo. During this time, both companies continued to grow and prosper. In August of 2013, Diageo approached United

Brands regarding an initiative called the “Route to Consumer” project. The goal of this project was to develop strategies aimed at reducing intermediaries in order to market more directly to retailers. Under Diageo’s proposed initiative, United Brands would need to expand its capabilities in order to market and distribute Diageo’s products on a broader scale, with the suggestion that undertaking this initiative would transform United Brands into a world-class distributor. United Brands’ decision to pursue the new initiative was made in reliance on documented statements made to United Brands by Jaime Graña, Diageo’s managing director of the western Latin America and Caribbean division. These statements indicated that Diageo intended to continue the exclusive contractual relationship with United Brands if United Brands made the structural transformations necessary to implement the Route to Consumer project. In reliance on these reassurances, United Brands agreed to invest and restructure. Between March 2014 and February 2015, United Brands invested $5.7 million in hiring additional personnel, purchasing new capital equipment, acquiring larger office and operational space and promoting Diageo products.

In January 2014, Diageo made an internal decision to evaluate additional product distribution plans, and developed a relationship with a company named Mercasid, a direct competitor of United Brands. In September 2014, Diageo and Mercasid entered into a letter of intent to effectively replace United Brands as

Diageo's exclusive distributor while continuing to allow United Brands to perform as usual under the Resale Agreement. In February 2015, Diageo gave United Brands timely notice of its intention to terminate the Resale Agreement. Because United Brands was bound by the Resale Agreement to market only Diageo products, its business suffered. As a result of Diageo's termination of the Resale Agreement, United Brands was forced to lay off employees and reduce its operations.

In August 2015, United Brands filed suit against Diageo Dominicana and Mercasid in the Dominican Republic. Diageo responded by filing this case in Miami-Dade County seeking declaratory relief and an anti-suit injunction to prevent United Brands from litigating its claims in the Dominican Republic pursuant to the forum selection clause in the Resale Agreement. The trial court entered an order granting Diageo's request and enjoined United Brands from pursuing its claims against Diageo in the Dominican Republic.[1] On appeal, this Court affirmed. United Brands then filed a counterclaim in Miami-Dade County for breach of implied covenant of good faith and fair dealing, breach of contract, and fraud. The trial court denied the Diageo entities' motion to dismiss the counterclaim.[2] The trial court subsequently

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[1] Diageo Dominicana subsequently obtained expansion of the scope of the injunction to preclude United Brands from pursuing its claims in the Dominican Republic against defendants Diageo Brands and Ketel One Worldwide.

[2] Diageo has since voluntarily dismissed its appeal of the lower court's non-final order denying its motion to dismiss, originally docketed under Case No. 3D18-449 and later consolidated with Case No. 3D18-1989.

granted United Brands' leave to amend its counterclaim to include a claim for punitive damages in connection with its fraud count. Diageo[3] filed a petition for writ of certiorari challenging the grant of leave to amend the counterclaim to add punitive damages. Later, that petition was rendered moot.[4]

After a twelve-day trial, the jury determined that Diageo did not breach the Resale Agreement when it terminated United Brands in accordance with that contract's terms (Counts II and III of the Corrected Amended Counterclaim). On Count IV of United Brands' Corrected Amended Counterclaim, the jury found that Diageo breached the implied covenant of good faith and fair dealing and awarded United Brands $2.3 million in damages. The trial court denied Diageo's motion to set this verdict aside. On Counts VI and VII, United Brands' fraud counts, the jury found Diageo was not liable. The jury similarly found in Count VIII that Graña was not liable for negligent misrepresentation regarding the Route to Consumer project.

The trial court instructed the jury that it could award punitive damages under Count IX only if it found Diageo liable for fraud. The interrogatory verdict form for

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[3] Excluding Diageo Dominicana.

[4] Diageo's petition for certiorari challenging the trial court's order allowing United Brands to amend its counterclaim to add a claim for punitive damages was originally docketed under Case No. 3D18-620 and later consolidated with Case No. 3D18-1989. We agree with United Brands' statement at oral argument that the jury's findings of punitive damages subsequent to the filing of the petition for certiorari render this petition moot.

Count IX, however, shows that the jury found, in contrast to its prior verdicts in Counts VII and VIII, that Graña, on Diageo's behalf, was personally guilty of intentional misconduct or gross negligence that caused damage to United Brands in connection with its fraud claim. The jury awarded $2.3 million in punitive damages against Diageo plc.

Prior to discharge of the jury, United Brands argued that the jury's findings were inconsistent and contradictory. It argued that the jury's finding in Counts VI, VII, and VIII – that Diageo and Graña were not liable for negligent or intentional fraud and misrepresentation – was apparently contradicted by their finding in Count IX, the punitive damages count, that Graña was liable for intentional misconduct in connection with United Brands' fraud claim, for which they awarded punitive damages. United Brands asked the trial court to return the fraud and punitive damage counts to the jury to deliberate further and resolve the apparent inconsistency. The trial court declined to submit the issue to the jury, and instead entered the final judgment against Diageo on the breach of implied covenant claim, and awarded $2.3 million to United Brands in compensatory damages. The trial court vacated the punitive damage award in Count IX.

On appeal, Diageo appeals from the trial court's denial of its motion to set aside the verdict, and seeks to vacate the final judgment. It argues that judgment should be entered in its favor with respect to United Brands' claim for breach of the

implied covenant of good faith and fair dealing. We agree, and reverse that portion of the final judgment finding Diageo liable for breach of implied covenant of good faith and fair dealing. On United Brands' cross-appeal seeking a new trial on fraud and punitive damages, we affirm.

II. Breach of the implied covenant of good faith and fair dealing.

A. Standard of Review

The standard of review of a trial court's grant or denial of a motion for directed verdict is de novo. See Contreras v. U.S. Sec. Ins. Co., 927 So. 2d 16, 20 (Fla. 4th DCA 2006); Publix Super Markets, Inc. v. Bellaiche, 245 So. 3d 873, 875 (Fla. 3d DCA 2018). However, "[a]n appellate court reviewing the grant of a directed verdict must view the evidence and all inferences of fact in the light most favorable to the nonmoving party, and can affirm a directed verdict only where no proper view of the evidence could sustain a verdict in favor of the nonmoving party." Owens v. Publix Supermarkets, Inc., 802 So. 2d 315, 329 (Fla. 2001) (citation omitted).

B. Discussion

United Brands asserts that Diageo breached the implied covenant of good faith and fair dealing inherent in the Resale Agreement by striking a behind-the-back deal with a competitor while promising to continue the relationship with United Brands, thus violating the reasonable expectations of the parties. Florida contract law

recognizes the implied covenant of good faith and fair dealing in every contract. Cty. of Brevard v. Miorelli Eng'g, Inc., 703 So. 2d 1049, 1050 (Fla. 1997) ("'[E]very contract includes an implied covenant that the parties will perform in good faith.'" quoting Champagne–Webber, Inc. v. City of Fort Lauderdale, 519 So. 2d 696, 697 (Fla. 4th DCA 1988)); Ins. Concepts & Design, Inc. v. Healthplan Servs., Inc., 785 So. 2d 1232, 1234–35 (Fla. 4th DCA 2001). The implied covenant of good faith and fair dealing is designed to protect the contracting parties' reasonable expectations. Speedway SuperAmerica, LLC v. Tropic Enters., Inc., 966 So. 2d 1, 3 (Fla. 2d DCA 2007); Cox v. CSX Intermodal, Inc., 732 So. 2d 1092, 1097 (Fla. 1st DCA 1999). However, there are two limitations on such claims: (1) where application of the covenant would contravene the express terms of the agreement; and (2) where there is no accompanying action for breach of an express term of the agreement. QBE Ins. Corp. v. Chalfonte Condo. Apartment Ass'n, Inc., 94 So. 3d 541, 548 (Fla. 2012) quoting Ins. Concepts, 785 So. 2d at 1234. A duty of good faith must "relate to the performance of an express term of the contract and is not an abstract and independent term of a contract which may be asserted as a source of breach when all other terms have been performed pursuant to the contract requirements." Id. (quoting Hosp. Corp. of Am. v. Fla. Med. Ctr., Inc., 710 So. 2d 573, 575 (Fla. 4th DCA 1998)); see also Johnson Enter. of Jacksonville, Inc. v. FPL Group, Inc., 162 F.3d 1290, 1314 (11th Cir. 1998) ("[G]ood faith requirement does not exist 'in the air'. Rather, it

attaches only to the performance of a specific contractual obligation.”). Allowing a claim for breach of the implied covenant of good faith and fair dealing “where no enforceable executory contractual obligation” exists would add an obligation to the contract that was not negotiated by the parties. Hospital Corp., 710 So. 2d at 575.

The jury found that Diageo did not breach the Resale Agreement, did not violate the termination provision of the Agreement, and fulfilled all of its contractual obligations under the Agreement. As discussed earlier, the Resale Agreement negotiated by the parties contained express provisions detailing the manner in which the agreement could be mutually terminated. The record on appeal shows that Diageo properly terminated the Agreement according to the express termination provision. The Resale Agreement also contained a provision that excluded any conditions, representations, and warranties implied by statute or common law that were not expressly included in the agreement. Those contract provisions are unambiguous. The provision waiving implied warranties not expressly set forth in the Agreement, coupled with the provision that gave either party the right to terminate the Resale Agreement with three months’ notice, does not implicate breach of the implied warranty of good faith and fair dealing because Diageo terminated the

Agreement pursuant to the plain and unambiguous termination provision of that contract.[5]

On de novo review of the record on appeal, we reverse the final judgment and remand for entry of judgment in favor of Diageo as to Count IV of United Brands' Corrected Amended Counterclaim for breach of implied covenant of good faith and fair dealing, and vacate the award of $2.3 million in damages to United Brands.

III. United Brands' cross-appeal.

In its cross-appeal, United Brands seeks to remand for a new trial on its Count VIII fraud claim and Count IX punitive damages claim. We affirm the trial court's denial of United Brands' motion for new trial.

A. Standard of review

Our standard of review on denial of a motion for new trial is whether the trial court abused its discretion. Brown v. Estate of Stuckey, 749 So. 2d 490, 497–98 (Fla. 1999); Graham Companies v. Amado, 45 Fla. L. Weekly D877 (Fla. 3d DCA, Apr. 15, 2020).

B. Discussion

[5] The Resale Agreement was the product of knowledgeable businesspeople negotiating in their own self-interest. Indeed, the Resale Agreement provision, in which each party acknowledged that all implied warranties not expressly set forth are excluded, finishes with the statement that, "[e]ach party had the opportunity to consult with counsel of its choice prior to entering into this Agreement."

The jury was properly instructed that it could award punitive damages in Count IX only if it found Diageo committed fraud. The jury determined in Counts VI, VII, and VIII that Diageo and Graña, on Diageo's behalf, did not commit fraud or intentional misrepresentation. However, in Count IX, the count for punitive damages, the jury found that Graña, on Diageo's behalf, personally committed intentional misconduct or gross negligence, and the jury thus awarded punitive damages. The trial court polled the jury, and the jury affirmed their verdict that Diageo did not commit fraud. Prior to discharge of the jury, United Brands' counsel objected to the punitive damages verdict and argued that the finding of no substantive fraud was inconsistent with an award of punitive damages. United Brands' counsel asked the trial court to return the verdict to the jury to resolve the apparent inconsistency by revisiting their findings of fraud. The trial court concluded that the jury's finding of no fraud in any of the substantive fraud counts meant there could be no award of punitive damages, and denied United Brands' request to send the verdicts back to the jury for reconsideration. The trial court subsequently denied United Brands' post-judgment motion for new trial on the fraud and punitive damages claims, and granted Diageo's motion to strike the punitive damage award as a departure from the jury instructions and applicable law.

We agree that without a finding of liability on the underlying fraud claims there can be no valid award of punitive damages. See Cont'l Assur. Co. v. Davis,

538 So. 2d 542, 544 (Fla. 1st DCA 1989); Oliveira v. Ilion Taxi Aero Ltda, 830 So. 2d 241(Fla. 4th DCA 2002) (reversing the award of punitive damages where, as a matter of law, a judgment for damages cannot be entered where there is no finding of liability). Finding no abuse of discretion, we affirm the trial court's denial of United Brands' motion for new trial, and affirm the final judgment for Diageo on the fraud and punitive damages claims.

Reversed in part; Affirmed in part.