

## [In re B.C.I. Fins. Pty Ltd. \(In Liquidation\)](#)

United States Bankruptcy Court for the Southern District of New York

April 24, 2018, Decided

Chapter 15, Case No. 17-11266 (SHL)

### Reporter

2018 Bankr. LEXIS 1217 \*

In re: **B.C.I. FINANCES** PTY LIMITED (In Liquidation),  
et al., Debtors in a Foreign Proceeding.

### Core Terms

Parties', Liquidators, Objecting, objecting party, situs, retainer, Reply, fiduciary duty claim, foreign law, cases, declarations, courts, requirements, eligibility, choice-of-law, chose in action, breach of fiduciary duty, resides, substantive law, conclusions, proceedings, determines, concludes, entities, deposited, notice, fiduciary duty, proposed order, state law, non-bankruptcy

### Case Summary

#### Overview

**HOLDINGS:** [1]-Two individuals who were appointed by an Australian court to liquidate Australian companies ("debtors") that operated primarily as intercompany borrowing and lending entities within a group of companies controlled by family members met their burden of showing that the proceedings in Australia were "foreign proceedings" that were eligible for recognition under Chapter 15 of the Bankruptcy Code; [2]-The debtors met the requirement imposed by *11 U.S.C.S. § 109(a)* that they have property in the United States when they placed retainers of \$1,250 in the trust account of the liquidators' counsel, and recognition was required so the liquidators could conduct discovery pertaining to two members of the family who had moved to the United States and repeatedly opposed compliance with or participation in various proceedings related to entities their family controlled in Australia.

#### Outcome

The court granted the liquidators' petition for recognition.

### LexisNexis® Headnotes

Bankruptcy Law > Ancillary & Other Cross Border Cases > Qualifications to be a Debtor

#### [HN1](#) **Ancillary & Other Cross Border Cases, Qualifications to be a Debtor**

Chapter 15 of the Bankruptcy Code and the Model Law are designed to optimize disposition of international insolvencies by facilitating appropriate access to the court system of a host country (the United States, in the case of Chapter 15) by a representative of an insolvency proceeding pending in a foreign country. [11 U.S.C.S. § 1521](#). [11 U.S.C.S. § 1517\(a\)](#) provides that a court shall, after notice and a hearing, enter an order recognizing a foreign main proceeding if: (1) such foreign proceeding for which recognition is sought is a "foreign main proceeding" within the meaning of [11 U.S.C.S. § 1502](#); (2) the foreign representative applying for recognition is a person or body; and (3) the petition meets the requirements of [11 U.S.C.S. § 1515](#). A "foreign proceeding" is defined as a collective judicial or administrative proceeding in a foreign country, including an interim proceeding, under a law relating to insolvency or adjustment of debt in which proceeding the assets and affairs of a debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation. *11 U.S.C.S. § 101(23)*.

Bankruptcy Law > Ancillary & Other Cross Border Cases > Qualifications to be a Debtor

#### [HN2](#) **Ancillary & Other Cross Border Cases, Qualifications to be a Debtor**

A "foreign representative" under the U.S. Bankruptcy Code is a person or body, including a person or body appointed on an interim basis, authorized in a foreign

proceeding to administer the reorganization or the liquidation of a debtor's assets or affairs or to act as a representative of such foreign proceeding. *11 U.S.C.S. § 101(24)*. Such a "person" includes an individual, partnership, or corporation. *11 U.S.C.S. § 101(41)*.

Bankruptcy Law > Ancillary & Other Cross Border Cases > Qualifications to be a Debtor

### [HN3](#) **Ancillary & Other Cross Border Cases, Qualifications to be a Debtor**

[11 U.S.C.S. § 1517\(b\)\(1\)](#) provides that a foreign main proceeding shall be recognized if it is pending in a country where a debtor has its center of its main interests, which is commonly referred to as a debtor's "COMI." The Bankruptcy Code presumes that in the absence of evidence to the contrary, a debtor's registered office is the debtor's COMI. [11 U.S.C.S. § 1516\(c\)](#). To determine a debtor's COMI, courts in the Second Circuit consider the location of the debtor's headquarters, the location of those who actually manage the debtor, the location of the debtor's primary assets, the location of the majority of the debtor's creditors or of a majority of the creditors who would be affected by the case, and/or the jurisdiction whose law would apply to most disputes. Under the Bankruptcy Code, an order of recognition "shall" be entered if a foreign representative's petition meets the requirements of [11 U.S.C.S. § 1515](#). [11 U.S.C.S. § 1517\(a\)\(3\)](#).

Bankruptcy Law > ... > Bankruptcy > Debtor Benefits & Duties > Eligibility

Bankruptcy Law > Ancillary & Other Cross Border Cases > Qualifications to be a Debtor

### [HN4](#) **Debtor Benefits & Duties, Eligibility**

Under *11 U.S.C.S. § 109(a)*, only a person who resides or has a domicile, place of business, or property in the United States may be a debtor under the Bankruptcy Code. The United States Court of Appeals for the Second Circuit has held that this requirement applies to Chapter 15 bankruptcy cases.

Bankruptcy Law > ... > Bankruptcy > Debtor Benefits & Duties > Eligibility

Bankruptcy Law > Ancillary & Other Cross Border Cases > Qualifications to be a Debtor

### [HN5](#) **Debtor Benefits & Duties, Eligibility**

It is well established that a debtor's funds held in a retainer account in the possession of counsel to a foreign representative constitute property of the debtor in the United States and satisfy the eligibility requirements of *11 U.S.C.S. § 109*.

Bankruptcy Law > ... > Bankruptcy > Debtor Benefits & Duties > Eligibility

Bankruptcy Law > Ancillary & Other Cross Border Cases > Qualifications to be a Debtor

### [HN6](#) **Debtor Benefits & Duties, Eligibility**

As a general matter, courts that have construed the "property" requirement in *11 U.S.C.S. § 109* with respect to foreign corporations and individuals have found the eligibility requirement satisfied by even a minimal amount of property located in the United States. *Section 109(a)* only says that a debtor must have property; it says nothing about the amount of such property nor does it direct that there be any inquiry into the circumstances surrounding a debtor's acquisition of the property. It would be contrary to the plain meaning of the statute to impose a quantum of property or a requirement that such property be "substantial." This approach is also consistent with how cases have interpreted *§ 109* for foreign companies outside of the context of Chapter 15 of the U.S. Bankruptcy Code. Several courts have held that nominal amounts of property in the United States enable a foreign corporation to qualify as a debtor under *§ 109(a) of the Bankruptcy Code*.

Bankruptcy Law > ... > Bankruptcy > Estate Property > Contents of Estate

### [HN7](#) **Estate Property, Contents of Estate**

The nature or scope of a debtor's interest in property is determined by "local" or "state" law.

Civil Procedure > ... > Federal & State Interrelationships > Choice of Law > Governmental

Interests

### [HN8](#) **Choice of Law, Governmental Interests**

Under New York choice-of-law rules, the law of the jurisdiction having the greatest interest in the litigation will be applied.

Evidence > Judicial Notice > Legislative Facts > Laws of Foreign States

### [HN9](#) **Legislative Facts, Laws of Foreign States**

[Fed. R. Civ. P. 44.1](#) provides that a party who intends to raise an issue about a foreign country's law must give notice by a pleading or other writing. In determining foreign law, a court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. A court's determination must be treated as a ruling on a question of law. [Fed. R. Civ. P. 44.1](#). By [Rule 44.1](#), a court is empowered to make determinations regarding foreign law, and granted discretion to decide on its own informed judgment what materials to consider in doing so.

Evidence > Judicial Notice > Legislative Facts > Laws of Foreign States

### [HN10](#) **Legislative Facts, Laws of Foreign States**

When a court considers the declarations of foreign law experts, it is not the credibility of the experts that is at issue; rather, it is the persuasive force of the opinions they express.

Evidence > Judicial Notice > Legislative Facts > Laws of Foreign States

### [HN11](#) **Legislative Facts, Laws of Foreign States**

The United States Bankruptcy Court for the Southern District of New York rejects the argument that there must be perfect clarity before applying foreign law. Foreign law should be argued and briefed like domestic law. Applying foreign law might pose a burden, but interpreting (1) decisions from foreign courts, (2) foreign statutes, and (3) local ordinances is precisely the kind of work American judges perform on a daily basis.

Evidence > Judicial Notice > Legislative Facts > Laws of Foreign States

### [HN12](#) **Legislative Facts, Laws of Foreign States**

Courts have typically found proof of foreign law to be insufficient under [Fed. R. Civ. P. 44.1](#) only where there was a complete failure to raise an issue of foreign law or present any supporting material.

**Counsel:** [\*1] For John Sheahan and Ian Russell Lock as Liquidators: Robert N. H. Christmas, Esq., Christopher J. Fong, Esq., NIXON PEABODY LLP, New York, New York.

For Ligon 158 Pty Limited and Andrew Binetter: Adam H. Friedman, Esq., Jonathan T. Koevary, Esq., OLSHAN FROME WOLOSKY LLP, New York, New York.

**Judges:** Sean H. Lane, UNITED STATES BANKRUPTCY JUDGE.

**Opinion by:** Sean H. Lane

## Opinion

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### MEMORANDUM OF DECISION

SEAN H. LANE

UNITED STATES BANKRUPTCY JUDGE

Before the Court are the foreign representatives' petitions for recognition under Chapter 15 of the Bankruptcy Code of the Australian liquidation proceedings of debtors ***B.C.I. Finances*** Pty Limited, BinQld Finances Pty Limited, E.G.L. Development (Canberra) Pty Limited, and Ligon 268 Pty Limited (the "Debtors"). See *Memorandum of Law in Support of Chapter 15 Petition* (the "Recognition Motion") [ECF No. 9]. Recognition is objected to by Ligon 158 Pty Limited and Andrew Binetter (the "Objecting Parties"). See *Objection to Verified Petitions for Recognition* (the "Recognition Objection") [ECF No. 16]. For the reasons that follow, the Court grants recognition.

### BACKGROUND

The Debtors were Australian companies that operated primarily as intercompany borrowing and lending entities within [\*2] a group of companies controlled and operated by the Binetter family. See *Decl. of Tobin P. Meagher* ("Meagher Petition Decl.") ¶¶ 6, 7 [ECF No. 6]; see also Transcript of Hearing held on June 27, 2017 ("Hr'g Tr.") 62:17-22, 63:15-19 [ECF No. 25]. Andrew, Michael, Margaret, and Gary Binetter each held various director and management positions for the Debtors from as early as the mid-1990's. See *App'x To Petition, Tab 1* (decision of Honourable Justice Gleeson of the Federal Court of Australia) ("Australian Decision") ¶¶ 19, 34-36, 46-47, 49, 59, 60 [ECF No. 2]. The Debtors were the subject of extended investigation by the Australian Taxation Office, and received significant tax assessments that they were unable to satisfy. See Hr'g Tr. 63:22-64:6; Australian Decision ¶ 2, 100. The audit also resulted in findings of "fraud or evasion" by the Commissioner of Taxation. Australian Decision ¶ 2. The Debtors are each in liquidation in Australia, are not operating, and have not traded for many years. See *Decl. of Chris Ardagna in Support of Objection to Verified Petitions for Recognition* ¶ 11 [ECF No. 16-2].

In August 2014, John Sheahan and Ian Russell Lock (together, the "Liquidators") were [\*3] appointed as joint and several liquidators of the Debtors in the Australian liquidation proceedings. See *Meagher Petition Decl.* ¶¶ 1, 8. In January 2015, the Liquidators brought a proceeding in the Federal Court of Australia seeking compensation relating to the Debtors' tax assessments, claiming that the actions of the Debtors' directors that caused or contributed to those liabilities constituted a breach of various statutory and fiduciary duties (the "SAD5/2015 Action"). See Australian Decision at PDF 3, and ¶¶ 4-8. Respondents in the SAD5/2015 Action include Andrew Binetter, Michael Binetter, other members of the Binetter family, Milgerd Nominees Pty Limited, Erma Nominees Pty Limited, Ligon 159 Pty Limited, Ligon 158 Pty Limited, the Estate of Emil Binetter, and the Estate of Erwin Binetter. See Australian Decision at PDF 3, 216, and ¶¶ 62-77. A trial was held before her Honour Justice Gleeson who issued a judgment finding that (i) most of the respondents, including Andrew and Michael Binetter, breached their duties as directors of one or more of the Debtors and/or was knowingly involved in the breaches; (ii) the breaches caused significant losses; and (iii) each of the respondents [\*4] was involved in certain breaches relating to the financial and taxation dealings of one or more of the Debtors and thereby caused different elements and amounts of losses suffered by the Debtors. See Hr'g Tr. 70:24-71:5; Australian

Decision ¶¶ 870-1028. As of summer 2017, the amount of damages remained to be determined by Justice Gleeson. See Hr'g Tr. 72:3-11. However, Andrew Binetter has admitted that the liability is at least AU\$20,000,000.00.<sup>1</sup> See *id.* 89:23-25 (reading a stipulation into the record).<sup>2</sup> At some point during the Australian proceedings, members of the Binetter family began to leave Australia.<sup>3</sup> Hr'g Tr. 72:17-73:8. Andrew and Michael Binetter currently reside in New York City. Hr'g Tr. 19:22-23, 72:17-73:4; see also *Supplemental Memorandum of Law in Further Support of Objection* ("Objecting Parties' Suppl. Br.") ¶ 3 [ECF No. 28].

The Liquidators seek recognition of the Debtors' Australian liquidation proceedings as foreign main proceedings under Chapter 15 of the Bankruptcy Code in order to facilitate the administration of the Debtors' [\*5] estates in Australia. Specifically, the Liquidators seek the assistance of this Court in gaining access to and/or conducting discovery of Andrew and Michael Binetter, and any Debtor assets, documents, or records they may have with them in the United States. See Hr'g Tr. 122:16-123:15; see also [In re Platinum Partners Value Arbitrage Fund L.P. \(In Official Liquidation\), et al., 2018 Bankr. LEXIS 1156, \\*14-\\*19 \(Bankr. S.D.N.Y. Apr. 17, 2018\)](#) (discussing discovery generally as a form of relief available to foreign representatives in Chapter 15 cases pursuant to several different provisions of the Bankruptcy Code). Mr. Sheahan believes that Andrew Binetter will not return to Australia voluntarily, and that Michael Binetter is unable to return due to ill-health. See Hr'g Tr. 122:16-123:15.

The Objecting Parties argue that the Debtors are not

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<sup>1</sup> At today's exchange rate this converts to more than USD\$15 million.

<sup>2</sup> The Liquidators also commenced a second proceeding based on substantially the same subject matter as the SAD5/2015 Action, but against the various third party entities whom they allege contributed to the tax fraud (the "NSD1600/2015 Action"). See Hr'g Tr. 73:20-74:8. As of summer 2017, this proceeding remained in progress. See *id.* 74:9-15.

<sup>3</sup> The parties acknowledge that Andrew Binetter is an Australian citizen (see Recognition Objection ¶ 6; *Reply of Petitioners to Objection* ("Reply") ¶ 2 [ECF No. 18]), and the Objecting Parties have not disputed the Liquidators' assertion that Michael Binetter is as well (see *Supplemental Memorandum by Petitioners in Further Support of Verified Petitions for Recognition* ("Debtors' Suppl. Br.") at 10 [ECF No. 26]).

eligible for relief under Chapter 15 because they have not satisfied *Section 109(a) of the Bankruptcy Code*, which dictates that "only a person that resides or has a domicile, a place of business, or property in the United States, or a municipality, may be a debtor under this title." *11 U.S.C. § 109*; see Recognition Objection ¶¶ 2, 16-17. Before commencing this case, the Debtors each placed retainers of \$1,250 in the trust account of the Liquidators' counsel in this case, Nixon Peabody LLP, which [\*6] they contend satisfies the property requirement under *Section 109(a)*. See Hr'g Tr. 91:24-92:2; 104:18-105:8, 110:22-23; Reply ¶ 11. The Liquidators also contend that the Debtors' fiduciary duty claims in the SAD5/2015 Action against Andrew and Michael Binetter (the "Fiduciary Duty Claims") constitute property in the United States. Reply ¶¶ 4, 9. In contrast, the Objecting Parties argue that the attorney retainer account does not satisfy *Section 109(a)* because the Liquidators improperly manipulated the Debtors' assets by placing funds in the New York account just to comply with the statute. See Recognition Objection ¶¶ 2, 16-17. The Objecting Parties further argue that the situs of the Debtors' other claimed property—the Fiduciary Duty Claims—is in Australia. See Objecting Parties' Suppl. Br. ¶¶ 7-8, 15-16, 28.

A hearing on the Recognition Motion was held on June 27, 2017 (the "Recognition Hearing"). See Hr'g Tr 1:16, 4:2-5. Subsequent to the Recognition Hearing and at the Court's request, the parties submitted additional briefing on the issue of the situs of the Fiduciary Duty Claims, including what law should resolve that question. See Debtors' Suppl. Br.; Objecting Parties' Suppl. Br. Extensive additional briefing [\*7] was provided by the parties. See *Declaration of Tobin P. Meagher* ("Meagher Decl.") [ECF No. 27] (supporting Australian legal analysis in Debtors' Suppl. Br.); *Limited Response to Supplemental Memorandum by Petitioners and Request to Re-Open Recognition Hearing* at 6 ("Objecting Parties' Limited Response") [ECF No. 33] (challenging Debtors' Australian legal analysis and the sufficiency of the record on Australian law); *Declaration of Chris Ardagna in Support of Objection to Verified Petitions for Recognition* ("Ardagna Decl.") ¶¶ 7, 12-13 [ECF No. 33-1] (supporting the Objecting Parties' Australian legal analysis); *Reply of Petitioners to Limited Response* [ECF No. 35]; *Declaration of Tobin P. Meagher in Support of Reply* ("Meagher Reply Decl.") [ECF No. 36].

## **DISCUSSION**

**HN1** [↑] "Chapter 15 and the Model Law are designed

to optimize disposition of international insolvencies by facilitating appropriate access to the court system of a host country (the United States, in the case of Chapter 15) by a representative of an insolvency proceeding pending in a foreign country." *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.*, 389 B.R. 325, 333 (S.D.N.Y. 2008) (citing *11 U.S.C. § 1521*); see *In re Oi Brasil Holdings Cooperatief U.A.*, 578 B.R. 169, 193 (Bankr. S.D.N.Y. 2017) (stated purpose of Chapter 15 includes efficient administration of cross-border insolvencies that protects the interests [\*8] of all creditors and other interested parties and maximizes a debtor's assets) (citing *11 U.S.C. § 1501(a)*). *Section 1517(a) of the Bankruptcy Code* provides that the court shall, after notice and a hearing, enter an order recognizing a foreign main proceeding if: "(1) such foreign proceeding for which recognition is sought is a foreign main proceeding . . . within the meaning of *section 1502*; (2) the foreign representative applying for recognition is a person or body; and (3) the petition meets the requirements of *section 1515*." *11 U.S.C. § 1517(a)*;<sup>4</sup> see *In re Oi Brasil*, 578 B.R. at 194. A foreign proceeding is defined as a "collective judicial or administrative proceeding in a foreign country, including an interim proceeding, under a law relating to insolvency or adjustment of debt in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation." *11 U.S.C. § 101(23)*.

**HN3** [↑] A foreign main proceeding "shall be recognized . . . if it is pending in the country where the debtor has the center of its main interests," which is commonly referred to as a debtor's "COMI." *11 U.S.C. § 1517(b)(1)*; see *In re Oi Brasil*, 578 B.R. at 195-97. "The Bankruptcy Code presumes that 'in the absence of evidence to the contrary, the debtor's registered office . . . is . . . the [debtor's COMI]'" *In re U.S. Steel Can. Inc.*, 571 B.R. 600, 2017 WL 3225914, at \*6 (Bankr. S.D.N.Y. 2017) (quoting *11 U.S.C. § 1516(c)*). To determine [\*9] a debtor's COMI, courts in the Second Circuit also consider "the location of the debtor's headquarters; the location of those who actually manage the debtor . . . ; the location of the debtor's primary assets; the location

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<sup>4</sup> **HN2** [↑] A foreign representative is "a person or body, including a person or body appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of such foreign proceeding." *11 U.S.C. § 101(24)*. Such a "person" includes an individual, partnership, or corporation. *11 U.S.C. § 101(41)*.

of the majority of the debtor's creditors or of a majority of the creditors who would be affected by the case; and/or the jurisdiction whose law would apply to most disputes." [Morning Mist Holdings Ltd. v. Kryz \(In re Fairfield Sentry Ltd.\)](#), 714 F.3d 127, 137 (2d Cir. 2013) (quoting [In re SPhinX, Ltd.](#), 351 B.R. 103, 117 (Bankr. S.D.N.Y. 2006)). Under the Bankruptcy Code, an order of recognition "shall" be entered if the foreign representative's petition meets the requirements of [Section 1515](#). [11 U.S.C. 1517\(a\)\(3\)](#).

**HN4** [↑] Under [Section 109\(a\) of the Bankruptcy Code](#), "only a person that resides or has a domicile, a place of business, or property in the United States . . . may be a debtor under this title." [11 U.S.C. § 109\(a\)](#). The Second Circuit has held that this requirement applies to Chapter 15 cases. See [Drawbridge Special Opportunities Fund LP v. Barnet \(In re Barnet\)](#), 737 F.3d 238, 247 (2d Cir. 2013).<sup>5</sup> In this case, the only issue in dispute is whether the Debtors have property in the United States to satisfy the requirements of [Section 109\(a\) of the Bankruptcy Code](#). See Recognition Objection ¶¶ 2, 16-17. The Objecting Parties have not challenged any other requirements for recognition and the Court finds that these other requirements have been satisfied. See Recognition Motion at 2-7; Recognition Objection at i, § I; [Stipulation By and Between \[\\*10\] Petitioners, Andrew Binetter and Ligon 158 PTY Limited Regarding Certain Matters Related to Recognition Hearing ¶¶ 3, 4 \[ECF No. 21\]](#). Accordingly, the Court will only address the [Section 109\(a\)](#) issue in this decision.

#### **A. The Retainer Account Satisfies Section 109(a)**

The Court concludes that the retainer account constitutes property of the Debtors that satisfies [Section 109\(a\) of the Bankruptcy Code](#). Indeed, **HN5** [↑] it is well established that "[a] debtor's funds held in a retainer account in the possession of counsel to a foreign representative constitute property of the debtor in the United States and satisfy the eligibility requirements of [section 109](#)." [In re Poymanov](#), 571 B.R. 24, 2017 WL 3268144, at \*4 (Bankr. S.D.N.Y. 2017); see, e.g., [In re U.S. Steel Canada Inc.](#), 571 B.R. 600, 610 (Bankr. S.D.N.Y. 2017); [In re Inversora Electrica de](#)

[Buenos Aires S.A.](#), 560 B.R. 650, 655 (Bankr. S.D.N.Y. 2016); [In re Berau Capital Res. Pte Ltd.](#), 540 B.R. 80, 82 (Bankr. S.D.N.Y. 2015); [In re Octaviar Admin. Pty Ltd.](#), 511 B.R. 361, 373-74 (Bankr. S.D.N.Y. 2014); accord [In re Suntech Power Holdings Co., Ltd.](#), 520 B.R. 399, 411-13 (Bankr. S.D.N.Y. 2014) (finding a bank account held in New York and used, in part, to pay the debtor's U.S. bankruptcy counsel was sufficient property to satisfy [Section 109](#)); [In re Global Ocean Carriers, Ltd.](#), 251 B.R. 31, 39 (Bankr. D. Del. 2000) (finding the unearned portion of the retainer paid to the debtor's U.S. bankruptcy counsel was sufficient property to satisfy [Section 109](#)). For example, in [Octaviar](#), the foreign representatives established a retainer with their counsel by depositing \$10,000 in a client trust account with a New York bank. See [Octaviar](#), 511 B.R. at 372. The court found that the retainer was property in the United States that satisfied [Section 109](#)'s requirements. See [id.](#) at 373-74; see also [In re Inversora Electrica](#), 560 B.R. at 655 (finding [\*11] assets which included "(i) dollar deposits in a New York bank account, (ii) an attorney retainer also on deposit in New York, and (iii) New York law-governed debt containing a New York forum selection clause[,] whether considered alone or together, . . . provide a sufficient basis for jurisdiction and venue in New York.") (emphasis added); [In re Berau](#), 540 B.R. at 82 (finding attorney retainer held by foreign representative's New York counsel was "a sufficient basis" for Chapter 15 eligibility); [In re Ocean Rig UDW Inc.](#), 570 B.R. 687, 700 (Bankr. S.D.N.Y. 2017) (finding [Section 109\(a\)](#) satisfied by retainers for New York counsel, as well as by U.S. debt).

**HN6** [↑] As a general matter, courts that have construed the "property" requirement in [Section 109](#) "with respect to foreign corporations and individuals have found the eligibility requirement satisfied by even a minimal amount of property located in the United States." [In re Aerovias Nacionales de Colombia S.A.](#), 303 B.R. 1, 8-9 (Bankr. S.D.N.Y. 2003) (citing cases); see [In re Suntech Power](#), 520 B.R. at 413 (finding establishment of an account in New York prior to filing bankruptcy sufficient to satisfy [Section 109\(a\)](#)); [In re McTague](#), 198 B.R. 428, 431 (Bankr. W.D.N.Y. 1996) (permitting entity with mainly foreign operations and assets to be a debtor in a chapter 11 case upon showing of \$194 in a United States bank account); see also 8 Collier on Bankruptcy ¶ 1517.01 (16th 2018) ("Following the [Barnet](#) ruling, bankruptcy courts within the Second [\*12] Circuit have found that it takes very little to satisfy the [section 109\(a\)](#) requirement."). [Section 109\(a\)](#) only says that the debtor must have property, it "says nothing about the amount of such property nor does it direct that there be any

<sup>5</sup> But see 8 Collier on Bankruptcy ¶ 1501.03 (16th 2018) (criticizing approach in [Barnet](#)); see also [In re Avanti Commc'ns Grp. PLC](#), 2018 Bankr. LEXIS 1078, 2018 WL 1725544, at \*7 (Bankr. S.D.N.Y. Apr. 9, 2018) (referring to [Barnet](#) as "controversial").

inquiry into the circumstances surrounding the debtors acquisition of the property . . . ." [In re Suntech, 520 B.R. at 413](#) (quoting [Octaviar, 511 B.R. at 373](#)). It would be contrary to the plain meaning of the statute to impose a quantum of property or a requirement that such property be "substantial." See [Octaviar, 511 B.R. at 373](#).

This approach is also consistent with how cases have interpreted *Section 109* for foreign companies outside of the Chapter 15 context. See [id. at 372-373](#) ("There is a line of authority that supports the fact that prepetition deposits or retainers can supply 'property' sufficient to make a foreign debtor eligible to file in the United States.") (citing [In re Cenargo Int'l PLC, 294 B.R. 571, 603 \(Bankr. S.D.N.Y. 2003\)](#); [In re Yukos Oil Co., 321 B.R. 396, 407 \(Bankr. S.D. Tex. 2005\)](#); [In re Global Ocean Carriers, 251 B.R. at 39](#)). "Several courts have held that nominal amounts of property in the United States enable a foreign corporation to qualify as a debtor under *Section 109(a) of the Bankruptcy Code*." [In re Yukos Oil, 321 B.R. at 407](#) (finding funds deposited in a bank located in the United States sufficient to satisfy *Section 109 of the Bankruptcy Code*); see [GMAM Inv. Funds Trust I v. Globo Comunicacoes e Participacoes S.A. \(In re Globo Comunicacoes e Participacoes S.A.\), 317 B.R. 235, 249 \(S.D.N.Y. 2004\)](#) (noting courts have required nominal amounts to qualify as a debtor under [\*13] *Section 109*); see also [In re Paper I Partners, L.P., 283 B.R. 661, 674 \(Bankr. S.D.N.Y. 2002\)](#); [In re Global Ocean Carriers, 251 B.R. at 39](#) (holding a retainer paid on behalf of the debtors to U.S. bankruptcy counsel was sufficient property to satisfy *Section 109*).

Despite the weight of authority, the Objecting Parties nonetheless contend that the \$1,250 retainers were deposited with Debtors' U.S. counsel "in order to manufacture eligibility under *section 109* . . . ." Recognition Objection ¶ 11. Accordingly, the Objecting Parties urge the Court to refuse to countenance such "manipulation and gamesmanship" and find that the retainers do not satisfy the requirements of *Section 109*. *Id.* ¶ 28; see also *id.* ¶ 30 (asking this Court to depart from the existing case law on this issue and "not follow *Octaviar* and its progeny.").

The court in *Octaviar* rejected a similar argument. There, the objecting party argued that the retainer "was an improper or bad faith attempt to 'manufacture eligibility' to file for recognition under chapter 15 . . . ." [Octaviar, 511 B.R. at 372](#). The court disagreed, finding that the foreign representatives had acted in good faith and, in any event, the court was required to "abide by

the plain meaning of the words in [*Section 109*]," which says nothing about the amount of property required, "nor does it direct that there be any inquiry into the circumstances [\*14] surrounding the debtor's acquisition of the property . . . ." *Id. at 373*. Thus, the court found that the retainer satisfied *Section 109(a)*'s requirements. See [id. at 373-74](#); see also [In re Suntech, 520 B.R. at 413](#) (rejecting objector's argument that it was "somehow improper" for debtor to create eligibility by establishing a bank account to, in part, pay its U.S. bankruptcy counsel).

Likewise, the Court here finds that the \$1,250 retainers constitute property for purposes of *Section 109* eligibility, and rejects the Objecting Parties' argument of bad faith. The Court's conclusion is guided by the plain meaning of *Section 109(a)*, as well as precedent in this jurisdiction and elsewhere finding retainers to constitute eligible property under that Section. Preventing a "foreign debtor from establishing eligibility to support needed chapter 15 relief will contravene the purposes of the statute to provide legal certainty, maximize value, protect creditors and other parties in interests and rescue financially troubled businesses." [In re Suntech, 520 B.R. at 413](#) (citing [11 U.S.C. § 1501\(a\)](#)). The court in *Suntech* recognized that despite a lack of presence in the United States, enforcement of the debtor's scheme of arrangement here was necessary for a successful restructuring. See [In re Suntech, 520 B.R. at 413](#). The Debtors here similarly require access to the [\*15] members of the Binetter family in the United States who have repeatedly opposed compliance with or participation in the various proceedings related to the Binetter-controlled entities in Australia. See Hr'g Tr. 92:11-93:11; Hr'g Tr. 122:16-123:15.

In asking the Court to find that the Debtors' technical compliance with *Section 109* is insufficient, the Objecting Parties rely on [In re Patriot Coal Corp., 482 B.R. 718 \(Bankr. S.D.N.Y. 2012\)](#). However, that case is easily distinguishable. *Patriot Coal* was not a Chapter 15 case and did not involve the question of what constituted property under *Section 109*. Rather, the Chapter 11 debtors in that case had arranged for venue in New York by forming affiliate entities in the state in the days preceding their bankruptcy filing. See [In re Patriot Coal, 482 B.R. at 726-28](#). On the motions of several parties, the court in *Patriot Coal* faced the question of whether venue should be transferred out of New York under [28 U.S.C. § 1412](#). See [id. at 722](#). While finding the *Patriot Coal* debtors in technical compliance with [Section 1412](#) and explicitly ruling that the debtors had not acted in bad faith ([id. at 741-42](#)), the court

determined that transfer to the Eastern District of Missouri (one of several forums where venue existed) was warranted in the "interest of justice" and for "the convenience of the parties" (*id. at 753-54*; see [28 U.S.C. § 1412](#)). The [\*16] same questions and statutory considerations are simply not present here.

### **B. The Fiduciary Duty Claims also Satisfy Section 109(a)**

The Court also concludes that the Debtors' Fiduciary Duty Claims against Andrew and Michael Binetter constitute property in the United States to satisfy *Section 109(a)*. It is undisputed that these claims are property of the Debtors. See Hr'g Tr. 23:7-11. But the parties disagree on where these claims are located for purposes of *Section 109(a)*, and even what law to apply in determining that location. See Hr'g Tr. 24:4-6 (stating the dispute centers on the situs of the property).

#### 1. Australian Law Governs the Situs of the Fiduciary Duty Claims

As the parties acknowledge, [HN7](#) [↑] the nature or scope of a debtor's interest in property is determined by "local" or "state" law. See Debtors' Suppl. Br. at 2-3; Objecting Parties' Suppl. Br. ¶ 5; see also [In re Koreag, Controle et Revision S.A., 961 F.2d 341, 349 \(2d Cir. 1992\)](#) (While "'federal bankruptcy law determines the outer boundary of what may constitute property of the estate, state law determines the nature of a debtor's interest in a given item.") (quoting [In re Crysen/Montenay Energy Co., 902 F.2d 1098, 1101 \(2d Cir. 1990\)](#)); [In re Chateaugay Corp., 170 B.R. 551, 554-55 \(S.D.N.Y. 1994\)](#) (same); [Butner v. United States, 440 U.S. 48, 55, 99 S. Ct. 914, 59 L. Ed. 2d 136 \(1979\)](#) ("[p]roperty interests are created and defined by state law"); [In re Northern New England Telephone Operations LLC, 795 F.3d 343, 350 \(2d Cir. 2015\)](#) (same); [Kinney v. Gallagher, 524 B.R. 455, 460 \(W.D.N.Y. 2015\)](#) ("The existence and nature of a debtor's interest, and correspondingly [\*17] the estate's interest, in property is determined by state law.").

Determining which state's law to apply here requires reference to applicable choice of law principles. See [In re Koreag, 961 F.2d at 350](#) ("Having held that local law determines whether particular property is part of a debtor's estate, we must decide what local law will supply the substantive rule."); see also [In re Artimm, S.r.L., 335 B.R. 149, 163-64 \(Bankr. C.D. Cal. 2005\)](#) (determining whether to turn over property to a foreign representative in a [Section 304](#) case required

confirmation of the nature of the debtor's interest in the property, which in turn required application of choice-of-law rules to select the governing non-bankruptcy substantive law); [Kayne v. Ho, 2013 U.S. Dist. LEXIS 197233, 2013 WL 12120081, at \\*5 \(C.D. Cal. Nov. 4, 2013\)](#) (holding that determining which choice-of-law rules to apply in evaluation of the nature of interest in an alter ego claim was not necessary only because both federal and California choice-of-law principles produced same result). "Except in circumstances where a 'significant federal policy, [justifies] the imposition of a federal conflicts rule, . . . ' bankruptcy courts apply the choice-of-law rules of the forum state to determine which state's substantive law governs." [In re Cinque Terre Fin. Grp. Ltd., 2017 Bankr. LEXIS 3686, 2017 WL 4843738, at \\*13 \(Bankr. S.D.N.Y. Oct. 24, 2017\)](#) (quoting [Bianco v. Erkins \(In re Gaston & Snow\), 243 F.3d 599, 607 \(2d Cir. 2001\)](#)); see also [In re Koreag, 961 F.2d at 351](#) ("Selecting the appropriate conflicts rules . . . thus . . . require[s] us to characterize [\*18] the present issue . . . as either predominantly founded upon state-created rights, or involving important concerns implicating national bankruptcy policy.").

No party has convincingly identified—and the Court is unaware of—any overriding federal interest here in determining the situs of the Australian Fiduciary Duty Claims. Accordingly, New York state choice-of-law rules apply. See [In re Cinque Terre, 2017 Bankr. LEXIS 3686, 2017 WL 4843738, at \\*13](#) ("The dispute . . . involves property questions which are resolved through application of local law. . . . Accordingly, no such overriding federal policy or interest is present here.") (citing [In re Koreag, 961 F.2d at 349](#)). [HN8](#) [↑] Under New York choice-of-law rules, "the law of the jurisdiction having the greatest interest in the litigation will be applied." *Id.* (quoting [Kalb, Voorhis & Co. v. American Fin. Corp., 8 F.3d 130, 132 \(2d Cir. 1993\)](#)). Under this "greatest interest test," the Court concludes that Australian substantive law governs. The Liquidators were appointed by an Australian court, and are governed by Australian law, and Andrew Binetter is an Australian citizen. Perhaps even more importantly, the Fiduciary Duty Claims arose from acts committed in Australia and exist under Australian law, and any recovery will be distributed to foreign creditors through the Australian proceeding.<sup>6</sup> See [ICP Strategic Credit](#)

<sup>6</sup> Notably, even if federal choice-of-law rules applied, the result would be the same. See [In re Koreag, 961 F.2d at 350](#) ("[W]e discern no significant difference between the applicable federal and New York choice-of-law rules. The federal

[\*Income Fund, Ltd., et al. v. DLA Piper L.L.P., No. 17-1669-bk, 2018 U.S. App. LEXIS 10429, \\*4 \(2nd Cir. Apr. 23, 2018\)\*](#) [\*19] (summary order affirming that New York law applies to *in pari delicto* defense to a claim for aiding and abetting a breach of fiduciary duty where defendant is a New York-based law firm and conducted all of its relevant work in New York).

Correspondingly, the Court rejects the Objecting Parties' contention that New York substantive law should govern. The Objecting Parties have not provided an explicit justification for this choice. See Objecting Parties' Suppl. Br. ¶¶ 4-7 (arguing that non-bankruptcy law determines the nature of a debtor's property interest, but not explaining why New York law is the appropriate non-bankruptcy choice). Instead, they simply assert without much explanation that New York's rules on the situs of judgments and intangible property should dictate this Court's conclusions. See Objecting Parties' Suppl. Br. ¶¶ 8-27. But the Objecting Parties do rely heavily on a factual comparison of this case to *Fairfield Sentry*—which applied New York law to determine the situs of a claim—to imply that *Fairfield Sentry* supports the same result here. See Objecting Parties' Suppl. Br. ¶¶ 16-27 (citing [\*In re Fairfield Sentry Ltd., 768 F.3d 239 \(2d Cir. 2014\)\*](#)). This reliance is misplaced, however. When the bankruptcy court in *Fairfield Sentry* looked to "applicable nonbankruptcy [sic] law" and applied the so-called *Severnoe* test under New York law to determine the situs of a securities law claim, it did so only because the parties there had agreed that New York law should govern. [\*In re Fairfield Sentry Ltd., 768 F.3d at 244\*](#) (citing [\*Severnoe Sec. Corp. v. London & Lancashire Insurance Co., 255 N.Y. 120, 123-24, 174 N.E. 299 \(1931\)\*](#)). This Court enjoys no such agreement here. Indeed, other decisions utilizing the *Severnoe* test do so only after explicitly determining that New York law should apply. See, e.g., [\*In re Berau, 540 B.R. at 82-84\*](#) (referencing the *Severnoe* test when determining the situs of U.S. dollar denominated debt to be in the United States where "New York law expressly governs the debt indenture"); see also [\*In re U.S. Steel Canada Inc., 571 B.R. 600, 610 \(Bankr. S.D.N.Y. 2017\)\*](#) (citing *Berau Capital* when determining that intangible property rights stemming from a debt contract governed by New York

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common law choice-of-law rule is to apply the law of the jurisdiction having the greatest interest in the litigation. . . .") (citing [\*Wells Fargo Asia Ltd. v. Citibank, N.A., 936 F.2d 723, 726-27 \(2d Cir. 1991\)\*](#)); see also [\*In re Salander-O'Reilly Galleries, LLC, 475 B.R. 9, 31 \(S.D.N.Y. 2012\)\*](#) (collecting cases).

law constitute property in the United States).<sup>7</sup>

It appears that the Binettters' only connection to New York is their current residence. But this is not enough to justify use of New York law here given the much stronger connections to Australia. See [\*Soviet Pan Am Travel Effort v. Travel Comm., Inc., 756 F. Supp. 126, 131 \(S.D.N.Y. 1991\)\*](#) (applying Maryland substantive law in claims to pierce the corporate veil [\*21] of defendant entity because state of incorporation and residence has greatest interest in regulating such issues even when personal jurisdiction existed over defendants in New York); see also [\*Parisi v. Wipro Ltd., 2016 U.S. Dist. LEXIS 162722, 2016 WL 6905987, at \\*5, \\*7 \(S.D.N.Y. Nov. 23, 2016\)\*](#) (applying New York law to a wrongful discharge claim after finding that the state's "substantial interest in protecting employees who live and work in New York" outweighed the interests of other jurisdictions in which the plaintiff "sometimes" performed work); [\*Pierre v. Gts Holdings, Inc., 2015 U.S. Dist. LEXIS 160345, 2015 WL 7736552, at \\*3-\\*4 \(S.D.N.Y. Nov. 30, 2015\)\*](#) (applying New York law to a statutory wages and hours claim after finding New York to have the greatest interest in regulating employment conduct for a chauffeur who conducted the majority of his work in the state). In fact, when making their argument for finding an Australian situs under New York substantive law, the Objecting Parties highlight nearly the same facts that this Court relies upon to conclude that Australian law should govern under the greatest interest test:

[i] the Liquidators were appointed by an Australian court; [ii] the Liquidators are deemed to have custody and control over the assets at issue; [iii] the Liquidators conduct the business of administering the Debtors' assets in Australia; and [iv] any proceeds will be [\*22] administered in Australia pursuant to Australian insolvency law to primarily foreign creditors.

Objecting Parties' Suppl. Br. ¶ 21.

## 2. The Record Regarding Australian Law Comports with

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<sup>7</sup> The Objecting Parties also rely heavily on *Fairfield Sentry* to argue that [\*Section 1502\(8\) of the Bankruptcy Code\*](#) dictates application of non-bankruptcy law when determining the situs of intangible property. See Objecting Parties' Suppl. Br. ¶¶ 22-23 (quoting [\*In re Fairfield Sentry Ltd., 768 F.3d at 244\*](#)). While a plain reading of [\*Section 1502\(8\)\*](#) indicates that it does not apply in the context of [\*Section 109\(a\)\*](#), the Court does not need to further parse this issue given that it has already concluded that non-bankruptcy law should apply here. See [\*In re Koreag, 961 F.2d at 349\*](#).

Rule 44.1

The parties also disagree regarding the sufficiency and propriety of the record concerning Australian law. The Objecting Parties specifically request that "[s]hould this Court determine that it must refer to Australian law, . . . the Court reopen the evidentiary hearing to allow for cross-examination of [Debtors' Australian law expert] and rebuttal." Objecting Parties' Limited Response at 6. But the Court has already accepted dueling declarations from both sides' experts, and declines to re-open the record on Australian law. Instead, the Court has examined the existing record and finds it to be sufficient for determining applicable Australian law.

Indeed, the record here is consistent with Federal Rule of Civil Procedure 44.1, which governs determinations of foreign law. HN9 [↑] That Rule provides:

A party who intends to raise an issue about a foreign country's law must give notice by a pleading or other writing. In determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party [\*23] or admissible under the Federal Rules of Evidence. The court's determination must be treated as a ruling on a question of law.

Fed. R. Civ. P. 44.1. By that Rule, the Court is empowered to make determinations regarding foreign law, and granted discretion to decide on its own informed judgment what materials to consider in doing so. Here, the Liquidators first raised their contention that the Fiduciary Duty Claims satisfy *Section 109(a)* in their initial reply. See Reply ¶¶ 8-10. After the Recognition Hearing, the Court requested supplemental briefing from both parties specifically on that issue. The Liquidators set forth their argument for the application of Australian law in that briefing and submitted a supporting declaration from their Australian law expert, Mr. Meagher. See Debtors' Suppl. Br. at 9-14; Meagher Decl. The Court subsequently authorized the Objecting Parties to submit a supplemental response accompanied by a counter-declaration to address the details of any applicable Australian law. See Objecting Parties' Limited Response; Ardagna Decl. The Liquidators submitted a final reply accompanied by a reply declaration from their Australian law expert. See *Reply of Petitioners to Limited Response* [ECF No. 35]; [\*24] Meagher Reply Decl. The Court is satisfied that the parties have been given a sufficient opportunity to be heard on the issue of foreign law.

Case law affirms the sufficiency of the record here. A

similar scenario was handled by the court in *In re Daebo Int'l Shipping Co., Ltd.*, 543 B.R. 47 (Bankr. S.D.N.Y. 2015). In *Daebo*, plaintiffs relied upon a declaration submitted after trial to argue that, under Korean law, a Korean court's stay was geographically restricted. See *In re Daebo*, 543 B.R. at 53. The defendant objected to the submission on the ground that the evidence had already been closed; the defendant alternatively requested permission to submit its own supplemental declaration in opposition. See *id.* Citing the flexibility allowed under Rule 44.1 and the Rule's direction that determinations of foreign law are questions of law not fact, the court decided to consider the terms of the relevant Korean statute and the declarations from both parties on the scope of the stay. See *id.*; see also *Aristocrat Leisure Ltd. v. Deutsche Bank Tr. Co. Americas*, 2010 U.S. Dist. LEXIS 86092, 2010 WL 3306876, at \*3, \*5 (S.D.N.Y. Aug. 20, 2010) (rejecting defendants' contention that plaintiff failed to support its assertions regarding Australian law by not proffering an expert or citing other authority, after accepting and considering an expert declaration and Australian tax law, treaties, and case law submitted by plaintiff in its reply); [\*25] *c.f.* *Huang v. All Crematory Corp.*, 2002 U.S. Dist. LEXIS 28246, 2002 WL 34370241, at \*1 (N.D. Ohio Sept. 19, 2002) (upon cross-motions to exclude or limit expert legal testimony from both parties, the court cited Rule 44.1 and ruled that it would determine the Chinese law and would not submit the issue to the jury); *Faggionato v. Lerner*, 500 F. Supp. 2d 237, 244-48 (S.D.N.Y. 2007) (court based its interpretation of French law on the expert declarations submitted by both parties and accepted those areas where the two experts did not appear to be in disagreement).

### 3. The Fiduciary Duty Claims are Located in New York Under Australian Law

Having found that Australian law applies, the Court turns to the parties' opposing expert declarations and submissions to determine what the substantive law of Australia says about the location of the Fiduciary Duty Claims. HN10 [↑] When considering such foreign law expert declarations, it "is not the credibility of the experts that is at issue, it is the persuasive force of the opinions they expressed." *Norwest Fin., Inc. v. Fernandez*, 86 F. Supp. 2d 212, 227 (S.D.N.Y. 2000) (quoting *Itar-Tass Russian News Agency v. Russian Kurier, Inc.*, 153 F.3d 82, 92 (2d Cir.1998)); see also *Faggionato*, 500 F. Supp. 2d at 244-48 (accepting the conclusions of one of two dueling French law experts because it is the "persuasive force of the opinions' expressed that is conclusive under Rule 44.1") (quoting *Itar-Tass Russian*

[News, 153 F.3d 82 at 92\).](#)

For the reasons below, the Court agrees with the Debtors' expert that Australian law provides that the Fiduciary Duty Claims are located in New York where [\*26] the Binettters reside. The Liquidators submitted two declarations on the issue from their expert on Australian law. See Meagher Decl.; Meagher Reply Decl. Mr. Meagher first concludes that the Fiduciary Duty Claims against Andrew and Michael Binetter constitute property of the Debtors. See Meagher Decl. ¶ 12. Mr. Meagher also concludes that Australian courts classify "a claim for breach of fiduciary duty . . . in terms of property, as a chose in action . . . ." Meagher Decl. ¶ 13. The Objecting Parties' expert does not dispute either of these conclusions (see Ardagna Decl. ¶¶ 7, 12-13), both of which the Court finds persuasive and adopts.<sup>8</sup>

Mr. Meagher proceeds to opine about the situs of the chose in action at issue here. He starts with the "general principle of Australian law that a debt, which is a specific type of chose in action, is generally situated where the debtor resides . . . ." Meagher Decl. ¶ 15. He notes that "two Australian cases have considered the situs of a chose in action (though not specifically a claim for breach of fiduciary duty) and both decisions affirmed a decision of the English High Court of Justice in *Jabbour v Custodian of Absentee's Property of [\*27] State of Israel* [1954] 1 All ER 145 (*Jabbour*)." *Id.* ¶¶ 16-17 (citing *Australia in Ocean Marine Insurance Co Ltd v CSR Ltd* [2012] NSWSC 1229 at ¶¶ 67-68 ("Ocean Marine"); *Australian Public Trustees Ltd (re cs apptd) (in its capacity as trustee and/or responsible entity of the Government Property Trust No 5) v Australian Public Trustees Ltd (re cs apptd) (in its capacity as trustee of the Government Property Trust No 3)* (2012) 91 ACSR 236 at ¶¶ 31-32 ("APTL v. APTL")). Getting to the crux of the issue, Mr. Meagher reasons that "[t]he principle in *Jabbour* (as stated at page 151 [of that case]) is that 'not only debts, but also other choses in action, are for legal

purposes localised and are situated where they are properly recoverable and are properly recoverable where the debtor resides . . . ." Meagher Decl. ¶ 16. So while Mr. Meagher has been unable to find any Australian cases specifically dealing with the situs of a chose in action for breach of fiduciary duty, he concludes that "an Australian court would likely apply the principle in *Jabbour*" and find the situs of the Fiduciary Duty Claims against the Binettters to be in New York. *Id.* ¶ 19.

The Objecting Parties offer a competing view. Their expert, Mr. Ardagna, [\*28] counters that "[w]hile the general proposition applicable to a debt[,], that it is situated where the debtor resides . . . may extend to other choses in action[,], . . . this is a general proposition only." Ardagna Decl. ¶ 13. Mr. Ardagna has also been unable to identify any Australian case law that specifically addresses the situs of a chose in action for a breach of fiduciary duty. See *id.* ¶ 19. Mr. Ardagna also notes that if applied "at the time the breaches occurred," "the principles established in the cases to which Mr. Meagher refers . . . would deliver the result that, in relation to Andrew and Michael, the situs of the Claims was in Australia." Ardagna Decl. ¶ 24. Therefore, "[w]hether the situs of the Claims . . . has changed as a result of [the Binettters] taking up residence in the United States is a matter for speculation." *Id.* ¶ 25. Specifically, "the Australian Courts might . . . craft a more particularized standard if the question of situs of breach of fiduciary duty is ever decided there . . . ." Objecting Parties' Limited Response ¶ 16 (citing Ardagna Decl. ¶¶ 14-18).

Because of the possibility that an Australian Court *might* find an exception for breach of fiduciary duty [\*29] claims to the general rule for choses in action, the Objecting Parties contend that this Court should find the available material on Australian law insufficient, and should instead apply New York state law. *Id.* ¶ 19.<sup>9</sup>

<sup>8</sup>In reaching these conclusions, Mr. Meagher explains that resolution of the issue "under Australian law depends on the context in which the question is posed." Meagher Decl. ¶ 7. "As the Foreign Debtors are Australian companies in liquidation, the relevant legal framework is that which governs their liquidation, namely, the Corporations Act." *Id.* Mr. Meagher surveys case law (see *id.* ¶ 11) which shows "a consistent approach taken by various courts in Australia holding that a claim that a company may have for breach of fiduciary duty is property of that company under the Corporations Act." *Id.* ¶ 12.

<sup>9</sup>While the Objecting Parties do not cite [Rule 44.1](#), they presumably rely upon it. Under [Rule 44.1](#), "where parties fail to raise the issue of the applicability of a foreign law to a particular issue, a district court may choose to apply the law of the state in which it sits." [MSF Holding Ltd. v. Fiduciary Tr. Co. Int'l](#), 435 F. Supp. 2d 285, 301 (S.D.N.Y. 2006), *aff'd on other grounds*, 235 F. App'x 827 (2d Cir. 2007) (citing [Clarkson Co. Ltd. v. Shaheen](#), 660 F.2d 506, 512 n. 4 (2d Cir. 1981)). Thus, "where either no information, or else insufficient information, has been obtained about the foreign law, the forum will usually decide the case in accordance with its own local law . . . ." [Wujin Nanxiashu Secant Factory v. Ti-Well Int'l Corp.](#), 2002

Specifically, the Objecting Parties contend that "no party has sufficient information to answer the question" about the situs of an action for breach of fiduciary duty under Australian law. Objecting Parties' Limited Response ¶¶ 8-9. Thus, the Objecting Parties contend that the Liquidators propose "a novel interpretation of Australian law" (*id.* ¶ 19), and that an "essentially speculative sortie into Australian law by an American court does not make sense" (*id.* ¶ 18) (quoting [Standard Bank PLC v. Vero Insurance Ltd.](#), 2009 U.S. Dist. LEXIS 28821, 2009 WL 458680 (D. Colo. Feb. 24, 2009), vacated & remanded to state court on other grounds, 2009 U.S. Dist. LEXIS 120214, 2009 WL 4730474 (D. Colo. Dec. 7, 2009)). Going beyond Mr. Ardagna's comments, the Objecting Parties also criticize Mr. Meagher's reliance upon an English decision as the primary source for his proposition regarding choses of action. See Objecting Parties' Limited Response ¶ 12. They note that *Jabbour* does not address breaches of fiduciary duty, but rather an insurance claim for unliquidated damages. See *id.* ¶ 12. Finally, the Objecting Parties point out that Mr. Meagher's two Australian [\*30] decisions applying *Jabbour* do not address breaches of fiduciary duty either, and that Mr. Ardagna has somewhat distinguished their holdings from the general rule provided in *Jabbour*. See *id.* ¶¶ 14-15 (citing Ardagna Decl. ¶¶ 14-15).

But [HN11](#)<sup>↑</sup> the Court rejects the Objecting Parties' arguments that there must be perfect clarity before applying foreign law. In reaching this conclusion, the Court is mindful that "foreign law should be argued and briefed like the domestic law." [Curtis v. Beatrice Foods Co.](#), 481 F. Supp. 1275, 1285 (S.D.N.Y. 1980), *aff'd*, 633 F.2d 203 (2d Cir. 1980) (quoting Pollack, Proof of Foreign Law, XXVI American Journal of Comparative Law 470, 475 (1978)). "[A]pplying foreign law might pose a burden . . . [but] interpret[ing] (1) decisions from [foreign courts], (2) [foreign] statutes . . . , and (3) local ordinances . . . is precisely the kind of work American judges perform on a daily basis." [DiFederico v. Marriott Int'l, Inc.](#), 714 F.3d 796, 808 (4th Cir. 2013) (denying a motion to dismiss based on *forum non conveniens* and the difficulty of applying Pakistani law) (citations omitted). The Court concludes that there is sufficient clarity under Australian law—as described by the two experts—to reach this conclusion. As the Liquidators point out, *Jabbour* is relied on not only because English decisions are often [\*31] given weight in Australian

courts, but because "it reflects the position under Australian law." Reply to Limited Response at 6 (citing Meagher Decl. ¶¶ 16-17; Meagher Reply Decl., at ¶¶ 8-10). Indeed, the Objecting Parties' Australian law expert does not critique reliance on an English case generally.

Furthermore, Mr. Meagher and the cases he cites demonstrate the generalized principle behind *Jabbour* that the location of a chose in action turns on considerations of enforcement. See Meagher Reply Decl. ¶¶ 4-15 (citing *APTL v. APTL* ¶¶ 31-33 (finding the situs of a share in a company to be located where the company is incorporated because of considerations relating to enforcement); *Ocean Marine* ¶¶ 65-71 (explicitly quoting *Jabbour* to apply the rule that a chose in action is located where "properly recoverable" in the context of a claim for a debt due on a deed)). The Objecting Parties' expert does not present any reason—much less a persuasive one—why the same concerns about enforcement of a chose in action generally would not lead to exactly the same rule for a fiduciary duty claim. Indeed, such an inference is logical and does not require particularly nuanced or subtle legal reasoning. [\*32] *C.f.* [Wultz v. Bank of China Ltd.](#), 2012 U.S. Dist. LEXIS 161399, 2012 WL 5431013, at \*3-4 (S.D.N.Y. Nov. 5, 2012) (evaluating dueling expert opinions on Chinese tort law and rejecting a textualist approach where the "discrepancy between language and legal reality . . . calls into question the attempt to deduce Chinese law simply from the language of Chinese legal sources, without critical attention to the practices of Chinese legal institutions"). It is notable that Mr. Ardagna does not cite any additional cases to support his line of argument, but instead just attempts to distinguish the Australian cases relied upon by Mr. Meagher.

Indeed, [HN12](#)<sup>↑</sup> courts have typically found proof of foreign law to be insufficient under [Rule 44.1](#) only where there was a complete failure to raise the issue or present any supporting material. See, e.g., [MSF Holding Ltd.](#), 435 F. Supp. 2d at 301 (analyzing a contract under New York law where the parties did "not ma[k]e any arguments regarding the enforcement of . . . its terms, including its choice-of-law clause, which call[ed] for Dutch law to govern the agreement."); [Wujin Nanxiashu Secant Factory](#), 2002 U.S. Dist. LEXIS 9615, 2002 WL 1144903, at \*2 (denying a motion to dismiss arguing failure to state a claim under Chinese contract law where "defendants . . . provided . . . no more than a conclusory statement of Chinese law[,] . . . no text of the statutes on which they rel[ied], no treatises, [\*33] no caselaw, and no expert affidavit supporting their

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[U.S. Dist. LEXIS 9615, 2002 WL 1144903, at \\*2 \(S.D.N.Y. May 29, 2002\)](#) (quoting [Restatement \(Second\) of Conflicts § 136, cmt. h](#) (1971)).

interpretation").

The cases relied upon by the Objecting Parties do not support their posture. These cases reject foreign law only where there has been a similar total failure to argue foreign law or present supporting material, or otherwise resolve the issue of foreign law on other bases. See Objecting Parties' Limited Response ¶ 18 (citing [Mut. Serv. Ins. Co. v. Frit Indus., Inc.](#), 358 F.3d 1312, 1321-22 (11th Cir. 2004) ("The offshore insurers did not direct the district court or this court to a single rule of law for the Cayman Islands, either by case law or by statute. They cannot credibly argue that a different result would follow if that jurisdiction's law were followed."); [Republican Nat. Comm. v. Taylor](#), 299 F.3d 887, 891, 353 U.S. App. D.C. 236 (D.C. Cir. 2002) ("In any event, none of the parties cited any Mississippi cases in their briefs, and at oral argument none suggested any way in which Mississippi law differs from that of the District of Columbia on the issues that are relevant to our decision."); [Cavic v. Grand Bahama Dev. Co.](#), 701 F.2d 879, 882 (11th Cir. 1983) ("[N]one of the parties claimed the applicability of Bahamian law or asserted that it differs from that of Florida."); [Seguros Tepeyac, S. A., Compania Mexicana de Seguros Generales v. Bostrom](#), 347 F.2d 168, 174-76 (5th Cir. 1965) (issued prior to the passage of the modern [Rule 44.1](#) and sidestepping the district court's analysis of the sufficiency of proof of Mexican law by holding Texas law to apply anyhow); [\*34] c.f. [Standard Bank PLC](#), 2009 U.S. Dist. LEXIS 28821, 2009 WL 458680, at \*7 (holding that "it ma[de] little sense" for an American court to engage with an apparently novel argument under Australian law, but in the context of a *forum non conveniens* motion, and only after concluding that "an Australian court [would] likely repeat that same analysis prior to any enforcement of an order" from the American court)). In contrast to these cases, the Australian law experts here provided a credible canvassing of relevant foreign law, and the Court's conclusions require only a standard exercise of case law interpretation.

Finally, in support of finding a New York situs for the Fiduciary Duty Claims, the Liquidators also rely on the proposition that "as a general matter, where a court has both subject matter and personal jurisdiction, the claim subject to the litigation is present in that court." Debtors' Suppl. Br. at 3-4 (quoting [Octaviar](#), 511 B.R. at 372 (citing [In re British Am. Ins. Co. Ltd.](#), 488 B.R. 205, 231-32 (Bankr. S. D. Fla. 3013); [In re Iglesias](#), 226 B.R. 721, 723 (Bankr. S. D. Fla. 1998)). While the Court need not address this alternative argument given the conclusions above, this reasoning would also result in a New York

situs for the Fiduciary Duty Claims given that the Binettters' reside in New York and this Court has jurisdiction over matters impacting the Debtors and their estates. See [Residential Funding Co., LLC v. Greenpoint Mtg. Funding, Inc. \(In re Residential Capital, LLC\)](#), 519 B.R. 593, 599 (S.D.N.Y. 2014) (explaining the nature [\*35] of a bankruptcy court's "related to" jurisdiction over civil proceedings affecting a debtor's estate) (quoting [Parmalat Capital Finance Ltd. v. Bank of America Corp.](#), 639 F.3d 572, 579 (2d Cir. 2011)).

## **CONCLUSION**

For all the reasons set forth above, the Court grants the Recognition Petition. The Liquidators are directed to settle a proposed order on seven days' notice. The proposed order must be submitted by filing a notice of the proposed order on the Case Management/Electronic Case Filing docket, with a copy of the proposed order attached as an exhibit to the notice. A copy of the notice and proposed order shall also be served upon Objecting Parties' counsel.

Dated: New York, New York

April 24, 2018

/s/ **Sean H. Lane**

UNITED STATES BANKRUPTCY JUDGE

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