

FOR PUBLICATION

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

IN RE: HAWAI'I ISLAND AIR,
INC., DEBTOR

ELIZABETH A. KANE, Bankruptcy
Trustee; AIR LINE PILOTS
ASSOCIATION; HAWAI'I
TEAMSTERS AND ALLIED
WORKERS, LOCAL 996,

Plaintiffs - Appellants,

v.

PACAP AVIATION FINANCE,
LLC; PACIFICCAP INVESTMENT
MANAGEMENT, LLC; MALAMA
INVESTMENTS, LLC; SNOWBIZ
VENTURES, LLC; PACAP
MANAGEMENT SOLUTIONS
LLC; PACAP ADVISORS,
LLC; JEFFREY AU; JACK TSUI;
JACK CHUCK SHE TSUI TRUST;
LAWRENCE INVESTMENTS,
LLC; LAWRENCE J. ELLISON
REVOCABLE TRUST; OHANA
AIRLINE HOLDINGS LLC;
CARBONVIEW LIMITED, LLC;

No. 24-5683

D.C. Nos.
1:19-cv-00574-
JAO-RT
1:20-cv-00246-
JAO-RT

OPINION

PAUL MARINELLI; LAWRENCE
J. ELLISON,

Defendants - Appellees,

and

CATHERINE YANNONE, also
known as Kitty Lagareta,
CHRISTOPHER GOSSERT,

Defendants.

ELIZABETH A. KANE; AIR LINE
PILOTS ASSOCIATION; HAWAII
TEAMSTERS AND ALLIED
WORKERS - LOCAL 996,

Plaintiffs - Appellees,

v.

CARBONVIEW LIMITED, LLC;
LAWRENCE INVESTMENTS,
LLC; LAWRENCE J. ELLISON
REVOCABLE TRUST; OHANA
AIRLINE HOLDINGS, LLC; PAUL
MARINELLI; LAWRENCE J.
ELLISON,

Defendants - Appellants.

No. 24-6024

D.C. No.
1:19-cv-00574-
JAO-RT

ELIZABETH A. KANE; AIR LINE
PILOTS ASSOCIATION; HAWAII
TEAMSTERS AND ALLIED
WORKERS - LOCAL 996,

Plaintiffs - Appellees,

v.

PACAP AVIATION FINANCE,
LLC; PACIFICCAP INVESTMENT
MANAGEMENT, LLC; MALAMA
INVESTMENTS, LLC; PACAP
MANAGEMENT SOLUTIONS,
LLC; JEFFREY AU; JACK TSUI;
JACK CHUCK SHE TSUI TRUST,

Defendants - Appellants.

No. 24-6026

D.C. No.
1:19-cv-00574-
JAO-RT

ELIZABETH A. KANE, AIR LINE
PILOTS ASSOCIATION, HAWAII
TEAMSTERS AND ALLIED
WORKERS - LOCAL 996,

Plaintiffs,

v.

PACAP AVIATION FINANCE,
LLC; PACIFICCAP INVESTMENT
MANAGEMENT, LLC; MALAMA

No. 24-6290

D.C. No.
1:19-cv-00574-
JAO-RT

INVESTMENTS, LLC; PACAP
MANAGEMENT SOLUTIONS,
LLC; JEFFREY AU; JACK TSUI;
JACK CHUCK SHE TSUI TRUST,

Defendants - Appellees,

v.

DAVID UCHIYAMA,

*Third-party-defendant -
Appellant.*

ELIZABETH A. KANE; AIR LINE
PILOTS ASSOCIATION; HAWAII
TEAMSTERS AND ALLIED
WORKERS - LOCAL 996,

Plaintiffs - Appellants,

v.

PACAP AVIATION FINANCE,
LLC; PACIFICCAP INVESTMENT
MANAGEMENT, LLC; MALAMA
INVESTMENTS, LLC; SNOWBIZ
VENTURES, LLC; PACAP
MANAGEMENT SOLUTIONS,
LLC; PACAP ADVISORS, LLC;
JEFFREY AU; JACK TSUI; JACK
CHUCK SHE TSUI TRUST;

No. 24-6345

D.C. No.
1:19-cv-00574-
JAO-RT

LAWRENCE INVESTMENTS,
LLC; LAWRENCE J. ELLISON
REVOCABLE TRUST; OHANA
AIRLINE HOLDINGS, LLC;
CARBONVIEW LIMITED, LLC;
PAUL MARINELLI; LAWRENCE
J. ELLISON,

Defendants - Appellees.

Appeal from the United States District Court
for the District of Hawaii
Jill A. Otake, District Judge, Presiding

Argued and Submitted February 13, 2026
Honolulu, Hawaii

Filed September 29, 2026

Before: Jay S. Bybee, Ryan D. Nelson, and Danielle J.
Forrest, Circuit Judges.

Opinion by Judge Bybee;
Dissent by Judge Forrest

SUMMARY*

Bankruptcy

The panel affirmed in part and reversed in part the district court's judgment after a jury trial, and remanded, in adversary proceedings brought under Hawaii's Dislocated Workers Act ("DWA") and the federal Workers Adjustment and Retraining Notification Act ("WARN Act") by Elizabeth Kane, Chapter 7 bankruptcy trustee for the bankruptcy estate of Hawaii Island Air, Inc. ("Trustee"), the Air Line Pilots Association, and the Hawaii Teamsters and Allied Workers, Local 996 ("Unions") against Island Air's former owners, directors, and lenders, including Lawrence J. Ellison, Jeffrey Au, and their affiliated entities.

In Part II of its opinion, the panel held that it had jurisdiction under 28 U.S.C. § 1291 to review the district court's judgment, which was entered after the district court, having referred this proceeding to the bankruptcy court under 28 U.S.C. § 157(a), withdrew the reference under § 157(d), thus returning the proceeding to itself for adjudication. The panel held that when a district court sitting in bankruptcy withdraws the reference from the bankruptcy court and fully adjudicates a related civil proceeding, the court's judgment is final and appealable under § 1291 even though core bankruptcy-administration matters remain in the underlying bankruptcy case.

The panel held that the Trustee had Article III standing to bring Counts IV and V, which asserted breach-of-

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

fiduciary-duty claims against the “Au Defendants,” because these claims focused on harm to Island Air and thus were property of the debtor and the bankruptcy estate.

The panel held that the Unions had Article III standing to bring Counts I and II, alleging violations of the DWA, because, from the time of filing, each Union stood as the statutorily authorized representative of at least one employee who met the standing requirements of Article III.

In Part III of the opinion, addressing the fiduciary duty claims against the “Ellison Defendants,” the panel reversed the district court’s grant of judgment as a matter of law (“JMOL”) in favor of Ohana Airline Holdings, LLC, and Lawrence Investments on Counts VII and IX because a reasonable jury could find that they owed fiduciary duties to Island Air. The panel reversed the district court’s grant of JMOL in favor of Paul Marinelli, in his capacity as an Island Air director, with respect to Count VII and affirmed dismissal of the claims against Marinelli in his capacity as trustee of the Ellison Trust with respect to Count IX.

In Part IV, addressing the DWA claims in Counts I and II, the panel affirmed the district court’s employer ruling as to the Au Defendants but reversed as to Ohana and the Ellison Trust. The panel left it to the district court to determine on remand whether Ohana and the Ellison Trust’s status as employers subject to liability under the DWA may be decided as a matter of law or must be submitted to a jury. The panel held that the definition of “employer” reaches not only persons or entities that wholly own or have a majority stake in the covered establishment, but also those that, directly or indirectly, exercise sufficient control to be able to provide the required notice and satisfy the statute’s financial obligations, even if their ownership stake is less

than 50 percent. The panel held that a controlling interest may also be held collectively, by stockholders under common ownership whose stakes aggregate to control, and indirectly, by parent companies or other upstream entities that own or control the holders of that interest. Reversing the judgment on Count II, the panel held that Haw. Rev. Stat.'s § 394B-9(c)'s safe harbor affirmative defense to the DWA's 60-day notice requirement, which defers the notice obligation for an employer actively seeking a buyer, was unavailable. The panel held that § 394B-9(c) is available only when the employer enters a binding sale, transfer, or merger agreement that will result in a divestiture, meaning a transfer from one employer to another. The panel denied plaintiffs' motion to certify the DWA statutory interpretation questions to the Hawaii Supreme Court.

In Part V, addressing the WARN Act claim in Count III, the panel affirmed the district court's decision to amend the judgment to relieve Au of individual liability.

In Part VI, the panel affirmed the district court's evidentiary rulings.

In Part VII, addressing damages, the panel vacated the district court's award of nominal damages against the Au Defendants on Count VI, alleging breach of fiduciary duty, on the basis that the district court improperly formulated the jury instructions. The panel affirmed the district court's decision to prohibit punitive damages for the fiduciary duty claims. The panel affirmed the manner in which the district court prohibited double recovery.

In Part VIII, addressing equitable remedies, the panel affirmed the district court's decision to pierce the corporate veil of PaCap Aviation Finance, LLC ("PAF") and Malama Investments, Inc., on Counts IV and VI and its refusal to

pierce the veil of PAF and Malama on Count III, the WARN Act claim. Because the panel reversed the grant of JMOL in favor of Ohana on Counts VII and IX, it ruled that the district court could consider veil piercing for those counts on remand. The panel affirmed the district court's decision to equitably subordinate Carbonview Limited, LLC's loans; its refusal to recharacterize PAF and Carbonview's debt to equity; and its finding of a reasonably equivalent value defense to constructive fraud claims. The panel affirmed the district court's decision to order contribution from David Uchiyama.

Dissenting, Judge Forrest wrote that there was no final judgment before the panel, and so it lacked appellate jurisdiction under 28 U.S.C. § 1291. She wrote that regardless of whether finality was required only as to the adversary proceeding or as to the entire bankruptcy case, there was no final judgment here because, even considering just the adversary proceeding, the district court's judgment left issues for the bankruptcy court to decide. Judge Forrest also wrote that the panel could have assured itself of jurisdiction by issuing a limited remand asking the district court to determine whether a motion under Fed. R. Civ. P. 54(b) should be entertained.

COUNSEL

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OPINION

BYBEE, Circuit Judge:

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This case arises out of the Chapter 7 bankruptcy of Hawaii Island Air, Inc., an airline operating among the Hawaiian Islands. As relevant here, Island Air was owned between 2013 and 2016 by Oracle co-founder Lawrence J. Ellison's revocable trust. In 2016, as the airline struggled, Ellison sold a two-thirds interest to entities controlled by local businessman Jeffrey Au. The airline continued to hemorrhage, and on November 9, 2017, it informed its employees that it was shuttering the following day, leaving them without their final paychecks.

Elizabeth Kane was appointed as Chapter 7 bankruptcy trustee (the "Trustee") and together with the Air Line Pilots Association and the Hawaii Teamsters and Allied Workers, Local 996 (collectively the "Unions"), brought two adversary proceedings against Island Air's former owners, officers, directors, and lenders, including Ellison, Au, and their affiliated entities. Plaintiffs alleged violations of Hawaii's Dislocated Workers Act, Haw Rev. Stat. §§ 394B-9, 394B-11, and the federal Workers Adjustment and Retraining Notification Act, 29 U.S.C. §§ 2102(a), 2104(a)(1), for failing to provide 60 days' notice and to pay wages and benefits due at closing. The Trustee also alleged that various defendants breached fiduciary duties of care and loyalty to Island Air. Plaintiffs sought compensatory and punitive damages and equitable relief, including equitable subordination of certain claims against the estate, recharacterization of certain loans as equity, and veil piercing.

The district court allowed the case to proceed to a jury trial, although it granted judgment as a matter of law for some claims. After a month-long trial, the jury returned a mixed verdict finding the Au Defendants liable on several counts. In a comprehensive three-hundred-plus-page

opinion, the court then memorialized its own findings of fact and conclusions of law and addressed post-trial challenges to the jury's verdict in various orders. All parties filed appeals, raising more than twenty-four issues spread across over seven hundred pages of briefing. We affirm in part, reverse in part, and remand for further proceedings.

I. BACKGROUND

This case involves two main groups: the Ellison Defendants and the Au Defendants. Each group includes complex, interlocking corporations, LLCs, holding companies, and trusts. We set forth below the basic facts in narrative form. We will provide additional detail as necessary in our discussion of the legal issues raised by the parties. Visual charts of the corporate structures of the Ellison and Au Defendants are attached as Appendix A; a descriptive list of the entities and individuals involved is attached as Appendix B; a timeline of the relevant events is attached as Appendix C.

A. Factual Background

Island Air operated in Hawai'i's interisland market for nearly twenty-one years. During the relevant time period, Island Air flew routes to various Hawaiian Islands, had hundreds of employees, and occupied an important role as the second carrier in the competitive interisland market, in which Hawaiian Airlines held a near monopoly. Island Air was one of only two airlines that served the island of Lānaʻi, which Ellison had acquired almost in its entirety in 2012. In February 2013, the Lawrence J. Ellison Revocable Trust (the "Ellison Trust") wholly acquired Island Air through Ohana Airline Holdings, LLC ("Ohana"), an entity created for that purpose with no "business other than owning Island Air stock."

Ohana sat within a web of Ellison-affiliated entities. Ohana was owned by the Ellison Trust, whose co-trustees were Ellison and Paul Marinelli. Marinelli wore many hats. In addition to serving as president of Ohana, he was president of Lawrence Investments, LLC, a 30-person firm that oversees Ellison's personal financial affairs. Marinelli was also the president or manager of Carbonview Limited, LLC and of Island Leasing, LLC—two entities ultimately owned by the Ellison Trust that would come to have significant commercial dealings with Island Air. At trial, Marinelli testified that in every position he occupied, his role was the same: "I would always advocate for . . . Ellison's companies. I work for him and that's my job."

Under Ellison's ownership, Island Air experienced substantial losses. In the three years Island Air spent under Ohana's sole ownership, it lost more than \$46 million on annual revenue of less than \$35 million, and by late 2015 it was losing \$1 to \$2 million every month. In early spring 2015, Island Air sold its entire fleet, which consisted of five ATR-72s, to Ellison's aircraft-leasing affiliate, Island Leasing, LLC ("Island Leasing"), and leased the planes back because "Island Air needed the funding at the time." By 2015, Ellison and his advisors were also discussing the possibility of shutting down Island Air entirely. Marinelli advised Ellison in June 2015 that "[o]n a purely financial basis, I believe your best option is to shut down" Island Air. But Ellison's interests in Hawai'i were not purely financial: he was concerned that closing the local airline would carry political and reputational repercussions for his other ventures in the islands, including his 98 percent ownership of Lāna'i. So rather than shut Island Air down, Ellison and Marinelli searched for a buyer to take the failing airline off Ellison's hands. But finding willing buyers for the

struggling airline was no easy task. A November 2015 email from Marinelli to Island Air’s then-CEO David Pflieger explained the goal of a sale: “Regardless of the structure, we need to sell 50%+ of the company stock so we can legitimately say there is ‘new ownership[.]’”

Although no buyer would take all of Island Air, they eventually found an investor group willing to take two-thirds, provided that the Ellison side kept the final third and lent significant capital to the deal. The group was composed of Jack Tsui, a local businessman affiliated with Panda Travel, and Jeffrey Au, a lawyer and venture capitalist who managed a host of LLCs.

The parties signed a Stock and Warrant Purchase Agreement in December 2015 and closed in early February 2016. The transaction was structured as follows: Island Air redeemed all of its outstanding common stock and issued 600,000 new shares at two cents per share: 200,000 Series A shares to Ohana, 200,000 Series B shares to PaCap Aviation Finance, LLC (“PAF”), and 200,000 Series C shares to Malama Investments, LLC (“Malama”). The new investors paid just \$4,000 in equity for each of the one-third interests. PAF was 99.5 percent owned by Tsui’s trust and managed by Au, who indirectly owned the remaining 0.5 percent. Malama was wholly and indirectly owned and managed by Au. Under Island Air’s amended articles, each series elected one of the company’s three directors, and the corporation could not “[l]iquidate, dissolve, or wind up” its business and affairs without series-level consent. The agreement also granted Ohana alone a warrant to purchase up to 600,000 additional Series A shares at any time for two cents per share, or a total of \$12,000.

At the first closing, Island Air, PAF, and Ohana executed a Loan Agreement requiring PAF and Ohana to extend loans pursuant to promissory notes. Island Air obtained \$5 million in new financing through this Loan Agreement. Ohana later assigned its rights and obligations under the Loan Agreement to Carbonview Limited, LLC (“Carbonview”), an entity owned by Lawrence Investments. The Loan Agreement also obligated the parties to execute a Senior Security Agreement and Spare Parts Mortgage and Security Agreement, which created a lien on Island Air’s assets that Carbonview and PAF could exercise upon default. In all, more than \$16 million in capital, mostly through loans, would be made available to Island Air, with Carbonview alone lending more than \$12.8 million and extending Island Air a \$3.5 million “line of credit” pursuant to a Subordinated Secured Promissory Note.

Au had no experience running an airline. He immediately brought in a new management team made up of Tsui, Glenn Taniguchi, Les Murashige, Rob Mauracher, David Uchiyama, and himself. Murashige was also appointed the airline’s Chief Executive Officer (CEO), while Mauracher became the Chief Operating Officer (COO). Uchiyama initially joined as the Chief Commercial Officer (CCO). But in April 2016, Au terminated Murashige and Mauracher, and appointed Uchiyama as interim CEO. Murashige, Uchiyama, and Ohana’s appointee, Marinelli, formed Island Air’s three-person board of directors.

This change in leadership did not improve Island Air’s fortunes. In 2016 and 2017, Island Air lost between \$2 million and \$5 million per quarter. And beginning in May 2017, the airline faced recurring cash crises, most of them triggered by anticipated payroll shortfalls. Each time, Island Air looked to Ellison and Marinelli for rescue. To resolve

the first shortfall, Marinelli agreed to allow Island Air to draw \$850,000 from what remained of Carbonview's \$3.5 million line of credit. But when another payroll crisis came in June 2017, Ellison, on Marinelli's recommendation, declined to provide additional funding. Instead, Marinelli, Uchiyama, and two companies affiliated with Au loaned \$450,000 to Island Air. Two weeks later, Marinelli helped bridge another looming shortfall by agreeing to purchase Island Air's ATR spare parts inventory for \$800,000 via Island Leasing, the Ellison-owned company he managed that leased ATR aircraft to Island Air. Marinelli recommended the purchase to Ellison because of the "downside of a bankruptcy filing this week."

By late June, Marinelli's support had run dry. On June 27, Au asked Marinelli for \$1 million in cash so that Island Air could make its next payroll. Marinelli declined. Shortly thereafter, on July 10, 2017, Marinelli resigned from Island Air's board of directors citing potential conflicts of interest posed by the airline's mounting debts to Ellison-affiliated entities. The next month, Island Air, Island Leasing, and Elix (one of Island Air's Q400 aircraft lessors, unaffiliated with either the Ellison or Au Defendants) signed a letter of intent under which Island Leasing would sell its ATR aircraft to Elix. Elix assumed the lease for the aircraft and insisted that \$2 million of the proceeds be made available to Island Air to keep it afloat. Although the transaction was finalized after Marinelli resigned from Island Air's board, he participated in the negotiations for the sale while serving on Island Air's board.

Over the following months, Island Air's financial problems accelerated. In September 2017, Island Air was forced to ground two of its planes after missing several aircraft rent payments. On September 14, two new directors

selected by Au—Catherine Yannone and Christopher Gossert—joined the board. In October, Elix served a termination notice for the remaining Q400 leases and four days later, on October 16, Island Air filed for Chapter 11 bankruptcy.

Within a week of filing, Island Air concluded that it likely could not pay even the insurance premiums it needed to continue flying. As a result, the airline abruptly ceased operations on November 10, having only informed employees of the impending shutdown the day before via an email from Uchiyama. Two days after shuttering, Island Air moved the bankruptcy court to convert its Chapter 11 case to Chapter 7. The bankruptcy court granted the motion on November 15 and appointed Elizabeth Kane as the Chapter 7 trustee. In its final months of operation, from June 30, 2017, to the shutdown, Island Air’s debt to third parties grew by \$6,851,692.

B. Procedural History

In 2019, the Trustee and two employee unions—the Air Line Pilots Association and the Hawaii Teamsters and Allied Workers, Local 996—initiated two adversary proceedings in the United States Bankruptcy Court for the District of Hawai‘i. The District Court for the District of Hawai‘i withdrew the references in the two proceedings and later consolidated them. Plaintiffs asserted a range of statutory, common law, and equitable claims against Ellison, Marinelli, Ohana, Lawrence Investments, and Carbonview (“Ellison Defendants”), and Au, Tsui, PAF, Malama, PaCap Management Holdings, LLC, Snowbiz Ventures, LLC, PaCap Management Solutions, LLC, PaCap Advisors, LLC, and PacifiCap Investment Management, LLC (“Au Defendants”). Although Plaintiffs did not assert any claims

against Uchiyama, the Au Defendants named him as a third-party defendant and requested contribution.¹

1. The Claims

To summarize the counts in relevant part: In Counts I and II Plaintiffs alleged that all defendants except Carbonview had violated Hawai'i's Dislocated Workers Act ("DWA") by failing to give adequate notice of Island Air's shutdown and failing to promptly pay wages and benefits. Count III alleged that PAF, Malama, and Ohana violated the federal Worker Adjustment and Retraining Notification Acts ("WARN Act") by failing to provide adequate notice. The DWA gives employees the right to 60 days' written notice from their employer prior to a closing, divestiture, partial closing, or relocation. Haw. Rev. Stat. § 394B-9(a). The DWA provides a cause of action for back pay, benefits, and attorney's fees. *Id.* §§ 394B-9(b), (d), 394B-12, 394B-13. The WARN Act similarly provides that an employer must give its employees 60 days' notice and supplies a cause of action for back pay and benefits. 29 U.S.C. §§ 2102(a), 2104(a). Counts IV and V alleged that the Au Group, Yannone, and Gossert had breached their fiduciary duties by allowing the company to violate the DWA and WARN Act. Count VI alleged that the Au Group, Yannone, and Gossert breached duties of loyalty by allowing assets to dissipate in furtherance of their own interests; Count VII asserted a parallel theory against Marinelli, Ohana, and Lawrence Investments. Counts VIII and IX alleged various breaches of fiduciary duties by Marinelli for resigning while the

¹ Christopher Gossert and Catherine Yannone, two other defendants who served briefly on the board of directors, were named in the proceedings. Gossert settled with Plaintiffs before trial and the claims against Yannone were dismissed following her passing.

corporation was in crisis, and implementing an undercapitalized business plan. Finally, Count XII sought to equitably subordinate PAF's and Carbonview's claims against the bankruptcy estate, while Count XIII sought to recharacterize certain loans made by PAF and Malama as equity investments.² Plaintiffs additionally asked the court to pierce the corporate veil in Counts I through IX.

2. Trial Proceedings

In September 2023, the case proceeded to a jury trial. In the middle of trial, the Plaintiffs, the Ellison Defendants, and the Au Defendants all moved for judgment as a matter of law (JMOL) on the DWA claims (Counts I and II), the WARN Act (Count III), and the fiduciary duty claims (Counts VII, VIII, and IX). The court ruled orally on those motions contemporaneously and memorialized its reasoning in a later opinion.

DWA Claims (Counts I and II). On Plaintiffs' two DWA claims, the court held that no Ellison Defendant was liable because none was "an employer" under Haw. Rev. Stat. § 394B-2. The court reasoned that the Ellison Defendants were not employers because, at the time of the closure, they neither owned all of Island Air nor had "a controlling interest" in Island Air. The court conversely granted JMOL against the Au Defendants on Count I, but permitted the Au Defendants to assert an affirmative defense under Haw. Rev. Stat. § 394B-9(c) for Count II. The district court construed

² Counts X and XI are not relevant to the issues raised here. Count X alleged that Marinelli, Ohana, and Lawrence Investments aided and abetted Au's breach of fiduciary duty by implementing an undercapitalized business plan. The jury found that Au had not committed the predicate breach. Count XI alleged indemnity against all defendants except for Carbonview.

the DWA as permitting an affirmative defense where the employer was “actively seeking a buyer” and “there is a possibility of divestiture,” even if divestiture did not ultimately occur.

WARN Act (Count III). The court found PAF and Malama liable on Count III to the Unions for violating the WARN Act and awarded \$2,970,761. Although the court had initially found Au liable on the same count, it later reversed itself in its Amended Findings of Fact and Conclusions of Law, holding that Au could not be held liable because Plaintiffs had either failed to name him as a defendant in Count III or had forfeited their claim against him by the time trial concluded.

Fiduciary Claims (Counts VII, VIII, and IX). The court found for the Ellison Defendants (other than Marinelli) on all of the fiduciary duty claims. The court concluded that none of the Ellison Defendants aside from Marinelli “owed a fiduciary duty to Island Air” because Ohana was only a minority shareholder and none of the rest were “officers, directors, or shareholders of Island Air.” The court granted JMOL in favor of Marinelli on Count VII, finding that he did not owe fiduciary duties at the time of the relevant transaction, and on Count VIII finding that no evidence showed Marinelli resigned in bad faith and a director may resign at any time. The court, however, deferred ruling on JMOL for Marinelli on Count IX and allowed the claim to proceed to a jury, which found Marinelli not liable.

Punitive Damages. The district court denied punitive damages for the remaining fiduciary duty claims against the Au Defendants because “[p]unitive damages are not available for breaches of fiduciary duty under Delaware law.” Alternatively, the court declined to allow punitive

damages because “there was no evidence of any outrageous, egregious, willful, or wanton conduct.”

Piercing the Corporate Veil. Finally, the court pierced the corporate veil between PAF and its owners (the Tsui Trust and PaCap Management Holdings, LLC) and between Malama and its owner (PaCap Management Holdings, LLC) with respect to Counts IV and VI only. It declined to do the same for Count III, and did not reach veil piercing for the fiduciary duty claims against the Ellison Defendants.

3. The Jury Verdict

The jury returned a special verdict. With respect to Plaintiffs’ DWA § 394B-11 claim regarding prompt payment (Count I), the jury awarded \$2,981,668 in damages against the Au Defendants. On the DWA § 394B-9 claim for failure to provide notice of closure (Count II), the jury found for the Au Defendants on the grounds that they were actively seeking a buyer, which the district court ruled was an affirmative defense. Regarding the first of the fiduciary claims (Count IV), the jury found that PAF, Malama, and Au breached a fiduciary duty of loyalty to Island Air, resulting in damages of \$2,981,668. On the second fiduciary claim (Count V), the jury found that Au had breached his duty of care by allowing Island Air to violate the DWA’s notice requirement and awarded \$2,042,007 in damages. And on the third fiduciary claim (Count VI), the jury awarded nominal damages of \$0.99 for PAF’s, Malama’s, and Au’s breaches of their fiduciary duties of loyalty for allowing assets to dissipate in furtherance of their own interests and refusing to give up control in exchange for outside investments. The jury found the Au Defendants and Marinelli not liable on Count IX regarding the alleged implementation of an undercapitalized business plan.

With respect to damages awarded for the same conduct under different legal theories (Counts I and IV and Counts III and V), the court held that Plaintiffs could only enforce the judgment under one theory and recover the corresponding amount of prejudgment interest. Lastly, the court ordered David Uchiyama to contribute 5 percent of the damages awarded against the Au Defendants.

All the parties appealed.

II. JURISDICTION

We begin with jurisdiction. We have a “special obligation” to assure ourselves of both our own jurisdiction and the district court’s, and we must consider sua sponte questions of Article III standing and finality under 28 U.S.C. § 1291. *Chapman v. Pier 1 Imports (U.S.) Inc.*, 631 F.3d 939, 954 (9th Cir. 2011) (en banc) (quoting *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986)); see *In re Vylene Enters., Inc.*, 968 F.2d 887, 889 (9th Cir. 1992). The Au Defendants, for their part, raise three objections to our jurisdiction. We consider in Subpart A whether the Amended Judgment is a final decision under § 1291; then, in Subpart B, we consider two questions related to standing: First, whether the Trustee has Article III standing to bring the fiduciary-duty claims in Counts IV and V; and second, whether the Unions have standing to bring the DWA claims. We review questions of subject-matter jurisdiction and standing de novo. *Hajro v. U.S. Citizenship & Immigr. Servs.*, 811 F.3d 1086, 1098 (9th Cir. 2016).

A. Appellate Jurisdiction Under 28 U.S.C. § 1291

We first consider the statutory basis to review the district court’s Amended Judgment. The order on appeal was entered after the district court, having referred this

proceeding to the bankruptcy court under 28 U.S.C. § 157(a), withdrew the reference under § 157(d), thus returning the proceeding to itself for adjudication. The precise question is whether, after the reference to the bankruptcy court was withdrawn, § 1291 permits appellate review of a district court's related final judgment when allowance of claims and other core matters are still pending in the bankruptcy court. We hold that when a district court sitting in bankruptcy withdraws the reference from the bankruptcy court and fully adjudicates a related civil proceeding, the court's judgment is final and appealable under § 1291 even though core bankruptcy-administration matters remain in the underlying bankruptcy case.

1. Determining Finality in a Withdrawn Bankruptcy Proceeding

This bankruptcy appeal comes to us in an atypical posture. In the ordinary bankruptcy appeal, we review a district court's decision entered in its appellate capacity under 28 U.S.C. § 158(a), after the district court has reviewed a final order, judgment, or decree of a bankruptcy court. See Laura B. Bartell, *Motions to Withdraw the Reference—An Empirical Study*, 89 Am. Bankr. L.J. 397, 413–14 (2015) (recording only 65 motions to withdraw the reference compared to over 222,544 bankruptcy filings in the Ninth Circuit in 2013). Our jurisdiction over such appeals arises under 28 U.S.C. § 158(d)(1). Here, by contrast, the district court “sat in bankruptcy,” exercising original jurisdiction under 28 U.S.C. § 1334 after the bankruptcy court asked it to withdraw the reference. The district court agreed and conducted a complex, month-long jury trial in a consolidated adversary proceeding.

Because the district court exercised original jurisdiction under § 1334 rather than appellate jurisdiction under § 158(a), our jurisdiction arises, if at all, under 28 U.S.C. § 1291, and not § 158(d). *See Klestadt & Winters, LLP v. Cangelosi*, 672 F.3d 809, 813–14 (9th Cir. 2012) (“We have jurisdiction to hear appeals from district courts sitting in bankruptcy under § 1291, but have jurisdiction to hear appeals from district courts reviewing bankruptcy court decisions under 28 U.S.C. § 158(d)(1), as well as § 1291.”); *Benny v. England (In re Benny)*, 791 F.2d 712, 718 (9th Cir. 1986) (“[A]ppeals . . . may be taken to this court pursuant to section 158(d) only if the order appealed from is within the scope of section 158(a), a bankruptcy court order appealed to a district court.”).

It is well established that, to account for the distinctive structure of bankruptcy, § 158(d) affords a flexible approach to finality. *See, e.g., In re Bender*, 586 F.3d 1159, 1163 (9th Cir. 2009) (“[T]he unique nature of bankruptcy procedure dictates that we take a pragmatic approach to finality and use a more liberal finality standard.” (quotation marks and citation omitted)); *Bank of N.Y. Mellon v. Watt*, 867 F.3d 1155, 1157 (9th Cir. 2017) (“In bankruptcy, the [finality] rules are somewhat relaxed: appeals are permitted not only from final judgments but also from orders that ‘finally dispose of discrete disputes within the larger case.’” (quoting *Bullard v. Blue Hills Bank*, 575 U.S. 496, 501 (2015)))).

That flexibility, however, does not extend to bankruptcy appeals arising exclusively under § 1291. In *In re Hawaii Corp.*, we considered whether we had jurisdiction to review an order of a district judge sitting in bankruptcy requiring a former director to surrender stock certificates to the trustee. 796 F.2d 1139, 1141 (9th Cir. 1986). We held that “the liberalized rules of finality for bankruptcy appeals do not

apply to 28 U.S.C. § 1291 appeals,” so we had jurisdiction “only if the order of the district judge is an appealable collateral order.” *Id.* at 1142. We held that it was. *Id.* at 1142–43.

Since *In re Hawaii Corp.*, we have reaffirmed—sometimes reluctantly—that appeals from district courts sitting in bankruptcy are governed by ordinary § 1291 finality principles, not § 158(d)’s more flexible bankruptcy standards. *Klestadt*, 672 F.3d at 815 (“[W]e are bound by our decision in *Hawaii Corp.*, and as a three-judge panel, we cannot overrule it.”); *In re Vylene Enters.*, 968 F.2d at 893 (“*Hawaii Corp.* unequivocally requires us to apply different finality standards depending on which statute affords jurisdiction.”). But our cases grappling with that rule have arisen predominantly in the context of interlocutory or collateral orders. *See Klestadt*, 672 F.3d at 815–19 (holding that a sanctions order entered after a withdrawal of the reference did not satisfy the ordinary § 1291 collateral-order standard); *In re Canter*, 299 F.3d 1150, 1153 (9th Cir. 2002) (holding that a district court’s sua sponte order withdrawing the reference was “interlocutory and unreviewable under 28 U.S.C. § 1291,” but exercising mandamus jurisdiction).

In re Hawaii and its progeny have not addressed the appealability of a judgment in the kind of case before us: whether a judgment that fully resolves a withdrawn bankruptcy-related civil proceeding is final under § 1291 while the underlying bankruptcy case continues.³ *See*

³ On at least two occasions, we have exercised § 1291 appellate jurisdiction over an adversary proceeding arising from a district court sitting in bankruptcy, even though tasks remained in the underlying bankruptcy case. In *In re Manoa Finance*, a bankruptcy trustee brought a series of claims in an adversary proceeding against third parties on

Matter of Powelson, 878 F.2d 976, 979 (7th Cir. 1989) (describing this “puzzling jurisdictional issue” as “a difficult prefatory question”). We thus proceed under § 1291’s ordinary finality principles. This inquiry is an imperfect, or at least an underexplored, fit, because the § 1291 finality doctrine developed almost entirely outside the context of withdrawn bankruptcy adversary proceedings.⁴

behalf of the estate. 781 F.2d 1370, 1371–72 (9th Cir. 1986). After the bankruptcy judge recused himself, the case was transferred to an Article III district judge who granted summary judgment on two of the trustee’s claims. *Id.* We exercised § 1291 jurisdiction to hear the appeal of the claims, which had been certified under Rule 54(b), even though bankruptcy proceedings remained. *Id.* at 1372. Then, in *In re Bishop*, a bankruptcy trustee brought suit against the Bank of Hawai‘i to recover funds disbursed from the real estate collection account to the bankrupt corporation’s former directors. 856 F.2d 78, 78–79 (9th Cir. 1988). The district court, exercising original bankruptcy jurisdiction, granted summary judgment for the Bank, and the trustee appealed. *Id.* We exercised § 1291 jurisdiction over the adversary proceeding and affirmed summary judgment, finding that “appellate jurisdiction properly lies under § 1291.” *Id.* at 79. In neither case did we undertake an extended jurisdictional analysis.

In a third case, *In re Soderling*, 998 F.2d 730 (9th Cir. 1993), the district court granted partial summary judgment, holding that a criminal restitution judgment was nondischargeable in pending Chapter 7 proceedings. We noted that the district court had jurisdiction under 28 U.S.C. §§ 157(d) and 1934, and that we had appellate jurisdiction pursuant to § 1291. *Id.* at 732. Our brief discussion of the procedure does not permit us to determine more precisely the procedural posture of the case.

⁴ This strict bifurcation between § 158(d) and § 1291 in bankruptcy appeals is unique to our circuit. Nearly all our sister circuits have applied or recognized bankruptcy’s pragmatic finality principles where appellate jurisdiction arises under § 1291 due to the district court exercising original bankruptcy jurisdiction rather than appellate jurisdiction under § 158. *See, e.g., Tringali v. Hathaway Mach. Co.*, 796 F.2d 553, 558 (1st

Cir. 1986) (“We see no reason . . . for interpreting the word ‘final’ in § 1291 differently from the way we interpreted it in § . . . 158(d).”); *In re Sonnax Indus., Inc.*, 907 F.2d 1280, 1283 (2d Cir. 1990) (“We therefore follow the Third Circuit in holding that decisions regarding finality under Section 158(d) apply under Section 1291.”); *In re Amatex Corp.*, 755 F.2d 1034, 1039 (3d Cir. 1985) (“[A]lthough our jurisdiction must be established under § 1291, it is appropriate that our judgment in this regard be informed by notions of finality in bankruptcy appeals.”); *In re Marvel Ent. Grp., Inc.*, 140 F.3d 463, 470 (3d Cir. 1998) (“We see no reason to use conflicting [finality] standards when a district court, as distinguished from a bankruptcy court, has issued an order in bankruptcy directly.”); *A.H. Robins Co. v. Piccinin*, 788 F.2d 994, 1009 (4th Cir. 1986) (grounding appellate jurisdiction on the “more relaxed standard of finality for appeal purposes under 1291 traditionally assigned bankruptcy appeals”); *Matter of Cajun Elec. Power Co-op., Inc.*, 119 F.3d 349, 354 (5th Cir. 1997) (“[I]n the bankruptcy context, the liberalized final judgment rule of 28 U.S.C. § 158(d) applies, even when appellate jurisdiction is based on section 1291.”); *Lindsey v. O’Brien, Tanski, Tanzer & Young Health Care Providers of Conn. (In re Dow Corning Corp.)*, 86 F.3d 482, 487–88 (6th Cir. 1996) (applying a “functional” and “practical” § 1291 finality rule to an order of a district court sitting in bankruptcy); *In re UNR Indus., Inc.*, 725 F.2d 1111, 1115–16 (7th Cir. 1984) (recognizing that § 1291 is “flexible enough” to account for bankruptcy’s distinct finality concerns); *Rajala v. Gardner*, 709 F.3d 1031, 1034–35 (10th Cir. 2013) (treating a district-court ruling on the automatic stay as final under § 1291 because finality is “necessarily more flexible in the bankruptcy context, where the concept of finality requires consideration of a particular adversary proceeding or a discrete controversy rather than the broader litigation”); *Jove Eng’g, Inc. v. I.R.S.*, 92 F.3d 1539, 1547 (11th Cir. 1996) (“In the bankruptcy context, ‘finality’ under § 1291 is viewed similarly to ‘finality’ under § 158(d) . . .”).

Notwithstanding this apparent consensus among our sister circuits, we are bound by *In re Hawaii*’s command to apply ordinary § 1291 finality principles. See *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc) (holding that a Ninth Circuit panel may not overrule a prior circuit precedent unless an intervening higher authority is “clearly irreconcilable” with the prior precedent).

Under 28 U.S.C. § 1291, the courts of appeals have jurisdiction over “all final decisions of the district courts . . . except where a direct review may be had in the Supreme Court.” The finality requirement dates to the Judiciary Act of 1789, *see* Judiciary Act of 1789, ch. 20, § 22, 1 Stat. 73, 84 (authorizing Supreme Court review of “final judgments and decrees” of the federal circuit courts), and guards against piecemeal appeals in the service of “the effective conduct of litigation” and “a healthy legal system.” *Cobbledick v. United States*, 309 U.S. 323, 326 (1940). The finality rule is to be given a “practical rather than a technical construction.” *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949); *see Microsoft Corp. v. Baker*, 582 U.S. 23, 37 (2017).

The oft-quoted touchstone for § 1291 finality is whether the judgment “ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.” *Catlin v. United States*, 324 U.S. 229, 233 (1945). Other formulations ask whether the district court has “disassociate[d] itself from a case,” *Swint v. Chambers County Comm’n*, 514 U.S. 35, 42 (1995), whether the ruling “terminate[s] an action,” *Gelboim v. Bank of Am. Corp.*, 574 U.S. 405, 409 (2015), and whether the district court’s decision “(1) is a full adjudication of the issues, and (2) ‘clearly evidences the judge’s intention that it be the court’s final act in the matter,’” *Nat’l Distrib. Agency v. Nationwide Mut. Ins. Co.*, 117 F.3d 432, 433 (9th Cir. 1997) (citations omitted).

Although § 1291 speaks of a final “decision,” the familiar formulations refer to various proceedings, asking whether an order “ends the *litigation*,” *Catlin*, 324 U.S. at 233, “terminate[s] the *action*,” *Gelboim*, 574 U.S. at 409 (2015), or marks the “final act in the *matter*,” *Nat’l Distrib.*,

117 F.3d at 433 (citation omitted) (emphases added).⁵ This imprecision likely reflects the fact that, in ordinary civil litigation, the proceeding in question is uncontroversial: the

⁵ The dissenting opinion offers a technical reading of 28 U.S.C. § 1291. It concludes that we do not have an appealable “final decision” under § 1291 until the “entire bankruptcy case” has been closed by the bankruptcy court. Dissenting Op. at 166; *see also id.* at 159–160. The dissenting opinion depends in part on a close comparison of the texts of § 1291 and 28 U.S.C. § 158. *Compare* 28 U.S.C. § 1291 (providing appellate jurisdiction over “final decisions”), *with id.* § 158(d)(1) (providing appellate jurisdiction over “final decisions, judgments, orders, and decrees”). According to the dissent, the terms in § 158 represent “distinctions with a difference.” Dissenting Op. at 161.

We do not question the general application of the canons of construction, but the canons are not fixed rules. They are not themselves law, but general principles of interpretation that have to be adapted to the texts before us. Although the dissent believes the different terms in §§ 1291 and 158(d)(1) mean something, in the end, the dissent cannot tell us what that is. By the dissent’s reasoning, we only have appellate jurisdiction over “final decisions,” which “does not fully encompass § 158’s ‘judgment, orders, and decrees.’” Dissenting Op. at 161. If that is so then we do not have jurisdiction over “final judgments,” because that term is found in § 158, but not in § 1291. Yet the Supreme Court has routinely equated “final judgment” with “final decision” appealable under § 1291. *See, e.g., Hall v. Hall*, 584 U.S. 59, 64 (2018) (“Under § 1291, ‘any litigant armed with a final judgment from a lower federal court is entitled to take an appeal’ . . .”) (quoting *Arizona v. Manypenny*, 451 U.S. 232, 244 (1981)). If the textual differences between §§ 1291 and 158 were as categorical as the dissent makes them, we would not even have the dissent’s preferred solution available to us—remanding to the district court for certification under Federal Rule of Civil Procedure 54(b). *See* Dissenting Op. at 175–76. Rule 54(b) allows the district court to “direct entry of final judgment,” which would come within § 158(d)(1), but not § 1291.

Sometimes we have to give statutory terms a precise, technical reading. But in this case, the Supreme Court has instructed us to give “final decisions” a “practical rather than a technical construction.” *Cohen*, 337 U.S. at 546.

civil action. And in a civil action, “[a] ‘final decision’ . . . is normally limited to an order that resolves the entire case.” *Ritzen Grp., Inc. v. Jackson Masonry, LLC*, 589 U.S. 35, 38 (2020). But bankruptcy is not so straightforward. A bankruptcy case is not an ordinary civil action, but a collection of “‘individual controversies,’ many of which would exist as stand-alone lawsuits but for the bankrupt status of the debtor.” *Bullard*, 575 U.S. at 501 (quoting 1 Collier on Bankruptcy ¶ 5.08[1][b], p. 5–42 (16th ed. 2014)). We must therefore determine the “relevant proceeding” for assessing § 1291 finality in the context of a withdrawn related bankruptcy proceeding. *Id.* at 502. We conclude that the proper judicial proceeding is the withdrawn civil proceeding, not the bankruptcy case as a whole.

To understand why, some background on the structure of bankruptcy litigation is in order. The Constitution vests Congress with the power to “establish . . . uniform Laws on the subject of Bankruptcies throughout the United States.” U.S. Const. art. I, § 8, cl. 4. Exercising that power, Congress enacted the Bankruptcy Code, 11 U.S.C. § 101 et seq., which “contains hundreds of interlocking rules” for dealing with bankruptcies. *Harrington v. Purdue Pharma L.P.*, 603 U.S. 204, 209 (2024). A voluntary bankruptcy case is commenced by the filing of a petition, *see* 11 U.S.C. § 301(a), and, in a Chapter 7 asset case, the case is closed only after the estate has been fully administered and the trustee discharged, *see id.* § 350(a). In between, the bankruptcy case brings together numerous lawsuits within a lawsuit, including the debtor’s causes of action and suits between third parties, that must be resolved “before bankruptcy distribution can be made.” 1 Collier on Bankruptcy ¶ 5.08[1][b] (Richard Levin & Henry J. Sommer

eds., 16th ed.). In this way, the bankruptcy “case” serves as the “umbrella under which all of the proceedings that follow the filing of a bankruptcy petition take place.” *Id.* ¶ 3.01[2]. A bankruptcy “case,” in other words, is not a monolith; it must be distinguished from the discrete “proceedings” within it. *See In re Bayou Group, LLC*, 431 B.R. 549, 561 n.9 (Bankr. S.D.N.Y. 2010) (“There is no excuse, over thirty years after the enactment of the Bankruptcy Code, for lawyers practicing in bankruptcy court to continue to refer to bankruptcy cases as ‘proceedings.’ ‘Proceedings’ are discrete types of litigated matters within the larger bankruptcy case . . .”).

Consistent with this distinction, Congress has given federal district courts “original and exclusive jurisdiction of all *cases* under [the Bankruptcy Code],” 28 U.S.C. § 1334(a), but “original but not exclusive jurisdiction of all *civil proceedings* arising under [the Bankruptcy Code], or *arising in or related to cases* under [the Bankruptcy Code],” *id.* § 1334(b) (emphases added). Core proceedings are the proceedings “that arise in a bankruptcy case or under Title 11,” whereas non-core proceedings are those that are otherwise “related to” a bankruptcy case. *Stern v. Marshall*, 564 U.S. 462, 476 (2011); 1 Collier on Bankruptcy ¶ 3.01.

Core proceedings are the bread and butter of the bankruptcy process: matters concerning the administration of the estate, claims allowance, priority, distributions, and the like. *See* 28 U.S.C. § 157(b)(2). Related proceedings are civil proceedings that do not “arise under” the Bankruptcy Code or “arise in” a bankruptcy case, but whose outcomes may affect the estate’s administration. 1 Collier on Bankruptcy ¶ 3.01[3][e][ii]. These are the “lawsuits within a lawsuit”—the suits that could stand on their own but for the bankruptcy. Because such matters can be meaningfully

resolved only before distribution, we construe “related to” broadly. A proceeding is “related” to bankruptcy if its outcome “could conceivably have any effect on the estate being administered in bankruptcy,” and such a proceeding need not “be against the debtor or against the debtor’s property.” *In re Fietz*, 852 F.2d 455, 457 (9th Cir. 1988) (quoting *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984) (emphasis omitted)). It is enough that the “outcome could alter the debtor’s rights, liabilities, options, or freedom of action (either positively or negatively)” in a way that has an “impact[] upon the handling and administration of the bankrupt estate.” *Id.*

Although § 1334 vests this jurisdiction in the district courts, Congress has authorized district courts to refer all bankruptcy “cases” and related bankruptcy “proceedings” to bankruptcy judges in the first instance. 28 U.S.C. § 157(a). The District of Hawai‘i, like all districts, does so automatically. *See* D. Haw. L.R. 1070.1(a); 1 Collier on Bankruptcy ¶ 3.02[1] (noting that “every district court has provided by rule or order for automatic reference to bankruptcy judges”). As a result, the bankruptcy court is the tribunal in which most proceedings are handled. 1 Collier on Bankruptcy ¶ 3.01[3].

But the Seventh Amendment, Article III, and separation-of-powers concerns limit what a bankruptcy judge may do with a referred matter.⁶ A bankruptcy judge may enter final

⁶ Though we need not wade into these debates here, the authority of bankruptcy courts, as non-Article III courts, to enter final judgment in certain related proceedings has been the subject of a tug-of-war between Congress and the Supreme Court. *See Stern*, 564 U.S. at 503 (holding that the bankruptcy court lacked constitutional authority to enter final judgment on a state-law counterclaim not resolved in ruling on a creditor’s proof of claim); *N. Pipeline Constr. Co. v. Marathon Pipe Line*

judgment only in a core proceeding. *Stern*, 564 U.S. at 469; *see also* 28 U.S.C. § 157(b)(1) (providing that a bankruptcy judge “may hear and determine . . . all core proceedings arising under” the Bankruptcy Code, subject to review under the § 158 pathway). If the proceeding is non-core but “otherwise related to” a case under the Bankruptcy Code, the bankruptcy judge may hear it only if it “submit[s] proposed findings of fact and conclusions of law to the district court.” 28 U.S.C. § 157(c)(1). Although the district court has exclusive power to enter a “final order or judgment,” *id.*, the parties can consent to final adjudication by the bankruptcy judge, *id.* § 157(c)(2); *see Wellness Int’l Network, Ltd. v. Sharif*, 575 U.S. 665, 669 (2015) (affirming constitutionality of consent).

To serve as an escape hatch should adjudication of a referred matter by a non-Article III judge exceed its constitutional authority, the district court’s reference is revocable. District courts may withdraw the reference of a bankruptcy case or proceeding, “in whole or in part,” under certain circumstances. 28 U.S.C. § 157(d); *see also* Fed. R. Bankr. P. 5011(a) (establishing the procedure for withdrawal of reference). Once the reference is withdrawn, the

Co., 458 U.S. 50, 87 (1982) (plurality opinion); *see also Executive Benefits Ins. Agency v. Arkison*, 573 U.S. 25, 34–36 (2014) (holding that a *Stern* claim may proceed as non-core, with the bankruptcy court issuing proposed findings subject to de novo district court review). So too has the power of bankruptcy courts to conduct jury trials. *See* U.S. Const. Amend. VII; *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 36 (1989) (holding that the Seventh Amendment entitles a defendant who has not filed a claim against the estate to a jury trial on a trustee’s fraudulent-conveyance action, notwithstanding the claim’s statutory designation as “core”); 28 U.S.C. § 157(e) (permitting a bankruptcy judge to conduct a jury trial only if specially designated by the district court and with the express consent of all parties).

bankruptcy court loses jurisdiction over the withdrawn matter, which proceeds in the district court. But the rest of the bankruptcy case remains in the bankruptcy court unless stayed. *See* 28 U.S.C. § 157(d); Fed. R. Bankr. P. 5011(c); 9A Collier on Bankruptcy ¶ 5011.01.

In the ordinary course, the bankruptcy court adjudicates a proceeding, and its final order is reviewed by the district court or bankruptcy appellate panel (BAP) under § 158(a) or § 158(b), and then by the court of appeals under § 158(d)(1). In that posture, the flexible finality principles discussed above apply when the order “finally dispose[s] of discrete disputes within the larger case.” *Bullard*, 575 U.S. at 501 (citation omitted). But when, as here, the reference is withdrawn only as to a related civil proceeding, the district court adjudicates that proceeding under its original jurisdiction, not its appellate jurisdiction. We therefore cannot use the § 158 pathway to review it. *See Klestadt*, 672 F.3d at 813–16.

With that background in mind, we return to whether § 1291 finality is measured by the withdrawn related civil proceeding or the entire bankruptcy case. We think that the proper measure is the withdrawn civil proceeding. We base our analysis on both foundational principles and practical considerations.

We must start with the foundational principles “[b]ecause courts rarely invoke this discretionary power, [so] there is a paucity of judicial opinions construing [§ 157(d)].” *Matter of Powelson*, 878 F.2d at 976 (footnote omitted). As we have observed, § 157(d) provides a procedure by which district courts can withdraw “in whole or in part, any case or proceeding” previously referred to the bankruptcy court. And it may do so on its own motion or

“for cause shown” by “any party.” 28 U.S.C. § 157(d). The district court is not just withdrawing its referral to the bankruptcy court, it is reassuming original jurisdiction over the “case or proceeding,” whether “in whole or in part.” Thus, while the district court’s decision withdrawing or refusing to withdraw a referral is unreviewable because it is not a final decision under § 1291, *see In re Kemble*, 770 F.2d 802, 806 (9th Cir. 1985), a district court’s decision on the merits following withdrawal may be a final decision, *see In re King Memorial Hosp., Inc.*, 767 F.2d 1508, 1510 (11th Cir. 1985) (“Motions to withdraw reference from the bankruptcy court under § 157(d) essentially only determine the forum in which final decisions will be reached.”). The district court’s decision is final when it has resolved one of those “individual controversies” which “would exist as stand-alone lawsuits but for the bankrupt status of the debtor.” *Bullard*, 575 U.S. at 501 (citation omitted). Section 157(d) simply authorizes the district court to remove such controversies from the bankruptcy court’s jurisdiction and resolve them.

The district court’s decision on the matters that were withdrawn is binding on the bankruptcy court. Principles of issue and claim preclusion apply in the bankruptcy court proceeding because those matters were decided in a separate proceeding in the district court, and the “validity may not be relitigated in another proceeding on the claim.” *Katchen v. Landy*, 382 U.S. 323, 334 (1966); *see In re Nance*, 156 F.4th 961, 965-66 (9th Cir. 2025) (discussing issue and claim preclusion principles in the bankruptcy context). As to those matters decided by the district court, its decision is final in the remaining bankruptcy proceedings.

Although the Supreme Court has yet to address § 1291 in the context of a district court exercising original

bankruptcy jurisdiction, its decisions in related contexts reflect a broad principle: § 1291 finality turns on whether the district court has conclusively resolved the discrete proceeding before it, not on whether every related, collateral, or administratively tied matter has also come to an end. *See Hall*, 584 U.S. at 77 (holding that cases consolidated under Rule 42(a) “retain their separate identities” such that a final decision in one case is immediately appealable even if other consolidated cases remain pending); *Gelboim*, 574 U.S. at 413–14 (holding that dismissal of one action in an MDL was final because MDL consolidation does not create a single “monolithic multidistrict ‘action’”); *Ray Haluch Gravel Co. v. Cent. Pension Fund of Int’l Union of Operating Eng’rs & Participating Emp’rs.*, 571 U.S. 177, 183–89 (2014) (holding that an unresolved request for attorney’s fees does not prevent a merits judgment from being final, and emphasizing “operational consistency and predictability” in applying § 1291). Those cases support measuring finality here by the withdrawn proceeding that the district court finally adjudicated, not by the bankruptcy case that continues without it.

Our answer becomes even more apparent when we consider the practical alternatives: When could a withdrawn proceeding be appealed if finality were measured by the entire bankruptcy case? In the penultimate stage of a Chapter 7 case, the trustee prepares a final report (TFR). *See* 11 U.S.C. § 704(a)(9); Fed. R. Bankr. P. 5009(a); U.S. Dep’t of Just., Exec. Off. For U.S. Trs., Handbook for Chapter 7 Trustees 4-32–4-34 (2012) [hereinafter Chapter 7 Handbook]. After liquidating estate assets, but before making distributions, the trustee must certify, under penalty of perjury, “that all assets have been liquidated or properly accounted for and that funds of the estate are available for

distribution.” 28 C.F.R. § 58.7(a). But therein lies the first problem: The trustee cannot certify that all assets have been liquidated if the estate’s principal assets are the money judgments at issue in the appeal and enforcement has been stayed by a supersedeas bond. The TFR must also set out the trustee’s proposed distribution to creditors, *id.* § 58.7(a)(5). Once the report is approved and no objection is lodged, the trustee may distribute the estate according to the TFR, and final distribution “must be paid within 30 days of the entry of the final orders on compensation and expenses.” Chapter 7 Handbook, at 4-34. Dividends on allowed claims “must be paid as soon as practicable.” Fed. R. Bankr. P. 3009. Measuring finality by the whole bankruptcy case would therefore postpone review until the assets have been collected and distributed.

But even following the final report and distribution, the case has still not reached its end. The trustee must still issue a final account (TDR). Once all estate funds have been distributed and the estate’s bank statements show a “zero balance,” the trustee prepares a final account, certifies that the estate has been fully administered, and requests discharge. 28 C.F.R. § 58.7(c); Chapter 7 Handbook, at 4-35. If the trustee has filed the final report and final account and certified that the estate has been fully administered, and no objection is filed within thirty days, the estate is presumed fully administered. Fed. R. Bankr. P. 5009(a); Chapter 7 Handbook, at 4-35. Only then, after the estate is fully administered and the trustee discharged, does the court “close the case.” 11 U.S.C. § 350(a).

The problem we have described is not just academic: If there is no finality until the end of the entire bankruptcy case, we could not hear the merits of this appeal until distribution is complete, even though the judgment under review

materially alters not only the parties' claims, entitlements, and liabilities to the estate, but also the Trustee's ability to liquidate and collect assets. If we had to stay review until the distribution is complete, it would be effectively impossible to unwind the distribution. As the BAP has pointed out: "Unlike an adversary proceeding or a civil action outside bankruptcy, the culmination of [a] bankruptcy case does not result in a final judgment." *Stasz v. Gonzalez (In re Stasz)*, 387 B.R. 271, 276 (B.A.P. 9th Cir. 2008); see also *Klestadt*, 672 F.3d at 823 (Graber, J., concurring in part and dissenting in part) ("It is not clear to me what, exactly, constitutes a 'final judgment' in a bankruptcy case. . . . One close match would be the final order approving distribution of funds [but] [o]nce that order issues, . . . the heart of a bankruptcy case—the debtor's assets—will have disappeared, pro-rata, into a multitude of hands, precluding effective review of most, if not all, questions involving those assets.").

That is why, contrary to the dissenting opinion's and the Au Defendants' views, the considerations that inform our practical approach to finality overwhelmingly support the exercise of jurisdiction here. The most important of these considerations "are 'the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other.'" *Gillespie*, 379 U.S. at 152–53 (quoting *Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 511 (1950)). The Au Defendants' concern about piecemeal appeals is unavailing. In fact, the opposite is true: Delaying appellate review here would guarantee fragmented review. Once the district court refers the case back to the bankruptcy court for the "core proceedings," we will have § 158(d) jurisdiction over appeals from those proceedings *before* we have § 1291 jurisdiction over the issues now

before us. *See* 28 U.S.C. §§ 157(b), 158(a), (d). Yet those later proceedings—claim objections, distributions, and the like—would rest on the very conclusions challenged here. Are we to review those § 158(d) appeals first, with the understanding that they can be undone once we review the premises on which they rest? That suggests not only an advisory or premature opinion, but something even worse: the possibility of no review at all.⁷ As recovering assets after distribution would be practically impossible, assessing finality by the entire bankruptcy case would deny justice by imposing what may end up being an indefinite delay.

As a result, assessing finality by the whole bankruptcy case would “practically defeat the right to any review at all.” *Cobbledick*, 309 U.S. at 324–25. Because assessing finality as to the entire bankruptcy case would also impose what may be an indefinite delay, and in practical terms deny review, such a framing would run directly counter to the purposes of finality. Given the necessity of keeping the horse before the

⁷ The dissenting opinion suggests remanding the case to the district court to enter an order under Federal Rule of Civil Procedure 54(b). Dissenting Op. at 175–76. We suspect that the district court would have been willing to issue such an order in this case. And although Rule 54(b) represents a belt-and-suspenders solution, for the reasons we have explained, we think it unnecessary and, in another case, an imperfect solution. A district court’s decision *not* to issue a Rule 54(b) order is unreviewable. *See Air-Sea Forwarders, Inc. v. Air Asia Co., Ltd.*, 880 F.2d 176, 179 n.1 (9th Cir. 1989). In that case, the parties seeking immediate review of the district court’s “final judgment as to one or more, but fewer than all, claims or parties,” Fed. R. Civ. P. 54(b), would either have to press the argument that we resolve today—that at least some matters withdrawn under § 157(d) and then decided are final and immediately reviewable—or demonstrate some exception to finality, such as the collateral order doctrine. The alternative, as we explain above, is the possibility of no review at all.

cart, the proper unit of analysis for finality purposes is therefore the withdrawn related proceeding, not the bankruptcy case as a whole.⁸

2. Applying These Principles

Having identified the withdrawn related proceeding as the relevant judicial proceeding, we ask whether the Amended Judgment in this case was a “final decision” as to that proceeding. We think that it was.

After Island Air filed its Chapter 11 petition and it was converted to Chapter 7, several adversary proceedings followed. Two of them, the only ones still pending, were consolidated and are now before us. Within those proceedings, Plaintiffs asserted eighty-eight claims for relief against Defendants.⁹

The claims the Trustee brought on behalf of the Estate represented the Estate’s principal assets. The parties requested a jury trial due to the “complexity” of the action. On the bankruptcy court’s recommendation, the district

⁸ Although not considering bankruptcy finality within the scope of § 1291, the First Circuit, through then-Judge Breyer, traced the “uninterrupted tradition of judicial interpretation in which courts have viewed a ‘proceeding’ within a bankruptcy case as the relevant ‘judicial unit’ for purposes of finality.” See *In re Saco Loc. Dev. Corp.*, 711 F.2d 441, 445 (1st Cir. 1983). A “proceeding,” Judge Breyer concluded, was “not the overall liquidation or reorganization, but rather an ‘individual ‘matter [] of an administrative character . . . presented in the ordinary course of the administration of the bankrupt’s estate.’” *Id.* at 444–45 (quoting *Taylor v. Voss*, 271 U.S. 176, 181 (1926)).

⁹ The district court consolidated adversary proceedings Nos. 19-90027 and 19-90049. Proceeding No. 90049 contained 75 counts (Arabic numerals). Proceeding No. 19-90027 contained 13 counts (Roman numerals).

court withdrew the reference to conduct the jury trial, though it left the matter with the bankruptcy court for all other purposes until 90 days before trial. The district court classified dozens of the claims as legal, to be tried by a jury, and dozens of others as equitable, to be tried by the court. The equitable claims included those for equitable contribution, recharacterization, equitable subordination, piercing the corporate veil, and the WARN Act. The issues classified as legal included those for breaches of fiduciary duty and violations of the DWA. The Amended Judgment is the culmination of a month-long jury trial. It comprises rulings on dozens of motions, including for judgment as a matter of law, a new trial, and relief from judgment, and the district court's 303-page Amended Findings of Fact and Conclusions of Law resolving the equitable claims. The Amended Judgment resolved on the merits every claim in the consolidated adversary proceeding, save two of the Au Defendants' counterclaims, which it denied "without prejudice" to their "being brought in the Bankruptcy Court at the appropriate time." Those counterclaims challenged the Unions' requests for administrative expenses against the Estate.

The Au Defendants contend that this disposition of two claims without prejudice renders the entire judgment non-final. We disagree. The Unions filed claims Nos. 105 and 117 against the Estate, seeking almost \$10 million allegedly owed under the WARN Act, the collective bargaining agreements, and the DWA. The Unions also requested that their claims be classified as administrative expenses, which, if allowed, receive priority under 11 U.S.C. § 507(a)(2); *see also id.* § 503(b) (administrative expense claims "shall be allowed" "[a]fter notice and a hearing"); *id.* § 503(b)(1)(A)(ii). The Au Defendants objected to claims

Nos. 105 and 117 through Counterclaims II and III in the adversary proceeding before it was withdrawn. *See* 11 U.S.C. § 502(a) (any “party in interest” may object to a claim); Fed. R. Bankr. P. 3007. In denying the counterclaims without prejudice, the district court reasoned that the hearing required to resolve these claims had yet to occur in the bankruptcy court and that the Unions’ representatives had testified at trial that they intended to amend their administrative-expense claims.

Leaving those matters for the bankruptcy court does not affect the finality of the appeal before us. Two reasons.

First, although styled as counterclaims, the two counterclaims are claim objections in substance. They are labeled “[o]bjection[]s to [c]laim[s],” and they challenge claims Nos. 105 and 117 only as to allowance and priority—their classification as “administrative expenses” under 11 U.S.C. § 503—not as to the Defendants’ underlying liability under the DWA and WARN Act, which was before the district court. The counterclaims assert that the Unions’ claims arise from a breach of contract rather than from a “violation of federal or state law,” and that the claims “do not represent the actual, necessary costs and expenses of preserving the estate pursuant to § 503(b)(1)(A)(i).” Counterclaims II and III, in short, are properly understood as claim “objections” in the traditional bankruptcy sense, not counterclaims in the ordinary civil-litigation sense.

Importantly, these objections are “core” bankruptcy matters. The Bankruptcy Code lists “matters concerning the administration of the estate” and, with exceptions not relevant here, the “allowance or disallowance of claims against the estate” as core proceedings, 28 U.S.C. § 157(b)(2)(A), (B), which bankruptcy judges may “hear and

determine,” subject to review under § 158, *id.* § 157(b)(1). Under the Bankruptcy Rules, an objection to a proof of claim is a contested matter in the bankruptcy case unless it is included in an adversary proceeding. *See* Fed. R. Bankr. P. 9014 advisory committee’s note to 1983 amendment; Fed. R. Bankr. P. 3007(b); *cf.* 1 Collier on Bankruptcy ¶ 3.01[3][e][iii] (“A single civil proceeding may sometimes involve some causes of action that are core and some that are related.”). Thus, the district court did not leave part of the withdrawn merits action undecided; it left core bankruptcy matters for the bankruptcy court.

By entering judgment on the issues within the withdrawn proceeding and remitting only core bankruptcy matters to the bankruptcy court, the district court “disassociate[d] itself from [the] case” before it. *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 106 (2009) (quotation marks and citation omitted). The district court’s denial without prejudice with respect to Claims No. 105 and 117 does not defeat finality because the suit was at an end “so far as the District Court was concerned.” *United States v. Wallace & Tiernan Co.*, 336 U.S. 793, 794 n.1 (1949); *see also Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979, 983–84 (9th Cir. 2000) (treating dismissal as final where the record showed that the district court “intended the dismissal to dispose of the action” (citation and internal quotation marks omitted)).

Second, whether a claim receives administrative-expense priority under § 503 has no bearing on the Defendants’ liability on the underlying WARN Act or DWA claims. In the bankruptcy context, the Supreme Court has distinguished between the allowance of claims or the “distribution of assets” and the “validity of claims in the first instance.” *Raleigh v. Illinois Dep’t of Revenue*, 530 U.S. 15, 23–24 (2000). Disallowance only “mean[s] that the creditor

has no right to payment on the claim through the bankruptcy proceeding.” *In re Lane*, 959 F.3d 1226, 1230 (9th Cir. 2020). Questions of *enforcement* are distinct from questions respecting *liability*. So even if the bankruptcy court denies the Unions’ request for administrative-expense priority or disallows their claims against the Estate in whole or in part, the Au Defendants would remain liable to the Estate and to the Unions under the Amended Judgment all the same, and nothing in the bankruptcy court’s ruling would require the district court to alter, amend, or revise its judgment. Nothing about the Amended Judgment, then, is “tentative, informal or incomplete.” *Citicorp Real Estate, Inc. v. Smith*, 155 F.3d 1097, 1101 (9th Cir. 1998) (quotation marks and citation omitted). The bankruptcy court will decide how the Estate should administer and distribute its assets, not whether the district court correctly resolved the withdrawn proceeding.

And once the matter returns to the bankruptcy court, the Defendants may not reopen or relitigate the merits of the Amended Judgment under the guise of a claim objection or objection to the final plan. The bankruptcy court is bound by the Amended Judgment (and the resolution of this appeal) through claim preclusion. As we observed above, “[t]he normal rules of res judicata and collateral estoppel apply to the decisions of bankruptcy courts.” *Katchen*, 382 U.S. at 334 (explaining that claims and objections to claims are “bound by what is judicially determined”). Defendants cannot ask the bankruptcy court to decide anew the merits of the Defendants’ liability under the WARN Act and DWA.

The Federal Rules of Bankruptcy Procedure, moreover, bar a party from using a claim objection to reassert matters belonging in an adversary proceeding. A party objecting to a claim “must not include a demand for a type of relief” requested in an adversary proceeding, though it may include

a claim objection in an adversary proceeding. Fed. R. Bankr. P. 3007(b); *see also* 9A Collier on Bankruptcy ¶ 3007.02. So, although the Au Defendants could raise their claims objections in the adversary proceeding, they may not relitigate the adversary proceeding in their claim objections. What remains for the bankruptcy court is claim administration, not unresolved pieces of the withdrawn merits action. The Amended Judgment “end[ed] the litigation on the merits.” *Catlin*, 324 U.S. at 233.

The second prong of the *Catlin* formulation is also satisfied: nothing remains for the district court to do except “execute the judgment.” *Id.* In fact, execution of the Amended Judgment is already underway. Post-judgment proceedings to enforce the judgment and resolve attorneys’ fees are ongoing in the district court. Enforcement is possible because the district court has made its “final decision” regarding all the counts and claims that belong in an Article III non-core adversary proceeding; only the execution of the judgment and core bankruptcy matters, including Au’s objections to the administrative expense claims, remain. *See* 28 U.S.C. § 157; *Stern*, 564 U.S. 462.

In sum, the Amended Judgment ended the withdrawn consolidated adversary proceeding on the merits and left only execution, enforcement, and core bankruptcy-administration matters for later proceedings. Applying ordinary § 1291 finality principles to the relevant judicial unit—the withdrawn adversary proceeding—we have jurisdiction over the Amended Judgment.

B. *Article III Standing*

We turn to Article III standing. The Au Defendants raise two challenges. First, they contend that the Trustee lacked Article III standing to bring Counts IV and V, which assert

breach-of-fiduciary-duty claims against Au, PAF, and Malama based on Island Air’s violations of the DWA and WARN Act. Second, they contend that the Unions lack Article III standing to bring Count I, alleging a violation of the DWA notice requirement.

1. The Trustee’s Standing to Bring Counts IV and V

We first address the Trustee’s standing. “Standing is a threshold matter of jurisdiction.” *LA All. for Hum. Rts. v. Cnty. of Los Angeles*, 14 F.4th 947, 956 (9th Cir. 2021). To establish Article III standing, a plaintiff must show a concrete, particularized, and actual or imminent injury in fact, one that is likely caused by the defendant and is likely redressable by judicial relief. *TransUnion LLC v. Ramirez*, 594 U.S. 413, 423 (2021). Those requirements take on a unique formulation in the trustee–bankrupt debtor relationship. In bankruptcy, a trustee represents the estate and has the capacity to sue and be sued. 11 U.S.C. § 323(a)–(b). The trustee further has the duty to “collect and reduce to money the property of the estate,” *id.* § 704(a)(1), which includes “all legal or equitable interests of the debtor in property as of the commencement of the case,” *id.* § 541(a)(1), and the debtor’s “causes of action,” *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 205 n.9 (1983) (internal quotation marks and citation omitted). To that end, the trustee “stands in the shoes of the bankrupt corporation,” and “has standing to bring any suit that the bankrupt corporation could have instituted had it not petitioned for bankruptcy.” *Smith v. Arthur Andersen LLP*, 421 F.3d 989, 1002 (9th Cir. 2005) (internal quotation marks and citation omitted).

But a trustee may only assert claims belonging to the debtor, not claims belonging to creditors. Courts have long

recognized that “a bankruptcy trustee has no standing generally to sue third parties on behalf of the estate’s creditors” and “may only assert claims held by the bankrupt corporation itself.” *Id.* (internal quotation marks and citation omitted). That rule traces to *Caplin v. Marine Midland Grace Tr. Co. of New York*, 406 U.S. 416 (1972), which held that a reorganization trustee could not assert, on behalf of debenture holders, misconduct claims against an indenture trustee. *Id.* at 428. The trustee, the Supreme Court reasoned, may pursue causes of action “available to the estate” but may not “collect money not owed to the estate.” *Id.*; see also *Rochelle v. Marine Midland Grace Tr. Co.*, 535 F.2d 523, 527 (9th Cir. 1976) (describing *Caplin* as holding that “a reorganization trustee has no standing to maintain [an] action on the part of any person or entity other than his debtor corporation”). Consistent with *Caplin* and with the trustee’s duty to “reduce to money” the debtor’s causes of action, we have held that the “wrongful expenditure of corporate assets qualifies as an injury to the firm which is sufficient to confer standing upon the Trustee.” *Smith*, 421 F.3d at 1003. Most relevant here, we also held that a trustee may bring claims on behalf of the estate alleging that individual defendants breached their fiduciary duties to the company while it was insolvent. *Id.* at 1005–06.

Counts IV and V allege that the Au Defendants breached their fiduciary duties to Island Air by causing it to violate the DWA and WARN Act, exposing Island Air to statutory liability it would not otherwise have incurred. That liability, the Trustee posits, caused Island Air, and in turn, the Estate, to incur financial injury. The Au Defendants argue that the Trustee lacks Article III standing because the fiduciary duty claims are not property of the Estate. We disagree. The Trustee’s claim is not a creditor claim in disguise. *Smith*

instructs that, in distinguishing between “claims of the debtor,” which the trustee may assert, and “claims of creditors,” which *Caplin* bars, “the focus of the inquiry is on whether the Trustee is seeking to redress injuries to the debtor itself caused by the defendants’ alleged conduct.” *Id.* at 1002 (internal quotation marks omitted). Here, both the Complaint and the district court’s judgment focus on harm to Island Air, not direct injury to third-party creditors. Specifically, the Trustee alleges that the Au Defendants’ mismanagement caused Island Air to fail to provide the notice and compensation required under the DWA and WARN Act, thereby subjecting Island Air to statutory liability. By alleging that the Au Defendants’ breaches of fiduciary duty caused Island Air to incur liabilities it otherwise would not have incurred, the Trustee is “seeking to redress injuries suffered by [the Debtor] as a result of the defendants’ alleged conduct.” *Id.* at 1003. On that basis, the Trustee, in Counts IV and V, asserts claims belonging to Island Air. *Accord Brandt v. Hicks, Muse & Co., Inc. (In re Healthco Int’l, Inc.)*, 208 B.R. 288, 300 (Bankr. D. Mass. 1997) (“[The Trustee] alleges [Debtor corporation] was the victim of poor management causing damage to the corporation which necessarily resulted in damage to its creditors by diminishing the value of its assets and increasing its liabilities.”); *In re Golden Guernsey Dairy, LLC*, 548 B.R. 410, 412–13 (Bankr. D. Del. 2015) (denying a motion to dismiss a Chapter 7 trustee’s fiduciary duty claim alleging that the defendants exposed the debtor to liability under a state WARN Act).

That the same conduct also harmed the employees does not transform the nature of the claims. As *Smith* explains, that the conduct underlying the breaches necessarily harmed third parties does not mean that those parties alone, and not

also the company, “sustained any injury.” *See* 421 F.3d at 1004. The potential confusion stems from the fact that the two pairs of counts arise from the same statutory violations but enforce rights held by different parties. Counts I and II are the Unions’ direct statutory claims; Counts IV and V are the Estate’s fiduciary duty claims against those alleged to have caused Island Air to incur those statutory liabilities. The Trustee is enforcing the latter pair, while Counts I and II belong to, and were asserted by, the Unions.

Even so, the Au Defendants insist there is no standing because “no actual damages hav[e] been awarded against Island Air” and because it remains uncertain whether the Estate will ever pay the Unions’ claims. But neither the absence of a damages award against Island Air nor uncertainty about what the Estate will ultimately pay necessarily defeats injury in fact. The district court’s judgment identifies statutory liability incurred by Island Air. That liability is a present financial injury even if collection of the judgment remains uncertain.¹⁰ *See Clinton v. City of*

¹⁰ We note that another uncertainty regarding Plaintiffs’ ultimate payout derives from the fact that Island Air is jointly and severally liable for the violations. Au argues that the district court’s statement that “it remains purely speculative” whether the Unions will ultimately recover on their bankruptcy claims against the Estate for the DWA and WARN Act violations precludes standing, and that “the damages awarded to the Trustee on Counts IV and V constitute unjust enrichment to the Estate of millions of dollars with no offsetting liability.” This is misplaced. Because the DWA permits Plaintiffs to recover the damages from any liable entity, including Island Air, which undisputedly was an “employer” under HRS § 394B-2, Defendants’ liability is joint and several. *See* Haw. Rev. Stat. § 394B-9(b) (“An employer that violates this section shall be liable to each affected employee . . .”). Put another way, the Unions may recover DWA damages either directly from Defendants or through the bankruptcy claims process. But they may

New York, 524 U.S. 417, 430–31 (1998) (holding that a “substantial contingent liability” caused an immediate and concrete injury for Article III purposes even though the ultimate payment obligation remained uncertain).

The Au Defendants respond that because the Unions or other creditors may ultimately benefit from any recovery, the claim belongs to them alone. But that misunderstands the relationship between fiduciary liability and bankruptcy. Delaware law recognizes that “even in the case of an insolvent firm,” breaches of fiduciary duty “remain harms to the corporate entity itself.” *Prod. Res. Grp., L.L.C. v. NCT Grp., Inc.*, 863 A.2d 772, 792 (Del. Ch. 2004). Insolvency makes creditors, rather than shareholders, the “residual beneficiaries of any increase in value,” but the claim still belongs to the corporation. *N. Am. Cath. Educ. Programming Found., Inc. v. Gheewalla*, 930 A.2d 92, 101 (Del. 2007). The reason is straightforward: “[C]laims of this kind belong to the corporation itself because even if the improper acts occur when the firm is insolvent, they operate to injure the firm in the first instance by reducing its value, injuring creditors only indirectly by diminishing the value of the firm and therefore the assets from which the creditors may satisfy their claims.” *Id.* at 102 (quoting *Prod. Res. Grp.*, 863 A.2d at 776). That is why the unavoidable uncertainty as to ultimate distribution and payout that comes

recover those damages only once. Thus, to the extent the Unions recover their statutory damages directly from Defendants, their claim against the Estate is satisfied by the same amount. And if the Unions recover in full from Defendants, neither they nor the Trustee may obtain a second recovery for those same damages. The district court’s order prohibiting double recovery ensures that result. But these are questions of enforcement that do not bear on liability or standing and are not before us.

with Island Air's insolvency does not make the fiduciary duty claims any less the Estate's.

For the foregoing reasons, the Trustee has Article III standing to bring Counts IV and V.

2. The Unions' Standing to Bring Counts I and II

The Au Defendants also challenge the Unions' standing to bring claims alleging violations of the DWA. The DWA permits "any one or more employees" to sue "for and in behalf of oneself or themselves," or, alternatively, "the employee or employees may designate an agent or representative to maintain the action." Haw. Rev. Stat. § 394B-13(a). The district court found, and the parties do not dispute, that "at least one employee completed a designation form for each of the Unions before the Unions commenced the action." The other 192 of the 194 employees the Unions represent signed the forms after filing. The Au Defendants claim that, because standing is determined at the time of filing, the Unions lack standing as to the 192 employees who signed the forms after the action commenced.

The Au Defendants' argument misapprehends what Article III requires at the time of filing. Article III requires, at the time of filing, a plaintiff with a concrete stake in the outcome, an injury, fairly traceable to the defendant, that a favorable decision would redress. *TransUnion*, 594 U.S. at 423; *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 733 (2008). Each Union satisfied that standard. From the time of filing, each Union stood as the statutorily authorized representative of at least one employee who met the standing requirements of Article III. Each of the 194 employees satisfied Article III from the moment of Island Air's closing: Wages and benefits earned but unpaid are a concrete injury,

traceable to the failure to pay them, and fully redressable by the damages award the Unions sought. The statute, furthermore, authorizes an employee with a DWA claim to proceed through a designated representative. Section 394B-13(a) of the DWA provides that a DWA enforcement action may be maintained by “any one or more employees for and in behalf of oneself or themselves,” and that “the employee or employees may designate an agent or representative to maintain the action.” Haw. Rev. Stat. § 394B-13(a). Thus, because it is undisputed that at least one employee for each Union had executed a DWA Designation Form before the Complaint was filed, each Union was an authorized representative for at least one allegedly injured employee at the outset of the case. That is sufficient for Article III standing.

The 192 later designations raise a different question: whether the Unions may recover on behalf of employees who executed forms after filing. That question does not concern the Court’s subject matter jurisdiction over Count I; it concerns for whom the Unions can recover. And that is a question of statutory authorization: Who falls within the class of employees the legislature allowed a designated representative to sue for? Questions of that kind do not implicate a federal court’s subject matter jurisdiction. Who may enforce a claim on another’s behalf is a question of statutory authorization that “does not implicate subject-matter jurisdiction, *i.e.*, the court’s statutory or constitutional power to adjudicate the case.” *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 128 n.4 (2014) (internal quotation marks and citation omitted). The DWA does not specify any timing limitations for the designation and does not require that every member designate a representative before filing the lawsuit. Nor has Au shown

any prejudice from the timing of the designations. In fact, the complaint alleged that the Unions represented members who “have designated or will designate” them as DWA representatives. In that way, the Complaint forewarns of the additional designations and expanded scope of relief. The additional designation forms were produced at trial, and their authenticity was stipulated. For these reasons, the post-filing designations were permissible under the DWA.

In short, because it is undisputed that at least one employee for each union had executed a DWA Designation Form before the lawsuit was filed, the Unions had Article III standing to bring the DWA claims.

III. FIDUCIARY DUTIES

We now consider Plaintiffs’ request for a new trial on Counts VII (allowing Island Air’s assets to dissipate) and IX (implementing an undercapitalized business plan). On both counts, the district court granted JMOL in favor of Ohana and Lawrence Investments on the basis that neither were fiduciaries of Island Air. The court additionally granted JMOL to Marinelli in his capacity as a director on Count VII, but allowed Count IX to proceed to a jury. The jury, however, found Marinelli not liable on Count IX. Finally, the court granted JMOL to Marinelli in his capacity as a trustee of the Ellison Trust due to deficient pleading.

Plaintiffs now appeal the district court’s conclusion that Ohana and Lawrence Investments owed no fiduciary duties on Counts VII and IX, its grant of JMOL to Marinelli on Count VII, and its dismissal of the claims against Marinelli in his capacity as a trustee.

We review the district court’s grant of JMOL *de novo*. *Dees v. County of San Diego*, 960 F.3d 1145, 1151 (9th Cir.

2020). We view the evidence in the nonmovant's favor, draw all reasonable inferences for that party, and may not weigh evidence or assess credibility. *Id.* The parties agree that because Island Air was incorporated in Delaware, Delaware law governs its internal affairs, including the fiduciary duties owed to the corporation. See *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 621 (1983).

A. Ohana

We first address whether Ohana was a fiduciary. Plaintiffs argue that Ohana was a minority controlling shareholder with concomitant fiduciary duties. Directors owe fiduciary duties by virtue of their office, while stockholders are ordinarily the beneficiaries of those duties. But Ohana's status as a non-director stockholder does not end the inquiry, because "Delaware law imposes fiduciary duties on those who effectively control a corporation." *Quadrant Structured Prods. Co. v. Vertin*, 102 A.3d 155, 183–84 (Del. Ch. 2014). A shareholder who would not otherwise owe fiduciary duties assumes them upon exercising effective control of the corporation.

The Delaware Supreme Court has identified two paths to controlling stockholder status: A stockholder controls the corporation if it owns a majority of the corporation's voting power *or* if it holds less than a majority but "*exercises control* over the business affairs of the corporation." *Kahn v. Lynch Commc'n Sys., Inc.*, 638 A.2d 1110, 1113 (Del. 1994) (quoting *Ivanhoe Partners v. Newmont Mining Corp.*, 535 A.2d 1334, 1344 (Del. 1987)). Ohana held 33.33 percent of Island Air's stock during the relevant period, so our analysis turns on the second path. A minority stockholder does not, "without more," become a controller;

the plaintiff must show “domination by a minority shareholder through actual control of corporate conduct.” *Citron v. Fairchild Camera & Instrument Corp.*, 569 A.2d 53, 70 (Del. 1989) (citation and internal quotation marks omitted). And “[t]he requisite degree of control can be shown to exist generally or ‘with regard to the particular transaction that is being challenged.’” *Carsanaro v. Bloodhound Techs., Inc.*, 65 A.3d 618, 659 (Del. Ch. 2013) (citation omitted).

Delaware asks whether a stockholder, “as a practical matter, possesses a combination of stock voting power and managerial authority that enables him to control the corporation, *if he so wishes*.” *In re Cysive, Inc. S’holders Litig.*, 836 A.2d 531, 553 (Del. Ch. 2003) (Strine, V.C.) (emphasis added); accord *Corwin v. KKR Fin. Holdings LLC*, 125 A.3d 304, 307 (Del. 2015) (framing the inquiry as whether “a combination of potent voting power and management control” gives the stockholder “effective control of the board without actually owning a majority of stock”). The stockholder must exercise actual control, and the test “is not an easy one to satisfy.” *In re Oracle Corp. Derivative Litig.*, 339 A.3d 1, 20 (Del. 2025) (citation omitted). No numerical floor of ownership percentage or number of board seats governs.¹¹ In *Kahn*, for example,

¹¹ In 2025, the Delaware legislature passed Senate Bill 21, which, among other things, created a bright-line rule for controlling shareholders. Under SB 21, a controlling shareholder is a person who “together with such person’s affiliates and associates” either owns more than 50 percent of the voting power, or “control[s]. . . at least one-third in voting power” and “exercise[s] managerial authority over the business and affairs of the corporation.” Del. Code Ann. tit. 8, § 144(e)(2)(c) (2025). But the amendments “do not apply to or affect any action or proceeding commenced in a court of competent jurisdiction that is completed or

Alcatel held 43.3 percent of the shares and a minority of the board seats, yet the court held that Alcatel controlled the corporation. 638 A.2d at 1114–15; *see also, e.g., Tornetta v. Musk*, 310 A.3d 430, 497–520 (Del. Ch. 2024) (finding that Elon Musk exercised transaction-specific control over Tesla’s approval of his compensation plan despite holding only 21.9 percent of Tesla’s stock), *aff’d in pertinent part, rev’d in part on other grounds sub nom. In re Tesla, Inc. Derivative Litig.*, 351 A.3d 1005 (Del. 2025); *FrontFour Cap. Grp. LLC v. Taube*, 2019 WL 1313408, at *21–25 (Del. Ch. Mar. 11, 2019) (finding defendants dominated and controlled Medley Capital’s board for the challenged transactions although they owned less than 15 percent of Medley Capital’s common stock); *Delman v. GigAcquisitions3, LLC*, 288 A.3d 692, 713–16 & n.155 (Del. Ch. 2023) (holding it reasonably conceivable at the pleading stage that an entity with 21.76 percent of pre-merger shares controlled the company).

Delaware courts assess controller status by looking to various “indicia of effective control.” *Tornetta*, 310 A.3d at 500 (quoting *Basho Techs. Holdco B, LLC v. Georgetown Basho Invs., LLC*, 2018 WL 3326693, at *27 (Del. Ch. July 6, 2018), *aff’d sub nom. Davenport v. Basho Techs. Holdco B, LLC*, 221 A.3d 100 (Del. 2019); *see also Voigt v. Metcalf*, 2020 WL 614999, at *22 (Del. Ch. Feb. 10, 2020) (“Whether a constellation of facts supports an inference of control is a fact-specific inquiry, and different constellations of facts can

pending . . . on or before February 17, 2025.” 85 Del. Laws ch. 6, § 3 (2025). Thus, SB 21 has no bearing on our analysis. We note that even under the more demanding standard of SB 21, Ohana would qualify as a controller because it owned at least one-third of Island Air’s stock and, as we discuss below, possessed “managerial authority” over the corporation’s affairs.

lead to different outcomes.”). Relevant factors include compromised director independence; influence over key managers or advisers; commercial relationships with key suppliers or partners that give the stockholder leverage; and contractual rights that permit the stockholder “to channel the corporation into a particular outcome by blocking or restricting other paths.” *Basho*, 2018 WL 3326693, at *26 (citing cases). Delaware courts also consider broader markers of control such as the size of the minority stake, director-appointment rights, governance provisions enhancing minority power, and the ability to exercise “outsized influence” through roles such as CEO, chair, or founder. *Id.* at *27.

To apply these factors, we must untangle the idiosyncratic web of entities in this case. Much of the oddities here stem from the fact that Island Air was no ordinary investment. After Ellison bought 98 percent of the island of Lāna‘i in 2012, he decided, in 2013, to buy Island Air, one of the two airlines that serviced the island. Ellison acquired Island Air through Ohana, a holding company formed for that sole purpose, which became Island Air’s sole owner. Ohana was administered entirely by Lawrence Investments’ employees and funded on demand by Ellison’s trust. Rather than the conventional command to maximize returns, management’s instruction was, “Larry needs an airline he can be proud of.” When the market supported three daily flights to Lāna‘i, Island Air flew five, because “Larry wants five.” Ellison continued to pump cash into Island Air—upwards of \$67 million between 2013 and 2015. But soon the losses of operating an airline for what appear to be personal, rather than economic, reasons caught up with him. When Ellison grew tired of the \$1 to \$2 million per month losses but wanted to “shift the public relations risk”

of closing, he agreed to explore a sale. The resulting transaction was no ordinary transfer of control; the eventual buyers acquired two-thirds of the airline for \$8,000 in equity, while Ellison's side supplied \$8.5 million in loans. The Ellison affiliates remained the airline's lender and aircraft lessor.

Viewing the trial evidence in the light most favorable to Plaintiffs, and drawing every reasonable inference in their favor, we conclude that a reasonable jury could find that Ohana actually controlled Island Air.

First, the 2015–2016 transaction that brought Au and Tsui into Island Air left Ohana with considerable equity and a formidable financing position. The Stock and Warrant Purchase Agreement divided Island Air's 600,000 shares into three equal series: Series A to Ohana, Series B to PAF, and Series C to Malama. In addition to leaving Ohana with a 33.3 percent stake, the Agreement granted Ohana alone a warrant to purchase up to 600,000 additional Series A shares. The terms of the warrant were remarkable: It was exercisable "at any time" at two cents per share, for a total price of \$12,000—a drop in the bucket compared to the millions Ohana and its affiliates had invested in and lent to Island Air. As Marinelli conceded at trial, exercising the warrant would give Ohana a majority of Island Air's overall shares.

The disparity between who contributed the capital and who owned the equity was not just unusual—evidence at trial showed it was no accident. Prior to the first closing, Au wrote that because Ohana was "providing 80 percent of the total 10 million in financing," it was "customary, and would be expected under most circumstances, for [Ohana] to retain at least an option to own more than 50 percent, up to two-

thirds in this case of the company.” Au further agreed that “one purpose of the stock warrant was so that Mr. Ellison could acquire majority ownership,” including “if things didn’t go well with the new management team.” Beyond the tax benefits of structuring Ohana’s interest “as warrants rather than stock,” the arrangement served, in Au’s words, “to eliminate the perception of the company being a deep pocket because it is majority owned by Larry” during labor union negotiations. That consideration, Au cautioned, “should not be discussed publicly.” So, although Ohana may have held only one-third of the equity on paper, the money told a different story. A reasonable jury could take Au at his word and conclude that the option structure masked what continued to be, in substance, majority ownership. See *O’Reilly v. Transworld Healthcare, Inc.*, 745 A.2d 902, 913 (Del. Ch. 1999) (holding controller status adequately pled in part because a 49 percent stockholder held an option to acquire another 2 percent, and owned substantially all of the corporation’s debt).

The Ellison Defendants respond that the warrant left untouched Ohana’s right to nominate only one of Island Air’s three directors. That may be true, but Delaware imposes no hardline rule that a controller must hold, or be able to fill, a majority of board seats. *Kahn*, 638 A.2d at 1112–15 (finding Alcatel to be a controller even though it was limited to naming no more than five of the company’s eleven directors). Overall, a reasonable jury could view Island Air’s curious, clandestine ownership structure as weighing in favor of finding Ohana a controlling shareholder. We acknowledge that an unexercised option to retake majority ownership might not, standing alone, establish control. See *In re Primedia Inc. Derivative Litig.*, 910 A.2d 248, 257 (Del. Ch. 2006) (holding that a “bare

allegation” that a stockholder “possessed the potential ability to exercise control” was “insufficient”). But Ohana’s control went beyond the warrant.

Second, Ohana controlled Island Air through financial leverage. After the second closing, Island Air faced recurring cash shortages and relied, again and again, on access to Ellison’s purse, to which Marinelli held the key.

In 2015, Island Air sold its entire five-aircraft ATR fleet to Island Leasing, an Ellison Entity, and leased it back “because Island Air needed the funding at the time.”

Next, when a cash shortfall loomed in May 2017, Island Air’s new finance chief asked Marinelli about drawing on the Carbonview line of credit committed at the 2016 closing. Marinelli responded, “I propose that Carbonview wire in 700,000 this week,” and proposed that the cap on the committed line drop from \$3.5 million to \$3.2 million. Uchiyama replied, “Paul, can I call you?” Marinelli wrote back, “David, out of respect to you and your team, I suggest we split the difference and go with 850,000 tomorrow instead of my original \$700,000 proposal.” Dependent on Carbonview’s funding, and with little choice but to accept its terms, Island Air accepted the \$850,000 wire transfer on May 17. Leveraging the power imbalance, Marinelli—president and manager of both Carbonview and Ohana, and still an Island Air director—unilaterally proposed to reduce the committed credit line just as Island Air faced a severe cash shortfall. Through Marinelli, its manager and board designee, Ohana dictated the terms of Island Air’s survival by controlling the credit line that kept the company afloat.

By June 20, 2017, Island Air faced another cash shortage ahead of payroll and again relied on Ellison entities for the cash. At Marinelli’s recommendation and with Ellison’s

approval, Island Leasing, an Ellison entity, agreed to provide \$800,000 in exchange for Island Air's ATR spare parts. Island Air received the funds the next day.

And in August 2017, with Island Air "running on fumes" and at risk of missing payroll that week, Ellison controlled the terms of a deal to sell the five remaining ATR-72s. Elix, the lessor of Island Air's Q400 fleet and one of two bidders on the ATRs, proposed a \$5 million purchase with \$2.5 million loaned back to Island Air. Ellison, however, dictated a different allocation more favorable to himself: "We take 3.5 million and give Island Air 1.5 million, or no deal." The take-it-or-leave-it allocation gave Island Air \$1 million less than the \$2.5 million that Elix proposed for it. *See OTK Assocs., LLC v. Friedman*, 85 A.3d 696, 706 (Del. Ch. 2014) (treating a shareholder as a controller where he told the board to "take or leave my deal").

The repeated reliance on Ellison entities for funding is a potent indicium of controller status. The Chancery Court has emphasized that for "a cash-burning, asset-light company that could not borrow and that required regular rounds of equity financing," the parties who control its access to cash "sit on the company's lifeline, with the ability to turn it on or off," *Basho*, 2018 WL 3326693, at *29 (citation omitted). "When cash is like oxygen," the court explained, "self-interested steps to choke off the air supply provide a strong indicator of control." *Id.* Such is the case here. In Island Air's final year, Ohana, through Ellison-owned entities, functioned as the company's "lifeline." In practice, Island Air's ability to keep operating depended on whether Ohana would continue to fund it.

To borrow then Vice-Chancellor Leo Strine's famous metaphor of a controller as the "800-pound gorilla" whose

presence alone cowed a boardroom out of “fear [of] retribution from the gorilla if . . . he did not get his way,” *In re Pure Res., Inc., S’holders Litig.*, 808 A.2d 421, 436 (Del. Ch. 2002), Ellison, with and through his agent Marinelli, was the 800-pound gorilla. He wielded his leverage to secure the best possible exit and to dictate the terms of Island Air’s cash flow and lending arrangements.

Third, Ohana had exclusive access to knowledge about the company’s condition, as well as relationships with key advisors. Ohana had owned Island Air outright from February 2013 until the 2016 sale, and its former designee “continued to get regular updates” and remained “fully aware of Island Air’s dire financial situation” even after leaving the board. The Chancery Court has considered a defendant’s “access to board-level information” and use of an “important tip” received from company insiders to support a reasonable inference of control. *OTK Assocs., LLC v. Friedman*, 85 A.3d 696, 704, 704–06 (Del. Ch. 2014); *see also Voigt*, 2020 WL 614999, at *2–4, *16, *22 & n.13 (holding that a former majority stockholder plausibly remained a controller after its stake fell to 34.8 percent, based partly on its continuing relationships with management and advisors who played a “critical role” in supplying it with information and recommendations and a “sense of owing-ness” felt by the CEO).

Fourth, Ohana had relationships with key vendors. Ohana operated within a commonly controlled network that included Island Leasing, Carbonview, Lawrence Investments, and other entities forming the principal commercial relationships with Island Air. Island Air depended on those entities for aircraft, financing, or other resources necessary to remain in operation. Island Leasing, for example, owned Island Air’s aircraft fleet. Their

coordinated ability to provide or withhold those resources gave Ohana practical leverage beyond its formal voting stake. Delaware courts consider such relationships with key customers, suppliers, and lenders when evaluating actual control. *See OTK Assocs.*, 85 A.3d at 702, 702(recognizing effective control from a nonmajority stockholder's "combination of securities and contract rights," representation on the board, close ties to management, and pressure applied through the corporation's business partners); *see also Williamson v. Cox Commc'ns, Inc.*, 2006 WL 1586375, at *4–5 (Del. Ch. June 5, 2006); *Basho*, 2018 WL 3326693, at *26–30.

Finally, under the amended Articles, Island Air could not "[l]iquidate, dissolve, or wind up" its business and affairs without series-level consent, with each series "voting as a separate series." Ohana held all the Series A stock, giving it veto power over the decision to wind down. That veto power corresponds precisely with the conduct challenged here. Counts VII and IX do not challenge a merger or discrete transaction, but the decision, renewed month after month, to keep Island Air operating and accumulating unsecured debt rather than allow it to wind down. *See Kahn*, 638 A.2d at 1114 (noting that Alcatel used control to veto an acquisition); *Gatz Props., LLC v. Auriga Cap. Corp.*, 59 A.3d 1206, 1208 (Del. 2012) (controllers possessed a contractual veto power over key decisions); *OTK Assocs.*, 85 A.3d at 704 (controller's stock ownership gave it "blocking rights over various transactions").

Viewed in the aggregate, the evidence at trial supports a reasonable inference that Ohana exercised control over Island Air. On this record, Ohana's control rested on its one-third equity stake, favorable warrant arrangement, financial leverage, relationships with the suppliers and entities on

which Island Air relied, and insider knowledge and status. The fact that these sources of power took the form of ownership and contractual rights does not remove them from the controller inquiry. As the Supreme Court explained in a bankruptcy case involving a dominant stockholder, a fiduciary may not “use his power for his personal advantage and to the detriment of the stockholders and creditors, no matter how absolute in terms that power may be and no matter how meticulous he is to satisfy technical requirements. For that power is at all times subject to the equitable limitation that it may not be exercised for the aggrandisement, preference, or advantage of the fiduciary to the exclusion or detriment of the cestuis. Where there is a violation of those principles, equity will undo the wrong or intervene to prevent its consummation.” *Pepper v. Litton*, 308 U.S. 295, 311 (1939). The district court erred by granting JMOL in favor of Ohana.

B. *Lawrence Investments*

We turn to whether Lawrence Investments is also a proper defendant for the breach of fiduciary duty claims. The question is whether Lawrence Investments, despite itself not owning any stock in Island Air, can be grouped with Ohana, with which it shared common ownership and control, for purposes of the fiduciary duty claims.

Lawrence Investments is a California LLC that manages investments for Ellison and related entities. Ohana was administered entirely by Lawrence Investments’ employees and funded on demand by Ellison’s trust, which wholly owns both Lawrence Investments and Ohana. Ohana itself had no employees, no board, no meetings, and no business other than holding Island Air’s stock. Lawrence Investments was the outright owner of Carbonview, an Ellison entity that lent

to Island Air and other companies. Lawrence Investments, Carbonview, and Island Leasing were all owned by the Ellison Trust and managed by Marinelli. Marinelli, who was Ohana's sole manager and held "complete discretion for all decisions made at Ohana," was also the president of Lawrence Investments, the manager of Island Leasing, the president or manager of Carbonview, and Ohana's board designee to Island Air. In every capacity, Marinelli testified, his job was the same: "I would always advocate for—for Mr. Ellison's companies. I work for him and that's my job."

Delaware law recognizes the principle of "control groups," or multiple stockholders together "exercising majority or effective control, with each member subject to the fiduciary duties of a controller." *Sheldon v. Pinto Tech. Ventures, L.P.*, 220 A.3d 245, 251 (Del. 2019). To constitute a control group, the entities must be "'connected in some legally significant way'—such as 'by contract, common ownership, agreement, or other arrangement—to work together toward a shared goal.'" *Id.* at 251–52 (citation omitted). But the doctrine is not without its limits: to hold each member of a group liable for the fiduciary duties of a controller, "there must be some indication of an actual agreement," whether formal or written, not merely a "concurrence of self-interest among certain stockholders." *Id.* at 252 (citations and internal quotation marks omitted). Lawrence Investments and Ohana were connected in a legally significant way by virtue of their shared ownership (both were wholly owned by the Ellison Trust), their shared manager (Marinelli was the president and manager of both), and their shared personnel (Ohana was entirely run by Lawrence Investments employees).

But within the *Sheldon* control group caselaw, no recent Delaware case has squarely addressed whether an entity that

is not itself a stockholder can be part of a control group. *Sheldon's* control-group framework therefore does not by itself resolve the issue. A Delaware Chancery Court decision, *In re Pattern Energy Grp. Inc. S'holders Litig.*, 2021 WL 1812674 (Del. Ch. May 6, 2021), noted the problem but declined to address the issue at that juncture. At the motion-to-dismiss stage, the Chancery Court “le[ft] open the possibility” that a non-stockholder investor and supplier formed part of a control group with management stockholders, “given the investor’s consent right and other pervasive sources of soft power over the Company and its sales process.” *Id.* at *1. Without clear guidance from the Delaware courts, we must look to the broader principles underlying the equitable doctrine of fiduciary duty.

The doctrine of fiduciary duty arose in equity as a response to a basic conundrum about human nature. It rests on “a public policy, existing through the years, and derived from a profound knowledge of human characteristics and motives”: Those entrusted with power over the property of others will be tempted to use it for themselves. *Guth v. Loft, Inc.*, 5 A.2d 503, 510 (Del. 1939). Animating the doctrine is the “omnipresent specter” that a fiduciary may “act[] primarily in [his] own interests, rather than those of the corporation and its shareholders.” *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 954 (Del. 1985).

The doctrine therefore demands “undivided and unselfish loyalty,” and “peremptorily and inexorably, the most scrupulous observance of his duty.” *Guth*, 5 A.2d at 510. A fiduciary is held “to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior.” *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928) (Cardozo, C.J.). The heart of the doctrine is “fidelity

in the control of property for the benefit of another.” *In re USACafes, L.P. Litig.*, 600 A.2d 43, 48 (Del. Ch. 1991). It commands that “one who controls property of another may not, without implied or express agreement, intentionally use that property in a way that benefits the holder of the control to the detriment of the property or its beneficial owner.” *Id.*; see also *Pepper*, 308 U.S. at 311 (“He who is in such a fiduciary position cannot serve himself first and his cestuis second.”).

Because this duty flows from power, it cannot be evaded by form. Fiduciary duty is an equitable doctrine, and it is a maxim of equity that “equity regards substance rather than form.” *Monroe Park v. Metro. Life Ins. Co.*, 457 A.2d 734, 737 (Del. 1983); *Gatz v. Ponsoldt*, 925 A.2d 1265, 1280 (Del. 2007) (“It is the very nature of equity to look beyond form to the substance of an arrangement.”). Equity has never asked whether the defendant carries the title of trustee; it asks who in fact holds control, and it attaches the obligation there. That is why corporate officers and directors, “[w]hile technically not trustees,” nonetheless “stand in a fiduciary relation to the corporation and its stockholders,” *Guth*, 5 A.2d at 510, and the same logic that first bound directors and officers extended the duty to majority shareholders and, where actual control exists, to minority shareholders as well. *Feeley v. NHAOCG, LLC*, 62 A.3d 649, 668 (Del. Ch. 2012) (“Courts applying equitable principles therefore had little trouble extending liability for breach of fiduciary duty beyond the natural persons who served as directors to outsiders like majority stockholders who effectively controlled the corporation.”).

And although such cases are rare, fiduciary duties also attach to an entity that was not a direct shareholder but nevertheless controls the corporation through a direct

shareholder. “[B]ecause the application of equitable principles depended on the substance of control rather than the form, it did not matter whether the control was exercised *directly or indirectly through subsidiaries*.” *Id.* (emphasis added). Delaware courts have repeatedly “looked to who wields control in substance and have imposed the risk of fiduciary liability” on them. *Id.* (citing cases).

Southern Pacific Co. v. Bogert, 250 U.S. 483 (1919), is illustrative. There, in an opinion written by Justice Brandeis, the U.S. Supreme Court imposed fiduciary duties on the defendant, Southern Pacific, even though it owned no stock directly in the controlled railway. *Id.* at 491–92. The Court rejected the argument that Southern Pacific did not owe fiduciary duties “because it did not itself own directly any stock in” the company, and instead exerted “control . . . through a subsidiary,” which was itself a majority stockholder in the railway. *Id.* The doctrine of fiduciary duties “does not rest upon such technical distinctions,” pronounced the Court. *Id.* at 492. “It is the *fact of control* . . . , not the particular means by which or manner in which the control is exercised, that creates the fiduciary obligation.” *Id.* (emphasis added). Delaware applied that substance-over-form principle in *Eshleman v. Keenan*, imposing restitution upon two individuals who used “their control of the two corporations” to obtain duplicative compensation, 187 A. 25, 28–29 (Del. Ch. 1936). They owned a corporate entity that was the majority owner of another entity. The Delaware Supreme Court affirmed, reasoning that “[t]he conception of corporate entity is not a thing so opaque that it cannot be seen through.” *Keenan v. Eshleman*, 2 A.2d 904, 908 (Del. 1938). Together, these cases stand for the principle that fiduciary liability may reach

an actor who actually wields the relevant control, including an individual operating through an intermediate entity.

More recently, in an unreported pleading stage opinion, the Delaware Chancery Court found that an individual controlled a corporation through his control of the corporation's sole owner. *In re EZCORP Inc. Consulting Agreement Derivative Litig.*, 2016 WL 301245, at *9–10 (Del. Ch. Jan. 25, 2016). Surveying the seminal cases, the Chancery Court reaffirmed that “[l]iability for breach of fiduciary duty . . . extends to outsiders who effectively controlled the corporation.” *Id.* at *9; *see also* Jerry B. Helwig, *The Fiduciary Duty of Controlling Shareholders*, 7 W. Rsrv. L. Rev. 467, 468 (1956) (“[A]s long as effective control is actually exercised, equity courts will not hesitate to impose fiduciary standards, although this domination is obtained indirectly, such as by means of a subsidiary corporation.”).

This principle runs through several other cases, albeit not always stated explicitly. *E.g.*, *Kahn*, 638 A.2d at 1112 & n.2 (referring to a parent company, its subsidiary, and its subsidiary's subsidiary, which was the holding company that actually owned the stock directly, together as “Alcatel” and finding that “Alcatel” was a controller); *Voigt*, 2020 WL 614999, at *2 n.1, *10 n.2 (inferring that three entities within one “private equity complex” were “at a minimum, affiliates and under the common control” of the complex's “principals,” and so referring to them collectively as one entity, which was reasonably conceivably a controller); *cf.* *In re Primedia*, 910 A.2d at 258 n.26 (concluding at the pleading stage that a private equity firm could owe fiduciary duties to the corporation's noncontrolling stockholders by exercising control through intervening entities); *Shandler v. DLJ Merch. Banking, Inc.*, 2010 WL 2929654, at *15 (Del.

Ch. July 26, 2010) (finding control adequately pled where the defendant “presided over a family of entities that it dominated and controlled” and exercised “their unified power in a concerted way”); *Basho*, 2018 WL 3326693, at *28 (considering actions “taken on [the stockholder’s] behalf” in control analysis).

From these fiduciary duty principles, we have no trouble concluding that Lawrence Investments is a proper candidate for a jury determination with respect to the fiduciary duty claims. Notwithstanding the multiplicity of entities in form, Lawrence Investments and Ohana were, in substance, one and the same; their shared control all ran back to Marinelli and ultimately to Ellison.¹² Moreover, because Ohana’s control was exercised primarily through financial leverage and control of critical vendors, the money behind that control all flowed from Lawrence Investments, making Lawrence Investments the nucleus of Ohana’s control. Equity does not permit us to shut our eyes to this reality of control. “It is the *fact of control*” not “technical distinctions” “that creates the fiduciary obligation.” *Southern Pacific*, 250 U.S. at 492 (emphasis added). A fiduciary “cannot by the intervention of a corporate entity violate the ancient precept against serving two masters,” and he “cannot violate rules of fair play by doing indirectly through the corporation what he could not do directly.” *Pepper*, 308 U.S. at 311. “Where there is a violation of those principles, equity will undo the wrong or intervene to prevent its consummation.” *Id.* We

¹² These indicia also go to whether veil piercing is appropriate. Although the Plaintiffs pled veil piercing on Counts VII and IX, the district court did not reach the issue because it found for the Ellison Defendants on the threshold issue of duties owed. Because Lawrence Investments itself is the proper subject of fiduciary duties directly, Plaintiffs may find veil piercing not necessary on remand.

thus conclude that Lawrence Investments is an appropriate defendant on the breach-of-fiduciary-duty claims, and the district court erred in granting JMOL.

C. *Marinelli*

1. Marinelli in His Capacity as a Director

Plaintiffs argue that the court erred in granting JMOL for Marinelli on Count VII (alleging a breach of the duty of loyalty for allowing assets to dissipate). This claim concerned Island Leasing's sale of its ATR fleet and alleged that Marinelli only kept Island Air operating until the aircraft could be sold. Prior to the sale, Marinelli served as both director of Island Air and president of Island Leasing. The district court concluded that Marinelli did not owe a fiduciary duty at the time of the sale because he had resigned from the board before the letter of intent was signed and the sale closed. Plaintiffs, however, assert that he is not insulated from liability because "[h]is scheme to keep Island Air alive long enough to sell the ATRs was put in place before his resignation."

We agree with Plaintiffs. As a general matter, "former directors owe no fiduciary duties" and cannot "breach a duty [they] no longer ha[ve]." *In re Walt Disney Co. Derivative Litig.*, 907 A.2d 693, 758 (Del. Ch. 2005), *aff'd*, 906 A.2d 27 (Del. 2006). The Delaware Chancery Court, however, has held that a former director "breaches his fiduciary duty if he engages in transactions that had their inception *before* the termination of the fiduciary relationship." *BelCom, Inc. v. Robb*, 1998 WL 229527, at *3 (Del. Ch. Apr. 28, 1998), *aff'd*, 725 A.2d 443 (Del. 1999). In the same vein, directors have been found to violate their fiduciary duty of loyalty where they were "closely involved with the challenged" action, even if they were absent during the board's approval

of that action. *Gesoff v. IIC Indus., Inc.*, 902 A.2d 1130, 1166 n.202 (Del. Ch. 2006). What it means to be closely involved is still unclear, but the bottom line drawn by Delaware courts seems to be that “a director who plays ‘no role’ in the process of deciding whether to approve a challenged transaction cannot be held liable on a claim that the board’s decision to approve that transaction was wrongful.” *Id.* (citation omitted).

Marinelli was hardly a disengaged player in the plan to sell Island Leasing’s ATR fleet. Specifically, the court should have given more consideration to Marinelli’s role in the overall scheme to sell the aircraft, rather than resting its decision on the formal question of whether he held the director title when the sale officially went through. Although the court stated that “there was no evidence that Marinelli proposed the transaction, exerted any control or influence after his resignation, or misused any confidential information after his departure,” the court disregarded several statements by Marinelli that evinced his involvement in the ATR sale prior to his departure.

On June 2, 2017, Marinelli emailed Ellison to inform him that Island Air had completed its transition to an all-Q400 fleet. In the email, Marinelli noted that although Island Leasing still owned the five ATRs that previously comprised Island Air’s fleet, he was “in the process of running an auction to sell these aircraft” and there were “two serious bidders.” He emailed Ellison an update two days later, stating that the Island Air board had “[a]greed to approach Q400 lessor Elix with financing proposal to purchase some of Island Air’s parts inventory.” Marinelli further noted that “Elix is also one of the two bidders on our ATRs” and remarked that “if Island Air goes into chapter 11 and stops maintaining our ATRs, the value will drop

precipitously.” Finally, on June 20, 2017, Marinelli wrote to Ellison about Island Air’s request for further funding following a payroll shortfall. Island Air had asked that Ellison purchase the airline’s remaining ATR spare parts inventory for \$800,000 in order to help bridge the shortfall. Marinelli then told Ellison that “[g]iven the downside of a bankruptcy filing this week, I reluctantly conclude we should go ahead and purchase the spare parts as requested by the airline, and then I will push for a sale of both the spare parts and ATR aircraft as quickly as possible.” Ellison approved the spare parts sale the same day. A few weeks later, on July 10, Marinelli resigned from Island Air’s board. And less than a month later, Marinelli signed the letter of intent to sell the ATRs to Elix.

The district court did not acknowledge these communications and the spare parts purchase transaction when addressing Marinelli’s fiduciary duties. As Marinelli clearly played *some* role in the negotiations for the ATR sale, allowing him to escape liability creates perverse future incentives. We decline to endorse a loophole that excuses double-dealing by directors so long as they step down just before an interested transaction is formally executed.

The Ellison Defendants’ argue in the alternative that the business judgment rule insulates Marinelli’s efforts to keep the airline operating. The business judgment rule establishes “a presumption that in making a *business decision* the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company.” *Tindall v. First Solar Inc.*, 892 F.3d 1043, 1047 (9th Cir. 2018) (quoting *Gantler v. Stephens*, 965 A.2d 695, 705–06 (Del. 2009)). Unless the proponent of a claim rebuts the presumption by introducing evidence of director self-interest or self-dealing, the business

judgment rule “will attach to protect the directors and the decisions they make.” *Citron*, 569 A.2d at 64.

The business judgment rule, however, may be rebutted when directors engage in interested transactions. *Id.* A “[c]lassic examples[] of director self-interest in a business transaction involve[s] . . . a director appearing on both sides of a transaction.” *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 362 (Del. 1993), decision modified on reargument, 636 A.2d 956 (Del. 1994). But “Section 144 of the Delaware General Corporation Law provides a safe harbor for interested transactions if ‘[t]he material facts as to the director’s . . . relationship or interest and as to the contract or transaction are disclosed or are known to the board of directors . . . and the board . . . in good faith authorizes the contract or transaction by the affirmative votes of a majority of the disinterested directors.” *Benihana of Tokyo, Inc. v. Benihana, Inc.*, 906 A.2d 114, 120 (Del. 2006) (quoting 8 Del. C. § 144(a)(1)).¹³ “After approval by disinterested directors, courts review the interested transaction under the business judgment rule.” *Id.*

We decline to affirm the judgment on Count VII on the basis of the business judgment rule. The Ellison Defendants do not dispute that the spare parts transaction was an interested one. Instead, they claim that the transaction was cleansed by a majority vote of the informed and disinterested directors of the board. We disagree that we can resolve this issue on appeal. The spare parts transaction was approved through a “Unanimous Written Consent” form that listed just two directors: Paul Marinelli and David Uchiyama. Of the

¹³ We note that § 144(a)(1) was amended in 2025. Because this action was pending before February 17, 2025, the 2025 amendments do not apply. *See* 85 Del. Laws ch. 6 3 (2025).

two, only Uchiyama could possibly qualify as disinterested. We question whether approval by the single disinterested director on the board constitutes a majority for cleansing purposes. Moreover, Delaware courts have held that a “majority of disinterested directors is not ‘independent’ if that majority was dominated by an interested director.” *Cinerama, Inc.*, 663 A.2d at 1170 n.25.

The district court never reached this question, let alone assessed whether Uchiyama was adequately independent and informed. It is not enough, as the Ellison Defendants claim, that Plaintiffs have not introduced evidence of Uchiyama’s lack of independence. The Ellison Defendants bear the burden of demonstrating that the safe harbor applies. *See Benihana of Tokyo*, 891 A.2d at 173. And even so, a reasonable jury could find that Uchiyama was beholden to Marinelli: Uchiyama testified at trial that he would do anything Marinelli asked “[a]s long as it was reasonable” and that Marinelli had “influence.”

In sum, there is sufficient evidence to question whether Marinelli was “closely involved” with the ATR sale such that JMOL was inappropriate. Given that there are significant facts to be developed as to Marinelli’s conduct and Uchiyama’s independence, we remand the duty of loyalty claim in Count VII to the district court.¹⁴ The Ellison

¹⁴ The Ellison Defendants also argue in the alternative that Delaware law does not recognize a cause of action for deepening insolvency. Even assuming that Plaintiffs’ dissipation of assets claim is equivalent to a deepening insolvency claim, Delaware courts have merely stated that “prolonging an insolvent corporation’s life, *without more*, will not result in liability.” *Trenwick Am. Litig. Tr. v. Ernst & Young, L.L.P.*, 906 A.2d 168, 207 n.105 (Del. Ch. 2006) (emphasis added) (citation and internal quotation marks omitted), *aff’d sub nom. Trenwick Am. Litig. Tr. v. Billett*, 931 A.2d 438 (Del. 2007). But the Chancery Court has found

Defendants may reassert their business judgment defense in those proceedings.

2. Marinelli in His Capacity as a Trustee

Plaintiffs appeal the court's dismissal of the breach of fiduciary duty claims against Marinelli as a trustee of the Ellison Trust. The district court dismissed those claims on the ground that they were not adequately pled against Marinelli in his trustee capacity. "We review *de novo* a district court's determination of whether a plaintiff's complaint complied with the notice pleading requirements of Fed. R. Civ. P. 8." *Pickern v. Pier 1 Imports (U.S.), Inc.*, 457 F.3d 963, 968 (9th Cir. 2006).

Although the Federal Rules of Civil Procedure create a "simplified standard for pleading," *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514 (2002), and provide that "pleadings must be construed as to do justice," Fed. R. Civ. P. 8(e), we agree with the district court that Plaintiffs' complaint did not provide Marinelli with sufficient notice of his potential liability as trustee. "In the bankruptcy context, we construe a deficient pleading liberally, if the pleading substantially complies with the requirements of a complaint by giving the debtor 'fair notice of what the plaintiff's claim is and the grounds upon which it rests.'" *In re Dominguez*, 51 F.3d 1502, 1508 (9th Cir. 1995) (citation omitted). Even though this standard is generous, it is not a blank check. *See In re Marino*, 37 F.3d 1354, 1357 (9th Cir. 1994) ("[T]he policy of construing pleadings liberally does not justify the conclusion that any document filed in a court giving some

that one can still recover if "the defendant prolonged the company's life in breach of a separate duty." *Id.* Plaintiffs have met this requirement by alleging that the Ellison Defendants kept the company operating so they could benefit from the sale of the ATR fleet.

notice of a claim satisfies the requirements of the Federal Rules.”).

We are not persuaded that the Complaint gave Marinelli fair notice. The fiduciary duty claims against the Ellison Defendants (Counts VII, VIII, and IX) list three defendants: Marinelli, Ohana, and Lawrence Investments. Neither the headings nor the allegations contain any reference to the Ellison Trust or Marinelli’s role as a trustee. Relying on a perfunctory sentence at the start of each count stating that “[t]he foregoing paragraphs are incorporated and restated herein,” Plaintiffs attempt to attach the Complaint’s early description of Marinelli as a trustee of the Ellison Trust to all instances where his name appears. But we do not believe that a single reference to Marinelli’s trustee role on page five of a one-hundred-page complaint, automatically colors every mention of his name on pages ninety-three to ninety-nine, which encompass the fiduciary duty claims. *See Gibson v. City of Portland*, 165 F.4th 1265, 1291 (9th Cir. 2026) (finding a pleading deficient where it “incorporate[ed] allegations for all preceding counts,” was “conclusory and vague,” and “assert[ed] multiple claims against multiple defendants without identifying who did what.”). Moreover, Count VII repeats the Complaint’s earlier description of Marinelli as “Lawrence Investments’ President” . . . and “Ohana’s manager.” Consequently, although Marinelli was identified elsewhere as the trustee of Lawrence Investments, Marinelli could reasonably assume that the omission of his role as a trustee in Count VII meant that the claims were not brought against him in that capacity.

* * *

Because the record shows that Ohana and Lawrence Investments controlled Island Air, the district court erred in

finding that they did not owe fiduciary duties. We reverse the grant of JMOL in favor of Ohana and Lawrence Investments on Counts VII and IX and remand for proceedings consistent with this opinion. We also reverse the grant of JMOL in favor of Marinelli with respect to Count VII. We affirm dismissal of the claims against Marinelli with respect to Count IX.

IV. THE DISLOCATED WORKERS' ACT CLAIMS

We now turn to Plaintiffs' claims under Hawai'i's Dislocated Workers Act ("DWA"). In 1983, the Hawai'i Legislature enacted the DWA, Haw. Rev. Stat. ch. 394B, to "protect employees from the effects of unexpected and sudden layoffs or terminations resulting from closings, plant closures, partial plant closures, and relocations." *Id.* §§ 394B-1. Among its protections for employees in Hawai'i, and as relevant here, the DWA requires an "employer" to provide each employee written notice at least 60 days before a "closing, divestiture, partial closing, or relocation." *Id.* §§ 394B-9(a). An employer that fails to give that notice is liable to each affected employee for back pay and benefits for the period of violation, up to 60 days. *Id.* §§ 394B-9(b). The DWA also requires an "employer," at the time of a closing, to pay each employee "all wages, benefits, and other forms of compensation due and owing." *Id.* §§ 394B-11.

Island Air's noncompliance with the DWA is not disputed. When the airline closed, its employees received one day's notice and were not paid their final wages, benefits, or other compensation due and owing. The Unions brought Counts I and II on behalf of their member employees against the Au and Ellison Defendants for these violations. The district court's midtrial grant of JMOL proved decisive

on both claims. The district court held that the Ellison Defendants were not “employers” under the statute given Ohana’s minority ownership interest. The court also held that all defendants could invoke an affirmative defense to the § § 394B-9(a) notice violation. The jury found the predicates for the defense occurred, resulting in no damages on Count II.

Defendants’ liability hinges on two questions of statutory interpretation, both of first impression: the meaning of “employer” in § 394B-2, and the scope of an affirmative defense in § 394B-9(c). We address the questions in that order, then turn to Plaintiffs’ motion to certify them to the Hawai‘i Supreme Court. We review questions of statutory interpretation and grant of JMOL de novo. *Ehart v. Lahaina Divers, Inc.*, 92 F.4th 844, 849 (9th Cir. 2024); *Dees v. County of San Diego*, 960 F.3d 1145, 1151 (9th Cir. 2020).

A. “Employer” under the DWA

The DWA imposes liability only on an “employer,” as the statute defines that term. Haw. Rev. Stat. §§ 394B-2, 394B-9(a), 394B-11. Whether the Au and Ellison Defendants may be held liable therefore turns, as a threshold matter, on the construction and application of the DWA’s definition of “employer.” Ruling on midtrial cross-motions for JMOL, the district court held that the Au Defendants qualified as “employers,” but the Ellison Defendants did not. The Au Defendants challenge the first ruling; Plaintiffs challenge the second ruling.

The DWA defines an “employer” as “any individual or entity that, directly or indirectly, owns, operates, or has a controlling interest in a covered establishment, excluding the State or any political subdivision thereof.” *Id.* § 394B-2. No

Hawai‘i state court has construed this definition. It is undisputed that Island Air was a “covered establishment.” *See id.* (defining “covered establishment” as “any industrial, commercial, or other business entity that employs at any time in the preceding twelve-month period, fifty or more persons”). What matters is whether any of the Ellison or Au Defendants “directly or indirectly, own[ed], operate[d], or ha[d] a controlling interest” in Island Air at the time of the violations. *Id.*

Plaintiffs read the statutory definition to sweep in partial owners. As Plaintiffs see it, because Ohana, PAF, and Malama each held a one-third stake in Island Air, each had the power and responsibility to make Island Air comply with the statute. The Ellison Defendants, in turn, read the statutory definition to exclude entities with minority ownership interests, such as Ohana.

The parties focus on competing interpretations of “owns,” but we need not determine the outer boundaries of that term. The statutory definition sets out a trio of parallel predicate verbs— “owns,” “operates,” and “has a controlling interest”— connected by the disjunctive “or.” Each describes the requisite relationship of an employer vis-à-vis a covered establishment. Because the coordinate terms are disjunctive, any one suffices, and so we need not interpret them all; “controlling interest” is decisive here.

The statute does not define “controlling interest.” The district court implicitly adopted a bright-line rule, limiting “controlling interest” to those holding a numerical majority of shares. As a result, the district court held that the Au Defendants, who controlled two-thirds of the stock, qualified as an employer, but the Ellison Defendants, who held one-third of the shares, did not.

Although the district court chose one reasonable measure of “controlling interest,” that phrase is not limited to one who holds a majority of the stock. When the Hawaii legislature chose the word “controlling,” it did not use the terms “majority” or “more than 50%.” It could have, but it did not. And “controlling interest” is a term of art in corporate law. For example, *Black’s Law Dictionary* defines “controlling interest” as “Sufficient ownership of stock in a company to control policy and management; *esp[ecially]*, a *greater-than-50% ownership interest in an enterprise.*” *Controlling Interest*, Black’s Law Dictionary (12th ed. 2024) (emphasis added). The most current draft of the *Restatement of Corporate Governance* is more specific: “[C]ontroller” means a “person or group of persons that, directly or indirectly” own more than 50 percent of the voting shares or “[o]therwise exercises a controlling influence over the business and affairs of the corporation.” *Restatement of the Law, Corporate Governance* § 1.10 (Am. L. Inst., Tentative Draft No. 1, 2022) (emphasis added); *see also* 12B William Meade Fletcher et al., *Fletcher Cyclopedica of the Law of Corporations* § 5811.50 (revised Feb. 2026) (“[I]t is possible for a shareholder to be subject to a fiduciary duty even though not a majority shareholder, provided they are the ‘controlling’ shareholder.”). It is a “cardinal rule of statutory construction” that when a legislature employs a term of art, “it presumably knows and adopts the cluster of ideas that were attached” to that term. *Molzof v. United States*, 502 U.S. 301, 307 (1992) (quoting *Morissette v. United States*, 342 U.S. 246, 263 (1952)). *Cf. Agustin v. Dan Ostrow Const. Co.*, 636 P.2d 1348, 1351 (Haw. 1981) (“[T]he legislature is presumed to know the law when enacting statutes, and we must presume that the legislature knew of the definition” of a term in prior caselaw.). While

an interest of more than 50 percent is ordinarily a *per se* controlling interest, it is not uncommon for an owner with a smaller stake to be a controller.¹⁵ In fact, in many cases, an individual or entity with less than a 50 percent stake may nevertheless exercise control over a company. *See, e.g., Comm'r v. Fink*, 483 U.S. 89, 99 n.15 (1987) (recognizing that “a person or entity may exercise control in fact while owning less than a majority of the voting shares”); 2 William W. Cook, *A Treatise on the Law of Corporations Having a Capital Stock* § 317, at 1079–80 (8th ed. 1923) (“Often a minority interest is a controlling interest; and, in fact, most great corporations are controlled by those who own only a minority interest, and often a very small minority interest.”); Adolf A. Berle, Jr., *Non-Voting Stock and “Bankers’ Control”*, 39 Harv. L. Rev. 673, 673 (1926) (“Control of American corporations by holders of a minority of the capital stock is no novelty to business men or lawyers.”). The term, therefore, calls for a fact-specific inquiry into whether an owner exercises actual control.

Our understanding of the term is informed by its definition elsewhere in the Hawai‘i Revised Statutes. The Standards of Conduct Code, which governs public officers and employees, contains the only definition of “controlling interest” in the Hawai‘i Revised Statutes. There, “controlling interest” is defined as “an interest in a business or other undertaking which is sufficient in fact to control, *whether the interest be greater or less than fifty per cent.*” Haw. Rev. Stat. § 84-3 (emphasis added). That definition does not govern here, but it is consistent with the general definition of controlling interest. *See State v. Kamal*, 966

¹⁵ We discussed these principles in the context of Delaware law in Parts III.A–B.

P.2d 604, 607 (Haw. 1998), *as amended* (June 30, 1998) (looking to how an undefined term was defined in other Hawai‘i statutes because it “reflect[ed] a common legislative understanding” of its meaning). We thus understand it as persuasive evidence that the legislature declined to adopt a brightline numerical-majority rule and instead intended for courts to ask whether, as a practical matter, the interest is sufficient in fact to control the corporation. The “greater than 50 percent” formulation provides a per se rule, but general corporate law and § 84-3 recognize that the rule is not the exclusive measure of a controlling interest.

Hawai‘i law, however, offers no specific guidance for when a minority stockholder or group exercises corporate control. When confronted with the same lacuna, the District of Hawai‘i adopted Delaware’s seminal definition of controlling shareholder: one who “owns a majority interest in or *exercises control* over the business affairs of the corporation,” a principle discussed in some detail at Part III.A. *Mroz v. Hoaloha Na Eha, Inc.*, 410 F. Supp. 2d 919, 933 (D. Haw. 2005) (quoting *Kahn v. Lynch Commc’n Sys.*, 638 A.2d 1110, 1113–14 (Del. 1994)). But *Mroz* further explained that “a shareholder who owns less than 50% of a corporation’s outstanding stocks may be a controlling shareholder if the shareholder has actual control of the corporation’s conduct.” 410 F. Supp. 2d at 933. The Hawai‘i Supreme Court has likewise treated Delaware corporate law as persuasive in this area. *See Perl v. IU Int’l Corp.*, 607 P.2d 1036, 1046 (Haw. 1980) (relying on Delaware caselaw as persuasive authority in analyzing fiduciary duties between controlling and minority shareholders). We, too, think it sensible to draw on Delaware’s sophisticated body of case law to determine when a stockholder with less than a majority of shares holds

a controlling interest. Adopting Delaware’s understanding of “controlling interest” accords with the on-the-ground reality of corporate management. As the Ellison Defendants acknowledged, the statute’s definition reaches “persons or entities with the ability and responsibility to issue the notice and pay the compensation required by the DWA.”

One final phrase in § 394B-2’s definition merits attention. The definition of “employer” includes the adverbial phrase “directly or indirectly.” The legislature’s inclusion of “indirectly” broadens the definition’s scope beyond those that themselves own, operate, or control the covered establishment. By including those who “directly or indirectly” employ, the DWA also reaches those who do so via intermediaries, subsidiaries, affiliates, agents, or other similar arrangements.

In short, the definition of “employer” reaches not only persons or entities that wholly own or have a majority stake in the covered establishment, but also those that, directly or indirectly, exercise sufficient control to be able to provide the required notice and satisfy the statute’s financial obligations—even if their ownership stake is less than 50 percent. A controlling interest may also be held collectively, by stockholders under common ownership whose stakes aggregate to control, and indirectly, by parent companies or other upstream entities that own or control the holders of that interest.

Having interpreted the definition of “employer,” we turn to its application here. We begin with the Au Defendants. At the time of the violations, PAF owned 33.3 percent of Island Air’s equity and Malama owned another 33.3 percent. Furthermore, those entities “collectively had the power to elect two of the Debtor’s three directors,” and there was “no

genuine dispute that they always acted in concert.” Together they controlled more than 50 percent of Island Air, and the manager-managed LLC structure and record evidence show that Au effectively controlled both PAF and Malama. Although PAF was formally owned by the Tsui Trust, Tsui testified that “he deferred completely to Mr. Au on all matters related to the Debtor.” Because PAF’s and Malama’s combined two-thirds stake was effectively under the same control, PAF, Malama, the Tsui Trust, and Au directly or indirectly held a controlling interest in Island Air. PAF, Malama, the Tsui Trust, and Au were therefore “employers” under the DWA, as the district court held.

The same conclusion, however, may also be true of the Ellison Defendants. At the time of the violations, Ohana held a 33.3 percent stake in Island Air. But as we explained in Part III.A, there is sufficient evidence to conclude that Ohana was a minority controller under Delaware law. Ohana’s one-third equity stake, board-designation right, and affiliated creditor and lending leverage gave it actual control over Island Air. For the same reasons, Ohana held a controlling interest in Island Air for purposes of the DWA. And because the Ellison Trust ultimately owned Ohana, the Trust also indirectly held a controlling interest. Thus, a jury could find that the Ellison Trust and Ohana are each “employers” under the DWA, and it was error for the district court to grant JMOL in favor of Ohana and the Ellison Trust.

In some circumstances, it would be illogical to conclude that two entities each had a controlling interest in the same company. In this case, however, it is evident that the Au and Ellison Defendants were not adverse to one another at the time notice should have been given to Island Air’s employees. And either group had sufficient control over

Island Air to insist that it give its employees the notice required by the DWA.¹⁶ *See supra* section I.A–B.

In sum, the Au Defendants identified above had controlling interests in Island Air and were thus “employers” under the DWA. As to Ohana and the Ellison Trust, there is ample evidence from which a jury could determine that they too had controlling interests, and were thus employers. We leave it to the district court to determine whether the question can be decided as a matter of law or should go to a jury. If the district court determines, or a jury finds, that Ohana and the Ellison Trust were “employers,” then the district court should find Ellison and Au Defendants are jointly and severally liable on Count I given that Island Air’s violation is not disputed and the jury has already determined the

¹⁶ Delaware law does not treat a “controlling shareholder” as a position that only one person can occupy at a time. In *Manti Holdings, LLC v. Carlyle Grp. Inc.*, 2025 WL 39810 (Del. Ch. Jan. 7, 2025), *aff’d*, 350 A.3d 1222 (Del. 2025), for example, the Chancery Court found that one stockholder, Carlyle, “exercised control over [the company]” and owed fiduciary duties, and separately that two other Carlyle-affiliated entities, “on their own, had sufficient voting control of [the company] to make them controllers.” *Id.* at *14. Nor is the presence of a majority stockholder categorically inconsistent with treating a separate minority shareholder as a controller. In *In re Dell Techs. Inc. Class V S’holders Litig.*, 2020 WL 3096748 (Del. Ch. June 11, 2020), Michael Dell held stock carrying 73 percent of the company’s voting power, while Silver Lake held stock carrying 23 percent of voting power. *Id.* at *3. Both favored the challenged transaction, and both had control over it. *Id.* at *4, 16. The court treated both as controllers owing fiduciary duties. *Id.* at *1 (“Mr. Dell and Silver Lake control [the Company]”); *see also Williamson v. Cox Commc’ns, Inc.*, 2006 WL 1586375, at *1 n.4 (Del. Ch. June 5, 2006) (holding that plaintiffs had adequately pled that stockholders with 8.3 and 8.8 percent stakes together controlled the challenged transaction even though another stockholder owned 70 percent of the company).

amount of damages on Count I.¹⁷ We therefore affirm the district court’s employer ruling as to the Au Defendants identified above, and reverse and remand as to Ohana and the Ellison Trust for proceedings consistent with this opinion.

B. Section 394B-9(c)’s Affirmative Defense

Having resolved who qualifies as an “employer” under the DWA, we turn to the availability of an affirmative defense to the 60-day notice requirement. At issue is whether the Au and Ellison Defendants may avoid liability for failing to give employees 60 days’ notice before Island Air’s closing by invoking the safe harbor in § § 394B-9(c), which defers the notice obligation for an employer actively seeking a buyer. Plaintiffs argue that the safe harbor is available only in the context of a divestiture, and because Island Air undisputedly suffered a “closing,” not a divestiture, the defense is unavailable as a matter of law. The Au and Ellison Defendants read the provision, in accord with the district court, to apply whenever an employer is actively seeking a buyer, regardless of whether a divestiture ultimately occurs. On that reading, because the jury found, and Plaintiffs do not dispute, that Island Air was actively “seeking a buyer for a sale, transfer, or merger” at the time of the violations, the Defendants are excused from the notice requirement.

¹⁷ As the district court held, and the parties do not contest, liability under the DWA is joint and several. Plaintiffs may recover the damages owed from any or all of the entities held liable. Joint and several liability comports with the statute’s language that each violating employer “shall be liable to each affected employee.” See Haw. Rev. Stat. § 394B-9(b).

Section 394B-9(c) provides in full:

An employer of a covered establishment that is actively seeking a buyer for a sale, transfer, or merger shall not be required to provide the notice required under subsection (a) *until* the employer has entered into a binding agreement for the sale, transfer, or merger of the covered establishment *that results in a divestiture*.

Haw. Rev. Stat. § 394B-9(c) (emphases added). On its face, § 394B-9(c) offers employers a grace period for the notice obligation imposed by § 394B-9(a). The grace period applies when the employer is “actively seeking a buyer for a sale, transfer, or merger” and lasts “until” there is a “binding agreement . . . that results in a divestiture.” In this way, the statute distinguishes two stages: a preliminary stage, consisting of exploratory efforts, negotiations, and attempts to locate a buyer, and an operative stage, marked by a binding agreement producing a divestiture. The former excuses notice; the latter does not. That much is clear enough. The harder question is the provision’s scope—that is, whether, as Plaintiffs urge, divestiture in fact is a prerequisite to the safe harbor, or whether, as Defendants contend, the safe harbor is available whenever an employer is actively seeking a buyer, even if no divestiture results.

In determining the scope of the safe harbor, we look to the terms used. The statute uses the phrase “that results in.” “Results in” carries a particularly stark connotation of certainty, denoting an end or consequence that has actually occurred or come about. *See Result*, Black’s Law Dictionary (12th ed. 2024) (defining “result” as “[t]o be a physical,

logical, or legal consequence; to proceed as an outcome or conclusion.”). Plaintiffs read “results in” to mean that actual divestiture is a necessary condition of the safe harbor. On that reading, an employer receives no reprieve from the notice requirement unless the sale, transfer, or merger culminates in a divestiture. Defendants’ interpretation, Plaintiffs insist, would soften “results in” into “could lead to,” or “as long as there is a possibility of.” But the legislature chose the more definite, causal formulation over conditional language, suggesting that it intended an actual divestiture to be a prerequisite to the safe harbor.

The Ellison Defendants, by contrast, hang their hat on the term “until.” As they read § 394B-9, “until” introduces a condition—a “binding agreement that results in a divestiture”—sufficient to *retrigger* notice in the context of a broad exemption that lasts through any buyer search unless negotiations produce a divestiture. On that reading, procuring a divestiture in fact is not a prerequisite to the safe harbor; it is a sufficient condition for ending the safe harbor period. According to Defendants, the safe harbor applies and continues whenever an employer is actively seeking a buyer and ends only if a binding divestiture agreement is signed. But “until” is not synonymous with “unless.” In context, “until” may mark the endpoint of a temporary deferral that is available only when the statutory conditions are satisfied. If no such “divestiture” occurs, the precondition to the safe harbor has not been met.

For further clarity, we turn to the statutory structure and context. *See* Haw. Rev. Stat. § 1-15(1); *Priceline.com, Inc. v. Dir. Of Tax’n*, 436 P.3d 1155, 1172–73 (Haw. 2019). The doctrine of *expressio unius est exclusio alterius* loosely translates to “the mention of one thing implies the exclusion of another.” *Int’l Sav. & Loan Ass’n, Ltd. v. Wiig*, 921 P.2d

117, 120 (Haw. 1996) (quoting Black’s Law Dictionary 763 (6th ed. 1990)). Under this canon, “the express inclusion of a provision in a statute implies the exclusion of another.” *Fought & Co. v. Steel Eng’g & Erection, Inc.*, 951 P.2d 487, 505 (Haw. 1998); *see id.* (“This court has consistently applied the rule of *expressio unius est exclusio alterius* . . . in interpreting statutes.”). Section 394B-9(a)’s notice requirement enumerates four distinct events that trigger the obligation to provide notice: “closing, divestiture, partial closing, or relocation.” Section 394B-9(c)’s safe harbor, by contrast, refers to only one of those pathways: “a divestiture.” The terms “divestiture” and “closing” each carry specific, contrasting meanings in the DWA. *Compare* Haw. Rev. Stat. § 394B-2 (defining “divestiture” as “the transfer of any covered establishment from one employer to another”), *with id.* (defining a “closing” as “the permanent shutting down of all operations within a covered establishment . . .”). The self-evident contrast between “divestiture” in § 394B-9(c) and “closing, divestiture, partial closing, or relocation” in § 394B-9(a) suggests that the legislature deliberately singled out “divestiture” for the safe harbor. A “natural association of ideas” therefore “leads to an inference that” a closing “was not intended to be included” within the affirmative defense. *Int’l Sav.*, 921 P.2d at 121 (internal quotation marks and citation omitted). A provision that delays notice for only one of four triggering events should not be expanded to cover the others by implication.

Another canon cuts against the Au and Ellison Defendants’ reading. Under Defendants’ interpretation, the phrase “results in a divestiture” becomes surplusage. Courts must “give effect to all parts of a statute, and no sentence, clause or word shall be construed as surplusage if a

construction can . . . give force to and preserve all the words of the statute.” *In re Ainoa*, 591 P.2d 607, 609 (Haw. 1979). Had the legislature meant to excuse notice whenever an employer was seeking a buyer, it could have said so directly; there would have been no need to single out “divestiture.” Yet, on Defendants’ reading, an employer could invoke § 394B-9(c) for any closing merely by claiming it was “seeking a buyer,” thereby stripping “that results in a divestiture” of independent work and nullifying the legislature’s deliberate choice to include that language. Indeed, the legislature could have effected Defendants’ remedy by placing a period behind the reference to “subsection (a).” Giving the full “until” phrase independent effect indicates that actual divestiture is a necessary condition of the safe harbor.

In an effort to avoid this conclusion, the Ellison Defendants stress policy and purpose. For the Ellison Defendants, the policy behind the safe harbor is clear: there are “good reasons,” they contend, to preserve the confidentiality of “[a]ctive efforts to seek a buyer,” and these reasons apply equally to negotiations that ultimately fail to produce a divestiture. That may be true, and the legislature could have struck that balance, but it did not. As the statute is now written, § 394B-9(c) must be read alongside § 394B-9(a). Together, the provisions strike a balance between protecting the confidentiality of business negotiations and employees’ right to advance notice of dislocation.

Defendants’ reading upsets that balance by gutting the DWA’s hallmark protection: the 60-day notice requirement. On their view, an employer can escape that obligation simply by asserting that it was “seeking a buyer,” even if no binding agreement or divestiture came to fruition. As Defendants’ interpretation would shield the very employers that the

notice requirement targets, were we to adopt Defendants' reading, a distressed company will seek a § 394B-9 escape through a sale, transfer, or merger, no matter how unlikely. Any failing employer can claim it was looking for a buyer and, when the search fails, disclaim any obligation to provide notice. Defendants' expansive reading creates an exception that frustrates the rule. *See Natatorium Pres. Comm. v. Edelstein*, 515 P.2d 621, 625 (Haw. 1973) (rejecting an interpretation that could "render nugatory the mandatory provisions and language" of the statute in favor of one that "preserves as meaningful all parts" of one provision and is "consistent" with another).

Plaintiffs' reading, by contrast, preserves that balance. Requiring a divestiture does not, as Defendants warn, render the safe harbor meaningless merely because of the ever-present risk that negotiations will fall through. A healthy company exploring a possible sale need not give notice simply because negotiations are underway. Regardless of the outcome of the exploratory period, a healthy company is protected. If negotiations are successful, § 394B-9(c)'s safe harbor excuses such a company from providing notice during the critical bargaining period. And if the search ultimately fails, a healthy company can continue operations in the normal course, avoiding a notice-triggering "closing, divestiture, partial closing, or relocation." Haw. Rev. Stat. § 394B-9(a).

But a distressed employer that will close absent a sale stands on different ground. When a sale, transfer, or merger is the employer's only means to avoid a shutdown, the employer knows that failure to consummate the transaction will lead to a closing. Notice of that impending *closing* is not incompatible with preserving the confidentiality of negotiations over a possible *divestiture*. An employer can

tell its employees of a likely closing while still pursuing a last-ditch effort to save the company. The DWA does not permit an employer to keep employees in the dark until the day of closure, on the mere hope that a buyer will appear at the eleventh hour.

If any room remained for doubt, the legislative history forecloses the Defendants' reading. The "foremost obligation" in construing a Hawai'i statute is to "give effect to the intention of the legislature." *Kaheawa Wind Power, LLC v. Cnty. of Maui*, 456 P.3d 149, 161 (Haw. 2020). Hawai'i "courts may resort to extrinsic aids in determining legislative intent," including using "legislative history as an interpretive tool." *Id.*; see also *E & J Lounge Operating Co. v. Liquor Comm'n of City & Cnty. of Honolulu*, 189 P.3d 432, 447 (Haw. 2008) ("Legislative history may be used to confirm [the court's] interpretation of a statute's plain language."). Although the DWA has required notice to employees before a closing since 1987,¹⁸ the safe harbor was not added until 2007. This addition occurred through the same bill, H.B. 1503, that expanded the Act to cover divestitures and added "bankruptcies" to the definition of closing. Compare H.B. 445, Act 377, 1987 Haw. Sess. Laws. 1196–98 (approved July 7, 1987), with H.B. 1503, 23rd Leg., 1st Spec. Sess. (Haw. 2007).

From its inception, § 394B-9(c)'s safe harbor was tethered to divestiture. As introduced and first debated in 2007, H.B. 1503 added "divestiture" as a triggering event under § 394B-9(a) but contained no safe harbor. Compare H.B. 1503 H.D. 1, 24th Leg. § 2 (as reported by Comm. on the Judiciary, Mar. 2, 2007), with H.B. 1503 H.D. 1, S.D. 1,

¹⁸ The notice requirement was originally 45 days, but a 2001 amendment extended it to 60 days. See S.B. 28, 21st Leg., Reg. Sess. (Haw. 2001).

C.D. 1, 24th Leg. § 2(c) (as reported from Conf. Comm., Apr. 27, 2007). But after business interests submitted testimony in opposition, the Senate Committee on Judiciary and Labor amended the bill to add the safe harbor. *See* Haw. Leg., Stand. Comm. Rep., 24-1604, Reg. Sess., at 1–2 (Apr. 5, 2007). The Conference Committee explained that H.B. 1503 was meant to “strengthen protections for dislocated workers” by adding a “notification requirement for the transfer of any covered establishment from one employer to another,” and that subsection (c) was added to address “concerns . . . raised” whether a “business actively seeking a buyer for a sale, transfer, or merger . . . would be able to comply with the 60-day notice requirement.” Haw. State Leg., Conf. Comm. Rep., 24-68, Reg. Sess., at 1 (Apr. 26, 2007). The report describes the subsection as “[e]xempting a covered establishment which is actively seeking a buyer for a sale, transfer, or merger until such time as the sale, transfer, or merger results in a divestiture from notification requirements until a divestiture occurs.” *Id.* at 2. The repeated reference to divestiture signals a safe harbor designed to defer notice of a completed divestiture, not to excuse notice whenever an employer claims it searched for a buyer before closing.

The 2007 bill adding “divestitures” to § 394B-9(a) and the safe harbor at § 394B-9(c) was understood as expanding the DWA’s protections of workers, not contracting those protections in favor of employers’ interests. The House and Senate Conference Committee reports describe the bill as “strengthen[ing] protections for dislocated workers,” *id.* at 1, “[e]xpand[ing] the 60-day notification requirements to employees,” *id.*, and “help[ing] ameliorate the effects [divestitures] will have on people’s lives,” *id.* at 2; Haw. State Leg., Stand. Conf. Comm. Rep., 24-1075, Reg. Sess.,

at 1 (Mar. 2, 2007); *see also* Haw. H.R. Comm. on Lab. & Pub. Emp., Stand. Comm. Rep., Leg. 24-135, Reg. Sess., at 2 (Feb. 6, 2007) (noting that various employee unions testified in support of the bill). The Governor similarly characterized the bill as “expand[ing] the scope of Section 394B-9.” Gov. Msg. No. 1056, Statement of Objections to H.B. 1503, H.D.1, S.D.1, C.D.1, 24th Leg., Spec. Sess., at 1–2 (Haw. July 10, 2007). It would be strange to read a bill that all understood as expanding employer notification requirements and strengthening workers’ protections to instead eviscerate the DWA’s hallmark notice provision. Had the legislature intended to curtail the longstanding notice requirement in the case of a closing, one would expect that to be an object of debate or at least appear in the Committee Reports.

The veto fight over H.B. 1503 confirms this reading. Viewing the expansion of the “public disclosure” requirement as “objectionable,” Governor Lingle urged a more robust safe harbor for businesses attempting to rescue themselves. *Id.* But the legislature declined and overrode Governor Lingle’s veto by the required two-thirds majority. All in all, the legislative history shows that § 394B-9(c) was intended to be a narrow safe harbor, adopted alongside the extension of the notice requirement to divestiture, that defers notice of a divestiture until a binding agreement is signed.

* * *

In sum, § 394B-9(c) is best read as available only when the employer enters a binding sale, transfer, or merger agreement that will “result[] in a divestiture” (i.e., a transfer from one employer to another). Accordingly, if the covered establishment only suffered a closing and not a divestiture, as here, § 394B-9(c) offers no affirmative defense to the

§ 394B-9(a) notice violation. Because the district court erred as a matter of law on the availability of the affirmative defense, we reverse the judgment on Count II. And because Island Air’s violation of the 60-day notice requirement is undisputed, if on remand the district court or jury finds that Ohana and the Ellison Trust are “employers” under the DWA, they are jointly and severally liable with the Au Defendants under Count II.

C. Certification to the Hawai‘i Supreme Court

Finally, we address Plaintiffs’ motion to certify the two statutory interpretation questions to the Hawai‘i Supreme Court. Under Hawai‘i Rule of Appellate Procedure 13(a), “[w]hen a federal district or appellate court certifies to the Hawai‘i Supreme Court that there is involved in any proceeding before it a question concerning the law of Hawai‘i that is determinative of the cause and that there is no clear controlling precedent in the Hawai‘i judicial decisions, the Hawai‘i Supreme Court may answer the certified question by written opinion.” Both prerequisites are satisfied here: The interpretation of § 394B-2 and § 394B-9(c) presents questions of first impression under Hawai‘i law, and the answers are dispositive of the Unions’ DWA claims.

Even so, certification is never obligatory as it “rests in the sound discretion of the federal court.” *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974). Moreover, certification is unwarranted if “the law at issue is ‘reasonably clear such that the court can readily predict how the Hawai‘i Supreme Court would decide the issue.’” See *Robert Ito Farm, Inc. v. Cnty. of Maui*, 111 F. Supp. 3d 1088, 1108 (D. Haw. 2015) (citation omitted). As our analysis reflects, the statute’s test, structure, and history supply reasonably clear answers to

both questions, and certifying them would impose the delay and expense of a second round of litigation for little interpretive gain. *See Lehman Bros.*, 416 U.S. at 390 (“[M]ere difficulty in ascertaining local law is no excuse for remitting the parties to a state tribunal for the start of another lawsuit.”); *see also Eckard Brandes, Inc. v. Riley*, 338 F.3d 1082, 1087 (9th Cir. 2003) (affirming refusal to certify where, absent controlling Hawai‘i Supreme Court precedent, the district court “properly looked to decisions from other jurisdictions, other relevant Hawai‘i cases, and the Restatement to determine how a Hawai‘i court would resolve the[] issues.”). We thus deny the motion.

V. AU’S LIABILITY UNDER THE WARN ACT

The WARN Act, 29 U.S.C. §§ 2101–2109, is the federal analog to the DWA. Like the DWA, it requires employers to provide 60 days’ notice in advance of a plant closing or mass layoff. *Id.* § 2102(a). It provides a cause of action against “[a]ny employer who orders a plant closing or mass layoff” for back pay and benefits for up to 60 days. *Id.* § 2104(a)(1), (5). Because it was undisputed that Island Air had failed to provide notice to its employees before closing, the district court granted JMOL against PAF and Malama for violating the WARN Act. The court initially found Au liable for the same violation, but it later concluded that it had erred in doing so and corrected its judgment, citing Federal Rules of Civil Procedure 59(e) and 60(b). The court explained that Plaintiffs had either failed to name Au as a defendant in the Complaint or had forfeited any claim against Au by the time trial commenced. Plaintiffs appeal from the district court’s decision amending the judgment to relieve Au of WARN Act liability.

A motion to alter or amend a judgment under Federal Rule of Civil Procedure 59(e) “should not be granted, absent highly unusual circumstances, unless the district court is presented with newly discovered evidence, committed clear error, or if there is an intervening change in the controlling law.” 389 *Orange St. Partners v. Arnold*, 179 F.3d 656, 665 (9th Cir. 1999). Rule 60(b) similarly authorizes courts to grant relief due to “mistake” or “any other reason that justifies relief.” Fed. R. Civ. P. 60(b)(1), (6). Rule 60(b)(6) is “used sparingly, as an equitable remedy to prevent manifest injustice.” *United States v. Alpine Land & Reservoir Co.*, 984 F.2d 1047, 1049 (9th Cir. 1993). Under Rule 59(e), “the district court enjoys considerable discretion in granting or denying the [motion to amend].” *McDowell v. Calderon*, 197 F.3d 1253, 1255 n.1 (9th Cir. 1999) (quoting 11 Charles Alan Wright et al., *Federal Practice and Procedure* § 2810.1 (2d ed.1995)). Motions for relief from judgment are likewise “addressed to the sound discretion of the district court and will not be reversed absent an abuse of discretion.” *Casey v. Albertson’s Inc.*, 362 F.3d 1254, 1257 (9th Cir. 2004).

With these standards in mind, we conclude that the district court did not abuse its discretion by amending the judgment and granting relief to Au on Count III. As the district court acknowledged, whether Au was properly named as a defendant in the Complaint is unclear. Count III listed only three defendants in the heading—PAF, Malama, and Ohana—but the allegations refer to the “Control Group,” which is defined earlier in the Complaint to include Au. The district court also noted that “pretrial correspondence suggest[ed] that both Au and Plaintiffs believed Au to be a defendant for Count III, at least prior to trial.”

But regardless of whether WARN Act liability was properly pled against Au, and irrespective of the parties' pretrial understanding to that effect, the district court was well within its discretion to deem such claims forfeited by the time trial commenced. Two weeks before trial, the court ordered the parties to submit a list of all active claims, cross-claims, and counter-claims, and directed that specific parties within a group of defendants had to be individually identified. The parties then jointly submitted a chart of all active claims, which listed only PAF, Malama, and Ohana as defendants under Count III. Plaintiffs' filings during trial further suggest that they did not view Au as a Count III defendant. For instance, in response to the Au Defendants' motion for JMOL on Count III, Plaintiffs argued only that "PAF and Malama were employers under the WARN Act." Plaintiffs' written closing arguments also focused exclusively on PAF and Malama and failed to argue that Au was an "employer" for the purpose of WARN Act liability.

The only deviation from this pattern was Plaintiffs' Proposed Findings of Fact and Conclusions of Law, filed in December 2023, in which they argued that "Mr. Au, PAF, and Malama have violated the WARN Act." But this inconsistency is offset by subsequent filings that reverted to listing only PAF and Malama as Count III defendants.

Although we sympathize with the confusion that plagued the complex litigation below, Plaintiffs had ample opportunity to correct their mistake. Most damaging for Plaintiffs is their response to the district court's final request for clarification in February 2024, well after the trial. Having noted additional discrepancies between the parties' arguments and the jointly submitted list of active equitable claims, the court directed the Plaintiffs to review the list of claims and warned that any omissions from the list would be

“deemed forfeited.” Plaintiffs identified an unrelated discrepancy, but left untouched their description of PAF and Malama as the only Au Defendants for Count III.

Given its repeated requests for the parties to clarify the claims and defendants before it, the court did not abuse its discretion in determining that Plaintiffs had forfeited any WARN Act claim against Au. We thus affirm the district court’s ruling dismissing Au from Count III.

VI. EVIDENTIARY RULINGS

Plaintiffs challenged two of the district court’s evidentiary rulings. “We review the district court’s construction of the hearsay rule de novo and its decision to exclude evidence under the hearsay rule for an abuse of discretion.” *Orr v. Bank of Am., NT & SA*, 285 F.3d 764, 778 (9th Cir. 2002). We also review for abuse of discretion the “district court’s ruling on the relevance of evidence.” *United States v. Alvarez*, 358 F.3d 1194, 1217 (9th Cir. 2004). We affirm both evidentiary rulings.

A. *The Starn Memo*

Plaintiffs appeal the district court’s decision to exclude as hearsay a memo (“Starn Memo”) that memorialized a September 2015 conversation between Peter Starn, Island Air’s outside counsel, and the airline’s then-CEO David Pflieger. According to Starn’s recollections in the memo, Pflieger indicated that “based on his meeting with Larry Ellison on Monday, September 14, the decision is to get rid of Island Air and to acquire Mokulele Airlines.” The Starn Memo also stated that “Paul Marinelli would like to get as much as possible for Island Air. Larry Ellison was willing to just dump it.”

The Starn Memo is hearsay and excludable under Federal Rule of Evidence 802 unless a federal statute or rule makes it admissible. Plaintiffs sought its admission under two exceptions: The business records exception, Fed. R. Evid. 803(6), and the recorded recollection exception, Fed. R. Evid. 803(5). The district court declined to admit the Starn Memo under either exception.

The district court did not abuse its discretion by rejecting the business records exception. This exception only applies if the “source of information or the method or circumstances of preparation” do not “indicate a lack of trustworthiness.” Fed. R. Evid. 803(6)(E). That bar is not met here. During his deposition, Starn stated that he did not review the memo after dictating its contents and had no independent recollection of the call with Pflieger. Pflieger additionally testified that he did not recall making the statements captured in the memo. And the record is silent as to who transcribed Starn’s dictation, leaving the court with little to confirm the veracity of the information therein. This is more than enough to justify rejection of the business records exception.

We similarly conclude that the district court did not abuse its discretion in disallowing the recorded recollection exception. This exception requires that “(1) the witness once had knowledge about the matters in the document, (2) the witness now has insufficient recollection to testify fully and accurately, and (3) the record was made or adopted by the witness at a time when the matter was fresh in the witness’ memory and reflected the witness’ knowledge correctly.” *United States v. Collicott*, 92 F.3d 973, 984 (9th Cir. 1996).

We agree with the district court that Starn did not make or adopt the memo as required by the recorded recollection

exception. Although the memo purportedly contains Starn's dictation, he did not review its contents after it was typed. At no point did Starn affirmatively adopt any of the statements in the memo as his own, let alone do so "when the matter was fresh in [his] memory." Fed. R. Evid. 803(5)(B). Plaintiffs highlight Starn's later statements that the memo would have accurately reflected his recollections of the call with Pflieger at the time of dictation. But such testimony bears on the rule's separate requirement that the record "accurately reflects the witness's knowledge." Fed. R. Evid. 803(5)(C).

B. Creditor Impact Evidence

Plaintiffs next argue that the district court improperly excluded evidence of the bankruptcy's impact on creditors. The court reasoned that such evidence was not relevant, as Plaintiffs were not creditors and had not proposed a measure of damages that might rely on harm to creditors.

The district court did not abuse its discretion. Under Federal Rule of Evidence 401, evidence is relevant if "it has any tendency to make a fact more or less probable" and "the fact is of consequence in determining the action." Fed. R. Evid. 401. Relevant evidence is generally admissible. Fed. R. Evid. 402. Although Plaintiffs claim that the court "did not articulate a reason" for excluding the creditor impact evidence, the court did articulate one: It explained that the evidence was not relevant to the claims being pled or to any damages question.

We are unpersuaded by Plaintiffs' argument that the evidence was relevant to the fraudulent transfer claims because "the Trustee asserted claims that would otherwise be asserted by creditors were there no bankruptcy." A fraudulent transfer action "allows a trustee to avoid any

transfer of an interest of the debtor in property or any obligation incurred by the debtor if the debtor made such transfer or incurred such obligation with actual intent to hinder, delay or defraud any creditor.” *In re First All. Mortg. Co.*, 471 F.3d 977, 1008 (9th Cir. 2006) (citing 11 U.S.C § 548(a)(1). That creditors might be able to assert a similar claim if there was no bankruptcy does not explain why evidence of harm to creditors is relevant to the merits or remedy of a fraudulent transfer claim under the Bankruptcy Code. The district court thus did not abuse its discretion by excluding the creditor impact evidence.

VII. DAMAGES

Plaintiffs challenge three of the district court’s rulings related to damages. These include: (1) the court’s jury instruction on Plaintiffs’ fiduciary duty claims; (2) the court’s refusal to permit punitive damages for the fiduciary duty claims; and (3) the court’s decision to limit damages to prevent double recovery.

A. *Jury Instructions*

On the breach-of-fiduciary-duty counts, the district court instructed the jury in relevant part:

If you find for the Trustee on her claims for breaches of fiduciary duties, you must determine Island Air’s damages. . . .

The Trustee bears the burden to prove to you a non-speculative basis on which to quantify damages. That means that Plaintiffs are not only required to prove that they were injured or damaged each Defendants’ conduct, but must also demonstrate the extent of their loss to a degree that does not require you to

speculate. Your award of damages cannot be based upon speculation or guesswork, or conjecture.

....

... If you find for the Trustee but you find that the Trustee has failed to prove damages as defined in these instructions, you must award nominal damages. Nominal damages may not exceed one dollar.

Despite evidence that the breaches of fiduciary duties cost Island Air millions, the jury awarded \$0.99 in nominal damages against the Au Defendants for Count VI. Plaintiffs claim that the court's instruction was in error and that the district court should have instructed the jury that when the fact of damages has been proven, a plaintiff need not establish the precise amount of damages. We review the district court's "formulation of the jury instructions" for abuse of discretion but review "whether the instructions misstated the law" de novo. *Dang v. Cross*, 422 F.3d 800, 804 (9th Cir. 2005) (citations omitted).

The district court erred in rejecting Plaintiffs' requested instruction. Delaware's general rule is that the plaintiff must show "by a preponderance of the evidence" that the defendant "breached a fiduciary duty owed to them" and "that they suffered damages as a result of the breach." *Glick v. KF Peckslund LLC*, 2017 WL 5514360, at *19 (Del. Ch. Nov. 17, 2017) (citation omitted). Delaware does not "require certainty in the award of damages where a wrong has been proven and injury established." *Del. Express Shuttle, Inc. v. Older*, 2002 WL 31458243, at *15 (Del. Ch. Oct. 23, 2002); *id.* at *15 ("Responsible estimates that lack mathematical certainty are permissible so long as the court

has a basis to make a responsible estimate of damages.”); *see also Beard Rsch., Inc. v. Kates*, 8 A.3d 573, 613 (Del. Ch. 2010) (“The quantum of proof required to establish the amount of damage is not as great as that required to establish the fact of damage.” (citation and internal quotation marks omitted)), *aff’d sub nom. ASDI, Inc. v. Beard Rsch., Inc.*, 11 A.3d 749 (Del. 2010). In a case involving a breach of fiduciary duty claim, the Chancery Court explained: “Public policy has led Delaware courts to show a general willingness to make a wrongdoer ‘bear the risk of uncertainty of a damages calculation where the calculation cannot be mathematically proven.’” *Beard Rsch.*, 8 A.3d at 613 (citation omitted).

The district court’s instruction was legal error. It told the jury in clear terms that no level of uncertainty was permitted; the Trustee had to prove damages on a “non-speculative basis.” The court’s instructions also directed the jury that, if a precise number could not be discerned (which, of course, it could not), it was to award nominal damages (which it did). But in cases involving breaches of fiduciary duties, where complex economics and corporate valuations are at issue, it would be infeasible to compute a precise damages figure without any “speculation, guesswork, or conjecture.” That is why Delaware courts dealing with breach of fiduciary duty claims instead cabin uncertainty by limiting the *degree* of speculation; that is, damages calculations cannot be “overly speculative on the facts of the case.” *In re Orchard Enters., Inc. S’holder Litig.*, 88 A.3d 1, 45 (Del. Ch. 2014); *see also Carlson v. Hallinan*, 925 A.2d 506, 540 (Del. Ch. 2006) (“Further, Plaintiffs’ estimates are *far too speculative*. Although ‘mathematical certainty’ is not required to award damages, Plaintiffs have failed even to provide the Court with a basis for a reasonable estimate of

monetary damages.” (emphasis added)). Thus, a proper instruction would have permitted some degree of reasonable speculation so long as the jury came to a responsible estimate grounded in the evidence.

The district court’s error was not harmless. We must “presume prejudice where civil trial error is concerned,” and the “burden shifts to the defendant to demonstrate that it is more probable than not that the jury would have reached the same verdict had it been properly instructed.” *Clem v. Lomeli*, 566 F.3d 1177, 1181–82 (9th Cir. 2009) (citation omitted; citation modified). There is “sufficient prejudice to warrant reversal where ‘it is impossible to determine from the jury’s verdict and evidentiary record that the jury would have reached the same result had it been properly instructed.’” *Bearchild v. Cobban*, 947 F.3d 1130, 1139 (9th Cir. 2020) (quoting *Hoard v. Hartman*, 904 F.3d 780, 791 (9th Cir. 2018)).

There was significant evidence of the damages Island Air incurred from the Au Defendants’ breach of their fiduciary duties. At trial, Plaintiffs’ expert described one methodology for measuring the harm as the decline in Island Air’s net worth between when it should have ceased operations and when it actually shut down. The documentary evidence, including data from Island Air’s accounting system, showed a multi-million-dollar deterioration in shareholder net worth over the relevant period. Even though the figures for the last month of operations were incomplete, testimony and the prior-month trend evidence suggested a substantial additional net-worth decline in Island Air’s value through its November 10, 2017 shutdown. Taken together, the record provided a concrete financial basis from which a jury could determine a nontrivial damages award. We therefore vacate the nominal

damages award on Count VI and remand for a new trial on damages.

B. *Punitive Damages*

Plaintiffs sought punitive damages for their breach-of-fiduciary-duty claims. The district court, however, ruled that punitive damages for such claims were not available under Delaware law. This is a complex issue, one that has divided federal courts applying Delaware law. For the reasons explained below, we affirm the district court's ruling.

A plaintiff litigating in Delaware courts cannot obtain punitive damages for a breach of fiduciary duty. This reality is the result of a forum-specific quirk: In practice, all fiduciary duty claims in Delaware are brought to the Delaware Court of Chancery. *McMahon v. New Castle Assocs.*, 532 A.2d 601, 604 (Del. Ch. 1987) (“Among the most ancient of headings under which chancery’s jurisdiction falls is that of fiduciary relationships.”). And it is well settled that the Chancery Court, as a court of equity, cannot award punitive damages absent express statutory authorization. *Gesoff v. IIC Indus., Inc.*, 902 A.2d 1130, 1154 (Del. Ch. 2006) (“Obviously, the court cannot award punitive damages.”).

The same is not true for claims brought in other Delaware courts. Delaware permits punitive damages for certain actions such as contract or tort suits that do not need to be brought in the Chancery Court. *See Cloroben Chem. Corp. v. Comegys*, 464 A.2d 887, 891 (Del. 1983) (“Punitive damages are recoverable where the defendant’s conduct exhibits a wanton or wilful disregard for the rights of plaintiff.”); *E.I. DuPont de Nemours & Co. v. Pressman*, 679 A.2d 436, 445 (Del. 1996) (noting that punitive damages are recoverable for breaches of contract only when “the conduct

also amounts independently to a tort”). One way of looking at Delaware’s practice is that the unavailability of punitive damages in Delaware for fiduciary duty claims derives from the state’s rules for the forum in which such claims must be litigated, rather than the state’s rules for the claims themselves. Or, to restate the problem, nothing in Delaware law expressly prohibits awarding punitive damages in fiduciary duty cases; instead, punitive damages are not available in such cases because those claims must be litigated in courts of equity, which cannot award punitive damages.

The question in this case is whether a federal district court, applying Delaware law, can award punitive damages for a breach of fiduciary duty. Under the *Erie* doctrine, federal courts adjudicating state law claims apply state substantive law but federal procedural law. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). To determine whether “a law is substantive or procedural, we generally use an ‘outcome-determination test,’ which asks whether applying federal law instead of state law would ‘significantly affect’ the litigation’s outcome.” *Sonner v. Premier Nutrition Corp.*, 971 F.3d 834, 839 (9th Cir. 2020). But the inquiry does not begin or end there; the Supreme Court has stated that “[t]he ‘outcome-determination’ test . . . cannot be read without reference to the twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws.” *Hanna v. Plumer*, 380 U.S. 460, 468 (1965).

Is Delaware’s no-punitives-for-breach-of-fiduciary-duty rule a substantive rule of Delaware law or a consequence of Delaware’s procedural rules? Federal courts applying Delaware law have split over the *Erie* question, often with little elaboration. So far as we are aware, the First Circuit is

the only circuit to have allowed punitive damages for a Delaware fiduciary duty claim. But it did so by adopting citationless reasoning from the district court that “[u]nder Delaware law, punitive damages for breach of fiduciary duty may be awarded, but only upon proof that the Defendant acted maliciously for the purpose of injuring the Plaintiff.” *Niehoff v. Maynard*, 299 F.3d 41, 53 (1st Cir. 2002). Several other federal courts have similarly permitted punitive damage theories to proceed, reasoning that punitive damages are available for other kinds of claims in Delaware courts. *See, e.g., Heartland Payment Sys., LLC v. Carr*, 2020 WL 13580941, at *5 (D.N.J. Dec. 28, 2020) (noting that punitive damages are recoverable under Delaware law in cases of willful and wanton conduct and acknowledging that a “fact finder could conclude that” the Defendants’ alleged misconduct “demonstrate a disregard of the fiduciary duties owed to Plaintiff, justifying an award of punitive damages” under Delaware law); *In re Covenant Partners, L.P.*, 2017 WL 838637, at *9 (Bankr. E.D. Pa. Mar. 2, 2017) (similar). These cases, however, did not cite *Erie* or take account of the fact that the punitive-damages standard for other kinds of claims does not govern breaches of fiduciary duty in Delaware.

Of the courts permitting punitive damages, the most extended discussion of the issue comes from a decision by the Bankruptcy Court for the Southern District of New York. It concluded that the unavailability of punitive damages in the Chancery Court does not “stand for the proposition that punitive damages for a breach of fiduciary duties claim are barred under Delaware law.” *In re Extended Stay, Inc.*, 2020 WL 10762310, at *121 (Bankr. S.D.N.Y. Aug. 8, 2020). “The majority rule in Delaware,” the court averred, “is that the limitation on punitive damages for breach of fiduciary

duties under Delaware law is strictly limited to actions brought in the Chancery Court.” *Id.* On this view, the Chancery Court’s limitations as a court of equity would not constrain a federal forum applying Delaware law, and Delaware law does not categorically foreclose punitive damages for fiduciary duty claims.

On the other side of the aisle, a number of federal courts have held that punitive damages are not available under Delaware law because of the Chancery Court’s jurisdictional limitations. *U.S. Bank Nat’l Ass’n v. Verizon Commc’ns Inc.*, 817 F. Supp. 2d 934, 944 (N.D. Tex. 2011) (“Punitive damages are not available for breach of fiduciary duty claims adjudicated in the Delaware Chancery Court.”); *Accident Ins. Co., Inc. v. U.S. Bank Nat’l Ass’n*, 2019 WL 2865222, at *3 (D.S.C. July 3, 2019) (concluding “that the application of Delaware law is appropriate in precluding an award of punitive damages based on the jurisdiction of the Delaware Court of Chancery”); *In re Legendary Field Exhibitions, LLC*, 2025 WL 3299149, at *85 (Bankr. W.D. Tex. Nov. 25, 2025) (declining to provide for punitive damages because “the Delaware Court of Chancery, sitting in equity, has historically refrained from awarding punitive damages involving breaches of fiduciary duty.”). But aside from a brief discussion in *Accident Insurance*, these cases do not address whether Delaware’s jurisdictional rule constitutes a substantive or procedural rule under *Erie* and offer little to help us.

The one court to have conducted a more fulsome *Erie* analysis is the Southern District of New York in *Buchwald v. Renco Grp.*, 539 B.R. 31, 53 (S.D.N.Y. 2015), *aff’d sub nom. In re Magnesium Corp. of Am.*, 682 F. App’x 24 (2d Cir. 2017). *Buchwald* began with the observation that “[t]he availability of punitive damages on state claims in federal

courts is generally governed by state law under *Erie*.” *Id.* at 53. The court then addressed the First Circuit’s decision in *Niehoff* and concluded that “*Niehoff* does not set forth an accurate statement of Delaware law.” The court then rejected the notion that the punitive damages restriction was a “‘procedural’ rather than ‘substantive’ aspect of Delaware law.” *Buchwald*, 539 B.R. at 52. Emphasizing that “what is ‘substantive law’ for *Erie* purposes is not the same as what a state defines as substantive law, or what might be considered substantive for conflict-of-laws purposes,” the court instead looked to *Erie*’s twin aims of discouraging forum-shopping and avoiding “inequitable administration of the laws.” *Id.* (internal quotation marks and citation omitted). The court consequently concluded that allowing punitive damages “would produce all the harms *Erie* sought to avoid” and refused to permit a “sleight-of-hand that makes Delaware law on punitive damages different in federal court than state court.” *Id.* at 54.

We agree with much of *Buchwald*’s analysis. The Supreme Court has stated that in any “lawsuit where state law provides the basis of decision, the propriety of an award of punitive damages for the conduct in question, and the factors the jury may consider in determining their amount, are questions of state law.” *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 278 (1989). And the Court has accepted as true that “a statutory cap on damages,” or a law that would “eliminate the availability of damages for a particular claim entirely” “would supply substantive law for *Erie* purposes.” *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 428–29 (1996) (internal quotation marks and citation omitted); *see also Guar. Tr. Co. of N.Y. v. York*, 326 U.S. 99, 110 (1945) (“Plainly enough, a statute that would completely bar recovery in a suit if

brought in a State court bears on a State created right vitally and not merely formally or negligibly.”).

The conundrum arises from the fact that Delaware’s legislature and courts have never affirmatively declared that punitive damages are barred for breaches of fiduciary duty as a matter of substantive law. The unavailability of such damages instead derives from Delaware’s rules about the proper forum for fiduciary duty claims—a limit that arguably sounds in procedure. *See In re Cnty. of Orange*, 784 F.3d 520, 527 (9th Cir. 2015) (“A procedural rule . . . defines ‘a form and mode of enforcing’ the substantive right or obligation.” (citation omitted)).

Where does this leave us? We have little doubt that a state statute barring punitive damages for fiduciary duty claims would qualify as state substantive law and must be applied by federal courts under *Erie*. What is less clear is whether the same is true for Delaware’s arguably procedural rule about where fiduciary claims must be brought, which has a substantive effect due to the historical practices of the Chancery Court, a court of equity.

We conclude that Delaware’s bar on punitive damages reflects state substantive law and binds federal courts under *Erie*. Delaware’s rule is “bound up with [state-created] rights and obligations in such a way that its application in the federal court is required.” *Byrd v. Blue Ridge Rural Elec. Co-op., Inc.*, 356 U.S. 525, 535 (1958). Even when a rule is arguably procedural, we have recognized that “federal courts sitting in diversity must give full effect to state procedural rules when those rules are ‘intimately bound up with the state’s substantive decision making’ or ‘serve substantive state policies.’” *In re Cnty. of Orange*, 784 F.3d at 530 (quoting *Feldman v. Allstate Ins. Co.*, 322 F.3d 660,

667 (9th Cir. 2003)); *see, e.g., id.* (“California’s rule on pre-dispute jury trial waivers embodies the state’s substantive interest in preserving the ‘right to a jury trial’” (citation omitted)); *Price v. Seydel*, 961 F.2d 1470, 1475 (9th Cir. 1992) (“A federal court sitting in diversity applies state law in deciding whether to allow attorney’s fees when those fees are connected to the substance of the case.”).

Delaware’s approach to punitive damages indisputably embodies a substantive legislative choice to allocate fiduciary duty claims to the exclusive jurisdiction of a court of equity. As the Chancery Court explained in *McMahon*, “Chancery takes jurisdiction over fiduciary relationships because equity, not law, is the source of the right asserted.” 532 A.2d at 604 (internal quotation marks omitted). Fiduciary duties are not created by statute or contract; rather, they arise from relationships where “one person reposes special trust in and reliance on the judgment of another or where a special duty exists on the part of one person to protect the interests of another.” *Cheese Shop Int’l, Inc. v. Steele*, 303 A.2d 689, 690 (Del. Ch. 1973), *rev’d on other grounds*, 311 A.2d 870 (Del. 1973). Those in a fiduciary relationship are subject to various “duties, disabilities, and liabilities,” such as the duties to operate in “good faith” and to “avoid conflicts of interest.” Joshua Getzler, *Fiduciary Principles in English Common Law*, in *The Oxford Handbook of Fiduciary Law* 471, 473–74 (Evan J. Criddle, Paul B. Miller & Robert H. Sitkoff eds., 2019). These principles, which “serve to guide managerial power and prevent its perversion into self-interested abuse of trust,” “were settled by the English courts of equity in the mid-nineteenth century.” *Id.* at 474 (emphasis added).

Delaware’s assignment of fiduciary duty claims to courts of equity is thus no coincidence; the Delaware Chancery

Court “inherited its equity jurisdiction from the English Courts” and “has adhered more closely to the English Court of Chancery and to English precedents than those of any of her sister States.” *Glanding v. Indus. Tr. Co.*, 45 A.2d 553, 555 (Del. Ch. 1945) (internal quotation marks and citation omitted). These equitable roots are further entwined with the substantive character of fiduciary duty claims. Historically, “[e]quitable fiduciary enforcement was marked by a moralizing language of conscience and good faith,” themes that still resonate in modern fiduciary duty law. Getzler, *supra*, at 474. As such, “equitable conscience jurisdiction ha[s] long been seen as the main carrier of modern fiduciary principles.” *Id.* And this has remained particularly true in Delaware, which still “vigorously maintain[s]” a separation between “law and equity.” *Beals v. Washington Int’l, Inc.*, 386 A.2d 1156, 1159 (Del. Ch. 1978); *see also McMahon*, 532 A.2d at 604 (“The duties [corporate officers and directors] owe to shareholders with respect to the exercise of their legal power over corporate property supervene their legal rights, are imposed by equity and are recognized and enforced exclusively by a court of equity.”).

In the same way that the Chancery Court’s exclusive jurisdiction reflects the history and substance of fiduciary duty claims, the court’s bar on punitive damages is a deliberate feature of its equitable powers. “The purpose of awarding punitive or exemplary damages is to impose a penalty or deterrent to prevent conduct which is deemed to be bad or harmful.” *Beals*, 386 A.2d at 1160. Such retributive aims are inconsonant with the corrective nature of equitable relief: Because the Chancery Court is “[t]raditionally and historically . . . a court of conscience,” it “will permit only what is just and right with no element of

vengeance and therefore will not enforce penalties or forfeitures.” *Id.* at 1159. This rationale explains why the Chancery Court’s power to award a legal remedy like compensatory damages does not imply a corresponding ability to award punitive damages. *Id.*

The rule we adopt here is fully consistent with *Erie*’s “twin aims.” *Hanna*, 380 U.S. at 468 (describing *Erie*’s aims as “discouragement of forum-shopping and avoidance of inequitable administration of the laws”). Allowing federal courts to award punitive damages, while such damages remain barred in Delaware courts, would clearly frustrate both aims. Given the sizeable awards that punitive damages enable, having a different rule in federal courts would encourage significant forum-shopping. And the notion that punitive damages for fiduciary duty claims brought under Delaware law could be available everywhere *except* Delaware is as strange as it is inequitable. We thus conclude that failing to enforce Delaware’s jurisdictional bar on punitive damages “would unfairly discriminate against citizens of the forum State” and “have so important an effect upon the fortunes of one or both of the litigants that” doing so “would be likely to cause a plaintiff to choose the federal court.” *Hanna*, 380 U.S. at 468 n.9.

In sum, the substantive elements of Delaware’s jurisdictional rule and *Erie*’s twin aims compel us to adopt Delaware’s bar on punitive damages. Our conclusion is bolstered by the fact that Delaware’s rule creates “consequences that so intimately affect recovery or non-recovery” such that we “should follow State law.” *Guar. Tr. Co. of N.Y.*, 326 U.S. at 110. Indeed, our judgment is informed by the pre-eminent position of Delaware’s corporate rules. Its influence over corporate structure and government is undeniable. *See* Shane Goodwin, *The Texas*

Two-Step: Rewriting the Rules in the Battle Corporate Domicile, 53 Sec. Reg. L.J. (Winter 2025) (“Delaware continues to derive substantial competitive advantage from its specialized Court of Chancery, its legislature’s capacity to respond quickly to shifts in corporate governance practice, and a deeply entrenched body of precedent that shapes the expectations of boards, institutional investors, and transactional advisors. These institutional features create significant stability and reliance.” (citing Christine Hurt, *Texas, Delaware, and the New Controller Primacy*, 67 Ariz. L. Rev. 693, 693–772 (2025)); Craig W. Palm & Mark A. Kearney, *A Primer on the Basics of Directors’ Duties in Delaware: The Rules of the Game (Part I)*, 40 Vill. L. Rev. 1297, 1299 (1995) (“Delaware courts have played a preeminent role in defining fiduciary duties because of the significant number of major corporations incorporated in Delaware.”). And, given its preferred place in the pantheon of corporate law, we are reluctant to conclude that Delaware’s decision to continue to refer fiduciary duty claims exclusively to the Chancery Court is anything but a conscious decision, giving us a substantive rule. See Robert C. Holmes, *Benefits of Incorporating in Delaware Versus New Jersey: Busting the Myth and Closing the Gap*, 11 Rutgers Bus. L. Rev. 1, 5 (2014) (“Arguably the single greatest advantage that Delaware offers to companies formed within the State is the Court of Chancery.”). Delaware courts acknowledge that “[i]t is the Legislative Branch which should make the policy decision that a certain course of conduct, not previously cause for the imposition of punitive damages, should now be penalized beyond the awarding of compensatory damages.” *Beals*, 386 A.2d at 1160. In the absence of such a decision, we too decline to “take upon ourselves to change a centuries-old”

jurisdictional bar and “assess damages in excess of what is necessary to make an injured party whole.” *Id.* We thus affirm the district court’s decision to disallow punitive damages on the fiduciary duty claims.

C. *Double Recovery*

When the district court found the Au Defendants liable for violations of the DWA and WARN Act, and for corresponding fiduciary duty violations, the court effectively entered duplicative awards for the same conduct under multiple legal theories. For instance, the court awarded \$2,970,761 against PAF and Malama for failing to provide notice under the WARN Act (Count III), while also awarding \$2,970,761 against Au for breaching his duty of care by causing Island Air to violate the notice requirements (Count V). Although the damages awarded were identical, the associated amounts of prejudgment interest varied significantly: The court ordered \$324,038.94 in prejudgment interest against PAF/Malama and \$1,309,189.96 against Au.

To avoid running afoul of the prohibition against double recovery, the district court held that Plaintiffs could only enforce the judgment under one legal theory and were “entitled only to the corresponding amount of prejudgment interest.” Plaintiffs now seek to maximize their recovery by combining damages and prejudgment interest awards from different legal claims against different defendants. With respect to the notice violations, for example, they argue that the district court erroneously required them to choose between two packages of awards: \$3,294,800.94 from PAF and Malama, or \$4,279,950.96 from Au. They instead claim that the prohibition on double recovery merely means that the maximum they can recover is \$4,279,950.96, which

reflects the damages award and the highest amount of prejudgment interest. This, they say, allows them to recover \$3,294,800.94 from PAF and Malama and the difference (\$985,150.02) from Au.

We have not yet addressed this specific issue, and the parties have not proposed a standard of review. But under any standard of review, the district court was correct to prohibit double recovery in the manner it did. General principles of double recovery and prejudgment interest are instructive. We have previously held that “a plaintiff can recover no more than the loss actually suffered.” *Teutscher v. Woodson*, 835 F.3d 936, 954 (9th Cir. 2016). This “reflects the equitable principle that a plaintiff who has received full satisfaction of its claims from one tortfeasor generally cannot sue to recover additional damages corresponding to the same injury from the remaining tortfeasors.” *Uthe Tech. Corp. v. Aetrium, Inc.*, 808 F.3d 755, 760 (9th Cir. 2015). Relatedly, prejudgment interest compensates an injured party “for the loss of use of money due as damages from the time the claim accrues until judgment is entered,” helping restore “a party to the condition it enjoyed before the injury occurred.” *City of Milwaukee v. Cement Div., Nat’l Gypsum Co.*, 515 U.S. 189, 196 (1995) (quoting *West Virginia v. United States*, 479 U.S. 305, 310–11 n.2 (1987)). This is not a free-floating category of damages—it is calculated by applying a specific interest rate to the principal damages figure. See *Schneider v. Cnty. of San Diego*, 285 F.3d 784, 789 (9th Cir. 2002). Moreover, the district court has discretion to award prejudgment interest and set the applicable interest rate. *Id.*

With this guidance in mind, we believe that Plaintiffs cannot mix and match damages and prejudgment interest awards from different claims. If the court had declined to

award prejudgment interest at all, Plaintiffs would have had to choose between enforcing the judgment against PAF and Malama or against Au. Although the damages awarded by the jury for Counts III and V were identical, the theory of liability for the awards differed. As to Counts III and V, PAF and Malama and Au are not jointly and severally liable. Because the principal award against PAF and Malama is distinct from the prejudgment interest awarded against Au, it would amount to double recovery to allow Plaintiffs to enforce the full judgment against PAF and Malama while simultaneously dipping into the prejudgment interest awarded against Au. Prejudgment interest is a product of the principal award and should follow that award in its entirety.

VIII. EQUITABLE REMEDIES

The parties raise various issues with respect to equitable remedies. We first consider issues concerning piercing the corporate veil. We then turn to issues regarding the characterization of debts in the proceedings before the bankruptcy court. Finally, we consider the district court's decision order contribution from Uchiyama.

A. *Piercing the Corporate Veil*

“Piercing the corporate veil” is an equitable doctrine that allows a court to disregard the corporate entity and impose liability on a corporation's shareholders. “[I]t is long settled as a matter of American corporate law that separately incorporated organizations are separate legal units with distinct legal rights and obligations.” *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 591 U.S. 430, 435 (2020). In general, a corporation's obligations remain its own liabilities, not those of its shareholders. “But there is an equally fundamental principle of corporate law, applicable to the parent-subsidiary relationship as well as generally,

that the corporate veil may be pierced and the shareholder held liable for the corporation's conduct when, *inter alia*, the corporate form would otherwise be misused to accomplish certain wrongful purposes” *United States v. Bestfoods*, 524 U.S. 51, 62 (1998). Although such “wrongful purposes” include “most notably fraud,” *id.*, piercing the corporate veil is appropriate when failing to do so ““would work injustice upon an innocent third party.”” *Chan v. Soc’y Expeditions, Inc.*, 123 F.3d 1287, 1294 (9th Cir. 1997) (quoting *Kilkenny v. Arco Marine Inc.*, 800 F.2d 853, 859 (9th Cir. 1986)). Once a court decides that the corporate veil must be pierced, “the two [entities] are treated as one for purposes of determining liability.” *M/V Am. Queen v. San Diego Marine Constr. Corp.*, 708 F.2d 1483, 1490 (9th Cir. 1983).

On appeal, Plaintiffs and the Au Defendants raise two issues with the district court’s approach to piercing the corporate veil. First, the Au Defendants challenge the court’s decision to pierce the corporate veil after the jury found PAF and Malama liable for Counts IV and VI. Second, Plaintiffs contend that the district court erred in refusing to pierce the corporate veils of PAF and Malama with respect to Count III. Because “the question whether [a person] was the alter ego of his corporation is essentially factual, it is generally reviewed under the clearly erroneous standard.” *Wolfe v. United States*, 798 F.2d 1241, 1243 n.2 (9th Cir. 1986); *see Towe Antique Ford Found. v. IRS*, 999 F.2d 1387, 1391 (9th Cir. 1993) (“We have previously held that a district court’s application of the alter ego doctrine is reviewed for clear error.”).

1. Counts IV and VI

The jury found PAF and Malama liable for Count IV (breach of duty of loyalty for allowing Island Air to violate

the DWA) and Count VI (breach of duty of loyalty for allowing Island Air assets to dissipate). The court found it appropriate to pierce the corporate veil between the two entities and their owners: (1) between PAF and the Tsui Trust and PaCap Management Holdings, and (2) between Malama and PaCap Management Holdings.

When deciding whether to pierce the corporate veil, also known as imposing alter ego liability, we “apply the law of the forum state.” *In re Schwarzkopf*, 626 F.3d 1032, 1037 (9th Cir. 2010). On this issue, the Supreme Court of Hawai‘i has been willing to “look past a corporation’s formal existence to hold shareholders or other controlling individuals liable for ‘corporate’ obligations. . . . [w]hen a corporation is the mere instrumentality or business conduit of another corporation or person.” *Robert’s Hawai‘i Sch. Bus, Inc. v. Laupahoehoe Transp. Co.*, 982 P.2d 853, 869–70 (Haw. 1999). In *Robert’s*, the Supreme Court of Hawai‘i endorsed a litany of factors, none of which is dispositive, that courts should weigh “in determining whether a corporate entity is the alter ego of another.” *Id.* at 871–72.¹⁹ In

¹⁹ The court listed the following factors

“[1] Commingling of funds and other assets, failure to segregate funds of the separate entities, and the unauthorized diversion of corporate funds or assets to other than corporate uses; [2] the treatment by an individual of the assets of the corporation as his own; [3] the failure to obtain authority to issue stock or to subscribe to or issue the same; [4] the holding out by an individual that he is personally liable for the debts of the corporation; [5] the identical equitable ownership in the two entities; [6] the identification of the equitable owners thereof with the domination and control of the two entities; [7] identity of . . . directors and officers of the two entities in the responsible

supervision and management; [8] sole ownership of all of the stock in a corporation by one individual or the members of a family; [9] the use of the same office or business location; [10] the employment of the same employees and/or attorney; [11] the failure to adequately capitalize a corporation; [12] the total absence of corporate assets, and undercapitalization; [13] the use of a corporation as a mere shell, instrumentality or conduit for a single venture or the business of an individual or another corporation; [14] the concealment and misrepresentation of the identity of the responsible ownership, management and financial interest, or concealment of personal business activities; [15] the disregard of legal formalities and the failure to maintain arm's length relationships among related entities; [16] the use of the corporate entity to procure labor, services or merchandise for another person or entity; [17] the diversion stockholder [sic] or other person or entity, to the detriment of creditors, or the manipulation of assets and liabilities between entities so as to concentrate the assets in one and the liabilities in another; [18] the contracting with another with intent to avoid performance by use of a corporate entity as a shield against personal liability, or the use of a corporation as a subterfuge of illegal transactions; and [19] the formation and use of a corporation to transfer to it the existing liability of another person or entity.

Robert's, 982 P.2d at 871–72 (cleaned up). To this list, the court added six other factors:

(1) incorporation for the purpose of circumventing public policy or statutes; (2) whether the parent finances the subsidiary; (3) whether the subsidiary has no business or assets except those conveyed to it by the parent; (4) whether the parent uses the subsidiary's property as its own; (5) whether the directors of the subsidiary do not act independently in the interest of the corporation but take their orders from and serve the parent; and (6) whether the “fiction of corporate entity

addition to these factors, the Supreme Court of Hawai‘i’s decision in *Calipjo v. Purdy* articulated a two-prong test that must be satisfied to pierce the corporate veil:

[I]t must be made to appear that the corporation is not only influenced and governed by that person, but that there is such a *unity of interest* . . . that the individuality, or separateness, of such person and corporation has ceased, and that the facts are such that an adherence to the fiction of the separate existence of the corporation would, under the particular circumstances, sanction a fraud or promote injustice.

439 P.3d 218, 229 (Haw. 2019) (quoting *Robert’s*, 982 P.2d at 871) (emphasis added). A “unity of interest” requires that two entities’ “objectives are common, not disparate; their general corporate actions are guided or determined not by two separate . . . consciousness, but one.” *Id.* at 229–30 (citation and internal quotation marks omitted).

Because both *Calipjo* prongs and an overwhelming number of the *Robert’s* factors are satisfied here, the district court’s decision to pierce the veil of PAF and Malama is appropriate. First, there was a clear unity of their interests through common ownership. Malama was 100 percent owned by PaCap Management Holdings, which was solely owned by Au. All but 0.5 percent of PAF was owned by the Tsui Trust, and Tsui had delegated full control over PAF to Au. As a result, both PAF and Malama were functionally

. . . has been adopted or used to evade the provisions of a statute.”

Id. (cleaned up).

controlled by Au. *See Calipjo*, 439 P.3d at 229–32 (upholding veil-piercing of an LLC with a sole member and manager). Second, PAF and Malama showed no regard for even the fiction of corporate separateness. Both were created for the sole purpose of investing in Island Air and were severely undercapitalized, with virtually no assets. *See id.* at 230–32 (considering severe undercapitalization as relevant factor in piercing the veil of an LLC). Au testified at trial that neither company “had any employees [or independent contractors] who provided services,” “did not have bylaws,” and “never created any agendas or minutes for meetings of its managers.” These peculiarities were the product of PAF and Malama having “one manager”—PaCap Management Holdings for PAF and PaCap Management Solutions for Malama, each in turn managed by Au.

Given the substantial evidence that Malama and PAF were mere instrumentalities of the Tsui Trust and PaCap Management Holdings, “an adherence to the fiction of the separate existence” of the two companies and their owners “would, under the particular circumstances, . . . promote injustice.” *Calipjo*, 439 P.3d at 229. Although “[t]he injustice that allows a corporate veil to be pierced is not a general notion of injustice; rather, it is the injustice that results only when corporate separateness is illusory,” *Katzir’s Floor & Home Design, Inc. v. MMLS.com*, 394 F.3d 1143, 1149 (9th Cir. 2004) (citation omitted), we have no difficulty agreeing with the district court that any distinction between PAF and Malama and their owners was illusory. Without employees, adequate capitalization, or any of the hallmarks of a bona fide business, PAF and Malama served no other purpose but to allow Tsui and Au to invest in Island Air while shielding themselves from liability. As the district court put it, the entities were created as part of a broader

“Machiavellian” effort by Au and Tsui to “avoid liability” while protecting their investments. This was evidenced by Tsui’s attempts to “conceal and misrepresent the identity of the responsible ownership, management, and financial interest of PAF in Island Air,” as well as the lack of any arm’s length relationship between Malama and PaCap Management Holdings.

There is overwhelming evidence that PAF and Malama functioned as shells to hold Au and Tsui’s ownership interests in Island Air and allow them to dodge responsibility when the airline inevitably collapsed. We thus conclude that the district court did not clearly err in piercing the corporate veils of PAF and Malama.

2. Count III

Although the district court found PAF and Malama liable under the WARN Act (Count III), it refused to pierce the corporate veil between those two entities and their owners—PaCap Management Holdings and the Tsui Trust. The court rested its reasoning on deficient pleading, concluding that Count III of the Complaint only sought to pierce the veil between Island Air and its shareholders, PAF and Malama. The court thus declined to pierce Island Air’s veil as an equitable remedy, concluding that doing so would be redundant considering that it had already found PAF and Malama liable. Plaintiffs argue that this was error.

We affirm. To state a claim for relief, Federal Rule of Civil Procedure 8(a)(2) requires “a short and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). That statement must “give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 545 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47

(1957)). At half a page, Count III is surely short and plain. But it does not give notice to the entities Plaintiffs now seek to hold liable through veil piercing.

First, Count III expressly seeks to “pierce the corporate veil between the *Debtor* and its shareholders.” (emphasis added). Here, Island Air unambiguously constitutes the debtor. The language of Count III thus evinces a clear intent to pierce Island Air’s corporate veil and reach its shareholders. Such an understanding is further supported by the fact that the heading of Count III lists three defendants: PAF, Malama, and Ohana, the three owners of Island Air. At no point are PaCap Management Holdings or the Tsui Trust mentioned by name in this section of the Complaint.

This omission stands in stark contrast to how the rest of the Complaint is styled. In Counts I, II, IV, V, and VI, the complaint specifically asks the court to pierce the corporate veil between Malama and its owners and PAF and its owners. The deviation in Count III is a meaningful one. Because that count seeks only to pierce the veil of the debtor while other counts expressly ask the court to pierce the veils of PAF and Malama in order to hold their owners liable, PaCap Management Holdings and the Tsui Trust did not have notice that they could be subject to WARN Act liability under Count III.

B. *Debt*

1. Equitable Subordination

The Ellison Defendants raise one issue on appeal: Whether the district court erred by equitably subordinating \$5.5 million in secured credit and senior secured loans that Carbonview extended to Island Air. Under 11 U.S.C. § 510(c)(1), a court has the discretion “under principles of

equitable subordination, [to] subordinate [a claim] for purposes of distribution” after notice and a hearing. Subordination changes the order of debt repayment, placing creditors who engaged in unethical conduct lower in the payment priority order. *See Equitable Subordination, Norton Dictionary of Bankruptcy Terms* § E25 (Hon. William L. Norton, Jr. & William L. Norton III eds., 2026 ed.). “[T]he court exercises broad equitable power to subordinate claims,” which “we review for an abuse of discretion.” *In re Christian Life Ctr.*, 821 F.2d 1370, 1376 (9th Cir. 1987).

“A creditor’s claim cannot be subordinated to the claims of other creditors simply because the claimant is an officer, director, or controlling shareholder in a bankrupt corporation.” *Wood v. Richmond (In re Branding Iron Steak House)*, 536 F.2d 299, 301 (9th Cir. 1976). Rather, equitable subordination requires “some showing of suspicious, inequitable conduct beyond mere initial undercapitalization of the enterprise.” *Id.* at 302. We have held that equitable subordination requires that “(1) the claimant who is to be subordinated has engaged in inequitable conduct; (2) the misconduct results in injury to competing claimants or an unfair advantage to the claimant to be subordinated; and (3) subordination is not inconsistent with bankruptcy law.” *In re Filtercorp, Inc.*, 163 F.3d 570, 583 (9th Cir. 1998) (citations and quotation marks omitted).

Below, the district court found that Carbonview had engaged in inequitable conduct that granted it an unfair advantage and harmed other claimants. The Ellison Defendants argue that this was error because there is insufficient evidence of misconduct to justify equitable subordination. Specifically, they claim that “inequitable conduct” is limited to “three categories of misconduct . . . :

(1) fraud, illegality, and breach of fiduciary duties; (2) undercapitalization; or (3) claimant's use of the debtor as a mere instrumentality or alter ego." *In re Fabricators, Inc.*, 926 F.2d 1458, 1467 (5th Cir. 1991); *see In re Hedged-Invs. Assocs.*, 380 F.3d 1292, 1301 (10th Cir. 2004) (same).

The Ellison Defendants' claim rests on a flawed premise: We have never adopted these three categories as the sole measure of inequitable conduct. Our BAP has merely characterized them as "three principles which may be considered." *In re Pac. Express, Inc.*, 69 B.R. 112, 116 (B.A.P. 9th Cir. 1986). We instead rely on a holistic analysis guided by several key principles. *See, e.g., Stoumbos v. Kilimnik*, 988 F.2d 949, 958–60 (9th Cir. 1993). Most importantly, "[w]here the trustee seeks to subordinate 'a claim arising from the dealings between a debtor and an insider,' the court will give the insider's actions rigorous scrutiny." *Id.* at 959 (citing *In re Fabricators*, 926 F.2d at 1465).

The district court did not abuse its discretion in finding that Carbonview engaged in inequitable conduct. Consistent with our guidance in *Stoumbos*, the district court found that Carbonview was an insider by virtue of its relationship with Ohana and Marinelli, its affiliation with Island Air, and its status as an arm of the Ellison Trust. None of these findings are challenged by the Ellison Defendants. Applying the rigorous scrutiny warranted by Carbonview's insider status, the district court then concluded that Carbonview used its insider knowledge about Island Air's poor financial state to "unfairly minimize Mr. Ellison's exposure in the likely event of bankruptcy." Specifically, the court emphasized that Carbonview's secured loans "were structured so as to give an insider, Carbonview, priority in repayment ahead of outside creditors at a time when insiders were much better

situated to assess the risk of Island Air's bankruptcy." Altogether, this conduct supports the finding of inequitable conduct. *Cf. Stoumbos*, 988 F.2d at 959 (concluding that inequitable conduct could be present where a creditor "intended, if possible, to place his own interest, which he believed to be secured, ahead of the interests of Debtor's creditors"). The court also relied on evidence that Island Air's insiders knew about the impending bankruptcy and consequently sold the airline for pennies in a transaction that minimized their equity investment and structured the remainder of their involvement as loans to be paid out upon insolvency. Finally, the court found that the decision by Marinelli, Carbonview's president and manager, to allow Island Air to draw on Carbonview's line of credit "was at least in part because he wanted to sell Island Leasing's ATR aircraft." Only when the aircraft were finally sold did Marinelli "start[] to aggressively assert Island Leasing's purported rights to funds held by Island Air." The intervening financial support allowed Island Air to stay in business for a few more months, thereby increasing the amount of debt owed to third-party creditors—debt that Marinelli knew would likely go unpaid. Altogether, there is no abuse of discretion in the district court's finding that the Ellison Defendants, relying on insider knowledge that Island Air was on the precipice of bankruptcy, used secured loans to keep the company alive just until they could sell Island Leasing's ATR fleet.

For similar reasons, there is no error in the district court's conclusion that the Ellison Defendants gained an unfair advantage to the detriment of other creditors. The district court found that Carbonview intentionally structured its debt to have priority over other creditors and now seeks to be paid on its secured debt ahead of \$21,985,264 in liabilities owed

to non-Defendants. The district court also found that Carbonview's loans, in keeping Island Air on life support so the ATR fleet could be sold before the company went bankrupt, deepened debt owed to other creditors that the Ellison Defendants knew would likely go unpaid. The court was within its discretion to deem this an unfair advantage, one that would be "inequitable to reward . . . by allowing Carbonview to affirmatively benefit by being paid before other innocent creditors."

Nonetheless, the Ellison Defendants argue that junior creditors do not suffer "a legally cognizable injury" by virtue of the normal operation of bankruptcy priority rules. *See In re Universal Farming Industries*, 873 F.2d 1334, 1337 (9th Cir. 1989). But *In re Universal Farming Industries* bears little resemblance to the case before us. There, we declined to find that the defendant was an insider subject to more rigorous scrutiny. *Id.* Accordingly, any risk of the claims in that case going unpaid was "not the result of the machinations" of the defendant. *Id.*

In sum, the record supports the district court's conclusion that the Ellison Defendants' inequitable conduct caused injury to other claimants such that equitable subordination was warranted. The district court did not abuse its discretion in ordering equitable subordination.

2. Recharacterization of Debt to Equity

Plaintiffs next challenge the district court's refusal to recharacterize PAF and Carbonview's debt to equity. In bankruptcy, the practice of debt recharacterization allows a court to treat a debt claim as an equity interest, regardless of how it is labeled. *See My Chi To & Matthew D. Siegel, Debt Recharacterization Looks Back on a Good Year*, Am. Bankr. Inst. J., Feb. 2007, at 1. This transforms a creditor into an

investor, placing her lower in priority for repayment upon bankruptcy. *Id.* Below, the district court applied Delaware’s standard for debt recharacterization and consequently refused to recharacterize PAF and Carbonview’s debt to equity. But the court noted that it had already equitably subordinated PAF and Carbonview’s debt, pushing them lower in the distribution order regardless.

Plaintiffs do not challenge the court’s application of Delaware’s standard on the merits. They instead take issue with the choice of Delaware law. “We review choice-of-law questions *de novo*.” *Cooper v. Tokyo Elec. Power Co. Holdings, Inc.*, 960 F.3d 549, 557 (9th Cir. 2020).

The district court did not err in applying Delaware law. With respect to debt recharacterization, we have held that district courts must look to state law to determine if an obligation constitutes “[a] debt or an equity interest.” *In re Fitness Holdings Int’l, Inc.*, 714 F.3d 1141, 1143 (9th Cir. 2013) (“[A] transaction creates a debt if it creates a ‘right to payment’ under state law.”). *Id.* The district court thus looked first to Hawaii law to determine if Island Air’s obligations to PAF and Carbonview qualified as debt or equity. Here, the parties agreed that Hawai’i law did not establish a standard for recharacterizing debt to equity. Indeed, state courts at every level seem to be entirely silent on the issue. The district court consequently applied Delaware law, as other courts in the Ninth Circuit have done “when the law of the forum state is silent.” *See In re L. Scott Apparel, Inc.*, 615 B.R. 881, 888 (C.D. Cal. 2020) (applying Delaware law where “[n]o California case establish[ed] standards for recharacterizing debt as equity”).

In determining whether debt should be recharacterized as equity, the District of Delaware has applied a seven-factor

test that considers (1) the name given to the instrument; (2) the intent of the parties; (3) the presence or absence of a fixed maturity date; (4) the right to enforce payment of principal and interest; (5) the presence or absence of voting rights; (6) the status of the contribution in relation to regular corporate contributors; and (7) certainty of payment in the event of the corporation's insolvency or liquidation. *In re Color Tile, Inc.*, 2000 WL 152129, at *4 (D. Del. Feb. 9, 2000). "The overarching inquiry," however, is "the parties' intent at the time of the transaction," which may be inferred from "what the parties say in their contracts, from what they do through their actions, and from the economic reality of the surrounding circumstances." *In re Zohar III, Corp.*, 2021 WL 3793895, at *7 (D. Del. Aug. 26, 2021), *aff'd*, 2022 WL 3009744 (3d Cir. July 29, 2022) (citation modified). Applying the factors, the district court concluded that "the disputed instruments were best characterized as bona fide loans, not equity."

Plaintiffs now challenge the district court's choice of Delaware law, arguing that Hawai'i courts would instead "adopt a more lenient standard that favors equity." They urge us to adopt the standard employed by the Eleventh Circuit, whereby "shareholder loans may be deemed capital contributions in one of two circumstances: where the trustee proves initial undercapitalization or where the trustee proves that the loans were made when no other disinterested lender would have extended credit." *Estes v. N & D Props., Inc.* (*In re N & D Props., Inc.*), 799 F.2d 726, 733 (11th Cir. 1986).

It is not clear to us that the Eleventh Circuit's standard differs significantly from the Delaware standard. But even assuming that *In re N & D Props* suggests a more generous standard, we see no reason why Hawai'i would adopt the

Eleventh Circuit's rule. As we noted earlier, the Supreme Court of Hawai'i and the federal District Court of Hawai'i have looked to Delaware law to fill gaps in Hawai'i's corporate law. *See, e.g., Perl v. IU Int'l Corp.*, 607 P.2d 1036, 1046 (Haw. 1980); *Mroz v. Hoaloha Na Eha, Inc.*, 410 F. Supp. 2d 919, 933 (D. Haw. 2005). We too have looked to Delaware as the "nation's leading authority on corporate law issues." *Simmonds v. Credit Suisse Sec. (USA) LLC*, 638 F.3d 1072, 1089 (9th Cir. 2011), *vacated and remanded*, 566 U.S. 221 (2012). And other courts in our circuit have applied Delaware's test for recharacterizing debt when the law of the forum state is silent. *See, e.g., In re L. Scott Apparel, Inc.*, 615 B.R. at 888. We find no basis for concluding that Hawai'i would borrow a test from the Eleventh Circuit, a region with no relationship to the parties or property in this case. The only authority Plaintiffs cite in support, *Schmidt v. HSC, Inc.*, merely notes the distinction between capital contributions and debt under the Uniform Fraudulent Transfer Act. 358 P.3d 727 (Haw. Ct. App. 2015). It does not stand for the proposition that Hawai'i courts broadly favor equity and does not compel us to adopt the Eleventh Circuit's test.

As Plaintiffs do not challenge the district court's application of Delaware's standard on the merits, we affirm the court's refusal to recharacterize PAF and Carbonview's loans.²⁰

²⁰ Plaintiffs separately claim that the district court erred in granting JMOL as to the constructive fraud claims on the basis that there was reasonably equivalent value for the allegedly fraudulent transfers. But Plaintiffs' only argument is that "[i]f the debt is recharacterized as equity, then the defense of reasonable equivalent value is unavailable." Because we decline to disturb the district court's decision on

C. Contribution

Although Plaintiffs did not name David Uchiyama as a defendant, the Au Defendants named him as a third-party defendant. The district court concluded that he was liable for 5 percent of the \$7,994,436 in damages awarded against the Au Defendants. The court specifically found that Uchiyama, as Island Air's CEO and as a director, jointly contributed to the Au Defendants' breaches of fiduciary duty in allowing Island Air to violate the DWA and the WARN Act. Uchiyama claimed that he was not aware of and never sought out information about his statutory obligations, but the court concluded that it was at least grossly negligent for Uchiyama "not to inform himself of the legal requirements for notification in the DWA and WARN Act or to ensure that Island Air complied with those requirements."

Uchiyama does not challenge the district court's conclusions on the merits. Instead, he raises several arguments contesting the applicability of the DWA and WARN Act to his individual conduct. With respect to the DWA, he argues that it would be fundamentally unfair to hold him liable because he was never personally responsible for paying employee salaries and did not own, operate, or have a controlling interest in Island Air. He similarly asserts that the court failed to find that he was an "employer" under the WARN Act.

Uchiyama's arguments rely on the faulty assumption that he was held liable for statutory violations, rather than breaches of his fiduciary duties. Because the district court concluded that Uchiyama violated his fiduciary duties to

recharacterization, we also affirm the court's application of the equivalent value defense.

Island Air, not a statutory duty to Island Air's employees, whether he could be considered an "employer" for WARN Act purposes is irrelevant. Uchiyama owed duties to Island Air, not its employees. As Uchiyama raises no meaningful argument that his lack of due diligence comported with those duties, it was not fundamentally inequitable for the court to order contribution.

Uchiyama separately contests the contribution order by arguing that there was no underlying violation of either the DWA or the WARN Act. With respect to the DWA, Uchiyama argues that Island Air's closing was excluded from the DWA by Hawai'i Administrative Rule § 12-506-4(b). This rule provides, in relevant part, that "[b]usiness shutdowns which occur as a direct result of or in connection with factors such as business failure, bankruptcy, or loss of lease or contract are not considered closings for the purposes of chapter 394B, HRS." Haw. Admin. R. § 12-506-4(b).

Although this rule may appear at first glance to create a categorical exception to the DWA's notice requirement, the statute's text and legislative history demonstrate that no such exception exists. As we discussed in greater detail in Part IV, the DWA unambiguously defines a "closing" as "the permanent shutting down of all operations within a covered establishment due to . . . bankruptcy." Haw. Rev. Stat. § 394B-2. The definition of "closing" in Haw. Rev. Stat. § 394B-2 was amended in relevant part in 2007, nineteen years after § 12-506-4(b) took effect. *Compare* 2007 Haw. Sess. Laws (Spec. Sess.) Act 5, § 1, *with* Haw. Admin. R. § 12-506-4 (adopted Aug. 15, 1988). The legislature's subsequent addition of "bankruptcy" to the list of shutdowns that qualify as closings clearly displaces any prior interpretations by Hawai'i agencies. *See In re Water Use Permit Applications*, 9 P.3d 409, 457 (Haw. 2000) (noting

that the rule of judicial deference does not apply when the agency's reading of the statute contravenes the legislature's manifest purpose). Hawai'i Administrative Rule § 12-506 contradicts the statute. As a consequence, the district court had no duty to follow the administrative rule. *Gov't Emps. Ins. Co. v. Dang*, 967 P.2d 1066, 1073 (Haw. 1998) (noting that Hawai'i courts "do not defer to the agency's interpretation of a statute, particularly when it is wrong.").

Uchiyama's challenge to his WARN Act liability is similarly unavailing. The Act provides a reduced notification period if the employer was "actively seeking capital or business which, if obtained, would have enabled the employer to avoid or postpone the shutdown and the employer reasonably and in good faith believed that giving the notice required would have precluded the employer from obtaining the needed capital or business." 29 U.S.C. § 2102(b)(1). Uchiyama argues that Island Air was seeking capital and thus falls within the Act's exception.

The WARN Act's "seeking capital" provision, however, is not a free pass. An employer relying on the exception must still "give as much notice as is practicable and *at that time* shall give a brief statement of the basis for reducing the notification period." 29 U.S.C. § 2102(b)(3) (emphasis added). We have observed that "Congress's purpose in requiring a brief statement must have been to provide employees with information that would assist them in determining whether the notice period was properly shortened," and said that the statement "should set forth the underlying factual events which led to the shortened period." *Alarcon v. Keller Indus., Inc.*, 27 F.3d 386, 389 (9th Cir. 1994).

Island Air’s one-day notice to its employees falls well short of what the Act requires. Without any reference to Island Air’s particular efforts to keep the business afloat, the emailed notice merely stated that the company had “exhausted all options that would have allow[ed] us to continue and [Island Air has] not been able to solidify any of those option[s] within the time frame needed.” Island Air’s vague reference to “options” was not sufficiently informative about the company’s financial straits and its efforts to seek capital, such that employees could determine whether the notice period was properly shortened. In *Alarcon*, we said that we would look to the “cumulative effect” of the “reference to the statute in combination with” the details provided. 27 F.3d at 390. Because Island Air offered nothing but the barest of explanations, it is not excused from the notice required by the WARN Act. We affirm the district court’s decision holding Uchiyama liable for contribution.

IX. CONCLUSION

To summarize our holdings:

We have jurisdiction over the Amended Judgment under § 1291. The Trustee has standing to bring the fiduciary claims in Counts IV and V, and the Unions have standing as to Counts I and II. *See* Part II.

With respect to the fiduciary duty claims against the Ellison Defendants, we reverse the court’s grant of JMOL in favor of Lawrence Investments and Ohana on Counts VII and IX as a reasonable jury could find they owed fiduciary duties to Island Air; we reverse the grant of JMOL in favor of Marinelli, in his capacity as an Island Air director, on Count VII; and we affirm the judgment on Count VIII and

the dismissal of fiduciary duty claims against Marinelli in his capacity as trustee of the Ellison Trust. *See* Part III.

On the DWA claims in Counts I and II, we affirm the district court's employer ruling as to the Au Defendants but reverse as to Ohana and the Ellison Trust. We leave it to the district court to determine whether Ohana and the Ellison Trust's employer status may be decided as a matter of law or must be submitted to a jury. On Count II, because we hold that § 394B-9(c)'s affirmative defense is unavailable, we reverse the judgment and remand for proceedings consistent with this opinion. We deny Plaintiffs' motion to certify the DWA questions to the Hawai'i Supreme Court. *See* Part IV.

On the WARN Act claim in Count III, we affirm the court's decision to amend the judgment to relieve Au of individual liability. *See* Part V.

We affirm the court's decision to exclude the Starn Memo and the creditor impact evidence. *See* Part VI.

We vacate the jury's award of nominal damages on Count VI on the basis that the district court improperly formulated the jury instructions. We affirm the court's decision to prohibit punitive damages for the fiduciary duty claims. We affirm the manner in which the court prohibited double recovery. *See* Part VII.

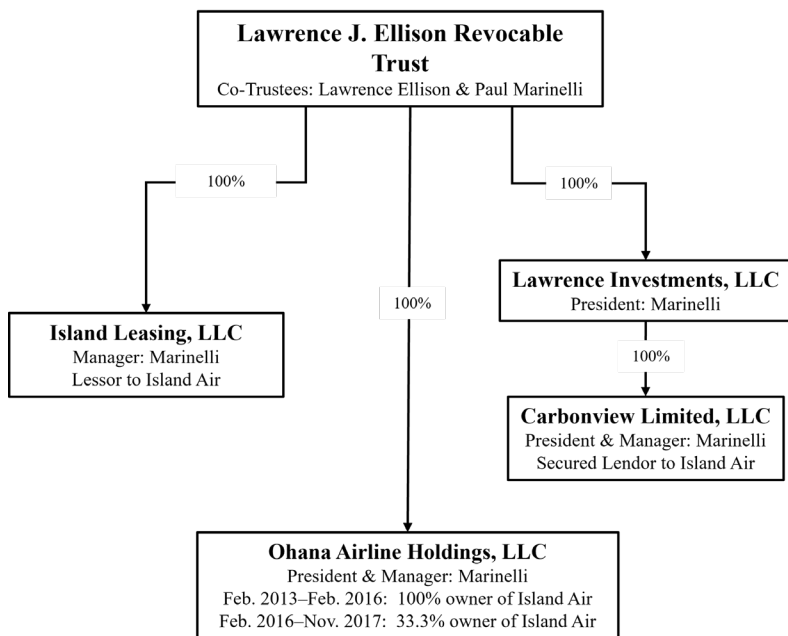
We affirm the court's decision to pierce the veil of PAF and Malama on Counts IV and VI and its refusal to pierce the veil of PAF and Malama on Count III. Although the court never addressed veil piercing with respect to the Ellison Defendants, because we reverse the grant of JMOL in favor of Ohana on Counts VII and IX, the district court may consider veil piercing for those counts on remand. We affirm the district court's decision to equitably subordinate

Carbonview's loans; its refusal to recharacterize PAF and Carbonview's debt to equity; and its finding of a reasonably equivalent value defense to the constructive fraud claims. Finally, we affirm the court's decision to order contribution from Uchiyama. *See* Part VIII.

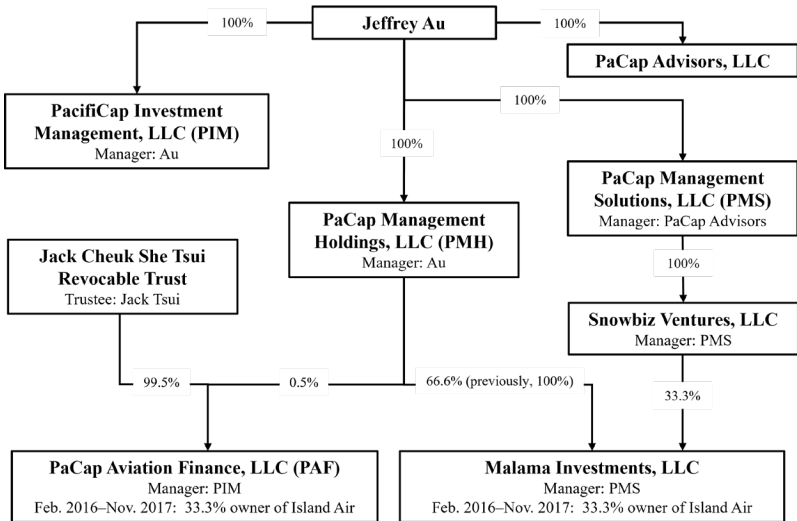
The judgment is **AFFIRMED in part, REVERSED in part, and REMANDED for further proceedings consistent with this opinion.** The parties shall bear their own costs on appeal.

APPENDIX A

THE ELLISON ENTITIES



THE AU ENTITIES



APPENDIX B

CAST OF CHARACTERS

Jeffrey Au (<i>Au Defendant</i>)	Hawaii venture capitalist who, alongside Jack Tsui, purchased two-thirds of Island Air from Ohana through PAF and Malama. Owned 100 percent of Malama and 0.5 percent of PAF, but served as the ultimate manager of both companies.
Carbonview Limited, LLC (<i>Ellison Defendant</i>)	Ellison-owned company that made loans to Island Air to keep it afloat.
Elix Aviation	Aircraft lessor that purchased Island Leasing's ATR fleet and assumed the lease of the ATRs to Island Air.
Lawrence J. Ellison (<i>Ellison Defendant</i>)	Billionaire who purchased Island Air in 2013 through his company Ohana. Sole beneficiary and co-trustee of the Ellison Trust, which is the ultimate owner of Ohana, Lawrence Investments and Carbonview.
Lawrence J. Ellison Revocable Trust	Trust created by Lawrence J. Ellison as the sole beneficiary and co-trustee. Owner of Ohana and Lawrence Investments, which owns Carbonview.

Christopher Gossert	Former Island Air executive and defendant who settled with Plaintiffs before trial.
Island Air (Debtor)	Hawaiian interisland airline owned by Ohana, PAF, and Malama Investments. Filed for bankruptcy in October 2017.
Island Leasing, LLC	Ellison-owned company, managed by Paul Marinelli, that owned five ATR aircraft leased to Island Air. Sold the ATRs to Elix Aviation after Island Air phased out its ATR fleet.
Lawrence Investments (Ellison Defendant)	Holding company that manages Lawrence J. Ellison's personal financial affairs. Owned Carbonview.
Malama Investments, LLC (Au Defendant)	LLC managed by Jeffrey Au that purchased one-third of Island Air from Ohana. Owned by PaCap Management Holdings and Snowbiz Ventures, which were both ultimately owned by Jeffrey Au.

Paul Marinelli (<i>Ellison Defendant</i>)	President and manager of Ohana, president of Lawrence Investments, president or manager of Carbonview and Island Leasing, and co-trustee of the Ellison Trust. Served as a director for Island Air from February 2013 to July 2017.
Rob Mauracher	Island Air's COO following the sale of the airline to PAF and Malama. Fired by Au in April 2016.
Les Murashige	Island Air's CEO and director following the sale of the airline to PAF and Malama. Fired by Au in April 2016.
Ohana Airline Holdings, LLC (<i>Ellison Defendant</i>)	LLC owned by the Ellison Trust that owned 100 percent of Island Air from 2013 until February 2016, when it sold two-thirds of the airline to PAF and Malama.
PaCap Aviation Finance, LLC ("PAF") (<i>Au Defendant</i>)	LLC managed by Jeffrey Au that purchased one-third of Island Air from Ohana. Owned by the Tsui Trust (99.5 percent) and PaCap Management Holdings (0.5 percent).
PaCap Advisors, LLC (<i>Au Defendant</i>)	LLC owned by Jeffrey Au that managed PaCap Management Solutions.

PacifiCap
Investment
Management, LLC
(Au Defendant)

LLC owned and managed by Jeffrey Au.

PaCap Management
Holdings, LLC
(Au Defendant)

LLC owned by Jeffrey Au that owned 0.5 percent of PAF.

PaCap Management
Solutions, LLC
(Au Defendant)

LLC owned by Jeffrey Au and managed by PaCap Advisors, which was also owned by Au. Owned 100 percent of Snowbiz.

Snowbiz Ventures,
LLC
(Au Defendant)

LLC owned and managed by PaCap Management Solutions, which was owned by Jeffrey Au. Owned one-third of Malama.

Peter Starn

Island Air's outside counsel in September 2015. Dictated a memo that recounted Ellison's alleged desire to "dump" Island Air.

Jack Tsui
(Au Defendant)

Business associate of Jeffrey Au who purchased one-third of Island Air through PAF. Settlor, trustee, and beneficiary of the Tsui Trust, which owned 99.5 percent of PAF.

Jack Cheuk She Tsui Trust controlled by Jack Tsui that
Revocable Trust owned 99.5 percent of PAF.
(*Au Defendant*)

David Uchiyama Island Air's CEO and director
(*Third-Party* from April 2016 to the shutdown.
Defendant) Appointed by Jeffrey Au to
replace Les Murashige.

Catherine Yannone Former Island Air director and
(a/k/a Kitty defendant who passed away
Lagareta) during the litigation. Following
her death, all claims against her
were dismissed.

APPENDIX C

TIMELINE

Nov. 25, 1996	Aloha Island Air, Inc., which became Hawaii Island Air, Inc., is incorporated in Delaware.
2013	Lawrence J. Ellison acquires Island Air through Ohana, which is owned by the Lawrence J. Ellison Revocable Trust.
2013–2015	Island Air sustains losses of over \$40 million and \$1–2 million per month by the end of 2015.
Dec. 20, 2015	Island Air, Ohana, PAF, and Malama sign the Stock and Warrant Purchase Agreement whereby Ohana agrees to sell two-thirds of Island Air to PAF and Malama.
Jan. 20, 2016	Carbonview transfers \$6 million to Island Air under an unsecured subordinated note. Island Air immediately returns \$3 million to repay earlier Carbonview loans.
Feb. 4, 2016	Ohana, PAF, and Malama each acquire one-third of Island Air's shares for \$4,000.

Feb.–June 2016	Au brings in a new management team consisting of Les Murashige (CEO), Rob Mauracher (COO), and David Uchiyama (CCO).
April 22, 2016	Au terminates Les Murashige as CEO and Mauracher as COO. Uchiyama becomes the interim CEO.
June 2016	Uchiyama becomes permanent CEO.
Dec. 20, 2016	Carbonview establishes a secured line of credit of up to \$3.5 million for Island Air.
Jan. 2017	Island Air begins leasing Q400 aircraft from Elix and Nordic Aviation Capital.
May 1, 2017	Christopher Gossert starts as Island Air's Vice President of Finance and discovers a \$700,000 cash shortfall.
May 15, 2017	Marinelli agrees to allow Island Air to draw \$850,000 from Carbonview's line of credit on the condition that there will be no further draws.
June 1, 2017	Island Air faces another payroll crisis and turns to Marinelli, who declines further financing.

June 4, 2017	Au-affiliated entities loan \$450,000 to Island Air to bridge the payroll gap.
June 9–20, 2017	To cover another cash shortfall, Marinelli agrees to purchase Island Air’s ATR spare parts inventory for \$800,000 via Island Leasing.
June 27, 2017	Au reaches out to Marinelli for help covering another \$1 million shortfall. Marinelli declines to provide assistance.
July 10, 2017	Marinelli resigns from Island Air’s board of directors.
Aug. 2, 2017	Ellison approves a \$5 million sale of Island Leasing’s five ATR aircraft if Island Leasing retains \$3.5 million.
Aug. 4, 2017	Island Leasing, Elix, and Island Air execute a letter of intent for the ATR sale.
Aug. 24, 2017	Elix issues a default notice after Island Air misses rent payments.
Sept. 12, 2017	Island Air grounds two Q400s.
Sept. 14, 2017	Catherine Yannone and Christopher Gossert become directors of Island Air.

Sept. 15, 2017	Island Air executes a lease deferral agreement to permit deferral of missed payments on the three Q400 aircraft leased from Elix.
Oct. 12, 2017	Elix serves a termination notice on Island Air for the three remaining Q400 aircraft.
Oct. 16, 2017	Island Air files for Chapter 11 bankruptcy.
Oct. 23, 2017	Island Air realizes it will be unable to pay its upcoming \$476,000 insurance premium.
Nov. 10, 2017	Island Air permanently ceases operations. Its 438 employees are not paid final paychecks.
Nov. 12, 2017	Island Air moves to convert its Chapter 11 case to Chapter 7.
Nov. 15, 2017	The bankruptcy court converts the case to Chapter 7 and appoints Elizabeth Kane as Chapter 7 trustee.

FORREST, Circuit Judge, dissenting:

No case is too big to fail for lack of jurisdiction. The majority admirably wades through the multitude of issues presented in this complex Chapter 7 bankruptcy appeal. Unfortunately, I cannot join them because there is no final judgment before us, and we lack appellate jurisdiction under 28 U.S.C. § 1291.

BACKGROUND

The underlying bankruptcy case is complicated. At its core, it concerns a somewhat-private island, a defunct airline, and what appears to be a multi-million-dollar game of hot potato. I discuss only those facts relevant to this court's appellate jurisdiction.

The now-defunct Hawaiian Island Air, Inc. (Island Air) filed for bankruptcy in October 2017, after suffering financial losses for an extended period. This appeal arises from an adversary proceeding, a discrete dispute contained within the larger bankruptcy case. And this adversary proceeding was unique in that it was heard in the first instance by the district court in Hawaii, not the bankruptcy court. This will be important.

The plaintiffs in the adversary proceeding are the bankruptcy trustee and two unions that represent workers previously employed by Island Air: the Air Line Pilots Association International and the Hawaii Teamsters and Allied Workers, Local 996 (Unions). Island Air informed its employees that they were losing their jobs one day before it ceased all operations in November 2017. Relevant here, the Unions sued the majority owners of Island Air (the Au

Defendants¹) for not promptly paying the employees their wages and benefits after operations terminated, in violation of Hawaii’s Dislocated Workers Act (DWA) (Count I). And the Trustee sued the Au Defendants for breach of fiduciary duty related to the alleged DWA violations (Count IV). The Au Defendants counterclaimed challenging the Unions’ entitlement to recover administrative expenses related to Counts I and IV.

A jury found for Plaintiffs on Counts I and IV and awarded \$2,981,668 in damages on each count, and the district court awarded different prejudgment-interest amounts on the two counts.² The district court entered an Amended Judgment for the amounts awarded by the jury and the court. In an order entered contemporaneously with the Amended Judgment, the district court directed that Plaintiffs cannot recover for both Counts I and IV because they relate to the same harm. The court explained: Plaintiffs “are entitled only to recover damages for the same loss on one applicable legal theory and are entitled only to the corresponding amount of prejudgment interest.”

The district court did not address whether or how recovery should be divided between the Trustee and the Unions. Rather, the court concluded that it was not its “role to prescribe in the Amended Judgment the details of how Plaintiffs may pursue recover due to them” and that any

¹ There is a second set of defendants in this proceeding—the Ellison Defendants—who are not relevant to the jurisdictional issues discussed herein.

² While the jury’s awards on these two counts were for the same amount, the prejudgment interest awarded by the district court was not because Count I is governed by Hawaii law and Count IV is governed by Delaware law.

disputes related to ultimate recovery could be litigated later in the bankruptcy court.

Regarding the Au Defendants' counterclaims, the Bankruptcy Code allows for the recovery of

actual, necessary costs and expenses of preserving the [bankruptcy] estate including . . . wages and benefits awarded pursuant to a judicial proceeding . . . as back pay . . . as a result of a violation of Federal or State law by the debtor . . . if the court determines that payment of wages and benefits by reason of the operation of this clause will not substantially increase the probability of layoff or termination of current employees

11 U.S.C. § 503(b)(1)(A). In the underlying bankruptcy case, the Unions filed claims for administrative expenses related to their unpaid-wages claims, including any awards based on Island Air's violation of federal or state law (Claims 105 and 117).

The Au Defendants filed counterclaims in the subject adversary proceeding, challenging the Unions' entitlement to administrative expenses. The Au Defendants argued that the Unions were not entitled to recover administrative expenses because no court had awarded unpaid wages or benefits, the Unions' requests for unpaid wages and benefits did not arise from a statutory violation, and the Unions' asserted measure of damages—their collective bargaining agreement contract rates—was improper. The Au Defendants specifically asked the district court to disallow Bankruptcy Claims 105 and 117 “as relates to the [Unions’]

claim for unpaid wages, vacation pay and employer contributions or contributions to a 401k plan and statutory damages under the . . . D[WA].”

Even though Plaintiffs prevailed on their claims related to unpaid wages in the adversary proceeding, the district court’s Amended Judgment dismissed the Au Defendants’ counterclaims “WITHOUT PREJUDICE to the[ir . . .] challenges to the Unions’ [administrative-expense] requests . . . being brought in the Bankruptcy Court at the appropriate time.” The district court stated that it was “neither grant[ing] nor finally den[y]ing [the] counterclaims to disallow Claim Nos. 105 and 117.” And it declined to clarify the relationship between its Amended Judgment and the administrative-expense claims pending in the bankruptcy court, reasoning that it was “not required to address every hypothetical recovery scenario.” In the district court’s view, if resolution of the administrative-expense claims affected the distribution of damages owed to the Unions, those issues must be litigated as part of the larger bankruptcy dispute.

Piecing the district court’s decisions together, while the total amounts recoverable on Counts I and IV are determined, it remains unresolved *who* will get the recovery, *how much* each Plaintiff may receive, and *how* the recovery will be awarded. And as the district court recognized, the answers to these questions may be impacted by the eventual resolution of the Unions’ administrative-expense requests challenged by the Au Defendants’ counterclaims that the district court did not resolve.

There are also unresolved issues in the larger bankruptcy case. This is the only adversary proceeding that still has pending issues. But the Amended Judgment may allow creditor claims to be amended or newly filed. *See* Fed. R.

Bankr. P. 3002(c)(3). There may be further objections to claims. *See* Fed. R. Bankr. P. 3007. And some unresolved matters, including the unresolved requests for administrative expenses, require notice and a hearing before decision. *See* 11 U.S.C. § 503(b). The Trustee also still must determine priority of all the allowed claims and distribute the bankruptcy estate before a final decree can be entered. *See* 11 U.S.C. § 726; Fed. R. Bankr. P. 5009.

ANALYSIS

A. Appellate Jurisdiction in Bankruptcy Cases

Bankruptcy matters are usually heard in the first instance by the bankruptcy court, with any appeal taken either to the Bankruptcy Appellate Panel or the district court sitting in an appellate capacity. *See* 28 U.S.C. § 158(a)–(b). When a bankruptcy proceeding takes that vector, *this* court’s jurisdiction broadly extends to review of all “final decisions, judgments, orders, and decrees” entered in “cases and proceedings referred to bankruptcy judges.” *Id.* § 158(a), (d)(1). The Supreme Court has recognized that § 158 allows for review of any “discrete disputes within the larger [bankruptcy] case.” *Bullard v. Blue Hills Bank*, 575 U.S. 496, 501 (2015) (citation omitted).

But adversary proceedings can be withdrawn from the bankruptcy court for decision by the district court in the first instance. 28 U.S.C. § 157(d). And when that occurs, § 158 does not apply because the district court is sitting in bankruptcy, not in an appellate capacity. *Klestadt & Winters, LLP v. Cangelosi*, 672 F.3d 809, 813–14 (9th Cir. 2012). Our jurisdiction in this context arises under § 1291, *id.*, which authorizes review of “final decisions” that “end[] the litigation on the merits and leave[] nothing for the court to do but execute the judgment,” *Catlin v. United States*, 324

U.S. 229, 233 (1945); *see Ritzen Grp., Inc. v. Jackson Masonry, LLC*, 589 U.S. 35, 38 (2020).

As should be clear, our jurisdiction in this case is governed by § 1291 because the district court heard the subject adversary proceeding in the first instance. Thus, the question is whether the district court’s Amended Judgment is “final” under that statute. In answering that question, the first inquiry concerns framing: is finality required for the entire bankruptcy proceeding or just the adversary proceeding that the district court decided? This inquiry is unnecessary when appellate jurisdiction arises under § 158 because, as discussed, that statute requires finality only as to “discrete disputes within the larger [bankruptcy] case.” *Bullard*, 575 U.S. at 501; *see In re Gugliuzza*, 852 F.3d 884, 891–92 (9th Cir. 2017) (discussing *Bullard*). But jurisdiction under § 1291 is more constrained. As the Supreme Court put it, “the usual judicial unit for analyzing finality in ordinary civil litigation [under § 1291] is *the case*, [but] in bankruptcy [under § 158], it is often *the proceeding*.” *Ritzen Grp.*, 589 U.S. at 39 (third alteration in original) (emphasis added) (citation omitted).

The majority asserts finality is required only as to the adversary proceeding. I am not so sure. As such, I analyze whether the district court’s judgment is final for purposes of § 1291 considering both the entire bankruptcy case and the specific adversary proceeding at issue. And as it turns out, it makes no difference. No matter how we untangle this case, we lack jurisdiction under § 1291.

1. Bankruptcy Finality

Bankruptcy litigation is unique because a single “bankruptcy case encompasses numerous ‘individual controversies, many of which would exist as stand-alone

lawsuits but for the bankrupt status of the debtor.” *Id.* at 38 (quoting *Bullard*, 575 U.S. at 501). Given this structure, “controversies adjudicated during the life of [the entire] bankruptcy case may be linked, one dependent on the outcome of another.” *Id.* at 38–39. With that entwinement, “the only truly final order in a bankruptcy proceeding occurs when the order closing the case is filed.” *In re Mason*, 709 F.2d 1313, 1316 (9th Cir. 1983).

The district court’s Amended Judgment obviously does not resolve the entire bankruptcy proceeding. Among other things, the Unions’ administrative-expense claims have yet to be resolved, *see* 11 U.S.C. § 503(b), and the bankruptcy estate must be distributed, *see* 11 U.S.C. § 726. Objections to these and other issues can be lodged in the bankruptcy court, injecting uncertainty as to the ultimate result. *See, e.g.*, Fed. R. Bankr. P. 3007 (objecting to claim); 6 Collier on Bankruptcy ¶ 727.01[4] (16th ed. 2026). All this means that if the entire bankruptcy case is the proper framing, the district court’s Amended Judgment is not “final” for purposes of § 1291.

The more difficult question is whether that is the right way to think about § 1291 finality in the bankruptcy context. Some—including the majority—suggest that strictly applying the general civil finality requirement to the entire bankruptcy proceeding would be “absurd” in most bankruptcy appeals. *See* 1 Collier on Bankruptcy, *supra* ¶ 5.08[b]. And most of our sister circuits brush aside the differences between § 158 and § 1291 and categorically apply a flexible finality standard in *all* bankruptcy matters, regardless of their procedural presentation. *See, e.g.*, *In re Sonnox Indus.*, 907 F.2d 1280, 1283 (2d Cir. 1990) (applying § 158’s flexible standard to appeals arising under § 1291). Indeed, the majority is correct that this court stands alone in

applying “the finality rule applicable to all civil appeals” to bankruptcy appeals arising under § 1291. *Compare Klestadt & Winters*, 672 F.3d at 814, with, e.g., *United States v. Nicolet, Inc.*, 857 F.2d 202, 205 (3d Cir. 1988), and *In re Sonmax Indus.*, 907 F.2d at 1283.³

We first addressed the difference between appellate jurisdiction arising under § 158 and § 1291 in *In re Hawaii Corp.*, 796 F.2d 1139 (9th Cir. 1986). We held that the “liberalized rules” that typically apply in bankruptcy appeals “do not apply to appeals from district judges sitting in bankruptcy.” *Id.* at 1141. And we have continually reaffirmed that view. *See, e.g., Klestadt & Winters*, 672 F.3d at 816.⁴

Regardless of its wisdom, as a three-judge panel, we must apply our rule. *See Miller v. Gammie*, 335 F.3d 889, 893 (9th Cir. 2003) (en banc). And in my view, our rule more faithfully applies the text of § 158 and § 1291. Why is it absurd to apply § 1291 finality to the larger bankruptcy

³ Our precedent on this issue splits with at least the First, Second, Third, Fourth, and Fifth Circuits. *See Klestadt & Winters*, 672 F.3d at 821–23 (Graber, J., concurring in part and dissenting in part); *see also, e.g., In re Cajun Elec. Power Coop.*, 69 F.3d 746, 747–48 (5th Cir. 1995), *as amended*, 74 F.3d 599 (5th Cir. 1996) (“[O]ther circuits . . . have refused to follow [the Ninth Circuit’s rule].”).

⁴ As the majority points out, we have exercised jurisdiction under § 1291 in adversary proceedings where open questions remained in the underlying bankruptcy action. *See Maj. Op.* at 27–28, n.3. But we have not analyzed the statute’s finality requirement when doing so, and thus our prior decisions have no precedential value on that issue. *See Webster v. Fall*, 266 U.S. 507, 511 (1925) (“Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.”).

proceeding just because it provides for narrower appellate review than § 158? Sections 158 and 1291 are facially different, and we must be particularly disciplined when construing jurisdictional statutes. *See Nuclear Info. & Res. Serv. v. U.S. Dept. of Transp. Rsch. & Special Prgrms. Admin.*, 457 F.3d 956, 960 (9th Cir. 2006).

Section 1291 grants jurisdiction to review “appeal[s] from all *final decisions* of the district courts of the United States.” 28 U.S.C. § 1291 (emphasis added). Section 158 more broadly confers appellate jurisdiction over “all *final decisions, judgments, orders, and decrees*” “entered in *cases and proceedings* referred to the bankruptcy judges.” *Id.* § 158(a), (d)(1) (emphasis added). Those are distinctions with a difference, as confirmed by three canons of statutory interpretation.

First, we assume that the use of different words conveys different meanings. *Ysleta Del Sur Pueblo v. Texas*, 596 U.S. 685, 698 (2022). That is, “decisions, judgments, orders, and decrees” in § 158 must include more than just “decisions,” which is all that § 1291 references. The list of actions that can be appealed from the bankruptcy court under § 158, which are technically interlocutory when viewed in the context of the entire bankruptcy case, is broader than what can be appealed under § 1291. *See Ritzen Grp.*, 589 U.S. at 39.

Second, the surplusage canon counsels that § 1291’s “decisions” does not fully encompass § 158’s “judgments, orders, and decrees.” *See Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts*, 174–79 (2012). Were it otherwise, the latter terms would have no significance. In other words, if § 1291 encompassed the same things over which § 158 grants review, § 158 would be

doing no work of its own. *See, e.g., Duncan v. Walker*, 533 U.S. 167, 174 (2001).

Third, “[w]e generally presume that Congress is knowledgeable about existing law pertinent to the legislation it enacts.” *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184–85 (1988); *see* Scalia & Garner, *supra*, at 252–55 (describing the related-statutes canon). Thus, we assume that when Congress added § 158 to the bankruptcy code in 1984, *see* Pub. L. No. 98–353, 98 Stat. 341 (1984), it was aware of § 1291, which was adopted in 1948, *see* 62 Stat. 929 (1948). And we can infer that when Congress wrote “decisions, judgments, orders, and decrees” into § 158, it knew it was broadening the more limited grant of review provided under § 1291. *See Progressive W. Ins. v. Preciado*, 479 F.3d 1014, 1018 (9th Cir. 2007) (holding that the presumption that Congress knows the legal context in which it is legislating is “especially appropriate” where that context “features a longstanding, near-canonical rule” (citation omitted)).

The statutory context further supports construing § 158 and § 1291 as having different jurisdictional scopes. Consider § 1292, which confers jurisdiction over specified interlocutory orders. *See* 28 U.S.C. § 1292. Subsection (a)(2) confers jurisdiction over “orders . . . to take steps to accomplish the purposes [of a receivership], such as directing sales or other disposals of property.” *Id.* § 1292(a)(2). And subsection (a)(3) confers jurisdiction over “[i]nterlocutory decrees . . . determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed.” *Id.* § 1292(a)(3). Obviously, those provisions do not apply here, but they demonstrate that Congress knows how to provide review for technically “interlocutory” orders that “determin[e] the rights and liabilities of the parties” when it wants to. *Id.*; *cf. Atl.*

Sounding Co. v. Townsend, 557 U.S. 404, 416–17 (2009) (reasoning that the existence of parallel, but inapplicable, statutory language proves that Congress knows how to create a rule “when it wants to”).

Cross-checking this case against the practice in receivership cases further mitigates absurdity concerns. *Cf. Klestadt & Winters*, 672 F.3d at 815; *see SEC v. Stanford Int’l Bank, Ltd.*, 927 F.3d 830, 842 & n.5 (5th Cir. 2019) (explaining that “bankruptcy and equity receiverships share common legal roots” and that the Bankruptcy Act of 1934 was meant to codify receivership practice). In *SEC v. Capital Consultants LLC*, 453 F.3d 1166 (9th Cir. 2006) (*per curiam*), two claimants appealed a receivership order distributing a portion of the receivership’s assets. Tellingly, no party argued that the challenged order ended the litigation; they instead disputed the applicability of the collateral-order doctrine and Federal Rule of Civil Procedure 54(b). *Id.* at 1170. Yet, we noted that the order would distribute a portion of the receivership assets and thus affected the overall disposition of the receivership. *Id.* at 1171–72. And because “[r]esolution of the appellants’ claims [would] directly affect the ongoing litigation,” the order was interlocutory, not final. *Id.* at 1172; *see Rubalz v. Tucson Gas, Elec. Light & Power Co.*, 280 F. 267, 270–71 (9th Cir. 1922) (holding that an order determining the priority of claims was not final).

So too here. Plaintiffs’ claims on which they prevailed in this adversary proceeding directly affect how Island Air’s bankruptcy estate will be resolved. As the majority opinion evinces, the district court’s Amended Judgment on these claims will resolve in part who will be liable to the bankruptcy estate and what assets are in the estate.

This reasoning is consistent with Supreme Court precedent. The Court’s discussions of the broader finality standard applicable in bankruptcy do not trace back to § 1291. Rather, its discussions of the “flexible approach” for bankruptcy cases have been in cases arising under § 158. *See Bullard*, 575 U.S. at 500–01; *Ritzen Grp.*, 589 U.S. at 40–41.⁵ While the Supreme Court has not directly answered whether the flexible approach should be extended to cases arising under § 1291, it has at least implied that the finality inquiry is different under the two statutes. *See Bullard*, 575 U.S. at 501 (distinguishing between § 158 and § 1291); *Ritzen Grp.*, 589 U.S. at 38 (explaining that the “ordinary understanding of ‘final decision’” does not apply under § 158).

Framing § 1291’s finality standard in reference to the entire bankruptcy proceeding admittedly creates an inconsistent scope of review between cases arising under § 158 and § 1291. But that result may be intentional.⁶ And

⁵ Collier’s discussion of the flexible approach to appellate jurisdiction in bankruptcy cases also presumes appeals brought under § 158. *See* 1 Collier on Bankruptcy, *supra* ¶ 5.08(a).

⁶ We “may not replace the actual text with speculation as to Congress’ intent.” *Corner Post, Inc. v. Bd. of Governors of Fed. Rsrv. Sys.*, 603 U.S. 799, 815 (2024) (internal quotation marks and citation omitted). But to temper any extra-textual concerns that Congress did not intend to create differing scopes of appellate review, the difference may be explained by focusing on the differences between district courts and bankruptcy courts. Our narrower review under § 1291 applies in appeals from district courts, which are vested with Article III power. Our broader scope of review applies in appeals from bankruptcy court, which do not have Article III power. *See Wellness Int’l Network, Ltd. v. Sharif*, 575 U.S. 665, 669–70 (2015); *see also In re Sisk*, 962 F.3d 1133, 1144 (9th Cir. 2020) (“[B]ankruptcy courts, although they are not Article III courts, are units of Article III courts.”). It is not unreasonable to think that

in any event, such inconsistency is Congress' doing, and Congress alone can fix it if it needs fixing. See *EPA v. Calumet Shreveport Refin., LLC*, 145 S. Ct. 1735, 1754 (2025) (explaining that if Congress created a difficult procedural framework, "it is a problem for Congress," not the federal courts, to fix (citation omitted)). Our job is simply to apply § 1291, as written, and exercise appellate jurisdiction only when presented with a "final decision[] of [a] district court[] of the United States." 28 U.S.C. § 1291; cf. *Kempe's Lessee v. Kennedy*, 9 U.S. (5 Cranch) 173, 185 (1809) (opinion of Marshall, C.J.) ("The courts of the United States are all of limited jurisdiction, and their proceedings are erroneous, if the jurisdiction be not shown upon them.").

My colleagues are concerned that this leads to an unreviewability problem. I would agree with their concern if such a problem existed, but it does not. The implication of my view is not that this case is grounded without review. But rather that a different path for reviewability is required for what otherwise would be interlocutory matters in cases arising under § 1291. And such a path exists. The Federal Rules of Civil Procedure provide a mechanism for a district court to enter final judgment on less than all claims or parties in a case: Rule 54(b).⁷ That maneuver allows some claims to

Congress would tailor the scope of review to these foundational differences.

⁷ "When an action presents more than one claim for relief--whether as a claim, counterclaim, crossclaim, or third-party claim--or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay. Otherwise, any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be

be appealed when others remain unresolved. *See Cap. Consultants*, 453 F.3d at 1173–74. The majority could have invited the district court to consider whether a Rule 54(b) certification is appropriate here, but it chose not to. Nonetheless, the availability of that procedure demonstrates that the majority’s contention that the merits issues raised here would be unreviewable under my approach is wrong.

In sum, there is good reason to think that the proper framing for determining finality in bankruptcy appeals arising under § 1291 may be the entire bankruptcy case. And if that is the proper framing, the district court’s order on appeal here is not final.

2. Adversary Proceeding Finality

The parties and the majority assume that the proper framing for assessing finality of the district court’s decision is the discrete adversarial proceeding at issue. Even if that view were correct, the district court’s decision was not final.

“A ‘final decision’ within the meaning of § 1291 is normally limited to an order that resolves the entire case.” *Ritzen Grp.*, 589 U.S. at 38. That means, in the context of disputes involving multiple claims and parties, *all* claims related to *all* parties must be fully resolved to trigger § 1291.⁸ *See Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427,

revised at any time before the entry of a judgment adjudicating all the claims and all the parties’ rights and liabilities.” Fed. R. Civ. P. 54(b).

⁸ The majority seems to assure us that there is a complete resolution because the Plaintiffs agree about the amount of damages owed. *See* Maj. Op. at 44–46. That agreement has little import on our jurisdiction, especially when there is agreement on only one side of the ‘v’. *Cf. Morongo Band of Mission Indians v. Cal. St. Bd. of Equalization*, 858 F.2d 1376, 1380 (9th Cir. 1988).

432–34 (1956). How the district court labels its order is not determinative. *See Microsoft Corp. v. Baker*, 582 U.S. 23, 41 (2017).

Particularly relevant here, the Supreme Court “ha[s] long held that an order resolving liability without addressing a plaintiff’s requests for relief is not final.” *Riley v. Kennedy*, 553 U.S. 406, 419 (2008); *see The Palmyra*, 23 U.S. (10 Wheat.) 502, 503–04 (1825) (opinion of Marshall, C.J.) (decree was not “final in the sense of the act of Congress” because “damages remain[ed] undisposed of” (emphasis omitted)). Courts have also held that “partial determinations of relief,” including damages awards that do not allocate an aggregate sum among claimants, are not final unless all that remains are “ministerial” tasks. 15B Wright & Miller’s Federal Practice & Procedure § 3915.2 (3d ed. Apr. 2026 Update); *see, e.g., Hain Pure Food Co. v. Sona Food Prods. Co.*, 618 F.2d 521, 522 (9th Cir. 1980) (per curiam) (dismissing appeal because a summary judgment granting an injunction and finding that a party was liable for unspecified damages was not final).

Relatedly, orders that contemplate further proceedings generally are not final. *See The Republic*, 62 U.S. (21 How.) 386, 387–88 (1858) (holding that an order determining the allocation of sale proceeds but not ordering payment because other claims might be filed was not final); 15B Wright & Miller’s Federal Practice & Procedure, *supra* § 3915.3. Even under a bankruptcy-specific, more flexible standard, we have held that “[w]hen further proceedings in the bankruptcy court will affect the scope of the order, the order is not subject to review.” *In re Four Seas Ctr., Ltd.*, 754 F.2d 1416, 1418 (9th Cir. 1985). But again, when any further proceedings are merely ministerial, finality is satisfied. *See* 15B Wright & Miller’s Federal Practice & Procedure, *supra*

§ 3915.3; *cf. Pauly v. U.S. Dep't of Agric.*, 348 F.3d 1143, 1148 (9th Cir. 2003).

These rules are variations on a theme: appellate review is permitted only for complete judgments, not issues subject to further consideration or change. *See Ritzen Grp.*, 589 U.S. at 38; *accord Catlin*, 324 U.S. at 233. So, the question is whether the district court's Amended Judgment completely resolved the liabilities presented in the subject adversary proceeding.

There is no doubt that the district court *intended* its decision to be final. It called its final action a "Judgment." And the decision referenced all the issues raised and purported to fully resolve all the Defendants' liability. But finality is more than an exercise in taxonomy.

Counseling against concluding that the Amended Judgment is a "final decision" under § 1291 is the district court's failure to finalize what each Plaintiff will recover from the Au Defendants. While these defendants were found liable to both the Trustee and the Unions in Counts I and IV, the district court specified that recovery on both counts would be duplicative. So, which Plaintiff(s) get paid? The district court did not specify whether recovered damages are to be paid to the Unions (Count IV) or the Trustee (Count I), or if recovery is to be shared among the Plaintiffs and, if so, how much each Plaintiff should receive. *See Strey v. Hunt Int'l Res. Corp.*, 696 F.2d 87, 87–88 (10th Cir. 1982) (dismissing appeal because damages awarded were not divided among class members and order did not measure fees to be assessed against the common fund). The district court also declined to resolve the Au Defendants' counterclaims challenging the Unions' administrative-expense claims, dismissing them "WITHOUT PREJUDICE

to the challenges . . . being brought in the Bankruptcy Court at the appropriate time.”

The Au Defendants contend that they and Island Air are liable for any administrative expenses recoverable by the Unions but that any amounts paid must be credited against recovery on the Amended Judgment, and vice versa. Presumably, resolution of the administrative-expense claims could also result in an award of different amounts to the separate Unions—resulting in different liabilities to different parties. Either aspect of the to-be-determined administrative-expense issues will impact the ultimate resolution of damages owed on the liability theories presented in this action. Simply put, there is more for the bankruptcy court to do than just “execute the judgment.” *Catlin*, 324 U.S. at 233.

The little analogous authority available also weighs against finality. In *Trustees of Pension, Welfare, and Vacation Fringe Benefit Funds of IBEW Local 701 v. Pyramid Electric*, 223 F.3d 459 (7th Cir. 2000), the district court approved a settlement agreement distributing funds among two parties and dismissed all claims without prejudice. *Id.* at 464. But the district court also gave the settling parties indefinite leave to reinstate their dispute if any party breached the settlement, *id.*, and its order acknowledged that the party previously found liable was appealing that determination, *id.* at 463. The Seventh Circuit concluded that it lacked appellate jurisdiction because the litigation could be reopened at any point before the settlement was complete, which was complicated by the settlement seemingly hinging on the outcome of an appeal. *Id.* at 464–65.

Pyramid Electric is analogous for two reasons. First, the orders there, like here, dismissed claims without prejudice

with the understanding that they could be brought later. *Id.* at 464. While it is true that “dismissals of claims without prejudice need not jeopardize the finality of an order,” the Seventh Circuit recognized that *conditional* dismissals have a much bigger impact on finality when they are issued at the *end* of a case. *Id.* The reason is that such dismissals leave the resolution of the case open-ended while the condition plays out. *Id.* at 465. While the dismissal in the district court’s Amended Judgment here was not conditional *per se*, it permits the Au Defendants to renew their objections to the administrative-expense requests—a matter presented in this adversary proceeding—before the bankruptcy court. And as in *Pyramid Electric*, that qualification on the dismissal clearly signals that the district court’s decision on the counterclaims is not final. *See id.* at 464.

Second, like in *Pyramid Electric*, the district court recognized that a later proceeding *could* impact the ultimate remedy. *See id.* at 464–65. The Seventh Circuit found that uncertainty problematic for finality. *Id.* at 465. And while the uncertainty was more explicit in *Pyramid Electric*, the contemplation of further proceedings here raises the same problems. *Id.*; *see also* 15B Wright & Miller’s Federal Practice & Procedure, *supra* §§ 3915.2, 3915.3 (noting that partial determinations of relief and orders that contemplate “future substantial revision” are not final); *Flores v. Garland*, 3 F.4th 1145, 1153 (9th Cir. 2021) (“A final order should not anticipate any further proceedings.”).

While the issue has not been addressed frequently, *Pyramid Electric* is not an outlier. For example, in *Guarantee Co. of North America v. Mechanics’ Savings Bank & Trust Co.*, 173 U.S. 582 (1899), the Supreme Court held that an order deciding secondary liability pending determination of actual damages was not final. *Id.* at 585–

86. It is only when an “amount is judicially ascertained and fixed by a final decree” that a case will be final for purposes of appeal. *Id.* at 586; *see also The Republic*, 62 U.S. at 387–88 (holding that order was not final because the pool of proceeds from the sale of a vessel had not been ascertained and adjusted amongst the parties). And in *Strey*, the Tenth Circuit remanded an appeal from a class-action judgment that awarded damages but did “not provide for the division of damages among the class members, for the disposition of any funds that go unclaimed by class members, and for the measure of attorney’s fees to be assessed against the common fund.” 696 F.2d at 87. *Strey* held that finality hinged on the district court determining *how* damages would be allocated between the stakeholders. *Id.* at 88. Rare as they are, these cases demonstrate that finality requires the rights of the parties to be fixed.

Cases applying a flexible finality standard for bankruptcy also suggest that this adversary proceeding is not final. As we recognized in *In re Four Seas Center*, when there is a compensation claim that “has not been finally settled,” there is no finality. 754 F.2d at 1419. The same view prevailed in then-Judge Breyer’s leading finality opinion in *In re Saco Local Development Corp.*, 711 F.2d 441 (1st Cir. 1983). There, the underlying order on review determined claim priority but not how much of the claim would receive priority treatment. *Id.* at 443. While the First Circuit held that the order was final under a flexible approach, it twice emphasized “doubt” that the order “would be considered ‘final’” under § 1291. *Id.* at 443, 447–48. Those doubts are not hypothetical here.

The majority’s insistence that the Unions’ administrative-expense remedy can be modified later without issue and relates only to claim allowance, not

liability, falls short. When further modifications require more than ministerial accounting, what's left is a partial—to be finalized—determination of relief. *Supra*, § 3915.2; *cf. Am. Ironworks & Erectors, Inc., v. N. Am. Constr. Corp.*, 248 F.3d 892, 898 (9th Cir. 2001). The district court created uncertainty regarding liability in its order preventing duplicative recovery under Counts I and IV. This is not a situation where the bankruptcy court can simply enforce the district court's judgment as part of the core bankruptcy proceeding. The district court is “not required to address every hypothetical recovery scenario,” but to trigger finality under § 1291, it must provide more than a general liquidated damages amount when multiple parties are entitled to recover. *See Strey*, 696 F.2d at 88.

And while an administrative-expense proceeding is in one sense “an accounting,” it is not ministerial. Ministerial functions are those that do not require “the independent exercise of discretion or judgment.” *Act, Ministerial*, Black's Law Dictionary (12th ed. 2024). The resolution of an administrative claim for wages, which requires notice and a hearing, *see* 11 U.S.C. § 503(b), is not that. *See Republic Nat. Gas Co. v. Oklahoma*, 334 U.S. 62, 69–70 (1948). It is a question of law.⁹ *See In re First Magnus Fin. Corp.*, 403 B.R. 659, 665–66 (D. Ariz. 2009) (analyzing whether WARN act damages should be awarded administrative priority status as a question of law); *PacifiCorp v. N. Pac.*

⁹ The majority suggests that the legal questions concern priority, not entitlement to relief. Maj. Op. at 44. But the majority ignores that the Au Defendants and the district court have both recognized that the administrative-expense claims can impact the amount of damages owed to each Plaintiff. That will no doubt impact priority, but it also concerns who is the proper party to receive the awarded damages, which undermines finality.

Canners & Packers, Inc., Civ. No. 6:21-cv-00863-AA, 2023 WL 1765691, at *2 (D. Or. Feb. 3, 2023) (“Ultimately, however, a Bankruptcy Court’s determination that a payment is or is not a proper administrative expense presents a question of law.” (internal quotation marks and citation omitted)); *see also* 4 Collier on Bankruptcy, *supra* ¶ 503.06[7][e], [h] (describing the *legal* standards that apply to administrative expense requests that stem from back pay awards and union benefits).

In sum, even considering just the adversary proceeding, the Amended Judgment is not final because it leaves for the bankruptcy court to decide issues that were presented in this proceeding.

3. Exceptions to § 1291 Finality

Congress has specifically provided for appellate review of certain interlocutory orders. 28 U.S.C. § 1292. And as we have recognized, the Supreme Court has also construed § 1291’s finality requirement “slightly more broadly than its narrow language would suggest” by recognizing two doctrines that allow for review of certain interlocutory orders not specified in the statutory interlocutory-review provisions. *Klestadt & Winters*, 672 F.3d at 813. These two doctrines—the collateral-order doctrine and the *Forgay* doctrine—are exceptions to strict finality. None of these paths for appellate review apply here.

First, this case does not fall within any of § 1292’s provisions for interlocutory review. The only provision that could possibly apply is § 1292(a)(1), which confers appellate jurisdiction over interlocutory decisions

concerning injunctions.¹⁰ 28 U.S.C. § 1292(a)(1). But the district court did not address any sort of injunction in its Amended Judgment.

Second, the collateral-order doctrine provides for appellate jurisdiction to review decisions that resolve collateral issues that are independent from the merits of a case. *Klestadt & Winters*, 672 F.3d at 813. “These appealable collateral orders must [1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment.” *Id.* (internal quotation marks and citation omitted).

Both the bankruptcy-case and adversary-proceeding framings splinter under the *Cohen* test. The adversary proceeding is not “completely separate” from the merits of the overall bankruptcy case. If anything, it is intrinsically tied to what the estate will look like when it is distributed. *Cf. SEC v. Am. Principals Holdings, Inc.*, 817 F.2d 1349, 1351 (9th Cir. 1987) (rejecting the application of *Cohen* to an order issued while the rest of the receivership hearing was pending). Likewise, the issues decided in the Amended

¹⁰ The other three subsections concern receiverships, admiralty, and certified questions. *See* 28 U.S.C. § 1292 (a)(2), (a)(3), (b). Beyond the statute, some sources imply that an equitable writ confers appellate review of interlocutory orders. *See* 15B Wright & Miller’s Federal Practice & Procedure, *supra* § 3911 (recognizing the possibility of, yet expressing skepticism about, the use of extraordinary writs as an alternative means of collateral appellate review); *Miller*, 335 F.3d at 894–95 (treating a premature notice of appeal as a petition for writ of mandamus). That route would be *quite* novel and is inapplicable to the facts here. *See Cheney v. U.S. Dist. Ct. for Dist. of Columbia*, 542 U.S. 367, 380–81 (2004) (noting that a writ of mandamus should “not be used as a substitute for the regular appeals process”).

Judgment are not collateral to the merits of the adversary proceeding.

Finally, the *Forgay* doctrine deems an order final and reviewable “if it requires the immediate turnover of property and subjects the party to irreparable harm if the party is forced to wait [for review] until the final outcome of the litigation.”¹¹ See *In re Hawaii Corp.*, 796 F.2d at 1143. There is no irreparable hardship in this case because the property at issue is money. Cf. *Rent-A-Center, Inc. v. Canyon Television & Appliance Rental, Inc.*, 944 F.2d 597, 603 (9th Cir. 1991) (“[E]conomic injury alone does not support a finding of irreparable harm, because such injury can be remedied by a damage award.”). This case simply does not fit into the narrow set of appeals covered by the *Forgay* doctrine.

B. Federal Rule of Civil Procedure 54(b)

Remarkably, there was an easy solution for assuring ourselves of jurisdiction and avoiding the complicated jurisdiction issues discussed here. The majority just choose not to use it. Upon an express determination by the district court “that there is no just reason for delay,” it may “direct entry of a final judgment as to one or more, but fewer than all, claims or parties.” Fed. R. Civ. P. 54(b). The function of this rule is to “enable[] the district court to sever a partial final judgment for an immediate appeal.” *James v. Price*

¹¹ We sometimes err in how we treat *Forgay* as relates to *Cohen*’s collateral-order doctrine. For example, *In re Hawaii Corp.* treats the two as one doctrine. 796 F.2d at 1142–43 (describing a *Forgay-Cohen* doctrine). Yet, *Cohen* concerns orders that are *collateral* to the merits of a case while *Forgay* concerns orders that “typically involve the major relief requested to enforce the right asserted.” Wright & Miller, *supra*, § 3910. In my view, the two are best kept separate.

Stern Sloan, Inc., 283 F.3d 1064, 1067 (9th Cir. 2002). That is, it allows the district court to serve as “dispatcher,” acting with discretion to determine “the ‘appropriate time’ when each final decision in a multiple claims action is ready for appeal.” *Curtiss-Wright Corp. v. Gen. Elec.*, 446 U.S. 1, 8 (1980) (quoting *Sears, Roebuck & Co.*, 351 U.S. at 435). The court of appeals must independently determine that a claim is final, but it otherwise affords “the discretionary judgment of the district court . . . substantial deference.” *Id.* at 10.

Here, the district court did not make a Rule 54(b) certification. But when it appears that such certification may convey jurisdiction over an otherwise nonfinal decision, we have issued a limited remand asking the district court to determine whether a Rule 54(b) motion should be entertained. *See, e.g., Nat’l Ass’n of Home Builders v. Norton*, 325 F.3d 1165, 1168 (9th Cir. 2003) (remanding “for the limited purpose of . . . granting or denying plaintiffs’ motion for a Rule 54(b) certification”). We should have done that here. A limited remand for the purpose of considering whether a Rule 54(b) certification was appropriate would have allowed the district court to determine if any issues resolved in its Amended Judgment warranted immediate review, and, if so, which ones. It also would have allowed the district court to clarify its damages award. There was no good reason not to pursue this path where it would have definitively resolved any doubt about our appellate jurisdiction. *See Klestadt & Winters*, 672 F.3d at 815 (noting that Rule 54(b) can alleviate harsh requirements of finality in some cases).

CONCLUSION

Although we lack appellate jurisdiction because this appeal does not challenge a final order, there was an easy

procedural option for resolving that problem and, mostly likely, proceeding to the merits. Because the majority decided to reason away the lack of finality, I respectfully dissent.