No. 22-

IN THE

Supreme Court of the United States

STANLEY WALESKI,

Petitioner,

v.

MONTGOMERY, MCCRACKEN, WALKER & RHOADS LLP, NATALIE RAMSEY and LEONARD BUSBY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998), this Court rightly denounced the practice among certain federal courts of "assuming" jurisdiction, explaining that the "statutory and (especially) constitutional elements of jurisdiction are an essential ingredient of separation and equilibration of powers" that must be addressed first before reaching the merits of a case. *Id.* at 101. Since *Steel Co.*, however, the Second Circuit and some other circuits have interpreted this to mean that they may assume the "statutory" element of subject matter jurisdiction, as distinguished from Article III ("constitutional") jurisdiction, and proceed to decide a case on the merits. The Eleventh Circuit rule is to the contrary, resulting in a circuit split and an inconsistent approach among the circuits regarding the scope of *Steel Co.*'s directive.

In the present case, the Second Circuit sidestepped an admittedly "difficult" question of subject matter jurisdiction and simply assumed "hypothetical jurisdiction" under 28 U.S.C. §§ 1334(b) and 157(a) to dismiss the case on the merits of Pennsylvania state law. Petitioner submits that the concept of presuming "hypothetical jurisdiction" so as to permit dismissal of state law claims between same-state parties on state law grounds is antithetical to the nation's jurisprudence. The question presented is, therefore:

Whether a federal court may assume "hypothetical" subject matter jurisdiction to reach a decision on issues of state law against the party challenging the court's jurisdiction, when the *very* issue presented on appeal is that of federal subject matter jurisdiction.

PARTIES TO THE PROCEEDINGS BELOW

Petitioner, Stanley Waleski, was the appellant below. Respondents, Montgomery, McCracken, Walker & Rhoads LLP, Natalie Ramsey and Leonard Busby, were the appellees below.

RELATED PROCEEDINGS

- *In re Tronox*, Dkt. No. 20-3949 (2d Cir.)
  Order and judgment entered on
  November 8, 2022.

- *In re Tronox*, Dkt. No. 1:20-cv-02128-AKH (S.D.N.Y.)
  Order and judgment entered on
  October 28, 2020.

- *In re Tronox*, Dkt. No. 19-01087-mew (Bankr. S.D.N.Y.)
  Order entered on February 21, 2020.

- *Waleski v. Montgomery, McCracken, Walker & Rhoads, LLP et al.*, Dkt. No. 1:19-cv-00309-AJN (S.D.N.Y.)

- *Waleski v. Montgomery, McCracken, Walker & Rhoads, LLP et al.*, Dkt. No. 3:18-cv-01144-RDM (M.D. Pa.)

- *Waleski v. Montgomery, McCracken, Walker & Rhoads, LLP et al.*, Dkt. No. 2018-04431 (Pa.Com.Pl.)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Stanley Waleski ("Mr. Waleski"), on his own behalf, and on behalf of more than 4,300 similarly situated individuals, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the Second Circuit invoking "hypothetical jurisdiction" to affirm the lower courts' dismissal of Mr. Waleski's claims is unreported, and is reprinted as Appendix A at 1a-9a. The opinion of the district court summarily affirming the orders of the bankruptcy court for the reasons stated on the record of argument is unreported, and relevant excerpts of the record of argument are reprinted as Appendix B at 10a-19a. The opinion of the bankruptcy court dismissing Mr. Waleski's contractual malpractice claims under the shorter statute of limitations for tort claims is reported at 616 B.R. 280, and is reprinted as Appendix C at 20a-48a. The opinion of the bankruptcy court finding "arising in" jurisdiction under 28 U.S.C. §§ 1334(b) and 157(a) over Mr. Waleski's removed state law breach of contract suit is reported at 603 B.R. 712, and is reprinted as Appendix D at 49a-80a.

JURISDICTION

The judgment of the Second Circuit became final on December 16, 2022 when the court denied Mr. Waleski's petition for rehearing *en banc*. Appendix E at 81a-82a. This Court has jurisdiction to review the judgment by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III of the United States Constitution, and 28 U.S.C. §§ 157(a) and 1334(b) are reproduced in full in Appendix F at 83a-90a.

INTRODUCTION

Over the span of decades, thousands of residents of Avoca, Pennsylvania were injured by creosote that was dispersed by the former Kerr-McGee plant in their community (the "Avoca Plaintiffs"). To try to escape growing liability, Kerr-McGee split itself into two and left its tort liability with the company it renamed Tronox, Inc. ("Tronox"). Tronox then filed for bankruptcy. The Avoca Plaintiffs' claims were stayed by the bankruptcy filing and counsel was retained to represent them in the bankruptcy proceedings.

During the course of the bankruptcy case, counsel for the Avoca Plaintiffs abandoned their clients' interests, breaching the terms of their retention agreement and causing the Avoca Plaintiffs hundreds of millions of dollars of damages. Several years later, when the Avoca Plaintiffs discovered their damages, Petitioner Stanley Waleski ("Mr. Waleski") commenced a Pennsylvania state suit, on his own behalf and on behalf of all the Avoca Plaintiffs, against his former Pennsylvania-based counsel. Respondents, who plainly did not want the state law claims decided in the state court, removed the action to the U.S. District Court for the Middle District of Pennsylvania, initially asserting "arising in" and "related to" bankruptcy

jurisdiction.[1] The Middle District of Pennsylvania then transferred venue to the Southern District of New York, which, in turn, referred the case to the bankruptcy court for the Southern District of New York, where the Tronox bankruptcy had been filed. There, Mr. Waleski challenged the bankruptcy court's subject matter jurisdiction and sought remand to Pennsylvania state court.

Notwithstanding the limited jurisdiction provided by 28 U.S.C. §§ 1334(b) and 157(a), the bankruptcy court found "arising in" subject matter jurisdiction over Mr. Waleski's state law claims asserted against his private non-bankruptcy appointed attorneys, and proceeded to dismiss the case on a unique issue of Pennsylvania law. Mr. Waleski appealed to the Southern District of New York, which affirmed the bankruptcy court in all respects, and then to the Second Circuit. But, rather than addressing the question presented to it on appeal – whether there is "arising in" bankruptcy jurisdiction under 28 U.S.C. §§ 1334(b) and 157(a) over a removed state law legal malpractice suit brought by a non-debtor private litigant against his former bankruptcy attorneys, where the underlying bankruptcy case is long closed, the attorneys were not bankruptcy court-appointed, and the suit does not in any way implicate the bankruptcy estate – the Second Circuit invoked "hypothetical jurisdiction" expressly to side-step this admittedly "difficult" question, and affirmed the lower courts on the merits under Pennsylvania state law, dismissing Mr. Waleski's case.

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1. Upon realizing that state law claims between non-diverse, non-debtor entities removed under "related to" jurisdiction are subject to mandatory abstention under 28 U.S.C. § 1332(c)(2), Respondents withdrew the "related to" portion of the removal notice to avoid having the claims heard in the Pennsylvania court.

As this Court has explained, "hypothetical jurisdiction" is a dangerous exercise because it pushes the federal courts beyond the bounds of their authorized jurisdiction and threatens the separation of powers at the core of Article III. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998). In this case, that exercise had severe consequences—dismissal of the Avoca Plaintiffs' claims by a court that was not designed to decide such claims, and disenfranchisement of the Pennsylvania state courts, which were deprived of judicial domain over areas in which they have an overwhelming interest: the regulation of lawyers within the state and adjudication of state common law disputes between its residents.

Recognizing the potential for these severe consequences, this Court in *Steel Co.* attempted to curtail the practice of "hypothetical jurisdiction" among the federal courts. Justice Scalia, writing for the majority, denounced "hypothetical jurisdiction," explaining that the question of subject matter jurisdiction is the gate-keeping question that a "court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it." *Id.* at 94-95. This obligation applies two-fold to appellate courts, which are obligated to assure themselves *first* of their own subject matter jurisdiction, and then that of the courts below. *Id.* at 94 ("[T]he first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes.").

Yet, after *Steel Co.*, the Second Circuit has continued to exercise "hypothetical jurisdiction," utilizing it as a crutch to avoid tackling difficult jurisdictional questions, while reaching the outcome desired by the sitting

panel. In doing so, the Second Circuit has created an outcome-determinative distinction between Article III ("constitutional") elements of subject matter jurisdiction, which it maintains cannot be circumvented, and the putatively less important "statutory" elements of subject matter jurisdiction, which it has held may be circumvented. At least eight circuits have, from time to time, followed the errant Second Circuit approach, while others, including the Eleventh Circuit, have rejected it, contributing to an ongoing circuit split. Therefore, a decision by this Court is necessary and appropriate to provide much needed clarity regarding the scope of *Steel Co.*'s directive—and specifically, whether the federal courts can still rely on "hypothetical" statutory jurisdiction, as the Second Circuit did here, to decide a state law claim on the merits *against* the party challenging federal subject matter jurisdiction, in an appeal where the very question presented was that of subject matter jurisdiction.

STATEMENT OF THE CASE

A. LEGAL FRAMEWORK

Congress alone has the power to establish and fix the bounds of a federal court's jurisdiction. Appendix F at 83a, U.S. Const. Art. III § 1; *Kontrick v. Ryan*, 540 U.S. 443, 444 (2004) ("Only Congress may determine a lower federal court's subject-matter jurisdiction."). This mandate is built on a single basic principle—that of separation of powers. At the time of the Constitution's enactment, there was a long-running debate among the framers between those who wanted the states to retain the brunt of the nation's political power, and those that favored a stronger, centralized government. Michael G.

Collins, Article III Cases, State Court Duties, and the Madisonian Compromise, 1995 Wis. L. Rev. 39, 42-43 (1995). The "Madisonian Compromise" was to enact language allowing Congress to create lower federal courts, and vesting Congress with the power to constrict the federal courts' jurisdiction to assure that they do not intrude upon the other branches of government or the state courts' judicial domain. *Id. See also Trichell v. Midland Credit Mgmt., Inc.*, 964 F.3d 990, 996 (11th Cir. 2020) ("In a debate over what became Article III, section 2, James Madison urged that the jurisdiction of the Supreme Court be limited to cases of a 'Judiciary Nature,' for the 'right of expounding the Constitution in cases not of this nature ought not to be given to that Department.' The delegates agreed without objection.").

Federal courts are thus courts of limited jurisdiction and "subject matter jurisdiction" serves to protect the federalism values at the core of Article III. Federal courts, in turn, have a "virtually unflagging obligation" to exercise only the jurisdiction given to them by Congress. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976). This obligation is core to our judicial system, as federal courts have "no more right to decline the exercise of jurisdiction which is given, *than to usurp that which is not given*." *Cohens v. Virginia*, 19 U.S. 264, 404 (1821) (emphasis added). Thus, while difficult jurisdictional questions "may occur which [federal courts] would gladly avoid," the federal courts "cannot avoid them." *Id.*

Notwithstanding these fundamental principles, for many years, some federal courts applied "hypothetical jurisdiction" to avoid tackling difficult jurisdictional

questions in cases where "(1) the merits question [wa]s more readily resolved, and (2) the prevailing party on the merits would be the same as the prevailing party were jurisdiction denied." *Steel Co.*, 523 U.S. at 93. Observing this, in *Steel Co.*, this Court set out to put an end to this aberration. Justice Scalia, writing for the majority, explained:

> We decline to endorse such an approach because it carries the courts beyond the bounds of authorized judicial action and thus offends fundamental principles of separation of powers. This conclusion should come as no surprise, since it is reflected in a long and venerable line of our cases. "Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." *Ex parte McCardle*, 7 Wall. 506, 514, 19 L.Ed. 264 (1868). "On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes. This question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it." *Great Southern Fire Proof Hotel Co. v. Jones*, *supra*, at 453, 20 S.Ct., at 691–692. The requirement that jurisdiction be established as a threshold matter "spring[s] from the nature and limits of the judicial power of the United States" and is "inflexible and without exception." *Mansfield, C. & L.M.R. Co. v. Swan*,

> 111 U.S. 379, 382, 4 S.Ct. 510, 511, 28 L.Ed. 462 (1884).

Id. at 94-95.

Given the potentially severe consequences of "hypothetical jurisdiction"—*i.e.*, extending beyond the bounds of authorized federal judicial action and usurping power committed to the state courts—*Steel Co.* requires that the question of "subject matter jurisdiction" always be answered first. *Id.* This obligation applies two-fold to federal appellate courts, which are obligated to assure themselves not only of their own subject matter jurisdiction, but also of the subject matter jurisdiction of the court below. *Id.*

B. FACTUAL AND PROCEDURAL HISTORY

The Avoca Plaintiffs are thousands of individuals who suffered years, and in some cases decades, of poisoning from noxious creosote emission from the Kerr-McGee wood treatment plant in Avoca, Pennsylvania. In 2005, when their diseases and injuries materialized, the Avoca Plaintiffs began asserting their toxic-tort claims against Kerr-McGee in the Luzerne County Pennsylvania Court of Common Pleas.

In the first two cases against Kerr-McGee, the plaintiffs prevailed on all issues and were awarded large verdicts. So, to try to avoid its liabilities, Kerr-McGee devised a scheme to fraudulently transfer billions of dollars of its assets, for little or no consideration, to a newly formed entity known as "New Kerr-McGee." This left the "Old Kerr-McGee" entities (collectively renamed Tronox,

Inc. ("Tronox")) with essentially no assets with which to satisfy the Avoca Plaintiffs' claims. Tronox then sought Chapter 11 bankruptcy protection in the U.S. Bankruptcy Court for the Southern District of New York, halting any further proceedings in Pennsylvania state court.

In the Tronox bankruptcy, the Avoca Plaintiffs were unsecured tort claim creditors, and their Pennsylvania state-court attorneys, the Powell Law Group ("PLG"), lacked expertise in complex bankruptcy litigation. To try to protect their clients, PLG engaged Montgomery, McCracken, Walker & Rhoads LLP, a Pennsylvania-based law firm, led by two of its Pennsylvania-based lawyers, Natalie Ramsey and Leonard Busby (collectively, "MMWR"), to represent the Avoca Plaintiffs in the Tronox bankruptcy. PLG arranged for MMWR to represent the Avoca Plaintiffs because MMWR had professed expertise in complex bankruptcy litigation and bankruptcy-related matters, and pledged to protect the Avoca Plaintiffs' interests and maximize their recovery. These terms were memorialized in a contingent fee agreement (the "Agreement").

During the course of the bankruptcy, MMWR materially breached the Agreement by, among other things, taking on a simultaneous conflicting representation of a member of the Official Committee of Unsecured Creditors without explaining to Mr. Waleski or the Avoca Plaintiffs the actual, damaging and prejudicial conflicts that this representation would present; submitting the Avoca Plaintiffs' claims in an artificially low amount at less than twenty percent (20%) of their actual and documented Pennsylvania state law value; and prematurely terminating their representation of the Avoca Plaintiffs without notice

to, or the consent of, the Avoca Plaintiffs or their state-court attorneys.

Critically, at the time MMWR terminated its representation, it remained unknown whether the Avoca Plaintiffs would obtain any recovery from the Tronox bankruptcy. The Tronox bankruptcy Plan had made the Avoca Plaintiffs beneficiaries of a Tort Claims Trust (the "Trust"), which would serve as the sole recourse against Tronox for *all* tort claimants. As beneficiaries of the Trust, the Avoca Plaintiffs would be entitled to receive a share of the Trust *res*, which would be comprised of any amount recovered from fraudulent transfer litigation, minus any administrative payments made from the Trust. MMWR thus abandoned the Avoca Plaintiffs while their claims remained unresolved and uncertain, and without providing the Avoca Plaintiffs with any notice, or any of the information necessary for the continued prosecution of their claims in the bankruptcy proceeding—causing the Avoca Plaintiffs more than $619 million in damages through MMWR's actions, inactions and omissions.

On April 11, 2018, Mr. Waleski filed this class action in the Court of Common Pleas of Luzerne County, Pennsylvania, asserting state law claims against MMWR for breach of their contractual obligations to the Avoca Plaintiffs in the Tronox bankruptcy case. On June 4, 2018, MMWR removed the action to the U.S. District Court for the Middle District of Pennsylvania on professed federal question grounds. MMWR then moved to transfer the action to the U.S. District Court for the Southern District of New York. Mr. Waleski, in turn, moved to remand the action back to Pennsylvania state court. The Middle District of Pennsylvania, however, addressed only

MMWR's venue motion and transferred the case to the Southern District of New York. The Southern District of New York then referred the case to the bankruptcy court for the Southern District of New York, leaving the issue of subject matter jurisdiction and remand for the bankruptcy court to decide.

1. The Bankruptcy Court Finds "Arising in" Jurisdiction Over Mr. Waleski's Claims, then Proceeds to Dismiss the Suit on Unique Issues of Pennsylvania State Law

On July 18, 2019, the bankruptcy court issued a Memorandum Decision denying remand and finding "arising in" bankruptcy jurisdiction over Mr. Waleski's state law claims (the "Remand Order") under 28 U.S.C. §§ 1334(b) and 157(a). *See* Appendix D at 73a-76a. Mr. Waleski then filed a motion to amend his complaint. At the hearing on the motion to amend, the bankruptcy court approved the filing of Mr. Waleski's proposed amended complaint and converted MMWR's opposition papers into a motion to dismiss the amended complaint.

In reviewing the converted motion to dismiss, the bankruptcy court focused exclusively on the seventh point in MMWR's brief—an affirmative defense under Pennsylvania's "gist of the action concept." But, since even MMWR had barely argued the point, the bankruptcy court ended the hearing with a request for supplemental briefing on Pennsylvania's "gist of the action" concept. Following supplemental briefing, on February 21, 2020, the bankruptcy court issued a Memorandum Decision holding that Pennsylvania's "gist of the action" concept—which was originally formulated to prevent plaintiffs from re-

casting contract claims as tort claims—could be invoked to apply the shorter statute of limitations for tort claims to Mr. Waleski's contract claims, and dismissed the case as time-barred (the "Dismissal Order"). *See* Appendix C at 33a-41a. Waleski then appealed the Remand and Dismissal Orders to the District Court. By summary order entered on October 28, 2020 (the "Summary Order"), the District Court affirmed the two orders of the Bankruptcy Court for the reasons stated on the record of argument, Appendix B at 10a-19a, and Mr. Waleski appealed to the Second Circuit.

2. On Appeal, the Second Circuit Invokes "Hypothetical Jurisdiction" to Avoid the "Difficult" Jurisdictional Issue Presented by Mr. Waleski's Appeal

Following argument, on November 8, 2022, the Second Circuit issued an order where it recognized that the jurisdictional question presented by this case is a "difficult one" of first impression, for which all doubts should be resolved in favor of remand. Appendix A at 4a. But, rather than tackle this difficult question, the Second Circuit invoked "hypothetical jurisdiction" to avoid the issue altogether and dismissed the case on the state law merits—disregarding its own mandate to resolve any doubt in favor of remand:

> The jurisdictional question in this case presents a matter of first impression in our Circuit. We are asked to determine whether Waleski's state-law legal malpractice suit against his former bankruptcy attorneys — where the underlying bankruptcy proceeding has

> already been terminated, the attorneys were not bankruptcy-court appointed, and Waleski seeks damages directly from the attorneys rather than from the estate — falls within the federal bankruptcy courts' "arising in" jurisdiction under 28 U.S.C. §§ 1334(b) and 157(a). Given that "the meaning of the statutory language 'arising in'" is less than "clear," *Baker v. Simpson*, 613 F.3d 346, 351 (2d Cir. 2010); *accord, e.g.*, *In re Wood*, 825 F.2d 90, 97 (5th Cir. 1987) (observing same), and that the Supreme Court has provided scant guidance in what is typically a highly fact specific inquiry, this jurisdictional question turns out to be a rather difficult one. But under our caselaw, "where a question of statutory (non-Article III) jurisdiction is complex and the claim fails on other more obvious grounds," we may "assume hypothetical jurisdiction in order to dismiss on those obvious grounds." *Miller v. Metro. Life Ins. Co.*, 979 F.3d 118, 123 (2d Cir. 2020).

Appendix A at 4a-5a. Notably, neither side had briefed the concept of "hypothetical jurisdiction," and the issue was not argued before the Second Circuit.[2]

In invoking "hypothetical jurisdiction," the Second Circuit relied on *Miller v. Metro. Life Ins. Co.*, 979 F.3d 118 (2d Cir. 2020), Appendix A at 4a-5a, which, in turn,

2. Nor, Mr. Waleski submits, were the grounds for dismissal "obvious." In fact, Mr. Waleski contends that the Pennsylvania state courts know best how to apply Pennsylvania state law to the claims of its residents and would reach an outcome different from that obtained below.

relied on *Butcher v. Wendt*, 975 F.3d 236 (2d Cir. 2020). In *Butcher*, the court invoked "hypothetical jurisdiction" to dismiss on the merits claims brought in federal court under 18 U.S.C. §§ 1962(c) and (d), and 42 U.S.C. § 1983. *Id.* at 245. Judge Menashi concurred in the judgment, but wrote a vigorous concurring opinion challenging the court's exercise of hypothetical jurisdiction. Judge Menashi explained:

> In *Steel Co.*, the Supreme Court made clear that "[t]he statutory and (especially) constitutional elements of jurisdiction are an essential ingredient of separation and equilibration of powers, restraining the courts from acting at certain times, and even restraining them from acting permanently regarding certain subjects." *Id.* at 101, 118 S.Ct. 1003. Accordingly, for a court "to resolve contested questions of law when its jurisdiction is in doubt" is, "by very definition, for a court to act ultra vires." *Id.* at 101-02, 118 S.Ct. 1003. Despite this precedent, our court has continued to employ the doctrine of hypothetical jurisdiction to bypass questions of "statutory jurisdiction." *See, e.g., Fama v. Comm'r of Corr. Servs.*, 235 F.3d 804, 816 n.11 (2d Cir. 2000). In some of the cases in which the court has done so, it seems to have confused non-jurisdictional questions with true jurisdictional limitations. For example, to the extent that a prior decision bypassed an issue of "statutory standing" to address the merits, it was not assuming jurisdiction. *See Lexmark Int'l v. Static Control Components*, 572 U.S. 118, 128 n.4, 134 S.Ct. 1377, 188 L.Ed.2d 392 (2014)

> (noting that "statutory standing" previously has been treated "as effectively jurisdictional" even though it "does not implicate subject-matter jurisdiction"); *see also Whitaker v. Dep't of Com.*, 970 F.3d 200, 210 & n.49 (2d Cir. 2020). But to the extent circuit precedent purports to afford us discretion to ignore statutory limits on our jurisdiction, it is inconsistent with *Steel Co.* and with the Constitution.

Id. at 245. The majority, cognizant of this vehement objection to "hypothetical jurisdiction," responded to Judge Menashi's opinion head-on:

> Our concurring colleague says that we should have fully grappled with the Rooker-Feldman doctrine before reaching the merits because it is a jurisdictional bar that we cannot avoid. Our refusal to address the doctrine as a threshold jurisdictional issue, he insists, contravenes *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998). To the contrary, resolving this appeal on the merits is in step with both our precedent and *Steel Co.* In *Steel Co.*, the Supreme Court instructed that we could not assume hypothetical jurisdiction over questions of Article III jurisdiction, as had been the practice . . . But the Court's holding in *Steel Co.* was limited to standing under Article III (that is, constitutional standing), which it distinguished from "statutory standing." *Id.* at 97, 118 S.Ct. 1003; *see also, e.g., id.* at 93, 118 S.Ct. 1003 (disapproving of the resolution

> of "cause-of-action questions ... where there is no genuine case or controversy" under Article III). We have consistently kept faith with Steel Co.'s focus on Article III jurisdiction. "The bar on hypothetical jurisdiction," we have held, "applies only to questions of Article III jurisdiction." *Moore v. Consol. Edison Co. of N.Y., Inc.*, 409 F.3d 506, 511 n.5 (2d Cir. 2005).

Butcher, 975 F.3d at 242-243.

Noting Judge Menashi's *Butcher* opinion and, more broadly, the circuit split regarding the scope of *Steel Co.*'s directive, Mr. Waleski petitioned for a rehearing *en banc*. On December 16, 2022, the Second Circuit denied Mr. Waleski's petition for a rehearing *en banc*. Appendix E at 81a-82a.

Mr. Waleski now petitions this Court for a writ of certiorari. This petition pertains solely to the Second Circuit's use of "hypothetical jurisdiction" to avoid the jurisdictional issue presented on appeal. While Mr. Waleski maintains that the Second Circuit erroneously applied Pennsylvania's "gist of the action" concept to dismiss his contract claims under the shorter statute of limitations for tort claims, in the absence of federal subject matter jurisdiction, the opinion "produces nothing more than a hypothetical judgment—which comes to the same thing as an advisory opinion, disapproved by this Court from the beginning." *Steel Co.*, 523 U.S. at 101.

REASONS FOR GRANTING THE PETITION

A. THE SECOND CIRCUIT'S HOLDING CONFLICTS WITH OTHER CIRCUITS, AND REFLECTS A GENERAL CONFUSION AMONG THE CIRCUITS REGARDING THE SCOPE OF *STEEL CO.*'S DIRECTIVE

Certiorari should be granted because the Second Circuit's ruling evidences a deep conflict between the circuits regarding this Court's directive in *Steel Co.* and the existence of "hypothetical jurisdiction." Shortly after *Steel Co.* was decided, the Second Circuit articulated its view that *Steel Co.* applies only "to constitutional bases of jurisdiction generally" but "does not prohibit the use of assumed or hypothetical jurisdiction where the jurisdictional requirement is only statutory." *See Boos v. Runyon*, 201 F.3d 178, 185 n.3 (2d Cir. 2000) (citation omitted). Each of the First, Third, Sixth, Eighth, Ninth, Tenth and D.C. Federal Circuits have, from time to time, issued rulings consistent with the Second Circuit view. *See Restoration Pres. Masonry, Inc. v. Grove Europe Ltd.*, 325 F.3d 54, 60 (1st Cir. 2003) ("[A] jurisdictional inquiry is not required here given that the question invokes statutory jurisdiction.); *Seale v. I.N.S.*, 323 F.3d 150, 155 (1st Cir. 2003) ("[W]e have made clear our agreement with the Second Circuit that *Steel Co.* did not lay down an 'absolute rule.'"); *Jordon v. Attorney Gen. of U.S.*, 424 F.3d 320, 330 n. 8 (3d Cir. 2005) ("[I]n *Bowers*, we found that *Steel Co.* only 'requires courts to answer questions concerning *Article III jurisdiction* before reaching other questions.'"); *Bowers v. Nat'l Collegiate Athletic Ass'n*, 346 F.3d 402, 416 (3d Cir. 2003) ("[T]hat case requires courts to answer questions concerning Article III jurisdiction

before reaching other questions."); *Khodr v. Holder*, 531 Fed.Appx. 660, 668 n. 4 (6th Cir. 2013) ("Our decision to dismiss Abou Khodr's petition on the merits is consistent with the Supreme Court's disfavor of 'hypothetical jurisdiction'—the practice of assuming jurisdiction exists in order to dispose of the case more easily on the merits—in the context of Article III."); *Lukowski v. Immigration & Naturalization Serv.*, 279 F.3d 644, 648 n.1 (8th Cir. 2002) ("We clearly have Article III jurisdiction to review the BIA's decision, so this is not the type of jurisdictional issue that must be decided before addressing the merits of the controversy."); *De La Rosa-Rodriguez v. Garland*, 49 F.4th 1282, 1291 (9th Cir. 2022) ("[I]t is settled that we can assume statutory jurisdiction *arguendo* when the jurisdictional issue is complex, but the claim asserted clearly lacks merit."); *Yancey v. Thomas*, 441 Fed. Appx. 552, 559 n. 1 (10th Cir. 2011) ("In rejecting the so-called doctrine of 'hypothetical jurisdiction,' which permits a court to assume jurisdiction for the purpose of dismissing a claim on the merits, the Supreme Court in *Steel* . . . repeatedly spoke in terms of Article III jurisdiction, rather than jurisdiction in general."); *Minesen Co. v. McHugh*, 671 F.3d 1332, 1337 (Fed.Cir.2012) ("While we are generally obligated to resolve jurisdictional challenges first, Supreme Court precedent *only* requires federal courts to answer questions concerning their Article III jurisdiction—not necessarily their statutory jurisdiction—before reaching other dispositive issues.") (emphasis added).

The Eleventh Circuit, on the other hand, has flatly rejected "hypothetical" jurisdiction, explaining in *Pacheco de Perez v. AT & T Co.*, 139 F.3d 1368 (11th Cir. 1998) that:

> [T]he Supreme Court has recently declined to endorse the approach taken by some of the courts of appeals of assuming jurisdiction for the purpose of passing upon the merits of an action. *See Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998) (rejecting the so-called "doctrine of hypothetical jurisdiction"). Important jurisdictional questions cannot be ignored merely because they are difficult. To do otherwise would allow defendants to evade [] statutory requirements . . . and allow the federal courts to make significant dispositive rulings in a case over which the federal courts may lack jurisdiction.

Id. at 1381 n. 4; *Friends of the Everglades v. U.S. E.P.A.*, 699 F.3d 1280, 1289 (11th Cir. 2012) ("We cannot exercise hypothetical jurisdiction any more than we can issue a hypothetical judgment. 'Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree.'"). So, when presented with an appeal questioning the bankruptcy court's subject matter jurisdiction in *In re Bayou Shores SNF*, LLC, 828 F.3d 1297 (11th Cir. 2016), the Eleventh Circuit properly held that:

> When the lower court "lack[s] jurisdiction, we have jurisdiction on appeal, *not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit*." *See Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541, 106 S.Ct. 1326, 89 L.Ed.2d 501

> (1986). "Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." *Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 94, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998) . . . Our only role here is to correct the bankruptcy court's error by affirming the district court's Order.

Id. at 1328-29. (Emphasis added).

Meanwhile, the position of the Fourth, Fifth and Seventh circuits has been less clear. Ultimately, however, these circuits lean toward the Eleventh Circuit approach, routinely noting the importance of establishing the statutory *and* constitutional elements of subject matter jurisdiction. In *B.R. v. F.C.S.B.*, 17 F.4th 485 (4th Cir. 2021), for example, the Fourth Circuit correctly explained that, "[a]lthough the term 'jurisdiction' has been used somewhat loosely on occasion in the past, it is now well established that it refers to 'the courts' statutory or constitutional power to adjudicate the case.'" *Id.* at 492. *See also Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 480 (4th Cir. 2005) ("Subject-matter jurisdiction ... is an [Article] III *as well as a statutory requirement*; it functions as a restriction on federal power, and contributes to the characterization of the federal sovereign.") (emphasis added).

The Fifth Circuit has similarly focused on the critical gate-keeping analysis, explaining that, "[i]n *Steel Co.*, the Court emphatically disapproved of the practice of the

exercise of 'hypothetical jurisdiction' by federal courts, and held that Article III courts must always resolve true questions of jurisdiction before proceeding to the merits."). *USPPS, Ltd. v. Avery Dennison Corp.*, 647 F.3d 274, 284 n. 6 (5th Cir. 2011) (citations omitted). *See also Whole Woman's Health v. Jackson*, 13 F.4th 434, 444 (5th Cir. 2021) ("No version of hypothetical jurisdiction could enable this court to grant Plaintiffs affirmative relief in the absence of jurisdiction."); *United States v. Ortiz*, 2007 WL 1223991, at *1 (5th Cir. Apr. 25, 2007) ("[T]he Supreme Court rejected the theory of hypothetical jurisdiction . . . Hence we must decide the jurisdictional question."); *Neinast v. Texas*, 217 F.3d 275, 282 n. 6 (5th Cir. 2000) ("We first address the statutory jurisdiction question in order to, if possible, avoid a constitutional question.").

The Seventh Circuit has also correctly observed that this Court "has been unwavering in its insistence that [federal courts'] adjudicatory authority is limited *by the Constitution and Congress*, and no result justifies [courts] intervening where [they] have not been granted the power to do so." *Groves v. United States*, 941 F.3d 315, 323 (7th Cir. 2019) (emphasis added). *See also Boim v. Am. Muslims for Palestine*, 9 F.4th 545, 557 (7th Cir. 2021) ("The Supreme Court has cautioned against deciding merits questions when evaluating challenges to jurisdiction."); *Meyers v. Oneida Tribe of Indians of Wisconsin*, 836 F.3d 818, 823 (7th Cir. 2016) ("'[J]urisdiction is vital only if the court proposes to issue a judgment on the merits.'"); *McNamara v. City of Chicago*, 138 F.3d 1219, 1222 (7th Cir. 1998) (distinguishing questions of "prudential standing" from true questions of subject matter jurisdiction).

Indeed, even the early proponents of the Second Circuit approach have expressed doubts regarding

its correctness. In *Seale v. I.N.S.*, 323 F.3d at 150, for example, the First Circuit remarked that "[t]he term 'statutory jurisdiction' is susceptible to a wide variety of constructions [and] it is arguable that Justice Scalia did not mean to exempt from the ruling in *Steel Co.* the kind of statutory jurisdictional issues" for which the courts have "assumed" jurisdiction. *Id.* at 156. The Eighth Circuit similarly observed in *Edwards v. City of Jonesboro*, 645 F.3d 1014 (8th Cir. 2011) that the question "[w]hether [the *Steel Co.*] rule also applies to statutory jurisdiction . . . is a matter of some dispute." *Id.* at 1017. While, in *McClendon v. City of Albuquerqu*e, 630 F.3d 1288 (10th Cir. 2011), the Tenth Circuit noted that "[t]he word 'jurisdiction' has 'many, too many meanings,' it is 'capable of different interpretations,' and it has sometimes been used with 'excessive[ ] exuberan[ce]' to encompass 'things other than the [true] absence of constitutional or statutory power to adjudicate a matter.'" *Id.* at 1297. In view of the foregoing, courts following the Second Circuit have not been consistent in their application of the Second Circuit rule. *Compare Fed. Home Loan Mortg. Corp. v. Briggs*, 556 Fed. Appx. 557, 558 n. 2 (8th Cir. 2014) ("[W]e have assured that the district court possessed subject matter jurisdiction before proceeding.") *with Lukowski v. Immigration & Naturalization Serv., supra*, 279 F.3d at 648 n.1 (adopting the Second Circuit approach); *compare Trackwell v. U.S. Gov't*, 472 F.3d 1242, 1245 (10th Cir. 2007) (addressing the question of statutory jurisdiction before the merits) *with Yancey v. Thomas*, *supra*, 441 Fed. Appx. at 559 n. 1 (adopting the Second Circuit approach).

In *Pub. Sch. Ret. Sys. of Missouri v. State St. Bank & Tr. Co.*, 640 F.3d 821 (8th Cir. 2011), for example, the Eighth Circuit was asked to decide an appeal in a removed

case where the only question of subject matter jurisdiction was statutory, and the Eighth Circuit correctly focused on the threshold gate-keeping analysis:

> We have stated [] that "a court may not assume 'hypothetical jurisdiction' to decide 'contested questions of law when its jurisdiction is in doubt.'" *Ark. Blue Cross & Blue Shield v. Little Rock Cardiology Clinic, P.A.*, 551 F.3d 812, 816 (8th Cir.2009) (quoting *Steel Co. v. Citizens for a Better Env›t,* 523 U.S. 83, 101, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998)). Instead, we have noted that "jurisdiction is a threshold question and must be answered before all other questions." *Ginters v. Frazier,* 614 F.3d 822, 826 (8th Cir.2010). Therefore, rather than considering whether the district court correctly remanded this case based upon a forum-selection clause in an agreement between the Retirement Systems and State Street, we first address whether State Street, as the removing party, has established by a preponderance of the evidence that the district court had original jurisdiction over this case. *Altimore v. Mount Mercy Coll.,* 420 F.3d 763, 768 (8th Cir.2005).

Id. at 825-26. In so holding, the Eighth Circuit departs from the Second Circuit rule, as applied here, where the Second Circuit refused to answer the threshold jurisdictional question and proceeded directly to the merits of the case.

Therefore, there is a persistent circuit split regarding the scope of this Court's decision in *Steel Co.*, as well

as general inconsistency among the circuits as to the meaning of "statutory" jurisdiction within the context of this Court's decision. *See e.g.*, *United States v. Texas Tech Univ.*, 171 F.3d 279, 295 n. 11 (5th Cir. 1999) (comparing the Eleventh Circuit interpretation of *Steel Co.* with that of the First and Second Circuits); *Abernathy v. Wandes*, 713 F.3d 538, 558 n. 17 (10th Cir. 2013) (noting the Second Circuit approach and its various proponents). It is thus necessary and appropriate for this Court to resolve the conflict—and to put an end, once and for all, to the notion that federal courts can simply assume "hypothetical jurisdiction" and decide uniquely state law issues between residents of the same state.

B. THE SECOND CIRCUIT'S HOLDING CONFLICTS WITH THIS COURT'S PRECEDENT AND USURPS THE PENNSYLVANIA STATE COURTS' DOMAIN

1. The Second Circuit's Holding Undercuts *Steel Co.* and its Progeny

Certiorari should also be granted because the Second Circuit rule is wrong. Treating "statutory" jurisdiction as a "lesser" element of subject matter jurisdiction that can be "assumed" is contrary to the constitution, and contravenes *Steel Co* and its progeny.

First, under Article III of the U.S. Constitution, jurisdiction is limited both by the bounds of "judicial power" as articulated in Article III, § 2, and by the extent to which Congress vests that power in the lower courts. Appendix F at 83a-84a, U.S. Const. Art. III, §§ 1-2. Therefore, the Second Circuit's attempt to distinguish between

"constitutional" as opposed to "statutory" jurisdiction is untenable, as both limitations, though distinct, ultimately stem from Article III.

Second, while the jurisdictional question presented in *Steel Co.* involved the case-or-controversy requirement of Article III, this Court made no hierarchical distinction between the constitutional and statutory concepts inherent in subject matter jurisdiction. To the contrary, in ruling that the federal courts must always decide jurisdictional issues before merits issues, this Court broadly described jurisdictional issues as those involving the "power to declare the law" or "the nature and limits of the judicial power of the United States"—and even cited to canonical cases dealing exclusively with statutory limits on subject matter jurisdiction. *Steel Co.*, 523 U.S. at 94-95 (citing *Ex parte McCardle*, 74 U.S. 506 (1868) (involving a statute that stripped away jurisdiction otherwise provided by Article III) and *Mansfield, C. & L.M.R. Co. v. Swan*, 111 U.S. 379 (1884) (involving the statutory requirement of complete diversity of citizenship)).

In summarizing this Court's holding, Justice Scalia explained:

> The statutory *and* (especially) constitutional elements of jurisdiction are an essential ingredient of separation and equilibration of powers, restraining the courts from acting at certain times, and even restraining them from acting permanently regarding certain subjects.

Id. at 102. (emphasis added). So, while the Second Circuit may have read into this passage the notion that

"statutory" jurisdiction is somehow less important and can be circumvented, this Court's unambiguous language establishes that both elements are "essential" to subject matter jurisdiction. *Id.*

This is established by subsequent decisions of this Court. In *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574 (1999), for example, the only disputed question of subject matter jurisdiction was complete diversity under 28 U.S.C. § 1332. The question presented was whether, in an action removed from state court, a federal court is required to address objections under 28 U.S.C. § 1332 *first*, before addressing objections to other threshold jurisdictional issues, like personal jurisdiction. Rather than endorse "hypothetical" statutory jurisdiction and create a distinction between "statutory" and "constitutional" jurisdictional elements, this Court explained the true determinative distinction: that between a decision on non-merits jurisdictional issues and a merits-based dismissal. *Id.* at 583-85. Under *Ruhrgas*, a court may, in appropriate circumstances, dismiss a case on non-merits grounds (like personal jurisdiction) before reaching the question of subject matter jurisdiction, because a dismissal on non-merits grounds "makes no assumption of law-declaring power" such as would violate "the separation of powers principles underlying *Mansfield* and *Steel Company*." *Id.* In so ruling, this Court emphasized that *Steel Co.* bans the courts from assuming subject matter jurisdiction. *Id.* It does not, however, dictate any particular hierarchy for threshold, non-merits based jurisdictional issues. *Id.*

In a long line of cases following *Ruhrgas*, this Court expanded on the foundation laid by *Steel Co.* and formulated a test for distinguishing between those statutes

that are truly "jurisdictional" (and must be addressed before the merits), and statutes that merely identify the elements of a federal cause of action or provide rules for administration of the courts, which cannot properly be called "jurisdictional." *See, e.g., Arbaugh v. Y&H Corp.*, 546 U.S. 500, 515-16 (2006) ("If the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional, then courts and litigants will be duly instructed and will not be left to wrestle with the issue."); *Lexmark Intern., Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 140 n. 4 (2014) ("[T]he absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, *i.e.*, the court's statutory or constitutional power to adjudicate the case.") (internal quotations and citations omitted); *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 435-36 (2011) ("Because the consequences that attach to the jurisdictional label may be so drastic . . . We have urged that a rule should not be referred to as jurisdictional unless it governs a court's adjudicatory capacity, that is, its subject-matter or personal jurisdiction.").

The rule that emerges from these cases is, if Congress clearly states that a statute is to govern a court's adjudicatory capacity, then it must be addressed before the court may reach the merits of a case. *See id.* Here, it is undisputed that the statutes at issue—28 U.S.C. §§ 1334(b) and 157(a), Appendix F at 85a-90a—are "jurisdictional" in that they set forth the bankruptcy courts' adjudicatory authority. *Kontrick v. Ryan*, 540 U.S. 443, 452-53 (2004) ("Only Congress may determine a lower federal court's subject-matter jurisdiction. U.S. Const., Art. III, § 1. *Congress did so with respect to bankruptcy courts in Title 28* . . ."). Therefore, by invoking "hypothetical jurisdiction"

and dismissing this case on issues of Pennsylvania state law, the Second Circuit exceeded the bounds of federal judicial authority, and disregarded the federalism values at the core of *Steel Co.*

2. The Second Circuit's Decision Usurps from the Pennsylvania State Courts A Judicial Domain in Which They Have an Overwhelming Interest

The Second Circuit also usurped the Pennsylvania state courts' overwhelming interest in regulating the lawyers within the state, as illustrated by this Court's decision in *Gunn v. Minton*, 568 U.S. 251 (2013). In *Gunn*, this Court was presented with a question analogous to that presented to the lower courts in this case. The question was whether a legal malpractice lawsuit involving an underlying patent case is subject to federal jurisdiction. Patent law, like bankruptcy law, is an exclusively federal concept, with roots in Article 1, section 8 of the Constitution, and with its own jurisdictional statute. *Compare* 28 U.S.C. § 1338 (patents) *with* 28 U.S.C. § 1334(b) (bankruptcy).

This Court explained that, although a case alleging legal malpractice in a federal patent case necessarily raises disputed issues of federal law, that alone is insufficient to confer federal jurisdiction over the state claims. *Id.* at 260-264. In order to confer federal jurisdiction, issues of federal law raised by state claims must be substantial to the federal system as a whole, and capable of resolution in federal court without disrupting the federal-state balance approved by Congress. *Id.* at 258. This combination of factors, however, will, very rarely, if ever, present itself because the backward-looking nature of legal malpractice claims necessarily renders any federal questions "merely

hypothetical," and state courts have an overwhelming interest in regulating lawyers within the state:

> The States . . . have "a special responsibility for maintaining standards among members of the licensed professions." *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447, 460, 98 S.Ct. 1912, 56 L.Ed.2d 444 (1978). Their "interest ... in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been officers of the courts." *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975) (internal quotation marks omitted). We have no reason to suppose that Congress—in establishing exclusive federal jurisdiction over patent cases—meant to bar from state courts state legal malpractice claims simply because they require resolution of a hypothetical patent issue.

Id. at 264. *Gunn* thus confirms that the lower courts here got it wrong. More importantly, it highlights the devastating result of "hypothetical jurisdiction" in this case—usurping from the Pennsylvania state courts a judicial domain over which they have an interest far superior to that of the federal courts.

C. THIS QUESTION OF "HYPOTHETIAL JURSIDICTION" IS AN IMPORTANT FEDERAL ISSUE, AND THIS CASE PRESENTS AN IDEAL OPPORTUNITY FOR THIS COURT TO RESOLVE THE CIRCUIT SPLIT REGARDING THE SCOPE OF *STEEL CO.*

The question of "hypothetical jurisdiction" is an important federal issue of fundamental legal significance concerning the balance between state and federal power. When federal courts exceed the bounds of their judicial authority, it harms the interests of the state courts, which are deprived of judicial authority, and harms state court litigants, like Mr. Waleski, who cannot pursue their state law claims against their same state defendants. "Hypothetical jurisdiction" also harms the federal judiciary's legitimacy because it leaves future litigants to grapple with difficult jurisdictional questions of first impression.

An article published in the Harvard Journal of Law and Public Policy examining *Steel Co.* and its progeny suggests that the reason this Court has not yet addressed the lower courts' misapplication of *Steel Co.* is because "[t]here is little incentive for a losing plaintiff to appeal the issue, as prevailing will only shift dismissal from one on the merits to one on jurisdictional grounds." Brian A. Kulp, *Jurisdictional Avoidance: Rectifying the Lower Courts' Misapplication of Steel Co.*, 44 Harv. J.L. & Pub. Pol'y 374, 398-40 (2021). Thus, it posits that the issue will make it before this Court only where a case has:

> the coincidence of: (1) a merits issue of sufficient import to attract the Court's attention; (2)

> a lower court that despite the import of the issue is willing to skip the jurisdictional inquiry after finding the merits so clear as to be "foreordained" by its own precedent; (3) a "difficult and perhaps close" jurisdictional question which ultimately falls on the side of jurisdiction; and (4) a Supreme Court willing to confront an issue unnecessary to the resolution of the case.

Id. at 398-99.

This case presents the very opportunity to address the issue and potential contours of "hypothetical" jurisdiction. The Second Circuit's practice of permitting courts to simply assume jurisdiction, instead of actually answering difficult jurisdictional questions, should end for the very same reason that the Respondents here did everything in their power to get this case out of the Luzerne County Pennsylvania Court of Common Pleas and into a New York bankruptcy court. Mr. Waleski believes that the Pennsylvania state court will provide him (and the 4,300 other injured families) a result different from that obtained in the bankruptcy court. So, while other litigants may choose to suffer in silence as their state law remedies are taken by a federal court unwilling to perform the gate-keeping function established at the founding of the Republic, Mr. Waleski has the case, the incentive and the duty to the class members for whom he speaks to press the issue and seek redress from this Court. This case is thus an ideal vehicle for this Court to resolve the circuit split over the permissibility of "hypothetical jurisdiction," and to clarify whether, after *Steel Co.*, the federal courts may assume "statutory" jurisdiction, as the Second Circuit

did here, and make rulings on state law claims between residents of the same state.

CONCLUSION

For all the foregoing reasons, Mr. Waleski's petition for a writ of certiorari should granted.

Respectfully submitted,

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APPENDIX

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APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, FILED NOVEMBER 8, 2022

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 20-3949-bk

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING TO A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 8th day of November, two thousand twenty-two.

Appendix A

PRESENT:

RICHARD C. WESLEY,
RICHARD J. SULLIVAN,
Circuit Judges,
BRIAN M. COGAN,
District Judge.

IN RE: TRONOX INCORPORATED,

Debtor.

STANLEY WALESKI, ON HIS OWN BEHALF AND ON BEHALF OF MORE THAN 4,300 SIMILARLY SITUATED CLASS MEMBERS,

Plaintiff-Appellant,

v.

MONTGOMERY, MCCRACKEN, WALKER & RHOADS, LLP, NATALIE D. RAMSEY, LEONARD A. BUSBY,

Defendants-Appellees.

Appeal from an order of the United States District Court for the Southern District of New York (Alvin K. Hellerstein, *Judge*).

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* Judge Brian M. Cogan, of the United States District Court for the Eastern District of New York, sitting by designation.

Appendix A

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED**.

Stanley Waleski appeals from the district court's summary affirmance of orders of the bankruptcy court (Wiles, *Bankr. J.*) that (1) denied Waleski's motion to remand to state court for lack of federal bankruptcy jurisdiction under 28 U.S.C. § 1334(b); and (2) dismissed, as untimely under Pennsylvania state law, his legal malpractice claims against Montgomery, McCracken, Walker & Rhoads, LLP and two of its lawyers, Natalie D. Ramsey and Leonard A. Busby (collectively, "MMWR"), who had represented him as lead plaintiff for a putative class (the "Avoca Plaintiffs") in the underlying bankruptcy proceedings. We assume the parties' familiarity with the underlying facts, procedural history of the case, and issues on appeal.

"We exercise plenary review over a district court's affirmance of a bankruptcy court's decision, reviewing de novo the bankruptcy court's conclusions of law, and reviewing its findings of fact for clear error." *In re Lehman Bros., Inc.*, 808 F.3d 942, 946 (2d Cir. 2015) (internal quotation marks omitted). Thus, we review de novo the bankruptcy court's determination that subject-matter jurisdiction exists, *In re Motors Liquidation Co.*, 829 F.3d 135, 152 (2d Cir. 2016), while construing the removal statute strictly and resolving all doubts in favor of remand, *Purdue Pharma L.P. v. Kentucky*, 704 F.3d 208, 220 (2d Cir. 2013). We also review de novo the bankruptcy court's interpretation and application of a statute of limitations,

and its ultimate dismissal of a claim as untimely, *City of Pontiac Gen. Emps' Ret. Sys. v. MBIA, Inc.*, 637 F.3d 169, 173 (2d Cir. 2011), while reviewing for clear error the factual findings underlying its tolling analysis, *Phillips v. Generations Fam. Health Ctr.*, 723 F.3d 144, 149 (2d Cir. 2013). "[I]n determining whether a suit is timely brought," we "refer to the statute of limitations of the forum state." *Muto v. CBS Corp.*, 668 F.3d 53, 57 (2d Cir. 2012) (citation omitted).

The jurisdictional question in this case presents a matter of first impression in our Circuit. We are asked to determine whether Waleski's state-law legal malpractice suit against his former bankruptcy attorneys — where the underlying bankruptcy proceeding has already been terminated, the attorneys were not bankruptcy-court-appointed, and Waleski seeks damages directly from the attorneys rather than from the estate — falls within the federal bankruptcy courts' "arising in" jurisdiction under 28 U.S.C. §§ 1334(b) and 157(a). Given that "the meaning of the statutory language 'arising in'" is less than "clear," *Baker v. Simpson*, 613 F.3d 346, 351 (2d Cir. 2010); *accord, e.g., In re Wood*, 825 F.2d 90, 97 (5th Cir. 1987) (observing same), and that the Supreme Court has provided scant guidance in what is typically a highly fact-specific inquiry, this jurisdictional question turns out to be a rather difficult one.

But under our caselaw, "where a question of statutory (non-Article III) jurisdiction is complex and the claim fails on other more obvious grounds," we may "assume hypothetical jurisdiction in order to dismiss on those

obvious grounds." *Miller v. Metro. Life Ins. Co.*, 979 F.3d 118, 123 (2d Cir. 2020). Indeed, "doing so is particularly appropriate where" — as here — "we are satisfied that we have Article III jurisdiction," "the [statutory] jurisdictional issue is both novel and arguably complex," and the lower court rested its dismissal on a threshold legal determination that the claim at issue "is plainly time-barred." *Id.* at 123-24 (internal quotation marks and alteration omitted). We therefore turn to the merits of Waleski's contention that the bankruptcy court erred in dismissing his legal malpractice claims against MMWR as untimely under Pennsylvania's two-year statute of limitations for tort claims. *See* 42 Pa. Cons. Stat. § 5524. Waleski does not dispute that Pennsylvania law supplies the statute of limitations applicable to his claims. Nor does he dispute that he commenced this action at least two years after his claims accrued. *See id.* § 5502(a) (providing that under Pennsylvania law, limitations periods are computed from the time the cause of action accrues). Rather, he argues that his claims were subject to Pennsylvania's four-year statute of limitations for contract claims, *see id.* § 5525, as opposed to the two-year statute of limitations for tort claims, *see id.* § 5524. We disagree.

Under Pennsylvania law, legal malpractice claims may be pleaded on a theory of either contract or tort liability. *See ATG Tr. Co. v. Schlichtmann*, 314 F. Supp. 3d 718, 722-23 (E.D. Pa. 2018). A plaintiff pursuing a legal malpractice claim under a breach-of-contract theory must establish: "(1) the existence of a contract, including its essential terms; (2) a breach of a duty imposed by the contract; and (3) resultant damages." *ASTech Int'l, LLC v. Husick*, 676

F. Supp. 2d 389, 400 (E.D. Pa. 2009) (quoting *CoreStates Bank, N.A. v. Cutillo*, 1999 PA Super 14, 723 A.2d 1053, 1058 (Pa. Super. 1999)). In contrast, a plaintiff pursuing a legal malpractice claim under a theory of tortious negligence must establish: (1) "[t]he employment of the attorney or other basis for duty"; (2) "[t]he failure of the attorney to exercise ordinary skill and knowledge"; and (3) "[t]hat such failure was the proximate cause of damage to the plaintiff." *Bailey v. Tucker*, 533 Pa. 237, 246, 621 A.2d 108 (1993).

Pennsylvania state courts employ the "gist-of-the-action" test to determine whether a legal malpractice claim sounds in contract or tort. *See Bruno v. Erie Ins. Co.*, 630 Pa. 79, 99-115, 106 A.3d 48 (2014). Under this test, "the nature of the duty alleged to have been breached, as established by the underlying averments supporting the claim in a plaintiff's complaint," is the "determinative factor." *Id.* at 111-12. "If the facts of a particular claim establish that the duty breached is one created by the parties by the terms of their contract — i.e., a specific promise to do something that a party would not ordinarily have been obligated to do but for the existence of the contract — then the claim is to be viewed as one for breach of contract." *Id.* at 112. "If, however, the facts establish that the claim involves the defendant's violation of a broader social duty" that "exists regardless of the contract, then it must be regarded as a tort." *Id.* But the mere fact that "a cause of action between two parties to a contract is based on the actions of the defendant undertaken *while performing his contractual duties*" does not mean that the action will be deemed "one for

breach of contract." *Id.* at 103 (emphasis added). Where a claim alleges negligence in the performance of a duty created by a contract — rather than a failure to perform the contractual duty altogether — then the claim sounds in tort. *See id.* at 114-15.

Various courts have applied the "gist-of-the-action" doctrine to legal malpractice claims and found that they sound in tort, despite the existence of contracts between the plaintiffs and defendants. *See, e.g., N.Y. Cent. Mut. Ins. Co. v. Edelstein*, 637 F. App'x 70, 72-74 (3d Cir. 2016); *Philidor Rx Servs. LLC v. Polsinelli PC*, 552 F. Supp. 3d 506, 515 (E.D. Pa. 2021). "Since *Bruno*, Pennsylvania courts have routinely applied the gist[-]of[-]the[-]action doctrine to legal malpractice actions and dismissed claims [nominally] brought under contract law that actually are based on failure of the defendants to abide by the relevant professional standard of care." *Juday v. Sadaka*, No. 19-cv-1643, 2019 U.S. Dist. LEXIS 148171, 2019 WL 4139089, at *5 (E.D. Pa. Aug. 30, 2019) (internal quotation marks omitted).

Here, Waleski's legal malpractice claims clearly sound in tort under the "gist-of-the-action" doctrine. The acts and omissions he alleges constitute negligence in the performance of MMWR's duties under the Contingent Fee Agreement governing its representation of the Avoca Plaintiffs — not a failure to perform those duties outright. Waleski's claims are based upon the following acts or omissions allegedly committed by MMWR: (1) withdrawing from representation before the parties settled the fraudulent-transfer litigation that ultimately

determined the size of the Trust res; (2) not designing the Trust in a way that would better protect the Avoca Plaintiffs' interests; (3) filing Proofs of Claim on behalf of the Avoca Plaintiffs in an "unknown" dollar amount; and (4) representing Michael E. Carroll (one of the Avoca Plaintiffs) individually in his capacity as a member of the Creditors' Committee while simultaneously representing the Avoca Plaintiffs as a putative class. But Waleski has failed to identify any specific provision of the Contingent Fee Agreement that creates any obligation MMWR purportedly breached by the acts of which he complains. Indeed, the Contingent Fee Agreement mainly addresses how MMWR would be paid.

The only part of the Contingent Fee Agreement in which MMWR adopted any contract-specific responsibilities toward the Avoca Plaintiffs provided that

> MMWR will, in a manner to be mutually agreed with PLG [the Avoca Plaintiffs' counsel in an earlier proceeding], represent the interests of these same plaintiffs in the bankruptcy proceeding of Tronox . . . . MMWR shall proceed in the Tronox Bankruptcy in such manner as PLG and MMWR shall both agree. . . . MMWR shall also assist PLG in the Avoca Litigation in such manner as PLG and MMWR shall both agree.

J. App'x at 51. In his Amended Complaint, Waleski did not rely on any specific language from the Contingent Fee Agreement. Instead, he emphasized that through that

agreement, "MMWR contractually agreed to represent the Avoca Plaintiffs as creditors in the Tronox Bankruptcy case." *Id.* at 336. Although Waleski's operative complaint referred to general "legal and ethical duties in the Tronox Bankruptcy case" that MMWR owed "strictly to the Avoca Plaintiffs" and mentioned that "MMWR was contractually obligated to file, advocate, protect[,] and maximize" the Avoca Plaintiffs' claims, he points to no section in the Contingent Fee Agreement (or any other agreement) that imposes a specific duty that MMWR breached. *Id.* at 337, 352.

In sum, since Waleski's complaint alleged negligence in MMWR's performance under the contract — but not that MMWR failed to follow specific instructions or breached a specific provision of the underlying contract — his claim sounds in tort. Therefore, the bankruptcy court properly dismissed his complaint as time-barred under Pennsylvania's two-year statute of limitations for tort claims. *See* 42 Pa. Cons. Stat. § 5524.

For the foregoing reasons, we **AFFIRM** the judgment of the district court.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court

/s/ Catherine O'Hagan Wolfe

APPENDIX B — EXCERPTS OF TRANSCRIPT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, FILED OCTOBER 27, 2020

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

2 cv 2128 (AKH)

New York, N.Y.
October 27, 2020
2:30 p.m.

In RE: TRONOX INCORPORATED

Before:

HON. ALVIN K. HELLERSTEIN,
District Judge

* * *

THE COURT: The involvement, it seems to me, of the Montgomery law firm in a bankruptcy in creating the trust distribution plan or participating in the creation of the trust distribution plan which provided for a recovery to non-asbestos tort claimants was an activity in the bankruptcy.

Insofar as plaintiff is challenging that, he's challenging an activity in the bankruptcy court and the integrity of the process of the bankruptcy court.

It's very hard to discern just what it is that the plaintiff is complaining about because there is no indication that what the plaintiffs filed claims about was inappropriate or how they suffered damage in any relationship was inappropriate.

But to focus, what is complained about is the Montgomery firm's activity in the bankruptcy court and the integrity of those proceedings in the bankruptcy court and to [26]what extent you can create a priority for one group of tort claimants over a similarly situated group of tort claimants.

Arranging priorities among claimants is one of the key functions of a bankruptcy court, and the complaint of the plaintiff pleads right into those functions. That's my observation.

* * *

[31]THE COURT: My review is whether or not there was an abuse of discretion by the bankruptcy judge. Plaintiff has the burden to prove, the burden to persuade, that permissive abstention is appropriate. And I find that plaintiff has failed in that burden.

There is a 12-factor test that is used in this field to decide whether or not there should or should not be

permissive abstention. The first and most important of these factors is the effect or lack thereof on the efficient administration of the estate if a court recommends abstention.

Well, of course, this estate is closed and everything is in the past. But the conduct of attorneys in the bankruptcy court measured by precedence of what happens in various proceedings after that is very important because there must be [32]an integrity of the bankruptcy proceedings. And that integrity, if it's challenged, should be in the bankruptcy court itself.

What an attorney does or does not do in the bankruptcy court, how the attorney conducts himself in the bankruptcy court, what obligations there are to clients and to the overall distribution of the bankruptcy court are issues that should be measured by the bankruptcy judge and not later on by a state court judge.

So I think this first factor, the effect or lack thereof on the efficient administration of a bankrupt estate, is a very powerful one against abstention.

The second factor is the extent to which state law issues predominate over bankruptcy issues. Well, the main issue here is the duty, the duty owed by the attorneys and whether or not the attorneys breached that duty. And where the breaches of the duty are based on decisions made in the bankruptcy court itself, it cannot be said that state law issues predominate over bankruptcy issues.

The third consideration is the difficulty or unsettled nature of the applicable state law. I think we're dealing with straightforward state laws involved and whether this action sounds in court or contract and with regard to the statute of limitations. But that's not what we're dealing with with duty. There is no state law that can predominate over duties in the [33]bankruptcy court.

The fourth is the presence of a related proceeding commenced in state court or other non-bankruptcy court. While this removal was because the state court action for malpractice threatened the integrity of what occurred in the bankruptcy court, again, the allegations of wrongdoing by the attorney were based entirely on decisions made by the attorney and proceedings conducted by the attorney in the bankruptcy court.

The fifth consideration is that jurisdictional basis, if any, other than 28 U.S. Code, Section 1334. 1334(c)(2) and (c)(1) deal with abstentions. There is no other statute that I know of that's involved.

Sixth is the degree of relatedness or remoteness of the proceedings to the main bankruptcy case, and that's really repetitive of what he said before.

Seventh is the substance rather than form of an asserted core proceeding. We're not involved with a core proceeding.

Eight is the feasibility of severing state law claims and core bankruptcy matters to allow judgments to be entered

in state court with enforcement left to the bankruptcy court. We're not involved with that here.

The burden of the court's docket is not involved. The likelihood that the commencement of the proceedings in a bankruptcy court involves forum shopping is not involved here.

[34]Eleven is the existence of a right to a jury trial. There can be a jury trial in a bankruptcy court. It's not usual, but it can be requested, and it can be conducted in a district court with all of the constitutional rights and obligations involving jury trials.

And 12 is the presence in the proceeding of non-debtor parties or involved with battles between creditors in the bankruptcy court fighting for priority or proportionality in relationship to bankrupt assets.

So all these factors, to the extent they're relevant, favor retention of the jurisdiction in the bankruptcy court.

Before we go on to discuss the proprietary of the dismissal of the claims, I think we have now concluded the review of Judge Wiles' decision of July 18, 2019.

I measure what Judge Wiles has done by a number of different considerations. First, to the extent that this is done in response to a Rule 12(b)(6) motion, my review is de novo.

The denial of a remand action is also reviewed de novo. The abstention jurisdictions in connection with

the mandatory jurisdiction is a matter of law and begin de novo. And the abstention decision, as I said before, is reviewed -- the permissive abstention decision is reviewed for abuse of discretion.

I've given the essential facts before. After the [35] conclusion of the bankruptcy malpractice lawsuit is brought in the court of common pleas of Luzerne County in Pennsylvania, removed to the United States District Court of the Middle District of Pennsylvania, and transferred to the bankruptcy court of the Southern District of New York and Judge Wiles' decision of July 18, 2019, his decision upholding its jurisdiction and denying abstention.

I reviewed this decision thoroughly. I think he's exactly right on his findings of fact and conclusions of law. For the reasons we've discussed in a discussion so far, it seems to me -- and I hold -- that the duties that are criticized in the allegations in the state court are precisely those duties that must be regulated by a bankruptcy judge.

That is to say, what is the conduct of a lawyer representing creditors in relationship to the limited assets of a bankruptcy court and how to divide them in an equitable manner to similarly situated claimants.

The bankruptcy court held, first, that there had to be a plan that divided the group's creditors into four. The Montgomery law firm participated in the drafting of that plan as is appropriate.

It got its place in the administration of the estate by means of the fact that Mr. Carroll, one of the members of

the Avoca plaintiffs, became a member of the creditors' committee.

[36]And there is no allegation -- although there are allegations of conflict, the only allegation of conflict is that the class did not get as much as it wanted to get. But that's the very nature of bankruptcy. Creditors don't get as much as they want to get. They have to get a proportional and equitable share.

And the Montgomery law firm's conduct in trying to figure out and help the bankruptcy court in figuring out what was the amount that was to go to non-asbestos tort claimants was a role that he took on by reason of his engagement by the Powell Law Group and in relation to the bankruptcy court. And since his conduct in the bankruptcy court is what is challenged, this is clearly a claim arising in the bankruptcy court.

I so hold, and I adopt the reasoning and conclusions and findings of the bankruptcy judge.

I also would add that as to the allegation that the Montgomery firm finished its services, a reading of the contingent fee agreement gives it the right to decide to what extent it will continue to act.

When the confirmation plan was agreed to and issued by the bankruptcy court and all that was left at that point was to prosecute a fraudulent conveyance lawsuit, the Montgomery firm terminated its services.

And it was in accordance with an agreement that it [37]would terminate its service, and there was no objection by the Powell Law Group representing the Avoca plaintiffs in the state court and the firm that hired the Montgomery firm in the first instance.

Thereafter, the Avoca plaintiffs were represented by extremely competent counsel, Brown Rudnick and the Weitz & Luxenberg law firm. The decision of the Court In Re Tronox indicates how vigorous the advocacy of Brown Rudnick was. And there can't be any complaint against the Montgomery law firm in relationship to what happened in that litigation because it was no longer acting, and rightly so.

* * *

[44]THE COURT: The *Bruno v. Erie* was an interesting case because of the history that the court went into in deciding this decision. [45]The case arose on an interlocutory appeal with two questions, whether a negligence claim brought against an insurer by its insured for alleged statements made by the insurer's adjustment and an opinion of an engineer was barred by the gist of the action doctrine.

And a second one, whether the provisions of certain sections of the Rules of Civil Procedure -- it's a procedural point that we needn't detain ourselves.

But the Court made a distinction that when a contract with a professional for services states what has to be done,

the obligation of carrying it out in a professional manner is a social obligation in tort.

So if the service provider didn't do what he was asked to do, he breaches. But if he does it in an incompetent manner, the damages are measured in tort and everything about it is measured in tort.

I found this history fascinating. It starts at page 34. It's hard to get the numbers right, but the Lexis number is 34. And it goes back to early English common law to show how, for various purposes and for various reasons, were it to become necessary for the court to decide whether the action was a tort action or an action on the case or a contract action called an inaction on a subset could be important in terms of which court handled it, what statute of limitations applied, what the rule of damages was, and so on.

[46]This, the court shows, was carried on into Pennsylvania law, received by Pennsylvania law, and was established by *Bruno v. Erie*. Although *Bruno v. Erie* was an insurance case and here we're involved with an illegal malpractice case, the principles are exactly the same.

I hold the bankruptcy court correctly held that the Pennsylvania law would be the gist of the action. The gist of the action was that this was measured by damages in tort, a claim of malpractice, not for what the Montgomery firm was supposed to do but didn't do but that it acted improperly and not according to the standard that should be applied to lawyers' professional services. So since the

two-year statute of limitations would apply to a tort action, the court dismissed the action since it was brought too late.

It also I think properly decided that the discovery rule does not apply to a contract action. A contract action is measured when there was a breach and more than four years elapsed between the termination of services by the Montgomery firm and the bringing of the lawsuit.

So I find the decision below a correct decision. This is a February 21, 2020, decision. I affirm that as well.

So these will be my findings of fact and conclusions of law. We'll have a summary order filed tomorrow, and this will be the final decision of the Court. Thank you, gentlemen. Good-bye.

* * * *

APPENDIX C — MEMORANDUM DECISION OF THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, FILED FEBRUARY 21, 2020

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

Chapter 11
Case No. 09-10156 (MEW)
Adv. Pro. No. 19-01087 (MEW)

IN RE TRONOX INCORPORATED, *et al.*,

Debtor.

STANLEY WALESKI, ON HIS OWN BEHALF AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Plaintiff,

v.

MONTGOMERY, MCCRACKEN, WALKER & RHOADS, LLP, *et al.*,

Defendants.

February 21, 2020, Decided
February 21, 2020, Entered

Appendix C

MEMORANDUM DECISION DISMISSING AMENDED COMPLAINT AS BARRED BY THE STATUTE OF LIMITATIONS

MICHAEL E. WILES
UNITED STATES BANKRUPTCY JUDGE

Plaintiff Stanley Waleski, (the "Plaintiff") has filed suit on his own behalf and on behalf of a purported class of persons (the "Avoca Plaintiffs") who claim they were injured by exposures to chemicals that were released from a plant in Avoca, Pennsylvania. Plaintiff alleges that Montgomery, McCracken, Walker & Rhoads, LLP ("MMWR") committed legal malpractice in its representation of Mr. Waleski and the Avoca Plaintiffs during the bankruptcy cases of Tronox Incorporated and its affiliates ("Tronox" or "Tronox Debtors") and that as a result the Avoca Plaintiffs' recoveries were less than they should have been. Two individual defendants were named in the original Complaint but have since been dropped from the action.

The case was filed in the Court of Common Pleas in Luzerne County, Pennsylvania. It was removed from the Pennsylvania state court to the District Court for Middle District of Pennsylvania. Plaintiff filed a motion to remand the case to the state court, and the defendants filed a motion to transfer the case to the Southern District of New York. The Pennsylvania District Court granted the transfer motion but declined to decide the remand motion so that it could instead be resolved by this Court following the transfer. This Court later issued its

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Memorandum Decision Denying Plaintiffs' Motion for Remand or Abstention, dated July 18, 2019 [ECF No. 16]. On that same day the Court entered an Order that denied Plaintiff's motion for remand and/or abstention.

Prior to the transfer of the case the defendants had filed a motion to dismiss the complaint for failure to state a cause of action. Among the arguments asserted by the defendants was that Plaintiff's claims are barred by the applicable statute of limitations. The orders entered by the District Court in Pennsylvania had stayed further action on the motion to dismiss; after the transfer the parties did not take further action to obtain a hearing on the motion, and the prior stay remained in place. However, Plaintiff filed a separate motion seeking permission to file an amended complaint. MMWR opposed the motion to amend, arguing that an amendment would be futile because the proposed amended complaint could not survive a motion to dismiss. In its opposition papers MMWR reiterated its argument that the claims are time-barred.

At a hearing on December 5, 2019, the parties agreed that Pennsylvania statutes of limitation govern the asserted claims. They also agreed that the statute of limitations for the assertion of a negligence claim in Pennsylvania is two years and that the statute of limitations for the assertion of a breach of contract claim is four years. *See* 42 Pa. Cons. Stat. §§ 5524(7), 5525(a)(8). Plaintiff agreed that if the tort statute of limitations governs the claims then this action is untimely and must be dismissed. However, Plaintiff argued that the four-year contractual statute of limitations applies and that the

action was filed less than four years after the contractual claims accrued. MMWR argued that under Pennsylvania's "gist of the action" rule the claims should be treated as tort claims (not contract claims) and that the action was untimely under any theory because the original complaint was filed more than four years after any claims accrued.

At the conclusion of the December 5 hearing, the Court ruled that it appeared that Plaintiff was entitled to amend the original complaint as a matter of right and that the proposed amended complaint (the "Amended Complaint") therefore would be deemed to have been filed.[1] The Court also ruled that the pending motion to dismiss would be deemed to apply to the Amended Complaint and that the Court would first consider the statute of limitations defenses that had been asserted, without prejudice to the parties' rights (after a decision on the statute of limitations issues) to file further briefs to the extent other issues needed to be addressed. The Court allowed the parties to file supplemental briefs on the following issues:

(1) the applicability of the "gist of the action" doctrine to Plaintiff's claims, and the applicability of certain decisions on that subject that the Court had identified during the Hearing; and

(2) if a four-year contractual limitations period applies, the point at which the contractual claims accrued.

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1. The Amended Complaint dropped the individual defendants from the action.

Thereafter, the parties submitted supplemental briefs on these issues.

JURISDICTION

As described above, the Court has previously ruled that the Court has jurisdiction under 28 U.S.C. § 1334 because Plaintiff's claims "arose in" the Tronox bankruptcy cases. The Court also held that mandatory abstention and permissive abstention theories did not call for the Court to decline to hear the case. Plaintiff has reserved his objections to those rulings but has not otherwise argued that the Court lacks Constitutional or statutory power to adjudicate this matter.

APPLICABLE PLEADING STANDARDS

In reviewing a motion to dismiss a court must accept the factual allegations of the complaint as true and draw all reasonable inferences in a plaintiff's favor. *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555-56, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007); *E.E.O.C. v. Staten Island Sav. Bank*, 207 F.3d 144, 148 (2d Cir. 2000). However, the factual allegations in a complaint must be supported by more than mere conclusory statements. *Twombly*, 550 U.S. at 555. The allegations must be sufficient "to raise a right to relief above the speculative level" and provide more than a "formulaic recitation of the elements of a cause of action." *Id.* (citations omitted). "[O]nly a complaint that states a plausible claim for relief survives a motion to dismiss." *Iqbal*, 556 U.S. at 679 (citing *Twombly*, 550 U.S. at 556).

"A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 678 (citing *Twombly*, 550 U.S. at 556). The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct," a complaint is insufficient under Fed. R. Civ. P. 8(a) because it has merely "alleged" but not "show[n] . . . that the pleader is entitled to relief." *Id.* at 679; *see also id.* at 682 (allegations are rejected where there is an "obvious alternative explanation" for the conduct alleged that is more "likely") (internal quotation marks and citation omitted).

The Amended Complaint refers to a Contingent Fee Agreement that MMWR signed (a copy of which was attached to the original complaint and to the supplemental papers that MMWR filed) and to various other documents.[2] It is proper for the Court to consider those documents as part of the Amended Complaint in ruling on the motion to dismiss. *See Grant v. County of Erie*, 542 Fed. Appx. 21, 23 (2d Cir. 2013) ("In its review [of a Rule 12(b)(6) motion to dismiss], the court is entitled to consider facts alleged in the complaint and documents attached to it or incorporated in it by reference, documents "integral" to

2. Although the Contingent Fee Arrangement purportedly had, as an exhibit, a copy of a separate contingent fee arrangement in effect between the Powell Firm and the Avoca Plaintiffs, that separate fee agreement was not provided to the Court.

the complaint and relied upon in it, and facts of which judicial notice may properly be taken under Rule 201 of the Federal Rules of Evidence."); *Rothman v. Gregor*, 220 F.3d 81, 88-89 (2d. Cir. 2000) (noting that it is proper to consider documents that are quoted in or attached to the complaint or incorporated in it by reference, or that plaintiffs either possessed or knew about and upon which they relied in bringing suit); *I. Meyer Pincus & Assocs., P.C. v. Oppenheimer & Co.*, 936 F.2d 759, 762 (2d Cir. 1991) (noting that it is proper to consider a document upon which allegations are based, whether or not it is attached to the complaint). In this regard, if an allegation is belied by the terms of the documents, the documents are controlling. *Id.; see also Alexander v. Board of Education of City of New York*, 648 Fed. Appx. 118, 2016 WL 2610009 (2d Cir. 2016) (summary order) (dismissing complaint where documents contradicted allegations).

THE FACTS ALLEGED IN THE AMENDED COMPLAINT

The Avoca Plaintiffs are 4362 individuals who claim they were poisoned or sickened by releases of toxic and carcinogenic chemicals, including creosote, from a plant in Avoca, Pennsylvania. Amended Complaint ¶ 1. They hired the Powell Law Group, P.C. (the "Powell Firm") during the early 2000s to pursue personal injury claims against Kerr-McGee Corporation and its affiliates, which had owned and operated the Avoca plant. *Id.* ¶ 35. Thereafter, certain Kerr-McGee entities transferred assets to a newly-formed company that the parties have referred to as "New Kerr-McGee," leaving certain assets (and tort

liabilities) with the "Old" Kerr-McGee companies. *Id.* ¶ 44. The "Old" Kerr-McGee entities, now renamed as Tronox, Inc. and its affiliates, later filed bankruptcy petitions in this Court on January 12, 2009, which stayed the pending personal injury cases.

After the bankruptcy filing, the Powell Firm contracted with MMWR to represent the Avoca Plaintiffs during the Tronox bankruptcy cases. To that end the Powell Firm entered into a Contingent Fee Agreement with MMWR, dated January 27, 2009. *Id.* ¶¶ 35, 48. The Contingent Fee Agreement provided that MMWR "will, in a manner to be mutually agreed with [the Powell Firm]," represent the interests of the Avoca Plaintiffs in the Tronox bankruptcy proceeding, and "shall proceed in the Tronox Bankruptcy in such manner as [the Powell Firm] and [MMWR] shall both agree." [ECF Dkt. No. 1-2 at p. 29 of 43].

On February 5, 2009, MMWR filed a motion seeking permission to represent one of the Avoca Plaintiffs, Michael E. Carroll, in his capacity as a member of the official committee of unsecured creditors in the Tronox cases. *Id.* 109. Plaintiff alleges that Mr. Carroll took on fiduciary duties as a member of the Creditors' Committee, and that MMWR's representation of Mr. Carroll gave rise to a conflict of interest with the Avoca Plaintiffs that MMWR never explained and for which MMWR never obtained a waiver. *Id.* ¶¶ 110-113.

On May 28, 2009 the Court established August 12, 2009 as the deadline, or "bar date," for the filing of

creditor claims in the Tronox cases. *Id.* ¶ 72. MMWR then prepared and filed proofs of claim on behalf of the Avoca Plaintiffs. *Id.* ¶ 73. Plaintiff alleges that MMWR should have filed claims on behalf of the Avoca Plaintiffs in the aggregate amount of more than $5.3 billion, but that MMWR did not do so. *Id.* ¶¶ 74-81. Instead, MMWR overruled concerns expressed by other counsel and filed the claims in "unknown" amounts. *Id.* ¶¶ 83-86.

At some unspecified time during the Tronox cases, but prior to the end of 2010, MMWR undertook on behalf of Mr. Carroll and/or the Creditors' Committee to draft a Tort Claims Trust Agreement that would govern the administration of a personal injury claimants' trust that would be established under a bankruptcy plan and that would distribute funds to personal injury claimants. *Id.* ¶ 114. Plaintiff alleges that this, too, represented a conflict of interest for which no disclosure was provided and no waiver obtained. *Id.* ¶ 115. Plaintiff further alleges that the trust documents should have provided separate treatment for the allowed claims of the Avoca Plaintiffs (rather than combining the Avoca Plaintiffs with other claimants who had asserted similar claims), and also should have included priority payment rights, objection rights and other terms that would have maximized the recoveries of the Avoca Plaintiffs, but that MMWR failed to include such terms in the documents it prepared. *Id.* ¶¶ 116-121.

In the late fall of 2010, MMWR allegedly instructed the Avoca Plaintiffs' other counsel to "fit all of the Avoca Plaintiffs' claims into a payout matrix with allocations for each disease category so that the claims would total

$852,476,000, which was an artificial, understated, unexplained and targeted amount." *Id.* ¶ 103.

The plan of reorganization for the Tronox bankruptcy cases was confirmed and entered on the docket on November 30, 2010. *Id.* ¶ 122. The Tronox reorganization plan established the Tronox Tort Claims Trust (the "Trust") to handle the administration and payment of tort claims against the Tronox Debtors. The reorganization plan and the Trust Agreement establish categories into which allowed tort claims are to be divided. The plan provided that the Trust would be funded with an initial cash payment of $12.5 million, plus the right to 12% of the proceeds of a certain fraudulent conveyance litigation against New Kerr-McGee, plus certain insurance assets. The Avoca Plaintiffs' claims, and the claims of other victims of creosote exposure (including claims related to a plant in Mississippi) were designated as Non-Asbestos Toxic Exposure Claims, and 81.25% of the Trust's share of any recoveries from the fraudulent transfer litigation were to be used to make payments to holder of claims in that category. *See Memorandum Opinion as to Tort Claims Trustee's Motion for Instructions*, dated June 17, 2015 (Case No. 09-10156, ECF No. 3046).

The Tronox Debtors' Plan became effective on February 14, 2011. *Id.* ¶ 122. The next day, MMWR terminated its representation of the Avoca Plaintiffs, "without notice and without the consent or agreement of the Avoca Plaintiffs or their state-court attorneys." *Id.* at 123.

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The fraudulent transfer litigation against New Kerr-McGee provided the biggest potential source of funding for the Trust. On December 12, 2013, after a lengthy trial, the Bankruptcy Court issued a decision concluding there was liability on the fraudulent conveyance claim. The Court reserved decision on the amount of damages pending further proceedings, while at the same time indicating that liability could be between $5.1 and $14.1 billion. *Id.* ¶ 128.

On January 15, 2014, the trustee of the Trust issued a report showing claims to be paid by the Trust. The report showed that the Avoca Plaintiff's claims had been allowed in the aggregate amount of approximately $949 million. *Id.* ¶ 133.

Several months later, on April 2, 2014, the parties to the fraudulent transfer litigation filed a motion seeking approval of a settlement agreement, under which all of the fraudulent transfer claims would be settled in exchange for a payment of $5.15 billion. *Id.* ¶ 128. On May 30, 2020, the Bankruptcy Court issued *Findings of Fact and Conclusions of Law on Joint Motion for a Report and Recommendation to the District Court Recommending Approval of Settlement Agreement Resolving the Adversary Proceeding and Issuance of an Injunction in Support thereof.* (Case No. 09-10156, ECF No. 3002). On notice to the parties, the Bankruptcy Court extended until July 7, 2014 the time to serve and file written objections to the report and recommendations. Amended Complaint ¶ 130. On November 10, 2014 the United States District Court for the Southern District of New York adopted the

Bankruptcy Court's findings of fact and conclusions of law and approved the settlement. *Id.* ¶ 131. A judgement was thereafter entered. *Id.* ¶ 132.

A total of $618 million was ultimately allotted for the satisfaction of Non-Asbestos Toxic Exposure Claims under the Trust. *Id.* ¶ 140. The Avoca Plaintiffs received their pro rata shares (a total of $329,693,120) in compensation for their claims. *Id.* ¶ 142.

PLAINTIFF'S CLAIMS

Plaintiff asserts claims that he characterizes as breach of contract claims "arising from MMWR's action and inactions committed while representing the [Plaintiff]." Amended Complaint at ¶¶ 1, 29. Plaintiff alleges that by filing the Avoca Plaintiffs' collective claims in an "unknown" amount rather than $5.3 billion, MMWR "undervalued and failed to reflect the full value of the claims," resulting in reduced recoveries. *Id.* ¶¶ 80-92, 101, 134-142. Plaintiff further alleges that it was an error and breach of contract to fail to amend the proofs of claim or move to liquidate the claims. *Id.* ¶¶ 93-102. Plaintiff alleges that if the Avoca Plaintiffs' claims had been properly valued when originally filed, or if the filing had been corrected by amendment, or if the claims had been liquidated and fixed by an appropriate motion, the Avoca Plaintiffs' claims would have been approved in the amount of $5.3 billion instead of the "greatly reduced amount of $949 million." *Id.* ¶¶ 124, 148-150. Plaintiff alleges that MMWR "was contractually obligated to file, advocate, protect and maximize the claims of the Avoca Plaintiffs"

in the bankruptcy case and breached this contractual duty. *Id.* ¶¶ 54, 143.

Plaintiff also alleges that MMWR subjected itself to a conflict of interest by representing one of the Avoca Plaintiffs as a member of the Creditors' Committee in the bankruptcy case. *Id.* ¶¶ 107-111. Plaintiff further alleges that MMWR failed to disclose its conflict of interest to the Avoca Plaintiffs or obtain a knowing waiver from them. (*Id.* ¶¶ 112-113). This conflict of interest allegedly was intensified when MMWR drafted the Tort Claims Trust Agreement for the benefit of all tort creditors, "while already contractually obligated to represent the specific and unique interests of the Avoca Plaintiffs as unsecured creditors," and when MMWR failed to draft that document "in a fashion that protected the Avoca Plaintiffs and maximized their recovery in the bankruptcy case." (*Id.* ¶¶ 113-121).

Finally, Plaintiff alleges that MMWR improperly terminated its representation of the Avoca Plaintiffs on February 15, 2011, prior to payment of the bankruptcy claims, without notice or the consent of the Avoca Plaintiffs or the Powell Firm. The Amended Complaint alleges that MMWR left the Avoca Plaintiffs without representation in the bankruptcy proceedings and failed to provide unspecified information that the Avoca Plaintiffs allegedly needed for the continued prosecution of their claims. *Id.* ¶¶ 113, 121-123, 125, 183-184.

Appendix C

DISCUSSION

This action was filed on April 11, 2018. MMWR argues that Plaintiff's claims are in reality tort claims (not breach of contract claims) and that the claims therefore are barred by Pennsylvania's two-year statute of limitations for tort claims. Alternatively, MMWR argues that, even if Plaintiff were entitled to assert breach of contract claims, those claims accrued prior to April 11, 2014, and therefore they are barred by Pennsylvania's four-year statute of limitations for contract claims. I agree with both contentions.

I. The Asserted Claims Are Tort Claims (Not Contract Claims) And Are Time-Barred

It is possible that a party who does business with another party may be entitled to assert claims for breach of contract as well as tort claims. However, there are often instances in the law when parties try to treat a contract claim as though it were a tort claim, or to treat a tort claim as though it were a contract claim, in order to obtain a perceived advantage in terms of the damages that may be awarded, the limitations period that may apply, or for other reasons. Pennsylvania courts use the "gist of the action" doctrine to resolve disputes as to whether a particular claim sounds in tort or in contract. *Bruno v. Erie Ins. Co.*, 630 Pa. 79, 106 A.3d 48, 61 (Pa. 2014). "[M]erely because a cause of action between two parties to a contract is based on the actions of the defendant undertaken while performing his contractual duties, this fact, alone, does not automatically characterize the action

as one for breach of contract." *Id.* at 63. The "nature of the duty alleged to have been breached, as established by the underlying averments supporting the claim in a plaintiff's complaint," is the "determinative factor" in deciding "whether the claim is truly one in tort, or for breach of contract." *Bruno*, 106 A.3d at 68 (Pa. 2014).

Accordingly, the label that a party applies to a claim is not controlling. *Id.* at 68. Instead, the substance of the claim controls, and the court must apply a "duty-based demarcation" to identify the true nature of the claim. *Id.*

> If the facts of a particular claim establish that the duty breached is one created by the parties by the terms of their contract—i.e., a specific promise to do something that a party would not ordinarily have been obligated to do but for the existence of the contract—then the claim is to be viewed as one for breach of contract. If, however, the facts establish that the claim involves the defendant's violation of a broader social duty owed to all individuals, which is imposed by the law of torts and, hence, exists regardless of the contract, then it must be regarded as a tort.

Bruno, 106 A.3d at 69 (citations omitted). Even though work that one party does for another may occur during the existence of a contractual relationship, the substance of the claim (and the nature of the duty that was allegedly breached) determines whether a claim sounds in contract or in tort. As further explained by the *Bruno* court,

> [A] negligence claim based on the actions of a contracting party in performing contractual obligations is not viewed as an action on the underlying contract itself, since it is not founded on the breach of any of the specific executory promises which comprise the contract. Instead, the contract is regarded merely as the vehicle, or mechanism, which established the relationship between the parties, during which the tort of negligence was committed.

Id. at 70; *see also Zell v. Arnold*, 2 Pen. & W. 292, 294, 1830 WL 3261 at *3 (Pa. 1830) (noting that where the gist of action "is not a failure to perform" under the contract but "a failure to perform in a workmanly manner," it is a tort.)

Prior to the *Bruno* decision, some courts had held that malpractice claims could be asserted as breach of contract claims on the theory that professional standards may be treated as implied terms of a retention agreement. *See, e.g., Gorski v. Smith*, 2002 PA Super 334, 812 A.2d 683, 697 (Pa. Super. Ct. 2002). *Gorski* and similar decisions relied on dicta in *Bailey v. Tucker*, 533 Pa. 237, 621 A.2d 108, 115 (Pa. 1993), in which the court stated that "an attorney who agrees for a fee to represent a client is by implication agreeing to provide that client with professional services consistent with those expected of the profession at large." Following the *Bruno* decision, however, courts applying Pennsylvania law have consistently held that the "gist of action doctrine" has to be applied in determining whether a claim alleging negligence in performing legal services is a claim in tort or a claim for breach of contract. They have

also rejected contentions that rules of professional conduct constitute "implied" contract terms, and have consistently held that claims based on alleged violations of professional standards are tort claims rather than contract claims.

In *New York C. Mut. Ins. Co. v. Edelstein*, No. 15-1541, 637 Fed. Appx. 70 (3d Cir., Feb. 1, 2016) (unpublished decision), for example, the Third Circuit Court of Appeals considered a complaint that alleged that attorneys had breached implied contractual terms by failing to perform services in a manner consistent with professional standards. The *Edelstein* court rejected this concept and rejected the outcome reached in *Gorski* and other cases, finding them incompatible with the *Bruno* decision and with the requirement, under *Bruno*, that a contract claim be based on a breach of a "specific" executory promise. 637 Fed. Appx. at 74.

In *Brenco Oil, Inc, v. Blaney*, No. 17-3938, 2017 U.S. Dist. LEXIS 204775, 2017 WL 6367893, at *3-4 (E.D. Pa. Dec. 13, 2017), the United States District Court for the Eastern District of Pennsylvania similarly held that *Bruno* requires that the "gist of the action" doctrine be applied. The underlying complaint in that case asserted a tort claim rather than a contract claim, because the complaint alleged that a firm had been negligent or careless in providing legal services rather than that the firm failed to perform a specific task named in a contract. 2017 U.S. Dist. LEXIS 204775, [WL] at *4. As a result, the defendant was alleged to have breached "a general social duty" not a duty that was created by the contract. *Id.* Courts reached the same conclusions in *Jacoby Donner,*

P.C. v. Aristone Realty Capital, LLC, No. 17-2206, 2018 U.S. Dist. LEXIS 56641, 2018 WL 1609341 (E.D. Pa. Apr. 2, 2018) (dismissing claim alleging breach of contract where the gist of the claim was that the attorney was negligent in performing contractual duties); and *Rinker v. Amori*, No. 15-1293, 2016 U.S. Dist. LEXIS 36712, 2016 WL 1110217, at *7 (M.D. Pa. Mar. 22, 2016) (dismissing malpractice claim that arose from one attorney's alleged negligent performance of his contractual obligations, but continuing breach of contract claim against another attorney that arose from the breach of an explicit agreement or instruction).

Most recently, in *Juday v. Sadaka*, No. 19-1643, 2019 WL 4139089, at *5 (E.D. Pa. Aug. 30, 2019), the court cited to many of the foregoing decisions and noted that "[s]ince *Bruno*, Pennsylvania courts have routinely applied the gist of the action doctrine to legal malpractice actions and dismissed claims that are under contract law but actually are based on failure of the defendants to abide by the relevant standard of care." The court in *Juday* dismissed legal malpractice claims as being barred by the two-year tort statute of limitations for tort actions.

We have found no contrary authority. Plaintiff has complained about MMWR's citation of an unreported and non-precedential decision issued by the Pennsylvania Superior Court in *Seidner v. Finkelman*, 195 A.3d 1048, 2018 Pa. Super. Unpub. LEXIS 3249, *10, 2018 WL 4178147, at *5 (Pa. Super. 2018), which held that claims based on failing "to exercise ordinary skill and knowledge" in performing a certain task or to "do due

diligence" constituted a negligence claim (not a breach of contract claim) that was subject to a two-year tort statute of limitations. Plaintiff argues that the decision in *Seidner* must be ignored by this Court because Pennsylvania court rules provide that a non-precedential decision may not be cited. *See* I.O.P. § 65.37, which derives from Pa. R.A.P. § 126. I note that by their terms the relevant Pennsylvania court rules are only binding on the state courts of Pennsylvania. *See* Pa. R.A.P. § 103 (noting that the scope of the rules concerning appellate procedure govern practice and procedure in certain Pennsylvania state courts). At least one court outside Pennsylvania has cited to the *Seidner* decision as authority for the proper application of Pennsylvania law. *See Etman v. Greater Grace World Outreach, Inc.*, No. 17-473, 2018 U.S. Dist. LEXIS 29017 at *12 (N.D.N.Y. Feb. 22, 2018). It does not matter, however, because *Seidner* is consistent with *Bruno, w*ith the federal court rulings cited above, and with my own interpretation of the relevant authorities. *Seidner* is not critical to my decision, and I would reach the same decision even if *Seidner* were to be ignored.

The prevailing rule under *Bruno* and subsequent decisions is that a purported contract claim that is not based on a specific contractual undertaking, but that instead alleges breaches of professional standards of care that supposedly are incorporated into a contract by implication, is in reality a tort claim and is subject to a two-year statute of limitations.

Plaintiff has argued that the "gist of the action" doctrine is only applicable when someone asserts tort and

contract claims at the same time and that the doctrine does not apply when a plaintiff chooses to characterize claims in only one way. However, there is no logic to that assertion, and no support for it in the case law. It is true that in some of the cited decisions plaintiffs sought to pursue both tort and contract claims, but none of the decisions cited that as a factor that is relevant in any way to the application of the "gist of the action" doctrine. Instead, the doctrine was described as one of general applicability, and at least one of the decisions cited above involved a case where (as here) the plaintiff sought to characterize a legal malpractice claim as a contract claim and did not otherwise seek to pursue a tort claim. *See New York C. Mut. Ins. Co. v. Edelstein*, No. 15-1541, 637 Fed. Appx. 70 (3d Cir., Feb. 1, 2016).

Plaintiff also argues that the "gist of the action" doctrine should not apply to statute of limitations determinations, but once again there is neither logic nor case law support for that proposition. The *Bruno* court stated that the doctrine applies "to resolve other legal questions in which the distinction between the underlying action being a tort or contract claim was dispositive." 106 A.3d at 60. In this case that distinction is dispositive because a breach of contract claim is barred after four years and a tort claim is barred after two years. As noted above, a number of decisions (including *Brenco* and *Juday*) have concluded that *Bruno*, and the "gist of the action" doctrine, control the application of the statutes of limitations, and dictate that the tort statute of limitations (not the contract statute of limitations) should be applied so long as the substance of the claim is that the lawyers

failed to live up to professional standards, rather than that the lawyers breached an explicit contract term.

In this case the only contract cited in the Amended Complaint is the Contingent Fee Agreement between MMWR and the Powell Firm. There is not a single allegation in the Amended Complaint that alleges a breach of a specific undertaking in that contract. Instead, Plaintiff alleges that "[t]he parties' agreement included the implied promise and legal mandate that [MMWR] would zealously, competently and diligently represent the interests of the Plaintiffs. *See* Pa. R. Prof. Conduct 1.1, 1.3, *passim*." Amended Complaint ¶ 175. There is no provision in the Contingent Fee Agreement that governs the manner in which proofs of claim would be filed, or the representations that Defendant could undertake, or the circumstances under which MMWR could terminate its representation. The gist of Plaintiff's claims is that MMWR violated professional standards of care — *not* that MMWR violated a contract. The contract merely established a relationship between the parties. It is tort law (not contract law) that defined the duties of care to be followed by MMWR in performing its work, and the alleged violations of those duties of care constitute tort claims, not contract claims.

Plaintiff argues that rulings about the "gist of the action" require the resolution of factual issues and can only be made by a jury at trial. However, the *Bruno* decision contemplates that a court should determine the correct character of a claim based on the pleadings. *See Bruno*, 106 A.3d at 68 (Pa. 2014) (holding that "the underlying

averments supporting the claim in a plaintiff's complaint" are the "determinative factor" in deciding "whether the claim is truly one in tort, or for breach of contract.") In any event, Plaintiff has not identified any factual issues that need to be resolved, and the Court can think of none.

I therefore conclude that the allegations in the Amended Complaint assert tort claims, not contract claims, and that the claims are barred by Pennsylvania's two-year statute of limitations.

II. Alternatively, Any Contract Claims Accrued More Than Four Years Prior to Suit and are Time-Barred

Even if the Amended Complaint properly asserted breach of contract claims, and even if a four-year statute of limitations applied, the claims asserted in the Amended Complaint would still be time-barred.

Under Pennsylvania law, the time within which an action must be commenced is computed "from the time the cause of action accrued." 42 Pa. Cons. Stat. § 5502(a). An action accrues "when the plaintiff could have first maintained the action to a successful conclusion." *Fine v. Checcio*, 582 Pa. 253, 870 A.2d 850, 857 (Pa. 2005); *Pocono Int'l Raceway, Inc. v. Pocono Produce, Inc.*, 503 Pa. 80, 468 A.2d 468, 471 (Pa. 1983) (noting that the statute of limitations commences when "the right to institute and maintain a suit arises.").

In this case, the lawsuit was commenced on April 11, 2018. Plaintiff asserts that the claims did not accrue until

July 7, 2014 at the earliest (the date to file objections to the Bankruptcy Court's report recommending to the District Court that it approve the settlement of the fraudulent transfer claims), on the theory that damages are a critical element of such a suit and based on the contention that the Avoca Plaintiffs could not assess the amount of damages until after the objection deadline for approval of the fraudulent transfer settlement had expired.

Plaintiff's contention is misguided. Pennsylvania contract law recognizes a party's entitlement to at least nominal damages immediately upon the occurrence of a material breach of a contract. *Carulli*, 216 A.3d 582, citing, *Freedom Oil Works Co. v. Williams*, 302 Pa. 51, 152 A. 741, 743 (1930) (holding that where defendant admitted there was a breach of contract, plaintiffs were entitled at least to nominal damages); *Wolfe v. Allstate Prop. & Cas. Ins. Co.*, 790 F.3d 487, 497 (3d Cir. 2015) (noting that under Pennsylvania law, summary judgement would be inappropriate if the only argument against a breach of contract claim was the absence of damages because such claimant would be "nonetheless entitled to recover nominal damages"). The Avoca Plaintiffs therefore had the right to file suit when the alleged breaches of contract occurred, and any contract claims "accrued" at that time, regardless of whether additional damage claims had yet been liquidated.

No decision has been cited in which a Pennsylvania court has applied a different accrual rule to a claim based on legal malpractice. Prior to the delineation of tort and contract claims in *Bruno*, and without distinguishing

between a tort or a contract legal malpractice claim, Pennsylvania courts generally concluded that in a legal malpractice action the statute of limitations began to run at the time of the occurrence of a breach of duty, not at the time when there was a full liquidation of an economic loss. *Wachovia Bank, N.A. v. Ferretti*, 2007 PA Super 320, 935 A.2d 565, 572 (Pa. Super. 2007) (applying concept to both tort and legal malpractice claims); s*ee also Robbins & Seventko Orthopedic Surgeons, Inc. v. Geisenberger*, 449 Pa. Super. 367, 674 A.2d 244, 246 (Pa. Super. 1996) (applying concept to tort claim and stating that "[i]n Pennsylvania, the occurrence rule is used to determine when the statute of limitations begins to run in a legal malpractice action. Under the occurrence rule, the statutory period commences upon the happening of the alleged breach of duty.")

The alleged breaches in performance by MMWR set forth in the Amended Complaint — including MMWR's actions concerning the proofs of claim, its involvement in the formation of the Tort Claims Trust, and the termination of its representation — all occurred prior to mid-February 2011, more than seven years prior to the commencement of this case. Contract claims therefore are untimely.

Plaintiff nevertheless asks this Court to apply an exception to the occurrence rule known as the "discovery rule." As a general matter Pennsylvania courts strictly apply limitations periods and "[l]ack of knowledge, mistake or misunderstanding, will not toll the running of the statute." *Wachovia*, 935 A.2d at 572. The "discovery rule,"

however, is an equitable remedy that tolls the running of the statute of limitations when, despite exercising due diligence, a party is unable to know of an injury or its cause. *Wachovia*, 935 A.2d at 572 (citations omitted).

The discovery rule has been applied primarily in personal injury actions where the injured party could not reasonably ascertain the existence of an injury or the cause of that injury. *See e.g., Nicolaou*, 195 A.3d at 892; *Gleason v. Borough of Moosic*, 609 Pa. 353, 15 A.3d 479, 484 (Pa. 2011) and *Fine v. Checcio*, 870 A.2d at 858. Some Pennsylvania courts have extended the judicially created discovery rule to non-tort actions, including quasi contractual actions such as unjust enrichment and promissory estoppel. *See* cases cited in *Carulli v. North Versailles TP. Sanitary*, 216 A.3d 564, 579-80 (Pa. Cmwlth. 2019). However, there is a split of authority as to whether the doctrine should be extended to cases involving an express written contract. *Compare Carulli*, 216 A.3d at 583-84 (concluding that the discovery rule should not be extended to breach of contract actions involving express written negotiated contracts), with *Morgan v. Petroleum Prods. Equipment Co.*, 2014 PA Super 104, 92 A.3d 823, (Pa. Super 2014) (stating that the discovery rule applies to all causes of action including breach of contract).

I do not need to decide if the Pennsylvania courts would apply the discovery rule to breach of contract claims because, even if the discovery rule were applicable to breach of contract claims generally, the allegations of the Amended Complaint make clear that the discovery rule would not be applicable to the claims asserted in this case.

Appendix C

The discovery rule cannot be invoked, and the limitations period is not tolled, once a plaintiff is put on "inquiry notice" of a potential claim. "Inquiry notice" is "actual or constructive knowledge" of some identifiable harm "without the necessity of notice of the full extent of the injury." *Nicolaou*, 195 A.3d at 892; s*ee also, Fine*, 870 A.2d 858 (concluding that reasonable diligence is measured by what a plaintiff might have known "by the use of the means of information within [its] reach"). A party can be on "inquiry notice" even if the party does not know the full extent of the loss that the party may experience. The basic inquiry is whether there are any identifiable damages; if so, it is not necessary that the plaintiff be able to calculate the full amount that might be owed. *Wachovia*, 935 A.2d at 572 (addressing issue of whether actual loss was required before a plaintiff could commence action for legal malpractice to avoid dismissal based on claim being remote or speculative, the court held that "the test of whether damages are remote or speculative has nothing to do with the difficulty in calculating the amount, but deals with the more basic question of whether there are identifiable damages. Thus, damages are speculative only if the uncertainty concerns the fact of damages rather than the amount.") (internal citations and quotation omitted).

The party that seeks application of the discovery rule also has the burden of proving the exercise of reasonable diligence. *Id.* The issue is not what was actually known by the injured party "but what he might have known by exercising the diligence required by law," taking into account the "qualities of attention, knowledge intelligence

and judgment which society requires of its members for the protection of their own interest and the interest of others." *Nicolaou v. Martin*, 195 A.3d 880, 893 (Pa. 2018) (citation omitted).

This simply is not a case where the very existence of an alleged breach of contract, or the very existence of an injury, could not reasonably have been ascertained in the exercise of due diligence. There is no allegation in the Amended Complaint that the Plaintiff, or the Avoca Plaintiffs generally, lacked awareness of the manner in which their proofs of claim were filed in 2009, or the fact that the "allowed" amounts of those claims ultimately was $949 million (not $5.3 billion). There is also no allegation that the Avoca Plaintiffs did not know the terms of the Trust documents, which in any event were publicly available. The Avoca Plaintiffs knew (or should have known simply by paying attention to papers filed in court) what the Avoca Plaintiffs' allowed claims were, that those claims would share *pro rata* with other similar claims, and that the Avoca Plaintiffs would not enjoy any priority in distributions.

Similarly, there is no allegation that the Plaintiff or the Avoca Plaintiffs were unaware at the time of MMWR's representation of Mr. Carroll, or of the terms of the Trust and the TDPs that MMWR drafted (which were publicly filed documents), or of MMWR's termination of its representation in February 2014. There are allegations that Plaintiff did not appreciate the implications of the alleged conflicts of interest, but those allegations are not enough to permit the discovery rule to be invoked. Inquiry

notice of the facts constituting the alleged breach — not full knowledge and appreciation of all the particulars of a legal claim -- is enough to negate the application of the discovery rule.

All of the information upon which the present claims are based — the details of the proofs of claim that were filed, MMWR's representation of Mr. Carroll, the structure of the Trust and of the TDPs, the amounts of the Avoca Plaintiffs' allowed claims, and the termination of MMWR's representation — was reflected in publicly filed documents and was openly available to the Avoca Plaintiffs by mid-February 2011 or earlier. This is therefore not a situation in which the very existence of a contractual breach could not have been ascertained through the exercise of reasonable diligence. The availability of nominal damages also resulted in an accrual of any contract claims at the time the breaches occurred. In addition, the initial funding of the Trust made it clear that there would be some financial impact from the breaches of duty that are presently alleged. The April 2, 2014 filing of a motion to approve the settlement of the fraudulent transfer litigation further made clear that the events about which the Avoca Plaintiffs are now complaining would have a large financial impact on them.

It was not necessary to the accrual of their contract claims that the Avoca Plaintiffs know the exact dollar amount by which their recoveries might be reduced. Similarly, the fact that the settlement of the fraudulent transfer litigation was not finalized until later in 2014 is not a proper reason to invoke a "discovery rule" as to

Plaintiff's breach of contract claims. The alleged breaches of duty described in the Amended Complaint all could have been ascertained from public events and filings that occurred no later than mid-February 2011. Plaintiff's April 11, 2018 effort to assert contract claims based on those matters is barred by the statute of limitations.

Plaintiff argues that a "reasonable diligence" is fact intensive and should be left to a jury, but based on the allegations of the Amended Complaint and the admitted chronology of events it is plain that no plausible claim for application of the "discovery rule" has been pleaded or could be pleaded.

CONCLUSION

For the foregoing reasons, all of the claims asserted in the Amended Complaint are barred by the applicable statutes of limitation, and the Amended Complaint should be dismissed, with prejudice. A separate Order will be entered to this effect.

Dated: New York, New York
February 21, 2020

/s/ Michael E. Wiles
HON. MICHAEL E. WILES
UNITED STATES BANKRUPTCY
JUDGE

APPENDIX D — MEMORANDUM DECISION OF THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, DATED JULY 18, 2019

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

Chapter 11, Case No. 09-10156 (MEW)

IN RE: TRONOX, *et al.*,

Debtors.

Adv. Pro. No. 19-1087 (MEW)

STANLEY WALESKI, ON HIS OWN BEHALF AND ON BEHALF OF OTHERS SIMILARLY SITUATED,

Plaintiff,

- v –

MONTGOMERY, MCCRACKEN, WALKER & RHOADS, LLP; NATALIE D. RAMSEY; AND LEONARD A. BUSBY,

Defendants.

July 18, 2019, Decided

Appendix D

MEMORANDUM DECISION DENYING PLAINTIFFS' MOTION FOR REMAND OR ABSTENTION

MICHAEL E. WILES
UNITED STATES BANKRUPTCY JUDGE

Before the Court is the motion (the "**Remand Motion**") of the plaintiff Stanley Waleski to remand this legal malpractice proceeding to the Court of Common Pleas in Luzerne County, Pennsylvania, which is where the action originally was filed. Waleski asks, in the alternative, that this Court abstain from hearing his claims. The Remand Motion is opposed by defendants Montgomery, McCracken, Walker & Rhoades, LLP (the "**Montgomery Firm**"), Leonard A. Busby (a current partner of the Montgomery Firm), and Natalie D. Ramsey (a former partner of the Montgomery Firm).

Mr. Waleski alleges that during the bankruptcy cases of Tronox Incorporated and its affiliates the defendants committed legal malpractice in their representation of Mr. Waleski and a class of other persons who had been exposed to chemicals (primarily creosote) emitted from a plant located in Avoca, Pennsylvania (the "**Avoca Plaintiffs**"). Most of the claims are based on allegations that the defendants should have ensured that the Avoca Plaintiffs' recoveries in the bankruptcy case were not diluted by the allowance of claims filed on behalf of persons who alleged injuries based on creosote emissions from a different Tronox-related plant located in Mississippi. Mr. Waleski also alleges that the defendants should have objected to

the settlement of a fraudulent transfer claim, the proceeds of which were used to fund payments to tort victims.

The action filed by Mr. Waleski was removed to federal court and was later transferred to this Court. Mr. Waleski now contends that this Court lacks subject matter jurisdiction over this proceeding. I disagree. The alleged wrongs committed by the defendants involved the performance of bankruptcy-specific tasks and the assertion of bankruptcy-specific objections and rights, and the dispute between the parties did not exist – and could not have existed – outside of the context of the Tronox bankruptcy cases. The dispute also implicates the integrity of the bankruptcy process and in certain respects requires the interpretation of prior orders and rulings of this Court. I therefore find that I have subject matter jurisdiction. I also decline to abstain from hearing Mr. Waleski's claims.

Background

On April 11, 2018, Waleski filed his complaint in the Court of Common Pleas of Luzerne County, Pennsylvania. The following facts are taken from the complaint and are assumed true only for purposes of the motion that is before the Court.

A. The Avoca Plaintiffs' Claims and the Montgomery Firm's Services

The plaintiff, Stanley Waleski, is a resident of Pennsylvania who resides in Luzerne County. He filed this

action on behalf of himself and a class of Avoca Plaintiffs that is alleged to have approximately 4,300 members. The Montgomery Firm is a Pennsylvania limited liability partnership, and the individual defendants are citizens of Pennsylvania.

In January 2005, the Avoca Plaintiffs began initiating lawsuits in the Court of Common Pleas in Luzerne County, through attorneys they hired for the state-court litigation. In January 2009, however – before the claims in the Pennsylvania actions were adjudicated – Tronox and various affiliated companies filed voluntary chapter 11 petitions. The Pennsylvania cases were automatically stayed by the bankruptcy filings.

The Avoca Plaintiffs' state-court attorneys retained the Montgomery Firm in January 2009 to represent the interests of the Avoca Plaintiffs in the Tronox bankruptcy case. The terms of the retention were memorialized in a contingent fee agreement. The agreement provided that the Montgomery Firm would "represent the interests of the [Avoca Plaintiffs] in the bankruptcy proceedings of Tronox, Incorporated, and all related entities, now pending in the United States Bankruptcy Court for the Southern District of New York, Case No. 09-10156." *See* Compl. ¶ 27. According to the plaintiff, one of the particular tasks entrusted to the Montgomery Firm was "to take steps to protect against any intrusion" from "potential claims from property owners in Mississippi who were represented by an aggressive lawyer from that state." *See id.* ¶ 41.

Sometime later, the Montgomery Firm also undertook to represent Michael E. Carroll, one of the Avoca Plaintiffs who served as a member of the official creditors' committee. The complaint alleges that in the course of that representation, while "[a]cting in [their] official capacity as bankruptcy court-approved counsel for [ ] Carroll," the defendants "took responsibility for drafting trust documents." *See id.* ¶ 53. The purpose of the trust was to compensate victims of exposure to various contaminants and to satisfy various environmental liabilities. The trust documents established separate sub-funds for various types of claims and contemplated that the assets in each sub-fund would be distributed *pro rata* to the claimants who held the designated types of claims. More particularly:

- Fund A was established for the benefit of Allowed Asbestos Claims, Allowed Future Tort Claims, and Allowed Unaccounted-for Tort Claims;

- Fund B was established for the benefit of Allowed Indirect Environmental Claims;

- Fund C was established for the benefit of Allowed Property Damage Claims; and

- Fund D was established for the benefit of Allowed Non-Asbestos Toxic Exposure Claims.

The Avoca Plaintiffs, as victims of creosote exposure, held claims that fell into category D.

Appendix D

The trust documents also included Trust Distribution Procedures that outlined the process by which claims could be made against the trust and the ways in which allowed claim amounts would be calculated. *See generally* Ex. D, Form of the Tort Claims Trust Distribution Procedures, Plan Supplement [Dkt. 2343] at 63. The trust documents, including the Trust Distribution Procedures, were incorporated into the confirmed plan of reorganization (the "**Plan**") in the Tronox cases and were approved by Judge Gropper of this Court in November 2011. *See* Confirmation Order [Dkt. No. 2567] ¶ 85. Both the Plan and the Confirmation Order provided that this Court retained jurisdiction over all matters arising out of the Tronox bankruptcy case, including the jurisdiction to "hear and determine disputes arising in connection with the interpretation, implementation or enforcement of the Plan or the Confirmation Order, including disputes arising under agreements, documents or instruments executed in connection with the Plan." Plan, Article XI; *see also* Confirmation Order ¶ 159.

The complaint alleges that the defendants sought to charge the Tronox estate for the services they provided in connection with the drafting of the trust documents and the Trust Distribution Procedures. *See* Compl. ¶ 54. The confirmed Plan explicitly acknowledged the role of both Carroll and the Defendants in the case and approved an award of compensation in the amount of $200,000. Subparagraph E of Article XII of the Plan noted the following:

> Tronox recognizes that Creditors' Committee member Michael E. Carroll contributed substantially to the formulation and development of the Plan and in connection with the support of Holders of Tort Claims for the Plan. Accordingly, Tronox agrees that, on the Effective Date, subject to supporting documentation being provided to counsel to each of Tronox, the Backstop Parties and the Creditors' Committee, Tronox shall pay all reasonable fees and expenses of Mr. Carroll's counsel, Montgomery, McCracken, Walker & Rhoads, LLP, for services rendered and to be rendered in connection therewith up to a maximum of $200,000.

Plan, Art. XII (E); *see also* Confirmation Order [Dkt. No. 2567] ¶ 145.

B. Subsequent Events

The defendants purported to end their representation of the Avoca Plaintiffs shortly after the confirmation of the Plan, though the complaint alleges that the Avoca Plaintiffs and their state-court attorneys did not consent to that termination. *See* Compl. ¶ 57. At that time, there were strong doubts as to whether there would be significant distributions from the trust to tort claimants. This is because the trust was to be funded mainly by a share of proceeds from a pending fraudulent transfer litigation, and that litigation had not yet been resolved.

A few years later, the fate of the trust – and that of the tort claimants – significantly brightened. In November 2014, the District Court approved a settlement payment of $5.15 billion into the Tronox estate. That settlement followed a lengthy trial of certain fraudulent transfer claims in the Bankruptcy Court. *See Tronox Inc. v. Kerr-McGee (In re Tronox Inc.)*, 503 B.R. 239, 248-49 (Bankr. S.D.N.Y. 2013). The confirmed Plan provided that 12% of the litigation proceeds would be allocated to the tort victim trust, and so the trust received approximately $599 million of the settlement proceeds. Most of the trust assets (84.53%) ultimately were allocated to Fund D for the benefit of holders of Allowed Non-Asbestos Toxic Exposure Claims.

One term of the settlement of the fraudulent transfer claims was a requirement that the District Court issue a permanent injunction that would bar tort claimants from asserting claims against Tronox-related entities (the "**Injunction**"), thereby effectively requiring them to look to the trust for compensation. *See Tronox Inc. v. Anadarko Petroleum Corp. (In re Tronox Inc.)*, Case. No. 14-cv-5495 (KBF), 2014 U.S. Dist. LEXIS 158767, 2014 WL 5825308, at *1 (S.D.N.Y. November 10, 2014). The District Court approved the settlement and issued the Injunction. In doing so, the District Court also overruled objections from certain of the Mississippi claimants that the $5.15 billion fraudulent transfer settlement payment was too low and that the alleged poor quality of *their* legal representation should defeat the settlement. 2014 U.S. Dist. LEXIS 158767, [WL] at *6.

C. Other Proceedings

In April 2015, the trustee of the tort victim trust requested further instructions from this Court concerning the handling of the Mississippi claims. *See* Motion of Tort Claims Trustee, Garretson Resolution Group, Inc. for Instructions [Dkt. No. 3030]. The Mississippi claims (like the Avoca Plaintiffs' claims) were based on alleged exposures to creosote. The Trustee's motion was prompted by complaints by the Avoca Plaintiffs that the Mississippi claims had originally been filed as "nuisance" claims and that they should be treated only as "Category C" property damage claims for purposes of the trust, and not as "Category D" non-asbestos toxic exposure claims. They also complained that a large number of Mississippi claims had been filed as an impermissible "group" proof of claim.

In June 2015, this Court granted the request for instructions. The Court held that the Mississippi Claimants were entitled to assert "Category "D" claims and that the Trustee had properly allowed those claims. The Court also held that the Avoca Plaintiffs lacked standing to complain about the "group" proof of claim, and that in any event that the objection to the filing of the "group" claim was without merit. *See* Memorandum Opinion as to Tort Claims Trustee's Motion for Instructions [Dkt. No. 3046] at 15-21.

In September 2015, the Avoca Plaintiffs moved to reinstate their pre-petition claims in Pennsylvania state court (which were stayed when Tronox filed for

bankruptcy) to the active docket, seeking further recoveries from an entity that had formerly been the ultimate parent of certain Tronox debtors. In February 2016, the United States District Court for the Southern District of New York held that the Avoca Plaintiffs' suit was in violation of the Injunction that the District Court had issued. *Tronox Inc. v. Anadarko Petroleum Corp. (In re Tronox Inc.)*, 549 B.R. 21, 50-51 (S.D.N.Y. 2016). The District Court ordered the Avoca Plaintiffs to dismiss the pending Pennsylvania actions with prejudice, and otherwise enjoined them from pursuing claims that had been released as part of the settlement. *Id.* at 56.

D. The Proceeding that is Now Before this Court

In April 2018, Mr. Waleski filed the instant suit against the Montgomery Firm and the two individual defendants. The complaint seeks approximately $620 million in damages plus statutory interest and costs. Mr. Waleski contends that the defendants fell short of their professional obligations to the Avoca Plaintiffs and that, as a result, the Avoca Plaintiffs received smaller recoveries on account of their tort claims than they otherwise would have received. More particularly, he has made the following criticisms of the actions (or inactions) of the defendants conduct during the course of the Tronox cases.

First, Mr. Waleski complains that after the Montgomery Firm agreed to represent the Avoca Plaintiffs in the Tronox bankruptcy, it also entered into the representation of Michael E. Carroll in his capacity as a member of the Unsecured Creditors' Committee, and thereafter served

as "bankruptcy court-approved counsel" for Carroll. *See* Compl. ¶¶ 42-43, 53. Mr. Waleski contends that this representation created a conflict of interest that required the defendants to act in the interests of all creditors and not just in the interest of the Avoca Plaintiffs. There is no allegation that this representation was unknown to the Avoca Plaintiffs at the time, and at oral argument Mr. Waleski's counsel conceded that Mr. Carroll himself was a member of the Avoca Plaintiff class. *See* May 17, 2019 Hr'g Tr. 18:2-7, 15-22. However, Mr. Waleski's counsel asserted at oral argument that the Montgomery Firm had not provided a sufficient explanation, to the Avoca Plaintiffs, of the potential consequences of the firm's representation of Mr. Carroll. *Id.*

Second, Mr. Waleski contends that the Montgomery Firm, in its capacity as counsel to Mr. Carroll, assisted with the drafting of the Trust Distribution Procedures. *See* Compl. ¶ 58. He asserts that the Montgomery Firm should have drafted procedures that would have separately classified the Avoca Plaintiffs' claims and that would have provided better treatment of the Avoca Plaintiffs' claims in comparison to other claims.

Third, Mr. Waleski asserts that the defendants should have objected to the "omnibus" proof of claim filed on behalf of the Mississippi claimants, and contends that if they had done so on a timely basis the claim would have been disallowed. *See* Compl. ¶¶ 62, 73. The complaint argues that this Court's 2015 decision regarding the group proof of claim should be interpreted as merely holding that the Avoca Plaintiffs no longer had standing to raise

the issue in 2015, and not as a ruling on the merits of the objection. *Id.* ¶ 71.

Finally, Mr. Waleski contends that the defendants should have objected to the $5.15 billion settlement of the fraudulent transfer litigation on the ground that it was not sufficient to ensure full payment of all of the Avoca Plaintiffs' claims, and that if such an objection had been filed then such full payment could and would have been obtained. *Id.* ¶¶ 67, 74.

Mr. Waleski's suit was removed by the defendants to the United States District Court for the Middle District of Pennsylvania. Mr. Waleski sought to remand the case back to state court, and the defendants filed a motion to transfer the case to the Southern District of New York. The District Court for Middle District of Pennsylvania granted the transfer motion and declined to decide the Remand Motion so that it could instead be resolved by this Court. *See* Order, *Waleski v. Montgomery, McCracken, Walker & Rhoads, LLP*, 18-cv-01144 (RDM), [Dkt. No. 37], 2019 U.S. Dist. LEXIS 2670.

Discussion

As the removing parties, the defendants bear the burden to show that federal jurisdiction exists. *Pullman Co. v. Jenkins*, 305 U.S. 534, 540, 59 S. Ct. 347, 83 L. Ed. 334 (1939); *Vasura v. Acands*, 84 F. Supp. 2d 531, 533 (S.D.N.Y. 2000). Courts construe the removal statute strictly, resolving all doubts in favor of remand. *Purdue Pharma L.P. v. Kentucky*, 704 F.3d 208, 220 (2d Cir. 2013);

In re Village of Kiryas Joel, 2012 U.S. Dist. LEXIS 44312, 2012 WL 1059395 at *2 (S.D.N.Y. Mar. 29, 2012).

Section 1334(c) of title 28 of the U.S. Code provides that federal district courts – of which bankruptcy courts are a unit – have jurisdiction over "civil proceedings arising under title 11 or arising in or related to a case under title 11." 28 U.S.C. §§ 157(a), 1334(b). The parties agree that the outcome of the Remand Motion depends on whether the asserted claims are claims that arose "in" the Tronox bankruptcy cases.[1]

Courts that have grappled with the scope of "arising in" jurisdiction have observed that the term "is not entirely clear." *Baker v. Simpson*, 613 F.3d 346, 351 (2d Cir. 2010). As a general matter it covers claims that "are not based on any right expressly created by [T]itle 11, but nevertheless, would have no existence outside of the bankruptcy." *Id.* (relying on *Wood v. Wood (In re Wood)*, 825 F.2d 90, 97 (5th Cir. 1987)). It plainly covers matters that require the interpretation or enforcement of orders issued during a bankruptcy case. *See KeyBank Nat'l Ass'n v. Franklin Advisers, Inc.*, 600 B.R. 214, 230 n. 14 (S.D.N.Y. 2019); *Giese v. Cmty. Trust Bank (In re HNRC Dissolution Co.)*, 2015 Bankr. LEXIS 3059, 2015 WL 5299468, at*6 (Bankr. E.D. Ky. Sept. 9, 2015); *Lothian Cassidy LLC*

1. Defendants at one point argued that Waleski's claims are "related to" the prior bankruptcy cases but their counsel withdrew that contention at oral argument and acknowledged that the defendants' sole jurisdictional argument is that the underlying claims "arose in" the Tronox bankruptcy cases. May 17, 2019 Hr'g Tr. 4:15-5:13.

v. Ransom, 428 B.R. 555, 560 (E.D.N.Y. 2010). It also generally covers matters over which a bankruptcy court has "core" jurisdiction, *see Mt. McKinley Insurance Co. v. Corning Inc.*, 399 F.3d 436, 447-48 (2d Cir.2005) – though the concept of "core" jurisdiction is itself not always easy to define.

While the full scope of "arising in" jurisdiction may be difficult to describe, a number of prior decisions provide guidance as to whether this court has "arising in" jurisdiction over the professional malpractice claims that Mr. Waleski has asserted.

One such decision is the decision by the Second Circuit Court of Appeals in *Baker v. Simpson*, 613 F.3d 346 (2d Cir. 2010). In *Baker*, the chapter 11 debtor brought state law claims in state court against various of his professionals, alleging that they had been guilty of legal malpractice, negligence, and fraud during the bankruptcy case. *Id.* at 348. After the defendants removed the case to federal court, the debtor sought to remand the case. *Id.* at 349. The Second Circuit affirmed the lower court's denial of the remand request and affirmed the finding that "arising in" jurisdiction existed over the claims. *Id.*

In *Baker*, the Court rejected the debtor's contention that the lower court lacked jurisdiction because the claims were made pursuant to state law. *Id.* at 351. The Court held that "the determinative issue" is not whether the "'origin' of the claims [is] found in state law" but instead "whether claims that appear to be based in state law are really an extension of the proceedings already before the

bankruptcy court." *Id.* (citing *Southmark Corp. v. Coopers & Lybrand (In re Southmark Corp.)*, 163 F.3d 925, 931-32 (5th Cir. 1999). The Court agreed that the professional malpractice claims in *Baker* were "inseparable from the bankruptcy context" and that resolving the claims was an "essential part of administering the estate." *Id.* at 350-51. The Court noted that "it is clear to us" that a bankruptcy court has the ability to review the conduct of attorneys whose appointment is approved by the court. *Id.* at 351. The Court also noted that the relevant services had been provided during the chapter 11 case, and that Baker's criticism of the attorneys' work (and of the outcomes of his case as reflected in the orders and judgments entered by the court) implicated the integrity of the bankruptcy process. *Id.*

Based on these factors, the Court concluded that the malpractice claims "would have had no practical existence but for the bankruptcy and that they had arisen in Baker's chapter 11 case." *Id.* (citation omitted). The Court also observed that its holding was consistent with decisions in other Circuits. *Id.* (citing *Grausz v. Englander*, 321 F.3d 467, 469, 471-72 (4th Cir. 2003) (debtor's malpractice claim against his attorneys arose "in" the bankruptcy case); *Geruschat v. Ernst Young LLP (In re Seven Fields Dev. Corp.)*, 505 F.3d 237, 260 (3d Cir. 2007); *In re Southmark Corp.*, 163 F.3d at 932; *Walsh v. Northwestern Nat'l Ins. Co. (In re Ferrante)*, 51 F.3d 1473, 1476 (9th Cir. 1995)).

Lower courts in this Circuit that have interpreted the scope of "arising in" jurisdiction over malpractice claims have similarly emphasized that the touchstone of

the inquiry is whether the dispute is "intimately related to the administration of the bankruptcy." *See Winstar Holdings, LLC v. Blackstone Grp. L.P.*, No. 07 CIV. 4634 (GEL), 2007 U.S. Dist. LEXIS 90482, 2007 WL 4323003, at *5 (S.D.N.Y. Dec. 10, 2007). In *Winstar*, a plaintiff acquired a debtor and then sued the professional advisors who provided the analyses that helped guide the reorganization process. 2007 U.S. Dist. LEXIS 90482, [WL] at *2. Neither the plaintiff nor the defendant was the debtor itself, and the "claim [was] not brought by the bankruptcy estate itself." 2007 U.S. Dist. LEXIS 90482, [WL] at *5. Nonetheless, the Court found that "the claims at issue," which were misrepresentation claims "sound[ing] *solely* in New York common law," were "more closely connected to the administration of the bankruptcy than most garden-variety common-law claims." 2007 U.S. Dist. LEXIS 90482, [WL] at *4 (emphasis added). Because "the matter is still intimately related to the administration of bankruptcy" and because the Court "has a vital interest in policing the integrity of the bankruptcy process in general," the Court found that it had "arising in" jurisdiction. 2007 U.S. Dist. LEXIS 90482, [WL] at *5.

Lothian Cassidy LLC v. Ransom, 428 B.R. 555 (E.D.N.Y. 2010), is also illustrative. *Lothian* concerned state-law claims by investors against the debtor's directors, officers and attorneys who initiated and participated in the debtor's reorganization process. *See* Compl., *Lothian Cassidy LLC v. Ransom*, No. 10-cv-00420 (ENV) (SMG) [Dkt. No. 1-4] ¶¶ 26, 34, 113, 119-123. The *Lothian* court found that "tort claims concerning alleged professional malpractice *in the actual administration* in

the bankruptcy court *of [the debtor's] bankruptcy estate* creates federal "arising in" jurisdiction, particularly where the claims are "intimately related to the administration of the bankruptcy," "involve[e] the enforcement or construction of a bankruptcy court order," and "require gateway interpretation of the bankruptcy court's prior orders." *Lothian*, 428 B.R. at 560 (emphasis added).

The bankruptcy court for the District of Columbia similarly found that it had "arising in" jurisdiction over malpractice claims in *In re Kaiser Group International, Inc.*, 421 B.R. 1 (Bankr. D.D.C. 2009). In *Kaiser*, the Court found that the integrity of the bankruptcy process – and therefore "arising in" jurisdiction – was implicated where a malpractice claim second-guessed the Court's determinations concerning a class claim that "significantly affected the plan's distribution of shares." *Id.* at 12 & n. 9. Because the plaintiff's theory was that the alleged negligence resulted in "erroneous" rulings by the Court, the claims were found to be "mired in bankruptcy law, [the] interpretation of the reorganization plan, and the bankruptcy court's determinations in the bankruptcy proceeding." *Id.*

Most of the malpractice cases that have raised issues as to the scope of a bankruptcy court's "arising in" jurisdiction have involved claims against a debtor's own professionals. However, decisions in other contexts have made clear that "arising in" jurisdiction exists so long as a matter is intricately related to the bankruptcy process, even if it does not involve a debtor or a court-approved professional.

Appendix D

In *KeyBank National Association v. Franklin Advisors, Inc.*, 600 B.R. 214 (S.D.N.Y. 2019), for example, the Court held that state-law breach of contract claims bore a sufficiently close relationship to the reorganization process that the court could properly exercise "arising in" jurisdiction over them, even though the debtor was not party to the action, the issues did not relate to services performed for the debtor, and the underlying bankruptcy case was in a different district. The dispute in *KeyBank* involved two creditors who had agreed to provide debtor-in-possession financing in a chapter 11 case in Delaware. *Id.* at 220-21. The plaintiffs in *KeyBank* contended that that the defendants had entered into a subsequent financing agreement that violated certain agreements that governed the initial debtor-in-possession financing. *Id.* at 219. The *KeyBank* court found that it had "arising in" jurisdiction in part because resolving the dispute "was born out of bankruptcy law and bankruptcy proceedings" and because, absent the bankruptcy, there would have been no debtor-in-possession financing agreement. *Id.* at 230. In reaching that conclusion the court cited *Delaware Trust Co. v. Wilmington Trust, N.A.*, 534 B.R. 500, 514 (S.D.N.Y. 2015), in which case the Court had held that a dispute over the calculation of adequate protection payments could only have arisen in a bankruptcy proceeding.

Bankruptcy courts in other districts have also determined that claims that functionally challenge the outcomes of bankruptcy cases, and that question whether orders entered in bankruptcy cases were proper or were instead the result of misconduct, are textbook examples of disputes that implicate the integrity of the

bankruptcy process. In *In re HNRC Dissolution Co.*, No. 02-14261, 2015 Bankr. LEXIS 3059, 2015 WL 5299468, at *6 (Bankr. E.D. Ky. Sept. 9, 2015), *aff'd sub nom. In re HNRC Dissolution Co.*, 585 B.R. 837 (B.A.P. 6th Cir. 2018), *aff'd*, 761 F. App'x 553 (6th Cir. 2019), the Court dealt with a declaratory judgment action initiated by a plaintiff who claimed an ownership interest in certain assets sold at a bankruptcy auction. The claim was made several years after the auction took place, and the aim of the action was to recover the assets from the winning bidders. 2015 Bankr. LEXIS 3059, [WL] at *1-3. The court held that "arising in" jurisdiction existed because "[t]he bulk of [p]laintiff's claims . . . complain of bad acts taken *in* a bankruptcy proceeding." 2015 Bankr. LEXIS 3059, [WL] at *6 (emphasis altered). The "very injury" plaintiff complained of was "the judgment concluding [the adversary] proceeding," and all of the plaintiff's state-law theories "fault [d]efendants for bad acts in the [proceeding]." *Id.; see also D.A. Elia Constr. Corp. v. Damon Morey LLP*, No. 11-CV-637-A, 2013 U.S. Dist. LEXIS 45931, 2013 WL 1337194, at *8 (W.D.N.Y. Mar. 29, 2013) ("arising in" jurisdiction exists over dispute between debtor and former counsel because the action against the defendants effectively challenged the fairness and propriety of the orders that had been issued by the court).

Based on these decisions, and applying the factors set forth in them, the Court concludes that the claims in this malpractice case arose "in" the Tronox bankruptcy cases and that this Court has jurisdiction over them.

First, it is quite clear that the alleged acts of malpractice occurred entirely during the bankruptcy case and in the context of the bankruptcy proceedings. The defendants were engaged to provide services *after* the petition date, and there is no allegation that they provided services outside of the bankruptcy case. All of the allegations regarding the defendants' alleged malpractice are limited to things the defendants did (or did not do) during the course of the bankruptcy cases themselves.

Second, the alleged misdeeds relate to bankruptcy-specific rights and tasks and could only have arisen in a bankruptcy context. More particularly:

- Waleski claims that the defendants should have objected to the omnibus claims filed on behalf of the Mississippi claimants. A creditor has the right to object to another creditor's claim during the bankruptcy process, but Mr. Waleski's counsel acknowledged during oral argument that there is no other context in which one class of tort creditors could object to claims made by another group. *See* May 17, 2019 Hr'g Tr. 11:18-12:13. Counsel further admitted that the Avoca Plaintiffs would not have been able to intervene in the Mississippi claimants' action against Tronox in the Mississippi state court. *Id.* It was only in bankruptcy process that the Avoca Plaintiffs could have objected to other creditors' claims.

- Waleski also claims that the Montgomery Firm should have achieved a better outcome for the Avoca Plaintiffs during the drafting of the trust procedures that were an integral part of the Plan. The drafting of the trust procedures, which addressed the respective rights of entire classes of tort and environmental creditors, was an integral part of a bankruptcy plan, and was born out of bankruptcy law and bankruptcy proceedings and the need (in the context of those proceedings) to classify claims and to provide mechanisms for their resolution. Absent the Bankruptcy Code and the bankruptcy cases, there would have been no Plan and no decisions to make as to how to classify the various tort claims. *Id.*

- Waleski contends that the defendants should have objected to the settlement of the fraudulent transfer claims that the estate had asserted. The estate's right to pursue those claims derived from powers granted by the Bankruptcy Code, *see* 11 U.S.C. §§ 544, 548, 550, and the rights of creditors to object to such a proposed settlement also is a product of the unique standing rules that apply in bankruptcy.

- Most importantly, the primary claim that Mr. Waleski has made is that the Avoca Plaintiffs should not have had to "share" so much of the available assets with the Mississippi Claimants and should somehow have gotten better outcomes than those other creditors received. Whether the defendants could have reasonably pushed for such different

> outcomes, and whether differential treatment of the claims was even possible, is entirely a function of bankruptcy law.

Third, Mr. Waleski's complaint expressly alleges that some of the defendants' alleged wrongs were committed in an "official," court-approved capacity - namely, as counsel to Mr. Carroll as a member of the official committee of unsecured creditors. *See* Compl. ¶ 53 (noting that the Montgomery Firm was "court appointed" and challenging acts that the defendants took in a court-appointed capacity). Waleski's counsel attempted to backtrack from these allegations during oral argument, *see* May 17, 2019 Hr'g Tr. 15:8-16:15, but the terms of the complaint are clear and they are controlling in measuring this Court's jurisdiction. *See S. New England Tel. Co. v. Glob. NAPs Inc.*, 624 F.3d 123, 132 (2d Cir. 2010) (noting that "the jurisdictional inquiry 'depends entirely upon the allegations in the complaint'" rather than a court's assessment of the merits of the allegations (internal citations omitted)).

Fourth, the claims require consideration and interpretation of this Court's prior orders and rulings. For example, the complaint alleges that a different outcome would have been possible if the defendants had objected to the Mississippi "omnibus" claim, and it further alleges that this Court's prior ruling on this issue was merely a holding that the Avoca Plaintiffs lost standing to object to the claims once the Plan was confirmed. This Court (not a jury in Pennsylvania) is in the best position to interpret this Court's own prior order.

Fifth, and perhaps most importantly, the asserted claims directly implicate the integrity of the bankruptcy process. The theory of the malpractice claims is that different Court orders would have been issued during the Tronox bankruptcy cases, different plan terms would have been approved and that a different settlement of fraudulent transfer claims would have occurred if only the defendants had acted differently. The Magistrate who recommend that this action be transferred to this Court correctly recognized that in these respects the underlying claims will "involve analyzing and potentially questioning the bankruptcy court's own resolution of the Avoca Plaintiffs' objections, and the distribution that the Avoca Plaintiffs eventually received." *See* Report and Recommendation, *Waleski v. Montgomery, McCracken, Walker & Rhoads, LLP*, 18-CV-1144 (RDM) [Dkt. No. 36], 2018 U.S. Dist. LEXIS 208727 at *14.

Mr. Waleski's primary contention, for example, is that the Avoca Plaintiffs who asserted claims based on creosote exposure were effectively in competition with the similarly situated Mississippi victims of creosote exposure, and that the defendants had a duty to ensure that the Avoca Plaintiffs fared better than the Mississippi claimants. However, it is fundamental to the bankruptcy process that similarly situated creditors are treated similarly. *See* 11 U.S.C. § 1122(a) (providing that, subject to subsection (b), "a plan may place a claim or interest in a particular class only if such claim or interest is substantially similar to the other claims or interests of such class"); *In re Ames Dep't Stores, Inc.*, 306 B.R. 43, 54 (Bankr. S.D.N.Y. 2004) (noting that the "general goal in bankruptcy law [is] to

distribute limited debtor assets equally among similarly situated creditors"); *In re Balport Constr. Co.*, 123 B.R. 174, 181 (Bankr. S.D.N.Y. 1991) (refusing a movant's request to treat a claim in a manner that "would violate the principle that all similarly situated creditors should share equally"). The gist of Mr. Waleski's claims is that the equal treatment of the Mississippi claims under the confirmed plan and under the approved trust procedures – and also under this Court's 2015 order – were not the products of fundamental justice, or of the requirements of the Bankruptcy Code, but instead were only the results of bad lawyering. Just as a bankruptcy court has "arising in" jurisdiction where claims implicate the integrity of sales processes, *see In re HNRC Dissolution Co.*, 2015 Bankr. LEXIS 3059, 2015 WL 5299468, at *6, so too does it have "arising in" jurisdiction where claims implicate the integrity of the confirmation process and of the fairness and propriety of the allocations of available assets among similarly situated creditors.

These points, taken together, make clear that "[i]t is somewhat disingenuous for [the Avoca Plaintiffs] to attempt to pry these claims out of their bankruptcy setting." *See In re Southmark Corp.*, 163 F.3d at 931.

Waleski's counsel urges the Court to limit *Baker* and its progeny to cases in which claims are made against estate fiduciaries. This would be unavailing, as noted above, because the complaint itself alleges that the defendants drafted trust procedures on behalf of the estate as court-approved counsel. In any event, I do not find that factor to be controlling. I find for the reasons

stated above that the Court's "arising in" jurisdiction over a malpractice claim should be based on the circumstances giving rise to the claim and the extent to which the claim is integrally related to the bankruptcy process, and should not be based solely on who the defendant is and who the defendant primarily represented.

Waleski similarly argues that there is no "arising in" jurisdiction because an attorney's duties to a client are based on state law and because the malpractice claim is asserted under state law. A similar contention was rejected by the Second Circuit Court of Appeals in *Baker*. *See* 613 F.3d at 351 (holding that "the determinative issue" is not whether the professional's duty to a client had its origin in state law, but instead "whether claims that appear to be based in state law are really an extension of the proceedings already before the bankruptcy court"). The determination of whether "arising in" jurisdiction exists should be based on the facts that allegedly gave rise to the claim. As noted above, the alleged errors and misdeeds in this case all involved bankruptcy-specific matters and could only have arisen "in" the bankruptcy context. The claims also implicate the integrity of the orders and creditor treatments approved by this Court in the Tronox bankruptcy cases.

It is true that the mere fact that conduct took place during a bankruptcy case is not enough to provide "arising in" jurisdiction. Waleski has cited, for example, to a number of decisions that involved conduct that occurred during a bankruptcy case but did not involve the performance of bankruptcy-specific tasks and/or

that did not challenge the outcomes of a bankruptcy case in ways that implicated the integrity of the bankruptcy process. *See Brown Media Corp. v. K&L Gates, LLP*, 854 F.3d 150, 160 (2d Cir. 2017) (rejecting an argument that a debtor's failure to raise an issue in bankruptcy court meant that a third party was barred by *res judicata* from bringing a later suit); *Gupta v. Quincy Med. Ctr. (In re Gupta)*, 858 F.3d 657, 660 (1st Cir. 2017) (involving narrow provision concerning severance pay in a pre-petition asset purchase agreement that was later summarily approved by the bankruptcy court); *Binder v. Price Waterhouse & Co. (In re Resorts Int'l, Inc.)*, 372 F.3d 154 (3d Cir. 2004) (involving the question of whether a litigation trust's accountants committed errors in rendering auditing and tax advice that did not involve bankruptcy-related processes or issues); *Torkelsen v. Maggio (In re Guild & Gallery Plus)*, 72 F.3d 1171, 1179 (1st Cir. 1996) (action against a bankruptcy trustee in his *personal* capacity and not his trustee capacity); *Nat'l City Bank v. Coopers & Lybrand*, 802 F.2d 990 (8th Cir. 1986) (malpractice action regarding perfection of a security interest, where the only connection to the bankruptcy case was an allegation that the problem would not have been discovered but for the filing of the bankruptcy case); *Morshet Israel, Inc. v. Audrey & Sydney Irmas Charitable Found. (In re Morshet Israel, Inc.)*, No. 95 B 45155 (CB), 1999 U.S. Dist. LEXIS 4127, 1999 WL 165699, at *2 (S.D.N.Y. Mar. 24, 1999) (malpractice action by secured DIP lender against its own counsel where counsel failed to perfect the liens collateralizing the DIP); *ICICI Bank Ltd. V. Essar Global Fund Ltd.*, 565 B.R. 241, 245 (S.D.N.Y. 2017) (action by creditor to enforce pre-bankruptcy obligations owed by

debtor's guarantors). Here, however, the claims "are more closely connected to the administration of the bankruptcy than most garden-variety common-law claims" and should be treated as matters that arise "in" the Tronox bankruptcy cases. *Winstar Holdings, LLC v. Blackstone Grp. L.P.*, No. 07 CIV. 4634 (GEL), 2007 U.S. Dist. LEXIS 90482, 2007 WL 4323003, at *4 (S.D.N.Y. Dec. 10, 2007).

Waleski also contends that this action should be remanded because it has no effect on the Tronox estate and because the Tronox case is closed. That might be a powerful factor if the contention were that this Court has jurisdiction only because the matter allegedly is "related to" the Tronox cases. Here, however, the contention is that the claims arose "in" the Tronox case. "A court's jurisdiction 'does not evaporate with the closing of a bankruptcy case.'" *Sterling Vision, Inc. v. Sterling Optical Corp. (In re Sterling Optical Corp.)*, 302 B.R. 792, 808 (Bankr. S.D.N.Y. 2003) (quoting *Speleos v. McCarthy*, 201 B.R. 325, 329 (D.D.C. 1996)). It is the subject matter of the claims, and not the timing of the lawsuit, that determines whether "arising in" jurisdiction exists.

Finally, Waleski argues that malpractice cases frequently are decided by a different court than the one in which the malpractice allegedly occurred. That may be true, but the issue presently before me is whether this Court has jurisdiction, and not whether another court would be precluded from hearing the claims.

For the foregoing reasons, I conclude that the Defendants have met their burden to show that federal

subject matter jurisdiction exists over Waleski's claims. *See Pullman Co. v. Jenkins*, 305 U.S. 534, 540, 59 S. Ct. 347, 83 L. Ed. 334 (1939); *Purdue Pharma L.P. v. Kentucky*, 704 F.3d 208, 220 (2d Cir. 2013); *Vasura v. Acands*, 84 F. Supp. 2d 531, 533 (S.D.N.Y. 2000). To be sure, this conclusion does not mean that every malpractice claim made by a creditor against a professional in connection with a bankruptcy case automatically falls within the ambit of a bankruptcy court's jurisdiction. It is the nature of the claims asserted here, and the actions and orders on which they are based, that give rise to this Court's jurisdiction.

Waleski has also argued that this Court should abstain from hearing his claims and should allow them to move forward in the Pennsylvania state court. I disagree.

So-called "mandatory abstention" rules plainly do not apply. Section 1334(c)(2) of title 28 provides, in applicable part, that the court "shall abstain" from hearing a claim "related to a case under title 11 but not arising under title 11 or arising in a case under title 11" if the claim could not otherwise have been heard in federal court. *See* 28 U.S.C. § 1334(c)(2). Because "arising in" jurisdiction exists over the plaintiff's claims, mandatory abstention is inapplicable.

Under section 1334(c)(1), this Court has the authority and the discretion to decline to exercise jurisdiction over a proceeding "in the interest of justice or in the interest of comity with State courts or respect for State law[.]" 28 U.S.C. § 1334(c)(1). Waleski bears the burden of persuasion

to demonstrate that such "permissive" abstention is appropriate. *Hough v. Margulies (In re Margulies)*, 476 B.R. 393, 402 (Bankr. S.D.N.Y. 2012) (citing *Bickerton v. Bozel S.A. (In re Bozel, S.A.)*, 434 B.R. 86, 102 (Bankr. S.D.N.Y.2010)).

Courts in this district typically rely on a twelve-factor test to determine if permissive abstention is appropriate. Those factors include: (1) the effect or lack thereof on the efficient administration of the estate if a Court recommends abstention, (2) the extent to which state law issues predominate over bankruptcy issues, (3) the difficulty or unsettled nature of the applicable state law, (4) the presence of a related proceeding commenced in state court or other non-bankruptcy court, (5) the jurisdictional basis, if any, other than 28 U.S.C. § 1334, (6) the degree of relatedness or remoteness of the proceeding to the main bankruptcy case, (7) the substance rather than form of an asserted 'core' proceeding, (8) the feasibility of severing state law claims from core bankruptcy matters to allow judgments to be entered in state court with enforcement left to the bankruptcy court, (9) the burden of the court's docket, (10) the likelihood that the commencement of the proceeding in a bankruptcy court involves forum shopping by one of the parties, (11) the existence of a right to a jury trial, and (12) the presence in the proceeding of non-debtor parties. *See Allstate Ins. Co. v. CitiMortgage, Inc.*, 2012 U.S. Dist. LEXIS 39616, 2012 WL 967582, at *6 (S.D.N.Y. Mar. 13, 2012); *Langston Law Firm v. Mississippi*, 410 B.R. 150, 156 (S.D.N.Y. 2008); *N.Y. City Employees' Retirement Sys. v. Ebbers (In re WorldCom, Inc. Sec. Litig.)*, 293 B.R. 308, 332 (S.D.N.Y.2003); *In re*

Gordon, 2011 Bankr. LEXIS 3446, 2011 WL 3878356 (Bankr. S.D.N.Y. Aug. 30, 2011).

However, "[i]n determining whether to exercise permissive abstention under § 1334(c) courts have considered *one or more* (not necessarily all) of twelve factors." *In re Cody, Inc.*, 281 B.R. 182, 190 (S.D.N.Y. 2002) (emphasis in original). The factors largely ask the Court to balance the federal interest in efficient bankruptcy administration against the interest of comity between the state and federal courts. *Fried v. Lehman Bros. Real Estate Assocs. III, L.P.*, 496 B.R. 706, 712-13 (S.D.N.Y. 2013). The analysis "is not a mechanical or mathematical exercise" and the court "need not plod through a discussion of each factor in the laundry lists developed in prior decisions." *In re Janssen*, 396 B.R. 624, 636 (Bankr. E.D. Pa. 2008). "'Ultimately, the pursuit of "equity," "justice" and "comity" involves a thoughtful, complex assessment of what makes good sense in the totality of the circumstances.'" *Id.* (quoting *Kerusa Co. LLC v. W10Z/515 Real Estate Ltd. P'ship*, No. 04 Civ. 708(GEL), 04 Civ. 709(GEL), 04 Civ. 710(GEL), 2004 U.S. Dist. LEXIS 8168, 2004 WL 1048239, at *3 (S.D.N.Y. May 7, 2004)); *see also Winstar*, 2007 U.S. Dist. LEXIS 90482, 2007 WL 4323003 at *16 ("Under all these circumstances, common sense dictates the conclusion that the Bankruptcy Court is the proper forum for resolving these disputes.").

Here, this Court has a strong and overwhelming interest in adjudicating the claims. That resolution of the claims necessarily depends not only on an interpretation of this Court's prior orders and rulings in a complicated and protracted bankruptcy process, but also a determination

of what would and would not have been permissible (from a bankruptcy perspective) in the treatment of competing creditors' claims in the Tronox cases. It is important to the integrity of the bankruptcy process, and of the orders that this Court issued, that Mr. Waleski's challenges to these outcomes be resolved in this Court.

Bankruptcy-law issues also predominate over the state-law issues, despite Mr. Waleski's conclusory contention to the contrary. An attorney's duty to a client may be a function of state law, but the questions of whether the attorneys violated their duties in this case, and whether the different outcomes posited by plaintiff were in fact possible outcomes, are questions of bankruptcy law. *See McClelland v. Grubb & Ellis Consulting Servs. Co. (In re McClelland)*, 377 B.R. 446, 458 (Bankr. S.D.N.Y. 2007), aff'd, 460 B.R. 397 (Bankr. S.D.N.Y. 2011) (finding permissive abstention inapplicable to malpractice claims concerning professionals who negotiated settlement approved by the court); *see also Norkin v. DLA Piper Rudnick Gray Cary, LLP*, 2006 U.S. Dist. LEXIS 14254, 2006 WL 839079, at *5 (S.D.N.Y. March 31, 2006) ("Although plaintiff's causes of action are styled as [ ] [s]tate law claims, they turn largely on issues that are intertwined with the bankruptcies . . . including the propriety of [defendant's] advice related to . . . those proceedings").

While Pennsylvania law might provide Waleski with a cause of action, he points to no complex or unsettled area of Pennsylvania law that would counsel in favor of remand, nor does he imply that this Court is somehow hamstrung from applying whatever points of Pennsylvania law might

be relevant. *See Winstar*, 2007 U.S. Dist. LEXIS 90482, 2007 WL 4323003, at *5 (no abstention because "[a]lthough plaintiffs' claims are based on state law, the state law claims are straightforward common-law claims that do not involve arcane or idiosyncratic provisions of [state] law.").

Finally, Mr. Waleski contends that should this Court choose not to abstain, he would lose his right to a jury trial. I will presume, for this purpose, that Mr. Waleski has the right to present these claims to a jury, though I will note that this particular issue has not been briefed and so my comments are not meant to be binding to the extent that any dispute exists over this point. I simply note that if there is a right to a jury trial then such a jury trial could be held before this Court if the parties were to consent to it. *See* 28 U.S.C. § 157(e). Alternatively, the reference could be withdrawn and the District Court could conduct the jury trial if that were necessary.

For the foregoing reasons, an order will be issued denying the Remand Motion and denying the request for abstention. The parties are directed to negotiate a scheduling order that will govern how this action will proceed.

Dated: New York, New York
July 18, 2019

/s/ Michael E. Wiles
Honorable Michael E. Wiles
United States Bankruptcy Judge

APPENDIX E — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, FILED DECEMBER 16, 2022

UNITED STATES COURT OF APPEALS
OR THE SECOND CIRCUIT

Docket No: 20-3949

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 16th day of December, two thousand twenty-two.

IN RE: TRONOX INCORPORATED,

Debtor.

STANLEY WALESKI, ON HIS OWN BEHALF AND ON BEHALF OF MORE THAN 4,300 SIMILARLY SITUATED CLASS MEMBERS,

Plaintiff-Appellant,

v.

MONTGOMERY, MCCRACKEN, WALKER & RHOADS, LLP, NATALIE D. RAMSEY, LEONARD A. BUSBY,

Defendants-Appellees.

Appendix E

ORDER

Appellant, Stanley Waleski, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk
/s/_____

APPENDIX F — RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. Art. III

ARTICLE III. THE JUDICIARY

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States,--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.[1]

1. This clause has been affected by the Eleventh Amendment.

Appendix F

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Section 3. Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

Appendix F

28 U.S.C.A. § 157

§ 157. Procedures

(a) Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.

(b)(1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.

(2) Core proceedings include, but are not limited to--

(A) matters concerning the administration of the estate;

(B) allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interests for the purposes of confirming a plan under chapter 11, 12, or 13 of title 11 but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11;

(C) counterclaims by the estate against persons filing claims against the estate;

(D) orders in respect to obtaining credit;

(E) orders to turn over property of the estate;

(F) proceedings to determine, avoid, or recover preferences;

(G) motions to terminate, annul, or modify the automatic stay;

(H) proceedings to determine, avoid, or recover fraudulent conveyances;

(I) determinations as to the dischargeability of particular debts;

(J) objections to discharges;

(K) determinations of the validity, extent, or priority of liens;

(L) confirmations of plans;

(M) orders approving the use or lease of property, including the use of cash collateral;

(N) orders approving the sale of property other than property resulting from claims brought by the estate against persons who have not filed claims against the estate;

(O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-

creditor or the equity security holder relationship, except personal injury tort or wrongful death claims; and

(P) recognition of foreign proceedings and other matters under chapter 15 of title 11.

(3) The bankruptcy judge shall determine, on the judge's own motion or on timely motion of a party, whether a proceeding is a core proceeding under this subsection or is a proceeding that is otherwise related to a case under title 11. A determination that a proceeding is not a core proceeding shall not be made solely on the basis that its resolution may be affected by State law.

(4) Non-core proceedings under section 157(b)(2)(B) of title 28, United States Code, shall not be subject to the mandatory abstention provisions of section 1334(c)(2).

(5) The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending.

(c)(1) A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11. In such proceeding, the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions

and after reviewing de novo those matters to which any party has timely and specifically objected.

(2) Notwithstanding the provisions of paragraph (1) of this subsection, the district court, with the consent of all the parties to the proceeding, may refer a proceeding related to a case under title 11 to a bankruptcy judge to hear and determine and to enter appropriate orders and judgments, subject to review under section 158 of this title.

(d) The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown. The district court shall, on timely motion of a party, so withdraw a proceeding if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.

(e) If the right to a jury trial applies in a proceeding that may be heard under this section by a bankruptcy judge, the bankruptcy judge may conduct the jury trial if specially designated to exercise such jurisdiction by the district court and with the express consent of all the parties.

Appendix F

28 U.S.C.A. § 1334

§ 1334. Bankruptcy cases and proceedings

(a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.

(b) Except as provided in subsection (e)(2), and notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

(c)(1) Except with respect to a case under chapter 15 of title 11, nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

(2) Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction.

(d) Any decision to abstain or not to abstain made under subsection (c) (other than a decision not to abstain in a proceeding described in subsection (c)(2)) is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of this title or by the Supreme Court of the United States under section 1254 of this title. Subsection (c) and this subsection shall not be construed to limit the applicability of the stay provided for by section 362 of title 11, United States Code, as such section applies to an action affecting the property of the estate in bankruptcy.

(e) The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction--

(1) of all the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate; and

(2) over all claims or causes of action that involve construction of section 327 of title 11, United States Code, or rules relating to disclosure requirements under section 327.