IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

STANLEY WALESKI, on his own behalf and on behalf of all others similarly situated,	:	
Plaintiffs,	:	**NO. 18-CV-1144**
v.	:	
	:	**JUDGE MARIANI**
MONTGOMERY, MCCRACKEN, WALKER & RHOADS, LLP, NATALIE D. RAMSEY and LEONARD A. BUSBY,	:	**MAGISTRATE JUDE CARLSON**
	:	**FILED ELECTRONICALLY**
Defendants.	:	

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

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INTRODUCTION

Plaintiff Stanley Waleski and the 4300 people he seeks to represent (referred to in the Complaint as "the Avoca Plaintiffs") collected $329 million in damages from the bankruptcy trust created to compensate victims of environmental contamination caused by Tronox, Inc. The substantial awards were materially funded by a $5.15 billion settlement of fraudulent transfer claims brought on behalf of the bankruptcy estate—the largest settlement ever in an environmental liability case—and an extremely favorable provision in the bankruptcy reorganization plan which directed that 12% of the proceeds of that settlement (and other funds) would be deposited into a bankruptcy trust for the benefit of personal injury and other unsecured claimants. The terms of the fraudulent transfer settlement, the terms of the reorganization plan and the procedures for allocating and distributing trust funds were thoroughly litigated in the Southern District of New York where the Tronox bankruptcy was administered.[1]

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[1] Because this case arises in the Tronox Chapter 11 case, (Compl. (ECF 1-2) ¶ 1), and the Tronox reorganization plan requires venue in the Southern District of New York, MMWR is also moving to transfer venue to the Southern District of New York pursuant to 28 U.S.C. § 1412. The transfer motion is properly decided first and before this motion or Waleski's motion to remand. *See, e.g., George Junior Republic v. Williams*, No. 07-4537, 2008 WL 763304, *5 (E.D. Pa. Mar. 19, 2008) ("the 'home court' is in the best position to evaluate the claims and determine whether remand is appropriate"); *In re III Enterprises, Inc. V,* 163 B.R. 453, 458 n.2 (Bankr. E.D. Pa. 1994) (motion to remand transferred to bankruptcy

Despite the manifestly positive outcome achieved for Waleski and the putative class and despite the extensive litigation in the bankruptcy court over distribution of estate assets, Waleski alleges in this action that Defendant Montgomery McCracken Walker & Rhoads LLP ("MMWR"), a Philadelphia-based law firm retained by the Avoca Plaintiffs' counsel, Powell Law Group, P.C., to assist in the Tronox bankruptcy, should have secured more generous awards for the Avoca Plaintiffs. Notably missing from this litigation is Powell Law Group, the very law firm that represented the Avoca Plaintiffs throughout the state court proceedings, bankruptcy proceedings and post-reorganization proceedings and the counter-party to the Contingent Fee Agreement upon which Waleski bases his claims.

Waleski's claims are defective on their face and should be dismissed for any of seven separate and independent reasons. First, the Avoca Plaintiffs already presented in the bankruptcy court and lost their claim to priority over other personal injury claimants and a larger share of the trust assets. Second, Waleski fails to plausibly allege that MMWR or any of its lawyers breached any provision in any contract or any professional obligation and for several other reasons fails to state a viable claim for malpractice, including because a party who chooses to

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court for determination), *aff'd,* 169 B.R. 551 (E.D. Pa. 1994); *Colarusso v. Burger King Corp.,* 35 B.R. 365, 366-68 (Bankr. E.D. Pa. 1984) ("the 'home' court should be the court which determines the question of remand").

settle his claims cannot later attack the settlement by alleging malpractice. Third, Waleski's claims are untimely. Fourth, Waleski is judicially estopped from taking the position that his bankruptcy settlement was undervalued because he prevailed on a related matter in Luzerne County by asserting just the opposite—that the Avoca Plaintiffs received "the best result possible" in the Tronox bankruptcy. Fifth, he is barred by *res judicata* from challenging the terms of the reorganization plan or tort claims trust and the fairness or adequacy of the fraudulent transfer settlement. Sixth, litigation in Ohio state court concerning payment of MMWR's fee is *res judicata* and bars Waleski from challenging MMWR's services in this proceeding. Seventh, Waleski failed to join Powell Law Group which is a necessary and indispensable party. And finally, Waleski's class allegations should be stricken because his claims are not susceptible to class treatment.

Waleski's repetitious and manifestly deficient claims should be dismissed forthwith consistent with the Supreme Court's directive that defective pleadings "should be exposed at the point of minimum expenditure of time and money by the parties and the court." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558 (2007) (citations and internal punctuation omitted).

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Waleski is one of approximately 4300 residents of Luzerne County who asserted claims relating to release of toxic chemicals from Tronox, Inc.'s (f/k/a Kerr-McGee Corporation) wood treatment plant in Avoca, Pennsylvania. (Compl. ¶¶ 2, 28.) The Avoca Plaintiffs initially pursued separate actions against Tronox, Inc. and/or its predecessor(s) in Luzerne County. (*Id.* ¶¶ 29-32.)[2] On January 12, 2009, Tronox and its affiliates filed for protection under Chapter 11 in the U.S. Bankruptcy Court for the Southern District of New York. (*Id.* ¶ 34.) The Avoca Plaintiffs were represented throughout the state court proceedings, the bankruptcy proceedings and post-reorganization proceedings by the Powell Law Group. (*Id.* ¶¶ 35, 41, 48, 64, 67, 70.)

On or about January 27, 2009, the Powell Law Group and MMWR entered into a Contingent Fee Agreement which provided that MMWR would assist in representing Powell Law Group's clients in the Tronox bankruptcy. (*Id.* ¶¶ 36-37.) Pursuant to the agreement, MMWR committed to represent the interests of the Avoca Plaintiffs "in a manner to be mutually agreed with [Powell Law Group]." (Compl., Ex. A, p.1.)

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[2] At the time the bankruptcy was filed, Waleski and approximately 3200 other Avoca Plaintiffs had not as yet suffered any cognizable personal injury but only had claims for medical monitoring.

MMWR diligently represented the interests of the Avoca Plaintiffs through preparation and confirmation of the reorganization plan. Shortly after the Chapter 11 filing, MMWR assisted in securing a seat for one of the Avoca Plaintiffs, Michael E. Carroll, on the unsecured creditors committee. (*Id.* ¶ 42.) On February 5, 2009, MMWR entered an appearance on behalf of Carroll in the bankruptcy court. (*Id.*) MMWR also took responsibility for drafting the documents that would govern administration of the tort claims trust which was created as part of the reorganization plan to resolve tort claims against the bankrupt entity. (*Id.* ¶ 53.)

On November 30, 2010, the bankruptcy court confirmed the reorganization plan, including the documents governing operation of the tort claims trust (Trust Distribution Procedures or TDPs). (*Id.* ¶ 56.) The bankruptcy court also approved payment of MMWR's fees for representing Carroll and recognized that Carroll's services to the bankruptcy case were substantial. (Order Confirming Plan (attached as Exhibit "A") ¶ 156; Reorganization Plan (attached to Order as Ex. A), Art XII, § E.) The plan became effective as of February 14, 2010. (Compl. ¶ 56.) MMWR gave notice on February 15, 2011 that its representation of the Avoca Plaintiffs was concluded. (*Id.* ¶ 57.) MMWR never agreed with Powell Law Group to perform any additional work and therefore had no further obligation under the Contingent Fee Agreement. (*Id.*; *see also* Contingent Fee Agreement, p.1.)

The Tronox reorganization plan established four different categories of tort claims (Categories A-D) that would be allowed and paid through the tort claims trust. (Reorganization Plan, Art. III, § B.4.) The trust was to be funded with an initial $12.5 million cash payment plus 12% of the proceeds of related litigation which sought to claw back certain estate assets under a fraudulent transfer theory. (*Id.*, § B.4(b).) The plan further provided that final determinations on the allowance or disallowance of claims would be made by the trustee pursuant to the TDPs. (*Id.*, § B.4(d).)

Like the Avoca Plaintiffs, a group of Mississippi residents alleged that they were harmed by contamination from a Tronox site in their state. (Compl. ¶ 47.) An *ad hoc* committee representing the Mississippi claimants filed a group proof of claim in the bankruptcy court prior to the August 12, 2009 bar date. (*Id.*; *see also id.*, Ex. B.) The trust claims administrator later approved their individual claims in the aggregate amount of $343 million. (*Id.* ¶ 62.) The Avoca Plaintiffs, through their then-counsel Brown Rudnick, objected to the proposed distribution of funds allocated to non-asbestos toxic exposure claims—referred to in the bankruptcy as "Category D" claims—to the Mississippi claimants. (*Id.* ¶ 71.) By Memorandum Opinion dated June 17, 2015, the U.S. Bankruptcy Court for the Southern District of New York rejected the Avoca Plaintiffs' challenges as meritless and affirmed the trustee's decision to include the Mississippi claimants in the Category D

distributions. *In re: Tronox, Inc.*, No. 09-10156, 2015 WL 3799702 (Bankr. S.D.N.Y. June 17, 2015).

On November 10, 2014, the U.S. District Court for the Southern District of New York entered an Order adopting the report and recommendation of the bankruptcy court and approving the $5.15 billion settlement of the fraudulent transfer claims. *In re Tronox, Inc.*, No. 14-CV-5495, 2014 WL 5825308 (S.D.N.Y. Nov. 10, 2014).

The final decree was entered in the bankruptcy court on September 30, 2015. The day before, Waleski and 105 other Avoca Plaintiffs sought leave from the Court of Common Pleas of Luzerne County to approve settlement payments from the bankruptcy trust, claiming in their petition that the settlement payments were the "best result possible for each of the Plaintiffs." (*See* Petition for Approval of Bankruptcy Awards to Certain Estates (attached as Exhibit "B") ¶ 85.) Their petition was granted by Order dated October 29, 2015. (A copy of the Order is attached as Exhibit "C.")[3]

Prior to entry of the final decree, in 2011, one of many creditors of the Powell Law Group commenced an action in state court in Ohio against the Tronox

[3] In September 2015, the Avoca Plaintiffs also sought to pursue claims against the "new" Kerr-McGee Corporation in Luzerne County. They were later enjoined from pursuing those claims. *See In re Tronox*, 549 B.R. 21 (S.D.N.Y. 2016), *appeal dismissed*, 855 F.3d 84 (2d Cir. 2017).

tort claims administrator seeking to attach funds held by the trust and payable to Powell Law Group for legal fees. Powell Law Group had also withheld payment from MMWR even though MMWR's work was completed. In 2012, MMWR sought to intervene in the Ohio litigation to compel payment of its fee. MMWR was allowed to intervene on June 10, 2013. Powell Law Group was also a party to the Ohio action, having been granted leave to intervene as a defendant in 2012. On August 26, 2016, the Ohio trial court concluded that MMWR was entitled to payment of its fee and entered summary judgment in its favor. The decision was affirmed by the Court of Appeals of Ohio on September 13, 2017. *First Nat'l Cmty. Bank. v. The Garretson Firm Resolution Grp.*, 97 N.E.3d 747 (Ohio Ct. App. 2017).

On April 11, 2018, Waleski initiated this action against MMWR and two of its lawyers, Natalie D. Ramsey and Leonard A. Busby,[4] in the Court of Common Pleas of Luzerne County alleging that the settlement he received from Tronox was undervalued and seeking to recover an additional payment, this time under a malpractice theory. Waleski seeks to represent himself and the other Avoca Plaintiffs who settled their claims with the bankruptcy trust. He purports to assert claims for breach of the Contingent Fee Agreement between MMWR and Powell

[4] For convenience, MMWR, Ramsey and Busby are referred to collectively herein as "MMWR" unless otherwise noted.

Law Group (Count I) and for breach of the same agreement under an intended beneficiary theory (Count II).

On June 4, 2018, MMWR removed the case to this Court pursuant to 28 U.S.C. §§ 1441(a) and 1452(a). (ECF 1.) On June 11, 2018, MMWR moved to dismiss Waleski's Complaint pursuant to Rule 12(b) (ECF 6) and for transfer of venue pursuant to 28 U.S.C.§ 1412 (ECF 7).

ARGUMENT

I. Waleski Presented and Lost These Same Claims in the Tronox Bankruptcy and Is Barred From Relitigating Them Here.

In the Tronox bankruptcy, the Avoca Plaintiffs presented and lost the very same challenges to the Mississippi claims that Waleski raises in his Complaint in this case. Having already litigated and lost these same issues, Waleski is barred from taking another bite at the apple in this Court.

Issue preclusion or collateral estoppel prevents a litigant from relitigating an issue that he presented and lost in a prior proceeding. *Peloro v. United States*, 488 F.3d 163, 174 (3d Cir. 2007). The defense applies where: (1) the issue to be precluded is the same as that involved in the prior action; (2) the issue was actually

litigated; (3) the issue was determined by a final and valid judgment; and (4) the determination was essential to the final judgment. *Id.* at 174-75.[5]

All prerequisites for issue preclusion are satisfied here.

The issues presented in Waleski's Complaint—whether the Mississippi claimants asserted valid claims and are entitled to share in Category D funds—were fully litigated in the Tronox bankruptcy. There, as in this case, the Avoca Plaintiffs argued that the Mississippi claimants did not qualify for an award under Category D and that their claims should have been disallowed because they were submitted collectively and by a committee. *In re: Tronox, Inc.*, No. 09-10156, 2015 WL 3799702, at **8-12 (S.D.N.Y. June 17, 2015). The U.S. Bankruptcy Court for the Southern District of New York rejected each of these arguments in the opinion issued on June 17, 2015. The bankruptcy court specifically concluded that "there is no merit to the objections asserted by the Avoca Plaintiffs." *Id.* at *11. The court found that the "group" or "class" proof of claim filed on behalf of the Mississippi claimants by the "Ad Hoc Committee" was "acceptable," *id.*, and that the Mississippi claimants were properly categorized and qualified for payment

[5] "The normal rules of *res judicata* and collateral estoppel apply to the decisions of bankruptcy courts." *Katchen v. Landy*, 382 U.S. 323, 334 (1966). The preclusive effect of those rulings is properly raised in a motion to dismiss. *Roach v. Vertarano*, No. 14-947, 2015 WL 672248, at *6 (W.D. Pa. Feb. 17, 2015); *Connelly Found. v. School Dist.*, 461 F.2d 495, 496 (3d Cir. 1972).

under Category D, *id.* at **8-11. In so ruling, the court rejected the Avoca Plaintiffs' argument that they were entitled to priority over the Mississippi claimants, explaining that "[s]imilar treatment of similar claims is . . . a bedrock principle of bankruptcy law" and the Avoca Plaintiffs' claim to priority was "utterly inconsistent with th[at] principle." *Id.* at *10.

The bankruptcy court's findings that the Mississippi claims were properly submitted and properly approved for distributions under Category D were not incidental, but rather essential to the ruling on the Avoca Plaintiffs' objections. *Jean Alexander Cosmetics, Inc. v. L'Oreal USA, Inc.*, 458 F.3d 244, 250 (3d Cir. 2006) (necessity requirement ensures that preclusive effect is not given to "incidental matters"), *cert. denied*, 549 U.S. 1305 (2007). Further, the bankruptcy court's decision that the trustee properly allowed the Mississippi claims was final for preclusion purposes. *Peloro*, 488 F.3d at 176 (bankruptcy court order affirming trustee's claim determination was final for issue preclusion purposes); *CoreStates Bank, N.A. v. Huls Am., Inc.*, 176 F.3d 187, 201 (3d Cir. 1999) (order rejecting objections is final for preclusion purposes).

Thus, all requirements for preclusion are met and Waleski is barred from relitigating in this proceeding the validity of the Mississippi claims. *See Peloro*, 488 F.3d at 175-76 (plaintiff barred from relitigating issue of whether bonds belonged to her rather than bankrupt estate because bankruptcy court already ruled

against her); *Roach*, 2015 WL 672248, at **9-10 (plaintiff barred from attributing denial of discharge to attorney's conduct in legal malpractice action where bankruptcy court denied discharge based on finding that plaintiff acted with fraudulent intent). Because Waleski's entire Complaint rests on the already rejected theory that the Mississippi claims are invalid, (Compl. ¶¶ 72-75), this action should be dismissed.[6]

II. Waleski's Complaint Should Be Dismissed Because He Fails To State a Claim Upon Which Relief Can Be Granted.

Application of issue preclusion requires dismissal of Waleski's Complaint as set forth above and there is no need to address the other grounds in MMWR's motion. It is plain, however, that Waleski fails to set forth a plausible claim for relief against any defendant and for this alternative reason his Complaint should be dismissed.

A. Waleski fails to plausibly allege a breach of any professional obligation.

In both counts of his Complaint, Waleski attempts to assert a claim for malpractice under a contract theory. He fails to do so.

[6] As one of the Avoca Plaintiffs, Waleski is, of course, bound by the bankruptcy court's decision approving the trustee's allowance of the Mississippi claims. *See Cooper v. Federal Reserve Bank*, 467 U.S. 867, 880 (1984).

Waleski does not allege a breach of any provision in the Contingent Fee Agreement but instead bases his contract claims on alleged deviations from the rules of professional conduct which he claims are implicit in the Contingent Fee Agreement. (Compl. ¶¶ 79-80, 96-98.)[7] He fails, however, to articulate a plausible basis for concluding that he was entitled to a larger share of Tronox's assets and, because he has no viable claim to an additional payment, he cannot prevail on a claim for malpractice. *See Kituskie v. Corbman*, 552 Pa. 275, 281, 714 A.2d 1027, 1030 (1998) (referred to as "case within a case" requirement); *Brock v. Owens*, 367 Pa. Super. 324, 328-29, 532 A.2d 1168, 1170 (1987) (to recover for malpractice, plaintiff must establish that he would have prevailed in underlying litigation); *Duke & Co.*, 275 Pa. Super. at 73-74, 418 A.2d at 617 (same holding in malpractice case brought under contract theory).

There is no legal authority for Waleski's assertion that the Avoca Plaintiffs had a "unique and superior interest[] in the Category D fund," (Compl. ¶ 87), and

[7] In federal question cases, the district court looks to the choice of law provisions of the forum state to determine which state's law applies. *Gay v. Creditinform*, 511 F.3d 369, 389 (3d Cir. 2007). Where the laws of two potentially applicable jurisdictions would produce the same result on the particular issue presented, there is a false conflict and a choice of law analysis is unnecessary. *Williams v. Stone*, 109 F.3d 890, 893 (3d Cir. 1997), *cert. denied*, 522 U.S. 956 (1997). Here, there is no conflict between Pennsylvania and New York law relating to the essential elements of a claim for malpractice and therefore no need for a choice of laws analysis. *Compare Duke & Co. v. Anderson*, 275 Pa. Super. 65, 71-72, 418 A.2d 613, 616 (1980) *with Fidler v. Sullivan*, 93 A.D.2d 964, 964-65, 463 N.Y.S.2d 279, 280-81 (1983) (New York law).

priority over Mississippi residents who also claimed to have been injured as a result of environmental contamination caused by Tronox, (*id.* ¶¶ 85). Waleski does not identify any legal argument that could have been asserted to establish priority over other claimants and there is none. The theory of liability that Waleski is advancing is antithetical to the purpose of the Bankruptcy Code which is to ensure equal distribution among similarly situated creditors. *See, e.g., Begier v. I.R.S.*, 496 U.S. 53, 58 (1990) ("Equality of distribution among creditors is a central policy of the Bankruptcy Code. According to that policy, creditors of equal priority should receive pro rata shares of the debtor's property."); *In re Combustion Eng'g, Inc.*, 391 F.3d 190, 239 (3d Cir. 2004) (reorganization plan that treats one group of similarly situated personal injury claimants differently than another group is not confirmable). Waleski's theory that MMWR should have developed a different payment scheme that preferred him and the Avoca Plaintiffs is simply untenable.

Waleski also alleges that MMWR should have challenged the proof of claim submitted on behalf of the Mississippi claimants because it asserted "multiple claims on behalf of multiple claimants" and was filed by "an 'ad hoc' entity." (Compl. ¶¶ 84, 102.) Contrary to Waleski's assertion, however, class proofs of claim are permissible in bankruptcy proceedings. *See In re Zenith Labs., Inc.*, 104 B.R. 659 (D.N.J. 1989); *In re Chateaugay Corp.*, 104 B.R. 626, 634 (S.D.N.Y.

1989); *In re Retirement Builders, Inc.*, 96 B.R. 390, 392 (Bankr. S.D. Fla. 1988); *In re Keck, Mahin & Cate*, 237 B.R. 430, 434 (Bankr. N.D. Ill. 1999), *aff'd* 253 B.R. 530 (N.D. Ill. 2000); *In re Great Western Cities, Inc.*, 107 B.R. 116, 119 (N.D. Tex. 1989). As a matter of law, and as the bankruptcy court already concluded in overruling the Avoca Plaintiffs' objections, *see In re: Tronox*, 2015 WL 3799702, at *11, the proof of claim filed on behalf of the Mississippi claimants was not invalid and failure to object was not malpractice.

Waleski also alleges that it was a breach of contract for MMWR to represent Carroll in his capacity as a member of the creditors' committee and, in connection therewith, to fail to draft the trust documents in a way that prioritized the claims of the Avoca Plaintiffs over the claimants from Mississippi. (Compl. ¶¶ 86-87, 104-05.) Again, Waleski's theory conflicts with governing law. MMWR's representation of Carroll in his capacity as a member of the committee was not improper.[8] To the contrary, the Bankruptcy Code expressly contemplates that individual creditors will serve on the committee. 11 U.S.C. § 1102(b)(1) ("A committee of creditors appointed under subsection (a) of this section shall

[8] Waleski appears to confuse MMWR's representation of Carroll in his capacity as a member of the committee and representation of the committee. MMWR did not represent the committee. Even if it had, this would not have been a *per se* conflict. *See* 11 U.S.C. § 1103(b) ("Representation of one or more creditors of the same class as represented by the committee shall not per se constitute the representation of an adverse interest.").

ordinarily consist of the persons, willing to serve, that hold the seven largest claims against the debtor of the kinds represented by such committee. . . ."). Moreover, contrary to the central thesis underlying Waleski's Complaint, members of a creditors' committee are *prohibited* from using their positions on the committee solely to advance their own individual interests. *See In re Map Int'l, Inc.*, 105 B.R. 5, 6 (Bankr. E.D. Pa. 1989); *Matter of Enduro Stainless, Inc.*, 59 B.R. 603, 605 (Bankr. N.D. Ohio 1986). Thus, Carroll and MMWR could not lawfully have exploited Carroll's role to the exclusive benefit of the Avoca Plaintiffs as Waleski proposes.

Waleski fails to plausibly allege that he was entitled to a larger distribution from the Tronox trust and therefore fails to state a claim for malpractice.

B. Waleski fails to state a claim for breach of contract against individual lawyers at MMWR.

Waleski's breach of contract claim against Natalie Ramsey and Leonard Busby fails for a more fundamental reason: they are not parties to the Contingent Fee Agreement. The agreement is between Montgomery McCracken Walker & Rhoads LLP and the Powell Law Group. It does not purport to bind or obligate any individual lawyer at the Montgomery McCracken Walker & Rhoads LLP firm. Nor is it alleged that Ramsey or Busby assumed any specific obligation in the Contingent Fee Agreement. Because the claims against Ramsey and Busby are

premised on a contract to which they are not parties, those claims should be dismissed. *See Riseman v. Advanta Corp.*, 39 F. App'x 761, 767 (3d Cir. 2002), *cert. denied*, 537 U.S. 1190 (2003); *B&L Asphalt Indus., Inc. v. Fusco*, 753 A.2d 264, 270 (Pa. Super. 2000); *Sweeney v. Herman Mgmt., Inc.*, 85 A.D.2d 34, 36, 447 N.Y.S.2d 164, 166 (1982).

C. Waleski fails to state a claim against MMWR for breach of contract.

Waleski's breach of contract claim in Count I fails for a similar reason. Because he is not a party to the agreement, he cannot pursue a direct claim for its breach. *Murray v. Commercial Union Ins. Co.*, 782 F.2d 432, 438 (3d Cir. 1986); *Black Car & Livery Ins., Inc. v. H&W Brokerage, Inc.*, 28 A.D.3d 595, 595-96, 813 N.Y.S.2d 751, 752 (2006).

D. Waleski cannot collaterally attack the settlement that he accepted from Tronox through a claim for malpractice.

Waleski's contract claims are based on the proposition that the settlements received from the bankruptcy trust were less generous than they should have been. *See, e.g.*, Compl. ¶ 91 (alleging "loss of further sums that would have been allocated to Plaintiffs' claims . . ."). The trust payments were made pursuant to the reorganization plan which constituted "a good faith compromise and settlement of all Claims" and which declared that "all Distributions made to Holders of Allowed

Claims . . . are intended to and shall be final." (Reorganization Plan, Art. IV, § B.) Having agreed to accept the trust payment, Waleski cannot turn around and attack the settlement under the guise of a claim for malpractice. *Muhammad v. Strassburger, McKenna, Messer, Shilobod & Gutnick*, 526 Pa. 541, 546, 587 A.2d 1346, 1348 (1991) ("An action should not lie against an attorney for malpractice based on negligence and/or contract principles when that client has agreed to a settlement."), *cert. denied*, 502 U.S. 867 (1991); *see also Phinisee v. Layser*, 627 F. Appx. 118, 124 (3d Cir. 2015) (affirming dismissal of malpractice claim which was "nothing more than an expression of dissatisfaction with the amount of money that [plaintiff] agreed to and received in the settlement"), *cert. denied*, 136 S. Ct. 1670 (1991); *Sutherland v. Milstein*, 266 A.D.2d 33, 698 N.Y.S.2d 15 (1999) (affirming dismissal of legal malpractice claim because client agreed to settle), *appeal denied*, 95 N.Y.2d 753, 733 N.E.2d 227 (2000). No recovery is possible in these circumstances and therefore Waleski's Complaint should be dismissed.

E. Waleski cannot pursue a malpractice claim because he failed to file the required certificate of merit.

Rule 1042.3(a) of the Pennsylvania Rules of Civil Procedure requires that a plaintiff alleging a breach of professional duty must file a certificate of merit attesting to the colorable merit of his claim within 60 days after filing his complaint. Pa. R. Civ. P. 1042.3(a). More than 60 days have passed since Waleski

commenced this action on April 11, 2018, but he has not filed a certificate of merit or a motion for extension with a legitimate excuse for his lapse. The certificate of merit requirement constitutes substantive state law and therefore remains applicable in this Court. *Iwanejko v. Cohen & Grigsby, P.C.*, 249 F. App'x 938, 944 (3d Cir. 2007), *cert. denied*, 555 U.S. 829 (2008). Further, the requirement applies even though Waleski frames his Complaint as one for breach of contract rather than negligence. *Donnelly v. O'Malley & Langan, PC*, 370 F. App'x 347, 349-50 (3d Cir. 2010) (certificate of merit required for contract claim alleging legal malpractice) (per curiam); *Perez v. Griffin*, 304 F. App'x 72, 75 (3d Cir. 2008) (plaintiff "may not avoid the filing of a certificate of merit by labeling professional liability claims as something else"), *cert. denied*, 556 U.S. 1260 (2009). Because Waleski failed to comply with Rule 1042.3(a), his Complaint should be dismissed.

III. Waleski's Claims Are Untimely.[9]

Waleski's Complaint is untimely because it was filed long after expiration of the two-year limitations period applicable to tort claims in Pennsylvania (and indeed long after the four-year limitations period applicable to contract claims).[10]

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[9] A statute of limitations defense is properly raised in a Rule 12(b)(6) motion where, as in the present case, "'the face of the complaint' demonstrates that the plaintiff's claims are untimely." *Stephens v. Clash*, 796 F.3d 281, 288 (3d Cir. 2015); *Cito v. Bridgewater Twp. Police Dep't*, 892 F.2d 23, 25 (3d Cir. 1989).

While Waleski seeks relief under a contract theory, the label he uses is not controlling. Instead, the "gist of the action" doctrine determines whether his claims sound in contract or in tort. *See Bruno v. Erie Ins. Co.*, 630 Pa. 79, 112, 106 A.3d 48, 68 (2014). Where, as in the present case, a plaintiff brings a claim for malpractice based on alleged breach of an implied contract duty to perform in a manner consistent with the profession at large, the claim sounds in tort rather than contract and is subject to the limitations period applicable to tort claims. *New York Cent. Mut. Ins. Co. v. Edelstein*, 637 F. Appx. 70, 73 (3d Cir. 2016). Waleski's claims are thus subject to the two-year limitations period for tort claims in 42 Pa. C.S.A. § 5524.

The statute began to run in this case no later than January 15, 2014 (and actually much earlier) when the trustee of the Tronox personal injury trust issued its final report itemizing the allowed claims that would be paid out of the trust, including the Avoca Plaintiffs' claims which were approved in the amount of $949 million and the Mississippi claims which were approved in the amount of $343 million. (Compl. ¶ 62.) All of the acts that Waleski complains of occurred on or before January 15, 2014, including MMWR's representation of Carroll in his

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[10] Under Pennsylvania's choice of law rules, Pennsylvania's statute of limitations generally applies. *Ross v. Johns-Manville Corp.*, 766 F.2d 823, 826 (3d Cir. 1985); *see also* 42 Pa. C.S.A. § 5521.

capacity as member of the creditors' committee, (*id.* ¶¶ 42-43), the drafting of the trust documents, (*id.* ¶¶ 53, 56), submission of the "omnibus claim" by the "ad hoc" committee on behalf of the Mississippi claimants and the lack of an objection thereto, (*id.* ¶ 47), MMWR's notice of termination of its representation of the Avoca Plaintiffs, (*id.* ¶ 57), the trustee's approval of the trust claims submitted by the Mississippi Claimants, (*id.* ¶ 62), and confirmation by the trustee that the Mississippi claimants stood to share in the funds allocated to Category D, (*id.*). Waleski waited for more than four years after January 15, 2014 before bringing this action. As a result, his claims are time-barred.[11]

IV. Waleski Is Judicially Estopped From Challenging the Value of the Bankruptcy Settlement Because He Alleged in Luzerne County That He Received "the Best Result Possible."

In addition to improperly seeking to relitigate issues that were presented and lost in the bankruptcy proceeding, Waleski makes allegations in his Complaint that are directly contrary to allegations he made in a related state court proceeding. His Complaint should be dismissed as a result of this duplicity.

Judicial estoppel bars a litigant from asserting a position that is inconsistent with a position he or she previously advanced before a court. *Scarano v. Central*

[11] Alternatively, Waleski's contract claims should be dismissed under the gist of the action doctrine. *See Jacoby Donner, P.C. v. Aristone Realty Capital, LLC*, No. 17-2206, 2018 WL 1609341, at *5 (E.D. Pa. Apr. 2, 2018).

R. Co., 203 F.2d 510, 513 (3d Cir. 1953). Three requirements must be met for judicial estoppel to apply. First, the party to be estopped must have taken positions that are irreconcilably inconsistent. *Krystal Cadillac-Oldsmobile GMC Truck, Inc. v. General Motors Corp.*, 337 F.3d 314, 319 (3d Cir. 2003), *cert. denied*, 541 U.S. 1043 (2004). Second, the party must have changed his or her position "in bad faith—i.e., with intent to play fast and loose with the court." *Id.* (citation and internal punctuation omitted). The bad faith element is satisfied if the self-contradiction was used to obtain an advantage. *Scarano*, 203 F.2d at 513-14. Third, judicial estoppel must be tailored to address the specific harm. *Krystal Cadillac-Oldsmobile*, 337 F.3d at 319. All three requirements are met here.

The positions advanced by Waleski in his Complaint are directly contrary to allegations made to the Court of Common Pleas of Luzerne County to secure approval for the bankruptcy settlements. On September 29, 2015, Waleski and other members of the putative class petitioned the Luzerne County Court for approval of settlement payments to estates they were administering (and for approval of payment of Powell Law Group's fees).[12] In their petition, Waleski and 105 other class members alleged that "the Powell Law Group . . . was successful in securing a seat on the unsecured creditors' committee." (Pet. for Approval ¶ 17.)

[12] Such approval is required for survival actions under Pennsylvania law. *Moore v. Gates*, 398 Pa. Super. 211, 217, 580 A.2d 1138, 1141 (1990), *appeal denied*, 590 A.2d 758 (Pa. 1991).

In this case, however, Waleski claims that Carroll "was appointed at [MMWR]'s suggestion and recommendation," (Compl. ¶ 42), and that that this was a breach of contract, (*id.* ¶¶ 86, 104). In Luzerne County, Waleski averred that "Powell Law Group's efforts . . . resulted in a plan to compensate the Tort Claimants in the Tronox Plan of Reorganization." (Pet. for Approval ¶ 19.) Here, Waleski asserts that MMWR "took responsibility for drafting trust documents" and "failed to draft the trust documents in a fashion to protect the Avoca Plaintiffs' claims . . .," (Compl. ¶¶ 53, 58), and that this was a breach of contract, (*id.* ¶¶ 87, 105). Waleski alleged in Luzerne County that "Powell Law Group worked with outside bankruptcy counsel to secure the Decedents' interests in the bankruptcy court," "worked with the Tort Claims Trust to secure *the best result possible* for each of the Plaintiffs," and "successfully positioned its clients to obtain significant recoveries." (Pet. for Approval. ¶¶ 84-85, 87.) (Emphasis added.) These allegations are directly contrary to Waleski's assertion in this case that he received less than he should have from the bankruptcy trust. (Compl. ¶¶ 82, 85, 103.) The inconsistency requirement for judicial estoppel is thus satisfied.

Waleski reversed his position to pursue a different theory of recovery against a different party and therefore the second element of bad faith is satisfied. Self-contradiction for personal advantage is a clear affront to "the integrity of the system which the doctrine of judicial estoppel seeks to protect." *See Oneida Motor*

Freight, Inc. v. United Jersey Bank, 848 F.2d 414, 419 (3d Cir. 1988), *cert. denied*, 488 U.S. 967 (1988).

The third requirement for judicial estoppel is also satisfied because no lesser sanction would adequately remedy Waleski's misconduct. Anything less than dismissal would only reward Waleski for his deception and excuse his waste of judicial resources. *Danise v. Saxon Mortg. Servs. Inc.*, No. 17-1732, 2018 WL 2750239, at *3 (3d Cir. June 7, 2018); *Haines & Kibblehouse, Inc. v. Balfour Beatty Constr., Inc.*, 553 F. Appx. 246, 251 (3d Cir. 2014).

Waleski is playing "fast and loose" with the Court in asserting that his trust payment was undervalued after having obtained relief in Luzerne County based on the contrary assertion that he received "the best result possible" from the bankruptcy court. His Complaint is properly dismissed based on judicial estoppel. *See Haines & Kibblehouse, Inc.*, 553 F. Appx. at 251.

V. Waleski Is Barred by *Res Judicata* From Challenging Bankruptcy Rulings in This Action.

Even if Waleski were able to overcome the many challenges set forth above—and he cannot—his claims nonetheless fail because they represent impermissible collateral attacks on final decisions in the Tronox bankruptcy.

An order confirming a reorganization plan is *res judicata* as to all issues which were decided or which could have been decided at the hearing on confirmation. 11 U.S.C. § 1141(a) ("the provisions of a confirmed plan bind . . . any creditor"); *Donaldson v. Bernstein*, 104 F.3d 547, 554 (3d Cir. 1997); *In re Szostek*, 886 F.2d 1405, 1408 (3d Cir. 1989). On November 30, 2010, the U.S. Bankruptcy Court for the Southern District of New York entered an Order confirming the Tronox reorganization plan, including the classification of tort claimants, the allocation of funds to the tort claims trust and trust distribution procedures. (*See* Order Confirming Plan ¶¶ 94-95, 98, 119-20, 185; Reorganization Plan, Arts. VI, VII, VIII.)[13] Waleski is barred from seeking to relitigate those same matters in this proceeding. *See In re Szostek*, 886 F.2d at 141008 ("confirmation of a debtor's plan binds both the debtor and creditors"); *In*

[13] The bankruptcy rulings are referenced in the Complaint, (Compl. ¶¶ 56, 68-69), and therefore properly considered in connection with this motion. *Pension Ben. Guar. Corp. v. White Consol. Ind., Inc.*, 998 F.2d 1192, 1196 (3d Cir. 1993), *cert. denied*, 510 U.S. 1042 (1994). Further, the Court may take judicial notice of prior litigation in ruling on a Rule 12 motion. *See O'Boyle v. Braverman*, 337 F. Appx. 162, 165 (3d Cir. 2009), *cert. denied*, 558 U.S. 1112 (2010); *Southern Cross Overseas Agencies, Inc. v. Wah Kwong Shipping Grp. Ltd.*, 181 F.3d 410, 426-27 (3d Cir. 1999).

re Arctic Glacier Int'l, Inc., 255 F. Supp. 3d 534, 546-48 (D. Del. 2017) (party barred from relitigating distribution procedure in plan).[14]

Res judicata likewise bars Waleski from challenging the adequacy of the settlement of the fraudulent transfer litigation. On November 10, 2014, the U.S. District Court for the Southern District of New York rejected a challenge to the settlement filed by other personal injury claimants (ironically, tort claimants from Mississippi) who argued that the $5.15 billion settlement was insufficient. Over this objection, the district court determined that the settlement "is fair and equitable and meets the standards for approval under applicable law." *In re Tronox, Inc.*, No. 14-CV-5495, 2014 WL 5825308, at *6 (S.D.N.Y. Nov. 10, 2014). Waleski seeks in this case to relitigate the same issue of whether the settlement "underfunded payment of Category D claims." (Compl. ¶ 89.) *Res judicata* bars this claim. *See Travelers Indem. Co. v. Bailey*, 557 U.S. 137, 152 (2009).

Because Waleski is precluded from relitigating the terms of the trust or the fairness of the fraudulent transfer settlement, he has no plausible claim for relief and his Complaint should be dismissed.

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[14] The Order confirming the plan also recognizes the substantial services rendered by MMWR and authorized an award of counsel fees to MMWR. (*See* Order Confirming Plan ¶ 156; Reorganization Plan, Art. XII, § E.)

VI. Waleski Is Barred by the Ohio State Judgment From Challenging the Quality of MMWR's Services.

On September 13, 2017, the Ohio First District Court of Appeals affirmed the entry of summary judgment in favor of MMWR on its assertion of a charging lien against funds being held in the bankruptcy trust to pay Powell Law Group's fees. *First Nat'l Cmty. Bank v. The Garretson Firm Resolution Grp.*, 97 N.E.3d 747 (Ohio Ct. App. 2017). The Ohio Court of Appeals determined that "MMWR played a significant role in securing more than $314,000,000 for PLG's Avoca Litigation clients through the creation of a torts claims trust . . . for the benefit of the Avoca Litigation clients . . ." and was therefore entitled to be paid from funds held for Powell Law Group. *Id.* at 748. The decision is *res judicata* in this case and bars Waleski from challenging the quality of the services provided by MMWR.

Under the Full Faith and Credit Act, "[t]he . . . judicial proceedings of any court of any . . . State . . . shall have the same full faith and credit in every court within the United States . . . ." 28 U.S.C. § 1738. Federal courts look to the law of the adjudicating state—in this case, Ohio—to determine the preclusive effect of its judgments. *Delaware River Port Auth. v. Fraternal Order of Police*, 290 F.3d 567, 573 (3d Cir. 2002); *Greenleaf v. Garlock, Inc.*, 174 F.3d 352, 357 (3d Cir. 1999). The requirements for *res judicata* under Ohio law are: (1) a prior final, valid

decision on the merits by a court of competent jurisdiction; (2) the second action involves the same parties or their privies; (3) the second action raises claims that were or could have been litigated in the first action; and (4) the second action arises out of the transaction or occurrence that was the subject of the first action. *Hapgood v. City of Warren*, 127 F.3d 490, 493 (6th Cir. 1997), *cert. denied*, 523 U.S. 1046 (1998). Each requirement is satisfied here.

The entry of summary judgment in favor of MMWR was an adjudication on the merits of MMWR's claim for payment. *A-1 Nursing Care of Cleveland, Inc. v. Florence Nightingale Nursing, Inc.*, 97 Ohio App. 3d 623, 627, 647 N.E.2d 222 (1994) ("Summary judgment terminates a party's action on the merits and a subsequent filing of an action decided on summary judgment is prohibited by the doctrine of res judicata. . . ."). Thus, the first requirement is met.

With respect to the second requirement, privity exists if two persons share a "mutuality of interest, including an identity of desired result." *Kirkhart v. Keiper*, 101 Ohio St. 3d 377, 379, 805 N.E.2d 1089, 1092 (2004). Because Powell Law Group was counsel for the Avoca Plaintiffs, there is privity between them. *See Commissioner v. Banks*, 543 U.S. 426, 436 (2005) ("the relationship between client and attorney . . . is a quintessential principal-agent relationship"); *Brown v. Florida Coastal Partners*, No. 13-CV-1225, 2015 WL 4205157, at *9 (S.D. Ohio July 10, 2015); *Render v. Hall*, No. 1:12-CV-46, 2012 WL 367950, at *7 (S.D. Ohio Feb. 3,

2012), *magistrate report & recommendation adopted*, 2012 WL 2030573 (S.D. Ohio June 6, 2012). Further, Waleski alleges that he is an intended beneficiary of promises made to Powell Law Group in the Contingent Fee Agreement, (Compl. ¶ 94), and thereby cannot deny privity with Powell Law Group with respect to enforcement of that agreement. *Resource Title Agency, Inc. v. Morreale Real Estate Servs., Inc.*, 314 F. Supp. 2d 763, 770 (N.D. Ohio 2004) ("A third-party beneficiary does not acquire any rights greater than those set forth in the contract by the parties.").

The third requirement of *res judicata* is satisfied because this action raises claims that could have and should have been brought in Ohio. Under Ohio law, a claim for legal malpractice is a compulsory counterclaim in an action to recover unpaid legal fees. *Harper v. Anthony*, No. 100082, 2014 WL 265574, at *2 (Ohio App. 8 Dist. Jan. 23, 2014); *Reese v. Wagoner & Steinberg, Ltd.*, No. L-10-1156, 2011 WL 1991748, at *3 (Ohio Ct. App. 6 Dist. May 20, 2011). Accordingly, any claim for malpractice was required to be asserted as a counterclaim in the Ohio action.

Finally, the fourth requirement is satisfied because this action arises out of the same legal representation in the Tronox bankruptcy that was at issue in the Ohio litigation.

Thus, *res judicata* applies and bars Waleski from attacking the quality of MMWR's services in this proceeding.

VII. The Complaint Should Be Dismissed Due to Failure to Join Powell Law Group.

The Contingent Fee Agreement between MMWR and Powell Law Group provides that MMWR would perform services "in a manner to be mutually agreed with [Powell Law Group]." (Compl., Ex. A, p.1.) Because Powell Law Group is a party to the agreement on which Waleski's claims are based, it is a necessary party that must be joined.[15]

A person must be joined under Rule 19(a) if "that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect the interest; or (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest." Fed. R. Civ. P. 19(a)(1)(B). Both prongs of Rule 19(a)(1)(B) are satisfied here.

[15] Waleski asserts that Powell Law Group represented the Avoca Plaintiffs throughout the bankruptcy proceeding, (Compl. ¶¶ 48-49, 58, 64, 70), yet he declined to name Powell Law Group or its principals as defendants. Similarly, he alleges in the related proceeding that Weitz & Luxenberg was retained in 2012 to represent the Avoca Plaintiffs, (Pet. for Approval ¶ 45), but he declined to name that firm or any of its members as defendants.

Powell Law Group is necessary under Rule 19(a)(1)(B)(i) because this dispute requires interpretation of a contract to which it is a party. *See, e.g., AAA Life Ins. Co. v. Kneavel*, No. 1:10-CV-00158, 2012 WL 895953, at *3 (M.D. Pa. Mar. 15, 2012) ("[I]n breach-of-contract actions, all parties to the contract should be joined."); *Ryan v. Volpone Stamp Co., Inc.*, 107 F. Supp. 2d 369, 387 (S.D.N.Y. 2000) ("It is well-established that a party to a contract which is the subject of the litigation is considered a necessary party."); *Ragan Henry Broadcast Grp., Inc. v. Hughes*, No. 91-CV-6157, 1992 WL 151308, at *2 (E.D. Pa. 1992) ("Generally, where rights sued upon arise from a contract, all parties thereto must be joined.").

Powell Law Group is also necessary under Rule 19(a)(1)(B)(ii) because litigating in its absence exposes MMWR to a risk of inconsistent obligations. Under the terms of the Contingent Fee Agreement, MMWR's fees were to be paid from the contingent fee paid to Powell Law Group. (Compl., Ex. A.) As noted above, Powell Law Group withheld payment from MMWR and MMWR was able to collect its fee only after obtaining a judgment in Ohio state court. (*See supra* p.27.) If Powell Law Group is not joined as a party, MMWR may face double liability if Waleski is successful on the merits and PLG later seeks to recoup the fees already paid to MMWR. To avoid this risk of inconsistent obligations, Powell Law Group must be joined.

Because Powell Law Group is necessary and indispensable, Waleski should join Powell Law Group or this action should be dismissed.

VIII. This Action Cannot Be Maintained as a Class Action.

When the failure to qualify for class certification is "plain enough from the pleadings," it is not necessary to proceed beyond the pleadings before denying certification. *General Tel. Co. v. Falcon*, 457 U.S. 147, 160 (1982); *see also Semenko v. Wendy's Int'l, Inc.*, No. 2:12-CV-0836, 2013 WL 1568407, at *11 (W.D. Pa. Apr. 12, 2013). This is one of those cases.

To bring a class action, a plaintiff must establish numerosity, commonality, typicality and adequate representation. Fed. R. Civ. P. 23(a). These requirements "limit the class claims to those fairly encompassed by the named plaintiff's claims." *Wal-Mart Stores, Inc. v. Duke*s, 564 U.S. 338, 349, 131 S. Ct. 2541, 2550, 180 L. Ed. 2d 374 (2011) (citations omitted).

Waleski's claims fail the commonality requirement in Rule 23(a). To satisfy commonality, "the claims must depend upon a common contention. . . which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Dukes*, 564 U.S. at 350, 131 S. Ct. at 2551. There is no commonality where, as in the present case, the claims relate to individual decisions that are not subject to adjudication on a common or

class basis. *Id.* at 359-60, 131 S. Ct. at 2556-67. Waleski's claim that trust payments were undervalued necessarily implicates the Avoca Plaintiffs' individual alleged injuries and their personal reasons for declining other options in favor of settlement with Tronox. Because no class wide inferences are possible with respect to causation or damages, Waleski's claims are not suitable for class treatment.

Further, Waleski's claims are not typical of the class he seeks to represent. The typicality requirement focuses on whether the named representative's claims have the same essential characteristics as the claims of the class at large. *Eisenberg v. Gagnon*, 766 F.2d 770, 786 (3d Cir. 1985), *cert. denied*, 474 U.S. 946 (1985). Waleski's claims are not typical of the proposed class because he concedes he received "*the best result possible*" from the bankruptcy trust. (*See* Pet. for Approval ¶ 85.) For the same reason, Waleski is not an adequate class representative under Rule 23(a).

Waleski cannot satisfy the basic prerequisites for class certification and therefore the class allegations in the Complaint should be stricken.[16]

[16] MMWR reserves all defenses to any motion for class certification and will present its arguments pursuant to the schedule set by the Court, if necessary.

CONCLUSION

For the reasons above, the Complaint should be dismissed with prejudice due to failure to state a claim upon which relief can be granted. In the alternative, the Complaint should be dismissed due to failure to join a necessary and indispensable party.

Respectfully submitted,

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Date: June 25, 2018

CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.8(b)(3)

I, Donna A. Walsh, hereby certify that the foregoing Memorandum of Law in Support of Motion To Dismiss is in compliance with Local Rule 7.8(b)(3) and the June 22, 2018 Order of Court. The brief contains 7985 words as computed by Microsoft Office Word.

/s/ Donna A. Walsh

Date: June 25, 2018

CERTIFICATE OF SERVICE

I, Donna A. Walsh, hereby certify that a true and correct copy of the foregoing Memorandum of Law in Support of Motion To Dismiss was served upon the following counsel of record via the Court's ECF System on this 25th day of June, 2018 in the manner indicated below:

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