No. ________

In The

Supreme Court of the United States

IDT CORPORATION and
WINSTAR HOLDINGS, LLC,

Petitioners,

v.

BLACKSTONE ADVISORY PARTNERS LP,
IMPALA PARTNERS, LLC, and
CITIGROUP INC.,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The assets of a publicly traded telephone company were sold to petitioner IDT for $42.5 million in a bankruptcy court auction. The three respondents had been retained to assist the bankrupt telephone company in maximizing the price realized for its assets, and they allegedly made false material representations in New York to IDT during IDT's "due diligence" inquiry. Following IDT's acquisition of the assets and discovery of the misrepresentations, IDT sued the three advisors in a New York state court for fraud. Over IDT's protests, its claims were removed to federal court and referred for decision to the Delaware bankruptcy court.

The Questions Presented are:

1. Whether 28 U.S.C. § 1334(b) and § 1334(c)(2) permit a bankruptcy court to assume jurisdiction and decide a state-court fraud lawsuit as "related to" a bankruptcy court proceeding if the state-court lawsuit does not name the debtor and alleges that, during the sale of the debtor's assets, misrepresentations were made by non-debtor parties that make those parties liable in damages to the plaintiff.

2. Whether, under this Court's constitutional decision in *Stern v. Marshall*, 131 S. Ct. 2594 (2011), a non-Article III bankruptcy court has jurisdiction to decide civil state-law fraud claims brought against non-debtor parties by the purchaser of an asset in a bankruptcy auction if the purchaser repeatedly refuses to consent to the jurisdiction of the bankruptcy court.

CORPORATE DISCLOSURE

The parties to the proceedings are identified in the caption of the case. Pursuant to Supreme Court Rule 29.6, Petitioner Winstar Holdings, LLC hereby discloses that Straight Path Communications Inc. (a publicly traded company) owns 100% of Winstar Holdings, LLC through DipChip Corp. and Straight Path Advanced Communications LLC (both DipChip Corp. and Straight Path Advanced Communications LLC are wholly owned by Straight Path Communications Inc.). There are no parent corporations or publicly held companies owning 10% or more of Petitioner IDT's stock.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit (Pet. App. A, pp. 1a-4a, *infra*) is reported as *In re Winstar Communications, Inc.*, 591 Fed. Appx. 58 (3d Cir. 2015). The Memorandum Order of the United States District Court for the District of Delaware (Pet. App. B, pp. 5a-13a, *infra*) appears at 2013 WL 6053838 (D. Del. Nov. 15, 2013). The Memorandum decision of the United States Bankruptcy Court for the District of Delaware (Pet. App. C, pp. 14a-39a, *infra*) is reported at 435 B.R. 33 (D. Del. Bankr. 2010). The Opinion and Order of the

United States District Court for the Southern District of New York (Pet. App. D, pp. 40a-57a, *infra*) appears at 2007 WL 4323003 (S.D.N.Y. Dec. 10, 2007).

JURISDICTION

The Court of Appeals for the Third Circuit issued its decision on January 28, 2015. A timely petition for rehearing was denied on February 24, 2015. Pet. App. E, pp. 56a-57a, *infra.* On May 11, 2015, Justice Alito extended the time for filing a petition for a writ of certiorari to June 24, 2015. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

28 U.S.C. § 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.

28 U.S.C. § 1452. Removal of claims related to bankruptcy cases

(a) A party may remove any claim or cause of action in a civil action other than a proceeding before the United States Tax Court or a civil action by a governmental unit to enforce such governmental unit's police or regulatory power, to the district court for the district where such civil action is pending, if such district court has jurisdiction of such claim or cause of action under section 1334 of this title.

(b) The court to which such claim or cause of action is removed may remand such claim or cause of action on any equitable ground. An order entered under this subsection remanding a claim or cause of action, or a decision to not remand, 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.

INTRODUCTION

In December 2007 – more than two years before this Court held in *Stern v. Marshall* that bankruptcy courts lacked jurisdiction to decide private cases or controversies covered by Article III – IDT's fraud claims against non-debtor defendants were removed to federal court and transferred to Delaware on the legal theory that a bankruptcy court in Delaware was the proper tribunal to try the case. Since that time IDT has repeatedly asserted that the case should be remanded to the New York state courts.

After *Stern v. Marshall* it is clear that the Delaware bankruptcy court had no Article III

jurisdiction over IDT's claims. Removal to federal court under Section 1452 was, therefore, invalid, as was transfer to Delaware and to its non-Article III bankruptcy court.

The 2007 decision was not appealable. Consequently, IDT had no choice but to proceed in Delaware, preserving at every juncture its claim that it was being forced to litigate in the wrong court.

In this petition we first seek review of the determination made by a federal judge in 2007 that Section 1334(b) authorized federal jurisdiction over IDT's claim and that Section 1334(c)(2) did not bar a decision by the bankruptcy court. That is an issue of statutory construction of the term "related to cases under title 11." Hence this Court should consider that issue before it reaches the constitutional question whether, after *Stern v. Marshall*, an action properly brought in a state court on state common-law claims may be removed, under federal statutes like Sections 1334 and 1452, to a federal non-Article III court. Our second Question Presented describes the constitutional issue raised by this case if Sections 1334(b) and 1452 are construed to permit removal and transfer of state common-law claims to a bankruptcy court.

STATEMENT

1. IDT Pays $42.5 Million To Buy Winstar Assets in a Bankruptcy Auction.

Petitioner IDT Corporation ("IDT") is in the telecommunications business. In 2001 IDT considered potential acquisitions, including purchase

of the assets of Winstar Communications, Inc. ("Winstar"), a company that provided telephone services by a "fixed wireless" system. On April 18, 2001, Winstar filed a voluntary bankruptcy petition under Chapter 11 in the United States Bankruptcy Court for the District of Delaware. The bankruptcy court scheduled an auction for sale of Winstar's assets for December 2001. Complaint, ¶¶ 1, 13-22; JA* 38-42; Pet. App. F, pp. 58a, 61a-63a, *infra*.

Between November 30 and December 5, 2001, IDT representatives engaged in "due diligence" meetings in New York City and reviewed financial data located in New York City. Present at these meetings was the head of the Restructuring & Reorganization Advisory Group of The Blackstone Group LP ("Blackstone"), a limited partnership with principal offices in New York City that was acting as a "financial advisor" to Winstar and was to receive a "transaction fee" of 1% of any purchase price under $350 million paid for Winstar's assets. Blackstone had prepared an "offering statement" for interested purchasers. Also participating in these meetings was a representative of Impala Partners, LLC ("Impala"), whose principal office is in Norwalk, Connecticut. Impala was a "restructuring advisor" to Winstar and was to receive 0.25% of any consideration under $350 million to be paid for Winstar's assets. Citicorp, whose principal office is in New York City, was Winstar's largest creditor and assisted Winstar in negotiating contract terms with Impala. Complaint,

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* "JA" represents the Joint Appendix in the Court of Appeals.

¶¶ 14, 17, 22; JA 40-42; Pet. App. F, pp. 61a-63a, *infra*.

IDT was allowed no additional "due diligence" after December 5. On or about December 17, 2001, IDT was advised that it could purchase Winstar's assets for $42.5 million, and the bankruptcy court required IDT to sign an agreement to purchase the assets by noon on December 18, 2001. An "Asset Purchase Agreement" was signed on December 18, 2001, and was approved by the bankruptcy court on the following day. On December 20, 2001, IDT, through a newly created entity called "Winstar Holdings, LLC," closed on the purchase, and it assumed operation of Winstar's business. Complaint, ¶¶ 41-45; JA 46; Pet. App. F, pp. 68a-69a, *infra*.

2. Relevant Clauses of the "Asset Purchase Agreement"

Section 9.9 of the "Asset Purchase Agreement" was titled "*Governing Law*" and it provided that the Agreement was to "be governed by and construed in accordance with the laws of the State of New York . . . as to all matters, including but not limited to matters of validity, construction, effect, performance and remedies." Section 9.10, titled "*Submission to Jurisdiction*," declared that "*the parties hereto* irrevocably submit to the exclusive jurisdiction of the Bankruptcy Court . . . over any dispute *arising out of or relating to this Agreement* . . . ."(Emphasis added.) Pet. App. G, pp. 82a-83a, *infra*.

3. IDT Discovers That Fraudulent Representations Were Made.

During its operation of Winstar's business, IDT learned that it was the victim of material misrepresentations made during the "due diligence" review. *Inter alia*, monthly revenues were overstated, "cash burn" losses were understated, the number of paying customers, the number of revenue-generating telephone lines, and the rate at which existing customers discontinued Winstar's services were all misrepresented. Complaint, ¶¶ 28, 30, 48; JA 43, 44, 47; Pet. App. F, pp. 64a, 65a, 69a, *infra.* The false representations were made in the presence of Blackstone, Impala, and Citicorp representatives, who failed to dispute them or disclose information that would have enabled IDT to learn the truth. Complaint, ¶¶ 29, 31; JA 43-44; Pet. App. F, pp. 65a, 66a, *infra*. In addition the respondents failed to disclose that service to federal and other customers could not be discontinued and that local telephone companies could "extort concessions . . . by threatening to discontinue termination of calls placed" by Winstar customers. Complaint, ¶ 32; JA 44; Pet. App. F, p. 66a, *infra*.

4. IDT Files a Fraud Lawsuit Within New York's Limitations Period.

On May 10, 2007 – within New York's six-year statute of limitations – IDT filed a complaint in the Supreme Court for the State of New York alleging only claims under New York law against the three respondents for their fraudulent misrepresentations and material omissions. JA 38-56; Pet. App. F, pp.

58a-81a, *infra*. The bankrupt debtor, Winstar Communications, Inc., was not named as a defendant. All three defendants are found in New York, the misrepresentations and material omissions occurred in New York, the witnesses are in New York, and most of the discoverable evidence is in New York.

5. Over IDT's Objection, the Case Is Removed and Referred to the Bankruptcy Court.

Respondent Impala removed the action to federal court under 28 U.S.C. § 1452 on the ground that the bankruptcy court had jurisdiction under 28 U.S.C. § 1334. IDT objected to the removal and moved for remand of the case to the New York court. JA 59. District Judge Lynch of the Southern District of New York ruled on December 10, 2007, that IDT's claim was one "arising in a case under title 11" within the meaning of 28 U.S.C. § 1334(b) and § 1334(c)(2). He denied IDT's motion to remand and directed that the case be transferred to the United States District Court for the District of Delaware. JA 192-202; Pet. App. D, pp. 42a-55a, *infra.* In the district court IDT reserved its right to claim that the case should be returned to the New York state court. JA 230 (Dkt. No. 60). That court referred the IDT lawsuit to the United States Bankruptcy Court for the District of Delaware on February 19, 2008. JA 211. IDT again moved in the bankruptcy court on March 14, 2008, for remand to the New York state court. JA 212-213.

6. More Than Two Years Later, the Bankruptcy Court Dismisses IDT's Complaint.

On August 11, 2010, the Delaware bankruptcy court judge dismissed IDT's complaint on the ground that the New York action was filed out-of-time under Delaware's three-year statute of limitations. JA 5-25; Pet. App. C, pp. 14a-39a, *infra.* He held that Delaware's "borrowing statute" "requires the Court to apply the *shorter* statute of limitations." (Emphasis original) JA 21; Pet. App. C, p. 35a, *infra*. The bankruptcy court judge also explicitly denied IDT's motion to remand the case to the New York court. JA 10-17, Pet. App. C, pp. 20a–28a, *infra*.

7. After Another Three Years, the District Court Affirms.

On November 15, 2013 – more than two years after IDT appealed the bankruptcy court decision – United States District Judge Stark, invoking the standard of review of bankruptcy-court decisions prescribed by 28 U.S.C. § 158(a)(1) and § 158(a)(3), affirmed the 2010 order of the bankruptcy court. JA 27-34; Pet. App. B, pp. 5a-13a, *infra.* Although the alleged misrepresentations and omissions occurred during meetings in New York and the parties are found in New York, the district court invoked Delaware's "borrowing statute" of limitations and implied that by claiming jurisdiction in New York IDT was "shopping for a forum with a longer statute of limitations than should be applied given that their claims arise in Delaware and relate to the bankruptcy proceedings in Delaware." JA 32; Pet. App. B, p. 11a, *infra.*

8. The Third Circuit Affirms.

The court of appeals affirmed with a brief "not precedential" opinion. Pet. App. A, pp. 1a-4a, *infra.* Rejecting the district court's rationale, the court of appeals held in footnote 3 of its opinion that "[t]he Delaware borrowing statute does not apply in this situation." Apart from declaring in conclusory fashion in footnote 4 that the remand request was "without merit," it did not address the argument made at pages 26-29 of IDT's brief on appeal that the case should be equitably remanded to the New York court.

REASONS FOR GRANTING THE WRIT

I.

THE THIRD CIRCUIT'S BROAD INTERPRETATION OF THE JURISDICTION OF BANKRUPTCY COURTS UNDER SECTION 1334(b) CONFLICTS WITH DECISIONS OF THE SEVENTH, NINTH, AND ELEVENTH CIRCUITS

The 2007 decision by Judge Lynch of the Southern District of New York held that IDT's claims against the respondents "related to" a bankruptcy case within the meaning of that Section and were removable to a federal court because the claims qualified under the "arising in" language of Section 1334(b). This conclusion followed the broad jurisdiction assigned to bankruptcy courts by the Third Circuit's construction of the words "related to" in *Pacor v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984). The *Pacor* construction was followed in the opinion of then-Circuit Judge Alito in *Belcufine v. Aloe*, 112

F.3d 633, 636 (3d Cir. 1997) ("*Pacor* holds that the reach of 'related to' jurisdiction is very broad . . . . Based on the broad reach of the term 'related to,' we agree with the district court's determination that it had subject matter jurisdiction over the employees' action.") This Court noted in its majority opinion in *Celotex Corporation v. Edwards*, 514 U.S. 300, 319 n. 6 (1995), that there was then a disagreement among Circuits regarding the *Pacor* test.

It appears from a recent ruling that the Fifth Circuit now agrees with the Third Circuit. See *Spillman Development Group, Limited v. Bischoff*, 710 F.3d 299, 304-305 (5th Cir. 2013); compare *Bass v. Denney*, 171 F.3d 1016, 1022-1023 (5th Cir. 1999); *In the Matter of Zale Corporation*, 62 F.3d 746, 752-755 (5th Cir. 1995). The Fourth Circuit also professes to follow the Third Circuit's *Pacor* decision. *New Horizon of NY LLC v. Jacobs*, 231 F.3d 143, 150-151 (4th Cir. 2000)

Other Circuits have, however, given the "related to" language of Section 1334(b) a much narrower reading. See, *e.g.*, *In re Ray*, 624 F.3d 1124, 1133-1135 (9th Cir. 2010); *In re Boone*, 52 F.3d 958, 960-961 (11th Cir. 1995); *Zerand-Bernal Group, Inc. v. Cox*, 23 F.3d 159, 161-162 (7th Cir. 1994). In footnote 6 of the majority opinion in *Celotex Corporation v. Edwards*, 514 U.S. 300, 319 n. 6 (1995), this Court observed that the Second Circuit had also differed with the *Pacor* standard.

Judge Posner said in the *Zerand-Bernal Group* case: "The reference to cases related to bankruptcy cases is primarily intended to encompass tort,

contract, and other legal claims ***by and against the debtor***, claims that, were it not for bankruptcy, would be ordinary stand-alone lawsuits between the debtor and others but that section 1334(b) allows to be forced into bankruptcy court so that all claims ***by and against the debtor*** can be determined in the same forum." 23 F.3d at 162 (emphasis added). Judge Posner's observation implies that lawsuits brought against parties other than the debtor should not be viewed as "related to" a bankruptcy case.

This case does not involve claims "by and against the debtor." The purchaser of the bankrupt's assets alleged that fraud was committed by entities that were present during IDT's "due diligence" meetings and review of financial data. These parties – the respondents in this Court – stood to benefit financially from any increased purchase price so that they had an incentive to misrepresent the profitability of the purchased assets. Hence they were proper defendants in a fraud action that did not include the debtor as a party.

The Third Circuit effectively affirmed Judge Lynch's 2007 decision, which was not appealable before a final judgment. It permitted removal under Section 1452 (which authorizes removal only when there is jurisdiction under Section 1334), transfer to the District of Delaware, and referral to the bankruptcy court under Section 1334 even though the debtor was not a party to the claims made by IDT. That holding conflicts with the Seventh Circuit's rationale for the "related to" jurisdictional provision and with the Ninth and Eleventh Circuit rulings we have cited. This Court may resolve the

conflict and determine the scope of "related to" jurisdiction of bankruptcy courts by considering and deciding this case. Such a ruling would secure uniformity in the application of federal law in this recurring procedural context.

II.

THE STATUTE THAT AUTHORIZES REMOVAL OF COMMON-LAW CLAIMS TO A FEDERAL BANKRUPTCY COURT IS UNCONSTITUTIONAL UNDER *STERN v. MARSHALL*

The controversy between IDT and the three respondents may only be decided in the federal judicial system by an Article III court applying legal rules regarding fraud and negligent misrepresentation. Under New York law, IDT was entitled to present its claim to a New York judge and obtain a jury's verdict.

The decision below approved removal of this common-law fraud case from the New York state-court system, where it would have been tried before a jury, and sent the litigation to a non-Article III bankruptcy judge. That procedure violated this Court's constitutional ruling in *Stern v. Marshall*, 131 S. Ct. 2594, 2611-2620 (2011), that a bankruptcy court lacks jurisdiction to determine such a claim.

This Court granted plenary review in *Executive Benefits Insurance Agency v. Arkison*, 134 S. Ct. 2165 (2014), and *Wellness International Network, Ltd. v. Sharif*, 135 S. Ct. 1932 (2015), to decide how the constitutional ruling in *Stern v. Marshall* applies when a district court reviews a bankruptcy judge's

determination by a *de novo* standard and when a litigant asserting a *Stern* claim impliedly consents to the jurisdiction of a bankruptcy judge.

In this case there was plainly no implied consent. At every stage of this extended litigation, IDT formally moved that its claims be remanded to the New York state courts. Although the ruling of the United States District Judge for the District of Delaware could be read as *de novo* review of an issue of law, the district judge said he was applying the appellate standard of review of bankruptcy-court decisions under 28 U.S.C. § 158.

In light of *Stern v. Marshall* this case should not have been heard by the United States Bankruptcy Court for the District of Delaware. It was (1) error to permit removal of the case to a federal court under Section 1452, (2) error to transfer to the United States District Court for the District of Delaware under 28 U.S.C. § 1404(a) or under 28 U.S.C. § 1406(a), and (3) error to refer the lawsuit to the bankruptcy court.

The New York state courts should be restored as the correct forum in which to try IDT's claims against the respondents. The New York courts might not apply the short Delaware statute of limitations that the Delaware bankruptcy court did. The New York courts should, in light of *Stern v. Marshall*, have the judicial authority to choose the applicable statute of limitations.

In June 2011 – when the constitutional decision in *Stern v. Marshall* was announced – the

bankruptcy court had already denied IDT's motion to remand, and IDT's appeal from that decision was awaiting resolution by the district court. IDT was not required, at that late juncture of an already aged litigation, to assert rights under this Court's newly announced constitutional rules. Under pre-*Stern v. Marshall* law IDT was entitled to litigate against the respondents in the New York state courts.

This Court may choose to vacate the decision of the Third Circuit summarily and remand the case for reconsideration in light of *Stern v. Marshall* and the two recent decisions regarding the bankruptcy court's limited constitutional jurisdiction. Or it may grant this petition for a writ of certiorari and inform lower courts in a plenary decision how to rule on cases in which bankruptcy courts have erroneously been given authority that exceeds the power they may constitutionally exercise.

III.

THE FORUM-SELECTION CLAUSE IN THE "ASSET PURCHASE AGREEMENT" DOES NOT SUPPORT THE RESPONDENTS

The opinion of the Third Circuit noted that in 2007 District Judge Lynch "found that IDT had agreed to a forum selection clause in the asset purchase agreement, and that it was not unjust for Blackstone to enforce that forum selection clause despite the fact that none of the defendants were parties to it." Pet. App. A, p. 3a, *infra*, Pet. App. G, pp. 82a-83a, *infra*, and p. 8, *supra*. The forum-selection clause governed ***only*** the parties to the purchase. Section 9.7 explicitly declared that no

person "other than the parties hereto, [had] any legal or equitable right, remedy or claim under or with respect to this Agreement." Section 9.6 also prohibited the assignment of any right, "including by operation of law," without the prior written consent of the other party. Hence the respondents had no standing to invoke the forum-selection clause.

Moreover, the "governing law" under Section 9.9 of the Agreement was to be "the laws of the State of New York . . . as to all matters, including but not limited to matters of validity, construction, effect, performance and remedies." Since the parties to this litigation had not selected a forum, the courts of New York are the proper venue to apply the governing law.

Finally, the "Asset Purchase Agreement" was written and signed in December 2001 – almost ten years before this Court announced in *Stern v. Marshall* that the bankruptcy court had no constitutional jurisdiction to decide a case such as this one. Had *Stern v. Marshall* been the law in 2001, IDT would not have agreed that a non-Article III judge could decide claims IDT might make after purchasing the Winstar assets. The forum-selection clause cannot, under these circumstances, be invoked by the respondents, who were not even parties or signatories to the Agreement.

Nor does this Court's decision in *Atlantic Marine Construction Company, Inc. v. United States District Court for the Western District of Texas*, 134 S. Ct. 568 (2013), support the decision below. That case concerned a forum-selection clause in a subcontract

signed by all litigants. Such a mutually agreed forum-selection clause is an appropriate measure of "holding parties to their bargain." 134 S. Ct. at 583. Compare *In re Rolls Royce Corporation*, 775 F.3d 671 (5th Cir. 2014), *petition for certiorari pending sub nom. PHI, Inc. v. Rolls Royce Corporation*, No. 14-1317.

CONCLUSION

For the foregoing reasons either (1) this petition for a writ of certiorari should be granted or (2) the decision below should be vacated and the case remanded for reconsideration in light of *Stern v. Marshall, Executive Benefits Insurance Agency v. Arkison*, and *Wellness International Network, Ltd. v. Sharif.*

Respectfully submitted,

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APPENDIX A

United States Court of Appeals,
Third Circuit.

In re WINSTAR COMMUNICATIONS, INC., et al,
Debtors.
Winstar Holdings, LLC; IDT Corp.
v.
Blackstone Advisory Partners LP f/k/a Blackstone Group LP; Impala Partners, LLC; Citigroup Inc., successor by merger to Citicorp Winstar Holdings, LLC & IDT Corp., Appellants.

No. 13–4713. | Submitted under Third Circuit LAR 34.1(a) on Sept. 9, 2014.
Opinion filed Jan. 28, 2015.

On Appeal from the United States District Court for the District of Delaware (D.C. No. 1–10–cv–00839), District Judge: Honorable Leonard P. Stark.

Attorneys and Law Firms

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Before SMITH, SHWARTZ and ROTH, Circuit Judges.

OPINION[1]

ROTH, Circuit Judge:

IDT Corporation and Winstar Holdings, LLC (collectively, IDT) appeals the order of the United States District Court for the District of Delaware, affirming the Bankruptcy Court's denial of their motion to remand to state court in New York and subsequent dismissal of their action as time-barred under Delaware's three-year statute of limitations. For the reasons stated below, we will affirm.

This case arises out of an adversary proceeding in the Bankruptcy Court, in which IDT alleges that it was defrauded by defendants Blackstone Advisory Partners L.P., Impala Partners LLC, and Citigroup, Inc. (collectively, Blackstone), in connection with the sale of assets in a 2001 bankruptcy proceeding. In May 2007, IDT filed this suit in New York Supreme Court. Blackstone then removed to the Southern District of New York and moved for transfer to Delaware, due to the case's connection with the 2001 bankruptcy, while IDT moved to remand. The New York court granted Blackstone's motion and denied IDT's. It found that the current dispute arose in the bankruptcy proceedings and that accordingly the Bankruptcy Court retained exclusive jurisdiction

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[1] This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

under its order approving the asset sale. Furthermore, the New York court found that IDT had agreed to a forum selection clause in the asset purchase agreement, and that it was not unjust for Blackstone to enforce that forum selection clause despite the fact that none of the defendants were parties to it. Upon receipt, the Delaware District Court referred the case to the Bankruptcy Court. The Bankruptcy Court then found that the claims were time-barred, and on appeal the District Court affirmed.

The suit was filed more than five years after the events allegedly took place. Accordingly, the current dispute centers on whether New York's six-year statute of limitations for fraud claims or Delaware's general three-year statute for torts applies here. Because the New York court found that the Bankruptcy Court had exclusive jurisdiction, the venue of the initial filing was improper, and the case was transferred pursuant to 28 U.S.C. § 1406. Where a case is transferred pursuant to § 1406, rather than § 1404(a), the statute of limitations of the transferee court, not the transferor court, applies.[2]

IDT argues that the New York court did not find transfer mandatory under § 1406, based on its alternative holding, that "even if transfer is not mandatory pursuant to 28 U.S.C. § 1406, discretionary transfer under § 1404(a) in the interests of justice is clearly appropriate." But even were that true, the majority of the court's discussion of § 1404(a) relied on the forum selection clause in

[2] *Lafferty v. St. Riel,* 495 F.3d 72, 81 (3d Cir.2007).

the purchase agreement, not an analysis of the public interest factors under § 1404(a). Accordingly, even if we treated the case as transferred under § 1404(a), it would be pursuant to a forum selection clause, and the transferee forum's choice of law rules would apply.[3] Here, as the District Courts both found, because statutes of limitations are procedural for choice of law purposes, the law of the forum, Delaware, applies.[4]

Delaware's choice of law provision does not have an exception for fraud cases, and began to run in December 2001. The statute expired three years later, and more than two years prior to IDT's commencement of this suit. This action is time-barred.

For the foregoing reasons, we will affirm the judgment of the District Court. [5]

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[3] *Atl. Marine Const. Co. v. U.S. Dist. Court,* ––– U.S. ––––, 134 S.Ct. 568, 583, 187 L.Ed.2d 487 (2013)

[4] The courts and parties discussed the Delaware "borrowing statute," Del. Code tit. 10, § 8121 at great length. As IDT contends, this statute only applies where a plaintiff files in Delaware rather than a foreign forum to take advantage of a more generous Delaware statute of limitations. Here the reverse is true, and IDT sought to take advantage of New York's more generous statute by filing in New York. The Delaware borrowing statute does not apply in this situation.

[5]We have also reviewed IDT's appeal of the denial of equitable remand and find it without merit.

APPENDIX B

United States District Court, D. Delaware.

In re Winstar Communications, Inc., et al.,
Debtors.

Winstar Holdings, LLC and IDT Corp., Plaintiffs,
v.

The Blackstone Group, LP, Impala Partners, LLC, and Citicorp., Defendants.

Winstar Holdings, LLC, and IDT Corp., Appellants,
v.
The Blackstone Group, LP, Impala Partners, LLC, and Citicorp, Appellees.

Bankr.Case No. 01–1430–KJC
Adv. Pro. No. 08–50296–KJC | Civ.No. 10–839–LPS
November 15, 2013

MEMORANDUM ORDER
Chapter 7

Leonard P. Stark, UNITED STATES DISTRICT JUDGE

At Wilmington this **15th** day **of November, 2013,** this matter coming before the Court upon an appeal from an order of the Honorable Kevin J. Carey, U.S.B.J. (the "Appeal") (D.I.1), and having considered the parties' papers submitted in connection therewith;

IT IS ORDERED that the Appeal is **DENIED,** and the order of the Bankruptcy Court dated August 11, 2010—"Order and Decree Denying Plaintiffs' Motion

for Remand or Abstention, Granting Defendants' Motions to Dismiss, and Dismissing Complaint" (the "Order")—is **AFFIRMED,** for the reasons that follow:

Background.[1] On April 18, 2001, Winstar Communications, Inc. and certain of its subsidiaries ("Old Winstar") filed voluntary petitions for relief under Chapter 11 of the United States Bankruptcy Code, 11 U.S.C. §§ 101, *et seq.,* in the United States Bankruptcy Court for the District of Delaware (the "Bankruptcy Court"); the Chapter 11 cases later converted to ones under Chapter 7. (*See* D.I. 2 Ex. 25, August 11, 2010 Memorandum Opinion (the "Opinion"), Adv. Pro. No. 08–50296–KJC, D.I. 48 at 4) Old Winstar had sold certain of its assets (the "Asset Sale") pursuant to 11 U.S.C. § 363, to Winstar Holdings, LLC ("New Winstar") and IDT Corp. ("IDT") (together, "Plaintiffs" or "Appellants") in late 2001. (*See* Opinion at 1–2)

In connection with the Asset Sale, The Blackstone Group, LLC ("Blackstone") was retained as Old Winstar's financial advisor, and Impala Partners, LLC ("Impala") was retained as its restructuring advisor. (*See* Opinion at 2; *see also* D.I. 11 at 1, 6) Citicorp was Old Winstar's largest creditor during

[1] More than three years have passed since the entry of the Bankruptcy Court Order that is the subject of this Appeal; the appellate briefing was completed more than two years ago. The parties have not provided the Court with any supplemental briefing, status report, or notice of subsequent developments. Hence, the Court will decide the issues presented in this Appeal solely on the basis of the briefing and record the parties created several years ago.

bankruptcy. (*See* Opinion at 2; *see also* D.I. 11 at 1) (Blackstone, Impala and Citicorp will be collectively referred to as "Defendants" or "Appellees.")

The subject adversarial action (the "Adversary Proceeding") arose out of the $42.5 million Asset Sale from Old Winstar to New Winstar and Defendants' roles in connection with the deal. (*See* Opinion at 1–2) Plaintiffs challenged the deal by asserting claims against Defendants for fraud, aiding and abetting fraud, negligent misrepresentation, negligence, and civil conspiracy. (*See* Adv. Pro. No. 08–50296–KJC, D.I. 1, Opinion at 2; D.I. 2 Ex. a; *see also* D.I. 9 at 2–3) Appellants summarize the history of their challenge as follows:

[O]n May 10, 2007, [Plaintiffs] filed a Complaint in the Supreme Court of the State of New York, County of New York, asserting New York state law claims against [Defendants]. Plaintiffs requested a jury trial and alleged that Defendants, two of which are headquartered in New York, were liable for misrepresentations and omissions that occurred during meetings held in New York prior to Plaintiffs' purchase of assets from [Old Winstar], a bankrupt company headquartered in New York.

Defendants asserted bankruptcy jurisdiction under 28 U.S.C. § 1452(a) and removed the case to the United States District Court for the Southern District of New York, which denied Plaintiffs' Motion to Remand and granted Defendants' Motion to Transfer to this Court. This Court then referred the case to the United States Bankruptcy Court for the District of Delaware.

The Bankruptcy Court denied Plaintiffs' Motion to

Remand and granted Defendants' Motion to Dismiss the Complaint as barred by Delaware's three-year statute of limitations, which it found applied because of the Delaware borrowing statute, 10 Del. C. § 8121. (D.I. 9 at 1)

New Winstar filed a Notice of Appeal on August 25, 2010 (*see* D.I. 12 Ex. 27, Adv. Pro. No. 08–50296–KJC, D.I. 51), which was entered on the docket of this Court on October 1, 2010 (*see* D.I. 1, 3). New Winstar seeks reversal of the Bankruptcy Court's Order (*see* D.I. 1, 2 Ex. 26, Adv. Pro. No. 08–50296–KJC, D.I. 49) and either equitable remand to New York State Court under 28 U.S.C. § 1452(b) or permissive abstention under 28 U.S.C. § 1334(c)(2) (*see generally* D.I. 9, 15; *see also* D.I. 2 at 19–20).

Contentions. On appeal, New Winstar argues that the Bankruptcy Court erred in applying Delaware's statute of limitations, 10 Del. C. § 8106, and "borrowing statute," 10 Del. C. § 8121, to the Adversary Proceeding. (*See generally* D.I. 9, 15; *see also* D.I. 2 at 19–20) In Appellants' view, New York has the "most significant" relationship to Plaintiffs' claims, so New York's longer six-year statute of limitations should apply. (*See* D.I. 9 at 2, 7–8; D.I. 15 at 6–7) Plaintiffs' complaint alleged that Defendants' misdeeds occurred during the due diligence period of November 30 through December 5, 2001. (*See* Adv. Pro. No. 08–50296–KJC, D.I. 2 Ex. A; Opinion at 14; *see also* D.I. 9 at 2–3) The asset purchase agreement ("APA") was executed on December 18, 2001 and approved by the Bankruptcy Court the next day; the Asset Sale closed on December 20, 2001. (*See* Adv. Pro. No. 08–50296–KJC, D.I. 2 Ex. A; Opinion at 14–15; *see also* D.I. 9 at 3)

If New York's six-year statute of limitations is applicable, then Plaintiffs' May 2007 complaint was timely filed. Alternatively, if, as the Bankruptcy Court concluded, Delaware's three-year statute of limitations applies, then Plaintiffs' claims are not timely and must be dismissed.

Standard of review. Appeals from the Bankruptcy Court to this Court are governed by 28 U.S.C. § 158. Pursuant to § 158(a), district courts have mandatory jurisdiction to hear appeals "from final judgments, orders, and decrees" and discretionary jurisdiction over appeals "from other interlocutory orders and decrees." 28 U.S.C. § 158(a)(1) and (3). In conducting its review of the issues on appeal, the Court reviews the Bankruptcy Court's findings of fact for clear error and exercises plenary review over questions of law. *See Am. Flint Glass Workers Union v. Anchor Resolution Corp.,* 197 F.3d 76, 80 (3d Cir.1999). "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. U.S. Gypsum Co.,* 333 U.S. 364, 395 (1948). The Court must "break down mixed questions of law and fact, applying the appropriate standard to each component." *Meridian Bank v. Alten,* 958 F.2d 1226, 1229 (3d Cir.1992).

Analysis. The Court agrees with the Bankruptcy Court that Delaware's three-year statute of limitations, and not New York's six-year statute of limitations, applies to Plaintiffs' claims. (*See* Opinion at 14–19)[2] Delaware's borrowing statute

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[2] While it is apparently undisputed that the APA requires New

provides, in pertinent part:

> Where a cause of action arises outside of this state, an action cannot be brought in a court of this State to enforce such a cause of action after the expiration of whichever is shorter, the time limited by the law of this State, or the time limited by the law of the state or country where the cause of action arose, for bringing an action upon such cause of action.

10 Del. C. § 8121. If Plaintiffs' causes of action arose in Delaware—because they arose out of Old Winstar's bankruptcy case, which was pending in Delaware; "the due diligence performed in this case was done as part of the sale process approved by this [Delaware] Bankruptcy Court, using professionals employed with the approval of th[e] [Delaware] Bankruptcy Court;" the "Asset Sale under Bankruptcy Code § 363 was an integral part of the Debtors' Delaware bankruptcy case;" and "[a]lthough the Defendants were not parties to the APA, the Plaintiffs agreed to resolve any disputes related to the APA in the Delaware Bankruptcy Court" (Opinion at 9, 11, 19)—then Delaware's three-year statute of limitations applies. Alternatively, even if the causes of action are deemed to have arisen in New York, Plaintiffs' claims are still time-barred, as these claims "cannot be brought in a court of this State to enforce such a cause of action after the

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York substantive law to apply to Plaintiffs' causes of action (*see* D.I. 9 at 6; D.I. 11 at 8 n.3), the Court agrees with the Bankruptcy Court that the choice-of-law clause in the APA did not expressly mandate that New York's statute of limitations also apply (*see* Opinion at 17; *see also* D.I. 11 Ex. 1 at 27).

expiration" of "the time limited by the law of this State," which is shorter than "the time limited by the law of the state ... where the cause of action arose."

Appellants' discussion of the Delaware Supreme Court's discussion in *Saudi Basic Indus. Corp. v. Mobil Yanbu Petrochemical Co., Inc.,* 866 A.2d 1, 16–17 (Del.2005), does not alter the outcome.[3] In *Saudi Basic,* the Court held that a literal application of the Delaware borrowing statute was not appropriate when it would circumvent the purpose of the statute, adding that "the overriding purpose of borrowing statutes ... is 'to prevent shopping for the most favorable forum.' " 866 A.2d at 15, 17. Under the circumstances presented here, the purpose of the borrowing statute is ***promoted*** by application of the literal terms of the Delaware borrowing statute. Otherwise, Plaintiffs could succeed in shopping for a forum with a longer statute of limitations than should be applied given that their claims arise in Delaware and relate to the bankruptcy proceedings in Delaware. *See generally K & K Screw Prods., L.L.C v. Emerick Capital Invs., Inc.,* 2011 WL 3505354, at *15 n.96 (Del. Ch. Aug. 9, 2011) (recognizing that "***in certain situations,*** Delaware courts do not apply the borrowing statute, even though its literal requirements may be satisfied, where such application would 'subvert' its overriding purpose, which is to prevent a plaintiff from

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[3] While the Bankruptcy Court did not cite *Saudi Basic*—most likely because it was not cited by the parties (*see* D.I. 9 at 1–2)—this Court has concluded that proper consideration of the case does not warrant reversal of the Bankruptcy Court's Order.

shopping for a favorable limitations period under Delaware law as compared to the law of the state where the cause of action arose") (emphasis added).

That this case ended up in Bankruptcy Court in Delaware due to Defendants' exercise of their right of removal and the granting of their motion to transfer does not compel a contrary conclusion. As Appellees argue:

> Indeed, the *Saudi Basic* court's rationale for not applying the borrowing statute—in order to discourage forum shopping—confirms why the Bankruptcy Court's interpretation of the borrowing statute was manifestly correct, because Defendants would not have had to move to transfer the case to Delaware if Plaintiffs previously had not shopped for a forum with a more favorable limitations period.

(D.I. 11 at 5) The Court further agrees with Appellees that, "Defendants were not shopping for a more favorable forum when bringing the case to Delaware; they were transferring the case to the only forum where Plaintiffs should have filed in the first instance. This dispositive fact immediately distinguishes *Saudi Basic* and confirms that the Bankruptcy Court's application of the borrowing statute was correct." (*Id.* at 13; *see also Winstar Holdings, LLC v. Blackstone Group, L.P.,* 2007 WL 4323003, at *5 (S.D.N.Y. Dec. 10, 2007) (granting motion to transfer to Delaware, as Plaintiffs' claims go "directly to the proper performance of duties by professionals retained by the bankruptcy estate, with the approval of the Bankruptcy Court, ... bear[ing] directly on the distribution of the debtor's

estate"))

Appellants' request that, following reversal of the Bankruptcy Court's Order, their causes of action not be returned to the Bankruptcy Court but, instead, be equitably remanded to the New York State Court (*see, e.g.,* D.I. 9 at 2; *see also* 28 U.S.C. § 1452(b)), is moot, given that the Court has not reversed the Bankruptcy Court Order. Likewise, there is no basis for permissive abstention. (*See* 28 U.S.C. § 1334(c); *see generally Kerusa Co. LLC v. W10Z/515 Real Estate Ltd. P'ship,* 2004 WL 1048239, at *3 (S.D.N.Y. May 7, 2004) ("Courts in this district have treated the analysis under these two statutory provisions as essentially identical....."))

Conclusion. For the reasons stated, the Bankruptcy Court's August 11, 2010 Order denying Appellants' request for remand or abstention and dismissing all claims against Appellees is **AFFIRMED.** The Clerk of Court is directed to **CLOSE** this case.

APPENDIX C

United States Bankruptcy Court,
D. Delaware.

In re WINSTAR COMMUNICATIONS, INC.,
et al., Debtors.
Winstar Holdings, LLC, and IDT Corp., Plaintiffs,
v.
The Blackstone Group, LP, Impala Partners, LLC,
and Citicorp.

Bankruptcy No. 01–1430 (KJC).
| Adversary No. 08–50296 (KJC). | Aug. 11, 2010.

MEMORANDUM[1]

KEVIN J. CAREY, Bankruptcy Judge.

Background

This adversary proceeding arises out of a sale of assets pursuant to Bankruptcy Code section 363 by the debtor, Winstar Communications, Inc., and its related entities (the "Debtors" or "Old Winstar") to Winstar Holdings, LLC ("New Winstar") and IDT Corporation ("IDT") (jointly, the "Plaintiffs"). At an auction held on December 5, 2005, the Plaintiffs' bid was identified as the highest and best offer for the assets. The Debtors and the Plaintiffs entered into an Asset Purchase Agreement dated as of December 18, 2001 (the "APA"), which was approved by an Order dated December 19, 2001 (see main case D.I. 1627). The parties completed closing immediately

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[1] This Court has jurisdiction to decide the motions before it pursuant to 28 U.S.C. § 1334 and § 157(a).

thereafter and the Plaintiffs purchased the assets for $42.5 million. (the "Asset Sale")

On May 10, 2007, more than five years after closing, the Plaintiffs filed a complaint in the Supreme Court of New York (the "New York State Court") against The Blackstone Group, LP ("Blackstone"), Impala Partners ("Impala"), and Citicorp, Inc. ("Citicorp") (collectively, the "Defendants") for their roles in connection with the Asset Sale. During the Debtors' chapter 11 case, the Bankruptcy Court authorized the employment of Blackstone as the financial advisor to the Debtors, and Impala as the restructuring advisor to the Debtors. Citicorp was the largest creditor of the Debtors and the Plaintiffs allege that Impala's actions in connection with the Asset Sale are attributable to Citicorp because Impala was working as Citicorp's agent. In the complaint, the Plaintiffs asserted five claims against the Defendants arising from the Asset Sale: fraud (Count 1), aiding and abetting fraud (Count 2), negligent misrepresentation (Count 3), negligence (Count 4), and civil conspiracy (count 5).

On June 1, 2007, Impala removed the action to the United States District Court for the Southern District of New York ("New York District Court") pursuant to 28 U.S.C. § 1452(a). On June 21, 2007, the Defendants filed a joint motion requesting that the New York District Court transfer venue to this Court pursuant to 28 U.S.C. §§ 1404(a) or 1406 (discretionary transfer and mandatory transfer, respectively). On July 1, 2007, the Plaintiffs challenged the removal by filing a motion to remand the action back to the New York State Court, arguing that removal was improper under 28 U.S.C.

§§ 1334 and 1452(a) because subject matter jurisdiction was lacking. Alternatively, the Plaintiffs contended that the New York District Court should abstain from hearing the action under 28 U.S.C. § 1334(c)(1) and (2), or should equitably remand the case under 28 U.S.C. § 1452(b).

On December 10, 2007, the New York District Court denied the Plaintiffs' request for remand or abstention, granted Defendant's request to transfer venue of the action, and transferred the case to the United States District Court for the District of Delaware (the "Delaware District Court"). The New York District Court determined that federal jurisdiction was appropriate because the Plaintiffs' claims "arose in" the Old Winstar bankruptcy case. Further, the New York District Court held that mandatory abstention was inapplicable, that permissive abstention and equitable remand were not appropriate, and that venue properly lay in Delaware. *Winstar Holdings, LLC v. The Blackstone Group, LP,* 2007 WL 4323003 (S.D.N.Y. Dec.10, 2007).

The action was transferred to the Delaware District Court on December 17, 2007. On January 29, 2008, the Defendants filed a joint motion to refer the action to this Court, which was granted on February 19, 2008. After the action was transferred, the following motions were transferred to this Court's docket:

> (1) Defendant The Blackstone Group, LP's Motion to Dismiss Plaintiffs' Complaint (*see* D.I. 7, attachment 8) (the "Blackstone Motion"), (2) Defendant Impala Partners,

> LLC's Motion for Judgment on the Pleadings Pursuant to Rule 12(c) (*see* D.I. 7) (the "Impala Motion"), and (3) Defendant Citigroup, Inc.'s Motion to Dismiss Plaintiffs' Complaint (*see* D.I. 7, attachment 2) (the "Citigroup Motion").

In its motion to dismiss, Blackstone argues that the Complaint fails to state a claim upon which relief can be granted pursuant to Fed.R.Civ.P. 12(b)(6), made applicable by Fed.R.Bankr.P. 7012(b), for three reasons: (1) the claims are time barred under the applicable statute of limitations; (2) the claims constitute an impermissible collateral attack on the final and binding court order which authorized and approved the Asset Sale; and (3) the claims are barred as a matter of law by the broad disclaimer clause in the APA. Moreover, Blackstone argues that Counts 1, 2, and 5 fail to allege fraud with the required particularity. The Impala Motion and the Citigroup Motion join in and adopt all of the points advanced by Blackstone. (Collectively, the Court will refer to the Blackstone Motion, the Citigroup Motion, and the Impala Motion as the "Motions to Dismiss.").

On March 14, 2008, Plaintiffs filed a motion requesting remand or abstention (D.I. 22) ("Motion For Remand or Abstention") with this Court. Plaintiffs argue that the New York District Court erroneously concluded that Plaintiffs' claims "arise in" Old Winstar's bankruptcy case. The Plaintiffs, still seeking to have the action remanded to the New York State Court, renew their argument that bankruptcy court jurisdiction is lacking, and ask this Court to review the jurisdiction question under

applicable Third Circuit law.

For the reasons set forth below, the Court denies Plaintiffs' Motion For Remand or Abstention and grants the Defendants' Motions to Dismiss.

Factual Allegations

For the purpose of ruling on the pending motions, the Court takes the following facts alleged in the Plaintiffs' Complaint (*see* D.I. 2, attachment 3) to be true.

Old Winstar was a publicly traded company that provided telephone services to customers using a "fixed wireless" system. On April 18, 2001, the Debtors filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware. On January 24, 2002, the Court entered an order converting the chapter 11 cases to chapter 7 cases. The bankruptcy cases remain pending before this Court.

Blackstone, Impala, and Citigroup's Role in Old Winstar's Asset Sale

The Debtors retained Blackstone as a financial advisor to market and sell their business assets. The Debtors also retained Impala as a restructuring advisor to provide them with restructuring advice and other related services in connection with the bankruptcy proceedings. As the Debtors' largest creditor, Citigroup assisted the Debtors in negotiating the terms of Impala's engagement.

The auction of the Debtors' business assets was planned for December 2001. To promote the sale of the Debtors' business assets, Blackstone, assisted by

Impala, prepared an offering statement. Blackstone, Impala, and Citicorp assisted in the development of financial data and presentations to the Debtors' Board of Directors, various creditors, and other parties. Blackstone also performed various analyses, including cash reconciliation of the Debtors' actual performance versus various sets of projections. Blackstone, Impala, and Citicorp controlled bidder access to the Debtors' staff and records.

IDT was one of several entities that expressed an interest in acquiring the Debtors' business assets. In conducting due diligence, IDT met with Blackstone and several of the Debtors' officials and reviewed the Debtors' business records, which were made available in a "data room." The meetings were held and the data room was located in New York City. The due diligence was conducted between Friday, November 30, 2001 and Wednesday, December 5, 2001.

During the due diligence period, Blackstone, Impala, and the Debtors each made material misrepresentations to IDT regarding the status of the Debtors' business, including statements about monthly revenue, the number of paying customers, the number of revenue-generating telephone lines, the rate at which existing customers discontinued service, and the Debtors' use of an intercity optical network built by Lucent. Furthermore, Blackstone, Citicorp, Impala, and the Debtors hid or blocked IDT's access to material information about the Debtors' finances and operations.

The Auction, Sale Order, and Asset Purchase Agreement

Following the due diligence period, IDT established New Winstar for the purpose of acquiring the Debtors' business assets. The auction was conducted on December 5, 2001 and New Winstar submitted a bid for the Debtors' business assets. The Defendants did not permit further due diligence between December 5, 2001 and December 17, 2001. On December 18, 2001, IDT and New Winstar entered into the APA with the Debtors to acquire the Debtors' business assets and certain other assets for $42.5 million.

On December 19, 2001, pursuant to 11 U.S.C. § 363, this Court entered an Order approving the APA (the "Sale Order," *see* main case D.I. 1627). Closing under the APA occurred on or about December 20, 2001, and New Winstar began operating with the Debtors' assets.

Shortly after acquiring the Debtors' assets, New Winstar and IDT discovered that the oral and written representations about the Debtors' operations made during due diligence period were false or contained material omissions. IDT and New Winstar would not have entered into the APA if they had known the truth. IDT and New Winstar suffered losses of over $300 million.

Plaintiffs' Motion for Remand or Abstention

In the Motion for Remand or Abstention, the Plaintiffs ask that this Court remand the action to the New York State Court, despite the fact that the New York District Court already denied a similar motion. *See Winstar Holdings, LLC v. Blackstone*

Grp., L.P., 2007 WL 4323003 (S.D.N.Y. Dec.10, 2007). The Defendants argue that the decision of the New York District Court regarding jurisdiction is the law of the case and is binding on this Court. The Plaintiffs, however, argue that this Court must make its own determination regarding subject matter jurisdiction under applicable Third Circuit law. The Plaintiffs contend that the law of the case doctrine does not apply here, because the New York District Court did not consider whether subject matter jurisdiction was proper in the *transferee* court, as required prior to deciding to transfer the action to Delaware pursuant to 28 U.S.C. § 1404(a).[2] Alternatively, the Plaintiffs argue that an exception to the law of the case doctrine applies here, because the New York District Court's analysis of "arising in" and "related to" bankruptcy court jurisdiction under 28 U.S.C. § 1334 was "clearly wrong" and must be

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[2] 28 U.S.C. § 1404(a) provides that "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division *where it might have been brought.*" (emphasis added)

The Plaintiffs rely upon the decision *Hayman Cash Register Co. v. Sarokin,* 669 F.2d 162 (3d Cir.1982) to support their argument that the law of the case doctrine does not apply and that this Court should reconsider jurisdiction. In *Hayman,* the Third Circuit recognized that a transferee court could consider venue and jurisdiction issues *only* when those issues had not been considered by the transferor court. *Id.,* at 166. The *Hayman* Court, however, applied the law of the case doctrine to the matter before it, preventing the transferee court from considering jurisdiction anew, after finding that the transferor court previously decided that jurisdiction was proper in the transferee court.

reconsidered to prevent a manifest injustice.[3]

The Law of the Case Doctrine

The law of the case doctrine "posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case. The rule of practice promotes the finality and efficiency of the judicial process by protecting against the agitation of settled issues." *Christianson v. Colt Indus. Operating Corp.,* 486 U.S. 800, 816, 108 S.Ct. 2166, 100 L.Ed.2d 811 (1988) (internal quotations omitted). "The law of the case doctrine does not limit a federal court's power; rather it directs its exercise of discretion." *Public Interest Research Grp. of New Jersey, Inc. v. Magnesium Elektron, Inc.,* 123 F.3d 111, 116 (3d Cir.1997) (citations omitted). In *Christianson,* the

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[3] The Plaintiffs also claim that reconsideration is permissible in this Court, since the transfer of this case effectively denied them of their right to move for reconsideration in New York. Pursuant to Local Rule 83.1 of the Southern District of New York, the case was transferred five business days after the transfer order was issued. (*See* S.D.N.Y. L.R.Civ.P. 83.1 (2007)). Although the time period is short, the Plaintiffs could have sought reconsideration by Judge Lynch during the five days before the transfer. Moreover, this exception is applied predominantly to allow a successor judge to reconsider issues when the predecessor judge is unavailable, which was not the case here. *Hayman,* 669 F.2d at 169 citing *TCF Film Corp. v. Gourley,* 240 F.2d 711, 714 (3d Cir.1957) ("[W]here a successor judge is asked by timely and proper motion to reconsider the legal conclusions of an unavailable predecessor, he or she is empowered to reconsider those issues to the same extent that his or her predecessor could have."). Plaintiffs have not demonstrated that their right to seek reconsideration by Judge Lynch was effectively denied.

Supreme Court explained the scope of this discretion as follows:

> A court has the power to revisit prior decisions of its own or of a coordinate court in any circumstance, although as a rule courts should be loathe to do so in the absence of extraordinary circumstances such as where the initial decision was "clearly erroneous and would work a manifest injustice."

Id. at 817, 108 S.Ct. 2166 quoting *Arizona v. California,* 460 U.S. 605, 618 n. 8, 103 S.Ct. 1382, 75 L.Ed.2d 318 (1983). The Third Circuit has recognized the following "extraordinary circumstances" that warrant a court's reconsideration of an issue decided earlier in the litigation: (1) new evidence is available; (2) a supervening new law has been announced; or (3) the earlier decision was clearly erroneous and would create manifest injustice. *Public Interest Research Grp.,* 123 F.3d at 116–17.

"Federal courts routinely apply law of the case principles to transfer decisions of coordinate courts." *Christianson,* 486 U.S. at 816, 108 S.Ct. 2166 (citing cases). "[T]he policies supporting the doctrine apply with even greater force to transfer decisions than to decisions of substantive law; transferee courts that feel entirely free to revisit transfer decisions of a coordinate court threaten to send litigants into a vicious circle of litigation." *Id.* *See also Public Interest Research Grp.,* 123 F.3d at 118 ("Transfer cases pose a special problem to litigants.... When transferee courts fail to follow the law of the case, they drive up the costs of litigation dramatically and

allow parties to capitalize on jurisdictional uncertainty.").

Decision by the New York District Court

The New York District Court determined that bankruptcy court jurisdiction is proper in this case pursuant to 28 U.S.C. § 1334(b), which provides, in pertinent part, that "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." In *Binder v. Price Waterhouse & Co., LLP (In re Resorts Int'l, Inc.),* 372 F.3d 154 (3d Cir.2004), the Third Circuit explained:

> Bankruptcy court jurisdiction potentially extends to four types of title 11 matters pending referral from the district court: (1) cases under title 11, (2) proceedings arising under title 11, (3) proceedings arising in a case under title 11, and (4) proceedings related to a case under title 11. [The first three types of matters] are referred to as "core" proceedings, whereas proceedings "related to" a case under title 11 are referred to as "non-core" proceedings. Congress vested the bankruptcy courts with full adjudicative power with regard to "core" proceedings, subject to appellate review by the district courts. 28 U.S.C. §§ 157(b)(1), 158(a), (c). At the same time, it provided that, for "non-core" proceedings that are otherwise related to a case under title 11, the bankruptcy court "shall submit proposed findings of fact and conclusions of law to the district court" subject to de novo review by that court. 28

U.S.C. § 157.

Resorts Int'l, 372 F.3d at 162 (citations omitted). The New York District Court held that the claims in this case "arise in" the Old Winstar bankruptcy case because:

> [P]laintiffs' claims go directly to the proper performance of duties by professionals retained by the bankruptcy estate, with the approval of the Bankruptcy Court, to assist it in maximizing the assets of the estate. .... [S]upervising the court-appointed professionals also bears directly on the distribution of the debtor's estate. If the estate is not marshaled and liquidated or reorganized expeditiously, there will be far less money available to pay creditors' claims. Here, of course, the claim is not brought by the bankruptcy estate itself, and the claim is rather that the professionals advising the estate obtained *excessive* compensation by defrauding the purchaser of the estate's assets. But the matter is still intimately related to the administration of the bankruptcy. The Bankruptcy Court has a vital interest in policing the integrity of the bankruptcy process in general, and of the sales of estate assets under the court's supervision in particular.

Winstar, 2007 WL 4323003 at *5 (internal quotation marks omitted).[4]

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[4] In a footnote, the New York District Court also determined that "related to" bankruptcy jurisdiction exists because the

Because this matter is a core proceeding arising in a bankruptcy case, the New York District Court determined that mandatory abstention under 28 U.S.C. § 1334(c)(2) is not applicable.[5] *Id.* at *5. Upon further analysis, the New York District Court also determined that permissive abstention under 28 U.S.C. § 1334(c)(1)[6] was not appropriate here, because (i) there was no basis for comity to the state courts since the state law claims are straightforward common-law claims that do not involve arcane or idiosyncratic provisions of New York law, (ii) the

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outcome of this action may affect the Debtors' rights or administration of the estate due, in part, to Impala's indemnification rights against Old Winstar. *Winstar,* 2007 WL 4323003 at *1 n. 1. This conclusion might be questioned under Third Circuit decisions *W.R. Grace & Co. v. Chakarian (In re W.R. Grace & Co.),* 591 F.3d 164 (3d Cir.2009) and *In re Federal–Mogul Global, Inc.,* 300 F.3d 368 (3d Cir.2002). However, I need not address this aspect of the Court's decision, since the New York District Court determined that core "arising in" jurisdiction is present.

[5] 28 U.S.C. § 1334(c)(2) provides: "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."

[6] 28 U.S.C. § 1334(c)(1) provides: "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."

matter is closely tied to the bankruptcy case since it arises out of the sale of assets that was a "central aspect and basic function of the bankruptcy proceedings," and (iii) the Plaintiffs' claims involve post-petition conduct that took place under the Bankruptcy Court's auspices and will involve interpretation of the Bankruptcy Court-approved Asset Purchase Agreement and the Court's orders. *Id.* at *5–*6.

After deciding that this matter is a core bankruptcy proceeding and that neither mandatory nor permissive abstention is appropriate, the New York District Court considered the Defendants' motion to transfer the case to the United States District Court for the District of Delaware for referral to the Bankruptcy Court. The New York District Court decided that the mandatory choice of forum clause in the APA provides a strong basis for concluding that venue is properly laid in Delaware. *Id.* at *6. Although the Defendants were not parties to the APA, the Plaintiffs agreed to resolve any disputes related to the APA in the Delaware Bankruptcy Court and the Defendants' alleged wrongdoing was—almost without exception—committed jointly with the Plaintiffs' counterparty to the APA: Old Winstar.[7] *Id.* The New York District Court further

[7] Section 9.10 of the APA states: "The parties hereto irrevocably submit to the exclusive jurisdiction of the Bankruptcy Court ... over any dispute arising out of or relating to this Agreement or any other agreement or instrument contemplated hereby or entered into in connection herewith or any transactions contemplated hereby or thereby. Each party hereby irrevocably agrees that all proceedings may be heard and determined in such courts. The parties hereby irrevocably waive, to the fullest extent permitted by applicable law, any objection which they

decided that "even if transfer is not mandatory pursuant to 28 U.S.C. § 1406, discretionary transfer under § 1404(a) in the interests of justice is clearly appropriate" because the point of federal jurisdiction is the close connection of the case to the bankruptcy proceedings in Delaware. *Id.* at *7. The Court determined that the Plaintiffs' arguments about inconvenience "rang hollow" when the physical distance between the courts is a short train ride and the fact that the Plaintiffs "irrevocably waived" any objections to venue in the District of Delaware on the grounds of inconvenience. *Id.*

Application of the law of the case doctrine

This case falls squarely within the law of the case doctrine. While it is true that courts may review the issue of subject matter jurisdiction *sua sponte* at any point in a case (*see, e.g., In re Flat Glass Antitrust Lit.,* 288 F.3d 83, 88 n. 5 (3d Cir.2002)), I can discern no reason to do so here. In *Christianson,* the Supreme Court wrote that:

> There is no reason to apply law-of-the-case principles less rigorously to transfer decisions that implicate the transferee's jurisdiction. Perpetual litigation of any issue—jurisdictional or nonjurisdictional—delays, and therefore threatens to deny, justice.

Christianson, 486 U.S. at 816 n. 5, 108 S.Ct. 2166. The New York District Court considered whether subject matter jurisdiction exists in a federal

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may now or hereafter have to the laying of venue of any such dispute brought in such court or any defense of inconvenient forum in connection therewith."

bankruptcy court, thoughtfully analyzing 28 U.S.C. § 1334(b), applicable treatises, and decisional law from the Second and Fifth Circuits. An analysis under Third Circuit law would not change the result. *See Geruschat v. Ernst Young LLP (In re Seven Fields Dev. Corp.),* 505 F.3d 237, 262–63 (3d Cir.2007) (holding that a malpractice action against a court-approved professional for misconduct during the bankruptcy case was a core proceeding "arising in" the bankruptcy). The New York District Court also presented a well-reasoned abstention analysis under 28 U.S.C. § 1334(c). Even if the jurisdiction and abstention issues here are considered to be close questions without clear answers, the Supreme Court in *Christianson* instructs:

> [C]ourts will rarely transfer cases over which they have clear jurisdiction, and close questions, by definition, never have clearly correct answers. Under law-of-the-case principles, if the transferee court can find the transfer decision plausible, its jurisdictional inquiry is at an end.

Christianson, 486 U.S. at 819, 108 S.Ct. 2166. The New York District Court's decision well exceeds the standard of plausibility. It is not "clearly erroneous" and does not result in any manifest injustice, particularly because the Plaintiffs have consented to jurisdiction in this Court for any issues related to the Asset Sale. The Plaintiffs' Motion for Remand or Abstention will be denied.[8]

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[8] There is yet another sound, prudential reason not to upset the New York District Court's determination: An Article III Court (a "Constitutional" court), from which bankruptcy courts

The Motions to Dismiss

Standard[9]

Fed.R.Civ.P. 12(b)(6), made applicable by Fed.R.Bankr.P. 7012(b), governs a motion to dismiss for failing to state a claim upon which relief can be granted. "The purpose of a motion to dismiss is to test the sufficiency of a complaint, not to resolve disputed facts or decide the merits of the case." *Paul v. Intel Corp. (In re Intel Corp. Microprocessor Antitrust Litig.),* 496 F.Supp.2d 404, 407 (D.Del.2007) citing *Kost v. Kozakiewicz,* 1 F.3d 176, 183 (3d Cir.1993). In considering a motion to dismiss under Fed.R.Civ.P. 12(b)(6), the court must accept as true all factual allegations in the complaint and draw all inferences from the facts alleged in the light most favorable to the plaintiff. *Worldcom, Inc. v. Graphnet, Inc.,* 343 F.3d 651, 653 (3d Cir.2003). Fed.R.Civ.P. 8(a)(2), made applicable by Fed.R.Bankr.P. 7008, requires the complaint to contain "a short and plain statement of the claim showing that the pleader is entitled to relief," in order to "give the defendant fair notice of what the ...

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directly derive their jurisdiction, has rendered its decision on issues completely within its purview. The Third Circuit's admonition that the revisiting of prior decisions should occur only under "extraordinary circumstances" is particularly applicable here. *Public Interest Research Grp.,* 123 F.3d at 116–17.

[9] The standard for a motion for judgment on the pleadings pursuant to Fed.R.Civ.P. 12(c), made applicable by Fed.R.Bankr.P. 7012(b), is the same as that applied to a motion to dismiss pursuant to Fed. R.Civ.P. 12(b), also made applicable by Fed.R.Bankr.P. 7012(b). *Shelly v. Johns–Manville Corp.,* 798 F.2d 93, 97 n. 4 (3d Cir.1986).

claim is and the grounds upon which it rests." *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 555, 127 S.Ct. 1955, 1964, 167 L.Ed.2d 929 (2007) quoting *Conley v. Gibson,* 355 U.S. 41, 47, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957).

In *Twombly,* the Supreme Court further decided that "[w]hile a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitle [ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly,* 550 U.S. at 555, 127 S.Ct. at 1964–65. *See also Fowler v. UPMC Shadyside,* 578 F.3d 203, 210 (3d Cir.2009) quoting *Ashcroft v. Iqbal,* —— U.S. ——, 129 S.Ct. 1937, 1948–49, 173 L.Ed.2d 868 (2009)("[I]t is clear that conclusory or 'bare-bones' allegations will no longer survive a motion to dismiss; 'threadbare recitals of elements of a cause of action, supported by mere conclusory statements do not suffice.' To prevent dismissal, all civil complaints must now set out 'sufficient factual matter' to show that the claim is facially plausible. This then 'allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.' ")

Statute of Limitations

In the Motions to Dismiss, all of the Defendants argue that the Plaintiffs' claims are barred by Delaware's three-year statute of limitations. *See* 10 Del. C. § 8106.[10] The Plaintiffs allege that the

[10] 10 Del. C. § 8106(a) reads:

> No action to recover damages for trespass, no action to regain possession of personal chattels, no action to recover

Defendants' wrongful acts occurred during the due diligence period of November 30, 2001 through December 5, 2001. As a result, the APA was signed as of December 18, 2001, approved by Court Order dated December 19, 2001, and the sale closed on December 20, 2001. In the Complaint, the Plaintiffs allege that revenues between August 1, 2001 and July 31, 2002 were materially less than represented. However, the Plaintiffs did not file their Complaint until May 10, 2007—over five years after the due diligence period and closing of the Asset Sale. Even assuming that discovery of the wrongful conduct occurred later (July 31, 2002), the Complaint's filing date still falls well beyond the three-year statute of limitations period.[11]

> damages for the detention of personal chattels, no action to recover a debt not evidenced by a record or by an instrument under seal, no action based on a detailed statement of the mutual demands in the nature of debit and credit between parties arising out of contractual or fiduciary relations, no action based on a promise, no action based on a statute, and no action to recover damages caused by an injury unaccompanied with force or resulting indirectly from the act of the defendant shall be brought after the expiration of 3 years from the accruing of the cause of such action....

See also Krahmer v. Christie's Inc., 903 A.2d 773, 778 (Del.Ch.2006) (applying § 8106 to negligent misrepresentation and fraud claims); *Christiana Marine Serv. Corp. v. Texaco Fuel and Marine Marketing,* 2002 WL 1335360, *3 (Del.Super. June 13, 2002) (applying § 8106 to negligence claims); and *Atlantis Plastics Corp. v. Sammons,* 558 A.2d 1062, 1064 (Del.Ch.1989) (applying § 8106 to a civil conspiracy claim).

[11] A cause of action accrues under § 8106 at the time of the wrongful act, even if the plaintiff is ignorant of the cause of action. *Krahmer,* 903 A.2d at 778 quoting *SmithKline Beecham*

The Plaintiffs argue that Delaware's three-year statute of limitations period is not applicable to its claims. Instead, the Plaintiffs argue that New York's statute of limitations should apply, because (i) the torts occurred in New York, (ii) the APA provides that it should be governed by and construed in accordance with the laws of the State of New York, and (iii) special circumstances in this case warrant the Court's application of New York—not Delaware—statute of limitations law. The New York statute of limitations for Plaintiffs' fraud, aiding and abetting fraud, negligent misrepresentation, and civil conspiracy claims (Counts 1, 2, 3, and 5) is six years. *See* N.Y. C.P.L.R. § 213(8).[12] The New York

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Pharm. v. Merck & Co., 766 A.2d 442, 450 (Del.2000). However, Delaware courts have tolled a limitations period under the doctrines of (i) fraudulent concealment, (ii) inherent unknowable injury, and (3) equitable tolling. *Krahmer,* 903 A.2d at 778. If one of the tolling exceptions applies, "the statute will begin to run only upon the discovery of facts constituting the basis of the cause of action or the existence of facts sufficient to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to the discovery [of the injury.]" *Id.* at 778–79 quoting *Wal–Mart Stores v. AIG Life Ins. Co.,* 860 A.2d 312, 319 (Del.2004). The Plaintiffs assert that § 8106 is not applicable to their claims and, consequently, have not argued that any tolling doctrine applies here. In the Plaintiffs' Memorandum in opposition to Citigroup's Motion to Dismiss and Impala's Motion for Judgment on the Pleadings (docket no. 18), the Plaintiffs allege that "[s]hortly after its acquisition of the assets of Old Winstar, New Winstar learned that Old Winstar had inflated its reported revenue by a variety of means...." (Memo. In Opp. at ¶ H, p. 8).

[12] N.Y. C.P.L.R. § 213(8) provides:

The following actions must be commenced within six years:

statute of limitations for Plaintiffs' negligence claim (Count 4) is three years. *See* N.Y. C.P.L.R. § 214(4).[13] Therefore, Count 4 must be dismissed whether the Delaware or New York limitations period applies.

This Court must apply the Delaware choice of law rules to determine whether the Delaware or New York statute of limitations applies to this adversary. *Burtch v. Dent (In re Circle Y of Yoakum, Texas),* 354 B.R. 349, 359 (Bankr.D.Del.2006) citing *In re PHP Healthcare Corp.,* 128 Fed.Appx. 839, 843 (3d Cir.2005)(applying the choice of law rules of the state in which the bankruptcy court sits). The

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...

(8) an action based upon fraud; the time within which the action must be commenced shall be the greater of six years from the date the cause of action accrued or two years from the time the plaintiff or the person under whom the plaintiff claims discovered the fraud, or could with reasonable diligence have discovered it.

See also Brady v. Lynes, 2008 WL 2276518, *8–*9 (S.D.N.Y. June 2, 2008) (noting that the limitations period for fraud and civil conspiracy claims is the greater of six years from the date the cause of action accrues or two years from the time the plaintiff could have discovered the fraud, and the limitations period for claims of negligent misrepresentation is six years from the date of the alleged injury).

[13] N.Y. C.P.L.R. § 214(4) provides:

The following actions must be commenced within three years:

...

(4) an action to recover damages for an injury to property....

See also Triangle Underwriters, Inc. v. Honeywell Info. Sys. Inc., 604 F.2d 737, 744 (2d. Cir.1979) ("The statute of limitations in New York for negligence claims is three years.... A cause of action accrues when acts or omissions constituting negligence produce injury.")

Plaintiffs contend that Delaware is a *lex loci delecti* jurisdiction, *i.e.,* it will apply the substantive law of the state where the tort or injury occurred. *Dymond v. Nat'l Broadcasting Co., Inc.,* 559 F.Supp. 734, 737 (D.Del.1983). However, for conflict of law purposes, a statute of limitations issue is a procedural, not substantive. *Norman v. Elkin,* 2007 WL 2822798, *3 (D.Del. Sept.26, 2007). Therefore, the law of the forum generally determines whether an action is barred by the statute of limitations. *Juran v. Bron,* 2000 WL 1521478, *10 (Del.Ch. Oct.6, 2000) citing *Restatement (Second) Conflict of Laws,* § 142. The Delaware Legislature modified this general rule by enacting a "borrowing statute," which provides, in pertinent part:

> Where a cause of action arises outside of this State, an action cannot be brought in a court of this State to enforce such cause of action after the expiration of whichever is shorter, the time limited by the law of this State, or the time limited by the law of the state or country where the cause of action arose, for bringing an action upon such cause of action.

10 Del.C. § 8121. Even assuming, without deciding, that the Plaintiffs' cause of action arose in New York, the borrowing statute requires the Court to apply the *shorter* statute of limitations and, therefore, Delaware's three-year limitations would apply here.

The Plaintiffs also argue that this Court should apply the New York statute of limitations based upon the choice of law provision in the APA, which provides:

> This Agreement shall be governed by and construed in accordance with the laws of the State of New York (regardless of the laws that might otherwise govern under applicable New York principles of conflicts of law) as to all matters, including but not limited to matters of validity, construction, effect, performance and remedies.

Asset Purchase Agreement, § 9.9. Delaware courts have decided that, while choice of law provisions will be given effect, those provisions will only include the statute of limitations of the chosen jurisdiction if the inclusion is specifically noted. *Juran,* 2000 WL 1521478 at *11; *American Energy Tech., Inc. v. Colley & McCoy Co.,* 1999 WL 301648, *2 (D.Del. Apr.15, 1999).

The Plaintiffs further argue that special circumstances in this case should persuade this Court to reject application of Delaware's three-year limitations period to this action. The Plaintiffs rely upon the *Juran* decision, in which the court determined that the matter before it presented "special or unusual circumstances where it would be inequitable to apply the statute of limitations law" and, therefore, the court, acting as a Court of Equity, should be guided by the equitable doctrine of laches. *Juran,* 2000 WL 1521478 at *11. The *Juran* Court decided that the cause of action in the matter before it arose in California because all of the parties resided in California, the contract was signed and performed in California, the breach of contract occurred in California, and the contract specified that it was subject to California law. *Id.* The possible limitations periods for the *Juran* cause of action

ranged from one year (Delaware) to four years (California). *Id.* at 12. The plaintiffs brought the action about two years after the injury occurred, and the *Juran* Court decided that the claims were not barred by laches. *Id.* The Court concluded that the plaintiffs did not sit on their rights and that the defendants had not shown any prejudice caused by the delay. *Id.*

Moreover, the *Juran* Court decided that the policy behind the Delaware borrowing statute was consistent with its decision. *Id.* The *Juran* Court noted that Delaware's borrowing statute was designed to protect Delaware courts from adjudicating stale out-of-state claims. *Id.* However, because the plaintiffs filed in a jurisdiction with a shorter, rather than longer, limitations period, there was no danger of forum shopping. *Id.*

The Plaintiffs in this adversary proceeding argue that the circumstances here are similar to those in *Juran.* They claim that all of the parties' principal offices are located in New York, and the due diligence activities and injuries arising therefrom, occurred in New York. The Plaintiffs claim that the site of the bankruptcy case is not relevant here, because neither the Debtors nor their estates were harmed by the Defendants' wrongful conduct. Further, the Plaintiffs argue that the policy behind the Delaware borrowing statute does not apply here, because there is no danger that the Plaintiffs were forum shopping, since the Plaintiffs sought to file this case in New York.

The matter before this Court does not exhibit any of the "special circumstances" present in *Juran,*

because the underlying facts are not tied solely to New York. The due diligence performed in this case was done as part of the sale process approved by this Bankruptcy Court, using professionals employed with the approval of this Bankruptcy Court. The Asset Sale under Bankruptcy Code § 363 was an integral part of the Debtors' Delaware bankruptcy case. It has been determined that jurisdiction and venue are proper in this Court. The Delaware statute of limitations applies to the Plaintiffs' Complaint. Accordingly, the Motions to Dismiss will be granted, since the Plaintiffs' claims are barred by the three-year Delaware statute of limitations.[14]

Conclusion

For the reasons stated herein, the Plaintiffs' Motion for Remand or Abstention will be denied and the Defendants' Motions to Dismiss will be granted. An appropriate order follows.

ORDER

AND NOW, this 11th day of August, 2010, upon consideration of the following motions:

(i) The Plaintiffs' Motion for Remand or Abstention (D.I. 22);

(ii) Defendant The Blackstone Group, LP's Motion to Dismiss Plaintiffs' Complaint (*see* D.I. 7, attachment 8),

(iii) Defendant Impala Partners, LLC's Motion for

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[14] Because I have determined that the Plaintiffs' complaint should be dismissed as barred by the Delaware statute of limitations, I need not consider the Defendants' other arguments in support of the Motions to Dismiss.

Judgment on the Pleadings Pursuant to Rule 12(c) (*see* D.I. 7), and

(iv) Defendant Citigroup, Inc.'s Motion to Dismiss Plaintiffs' Complaint (see D.I. 7, attachment 2)(the Defendants' motions shall be referred to jointly herein as the "Defendants' Motions to Dismiss"),

And upon consideration of the parties' memoranda of law and relevant filings regarding the above-referenced motions, and after oral argument, and for the reasons set forth in the accompanying Memorandum, it is hereby **ORDERED** and **DECREED** that:

1. The Plaintiffs' Motion for Remand or Abstention is hereby **DENIED**,

2. The Defendants' Motions to Dismiss are hereby **GRANTED** and, accordingly, the Complaint is dismissed.

BY THE COURT: s/Kevin J. Carey
United States Bankruptcy Judge

APPENDIX D

United States District Court
S.D. New York.

WINSTAR HOLDINGS, LLC and IDT Corp.,
Plaintiffs,
v.
The BLACKSTONE GROUP L.P., Impala
Partners, LLC, and Citicorp, Defendants.

No. 07 Civ. 4634(GEL). | Dec. 10, 2007.

Attorneys and Law Firms

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Andrew C. Gold (Stephen M. Rathkopf, of counsel), Herick, Feinstein LLP, New York, NY, for defendant Impala Partners, LLC.

Stephen L. Saxl (William Wargo, of counsel), Greenberg Traurig, LLP, New York, NY, for defendant Citicorp.

OPINION AND ORDER

GERARD E. LYNCH, District Judge.

The parties to this case agree on one thing: they don't want to be here. They disagree, however, on

where they should be. Plaintiffs filed this action in the Supreme Court of the State of New York, where they believe it should remain; accordingly, they have moved to remand the case to the state court. Defendants removed the case to this Court, only in order to move to transfer the case to the United States Bankruptcy Court for the District of Delaware. The plaintiffs' motion will be denied, and defendants' motion granted.

BACKGROUND

Plaintiff IDT Corp. formed plaintiff Winstar Holdings, LLC, in order to acquire the assets of Winstar Communications, Inc. ("Old Winstar"), and related entities. Old Winstar had filed for bankruptcy protection in the Bankruptcy Court in Delaware, and was in the process of liquidation. With the approval of the Bankruptcy Court, Old Winstar retained defendant Blackstone Group, L.P. as its financial advisor, and defendant Impala Partners, LLC ("Impala") as a restructuring advisor. Defendant Citicorp, Old Winstar's largest creditor, played a role in negotiating the terms of the contract between Old Winstar and Impala. Plaintiffs purchased the business assets of Old Winstar from the bankruptcy estate at an auction approved by the Bankruptcy Court for $42.5 million pursuant to an Asset Purchase Agreement ("APA") dated December 18, 2001, which was approved by the Bankruptcy Court the following day. The APA contains a forum selection clause in which the parties agree that the United States Bankruptcy Court for the District of Delaware shall have exclusive jurisdiction to resolve any dispute arising out of or related to the APA. (APA § 9.10, Gold Decl. Ex. 1.) The Bankruptcy

Court's order approving the sale similarly provides that that court retains "exclusive jurisdiction" to "resolve any disputes arising under or related to" the APA. (Sale Order ¶ 15, Gold Decl. Ex. 2.)

Plaintiffs allege that they were induced to enter the APA by various misrepresentations made by the defendants and by Old Winstar in an offering statement. Their claims sound solely in New York common law.

DISCUSSION

I. *Plaintiffs' Motion to Remand*

The threshold issue in addressing plaintiffs' remand motion is whether federal jurisdiction over this case exists because it "aris[es] in" a bankruptcy case or "aris[es] under" the bankruptcy code, or merely because it is "related to" a bankruptcy case. Although 28 U.S.C. § 1334(b) provides for federal jurisdiction in either situation, if the case is merely one "related to" the Old Winstar bankruptcy, and could not otherwise be brought in a federal court, statutory provisions requiring (28 U.S.C. § 1334(c)(2)) or permitting (28 U.S.C. § 1334(c)(1)) the Court to abstain from exercising jurisdiction and deferring to the state courts may apply. If, however, the case is a "core" bankruptcy proceeding that "arises under" the bankruptcy code or "arises in" a bankruptcy case, the mandatory abstention provision by its own terms do not apply and permissive abstention is less likely. Plaintiffs, accordingly, argue that the Court has, at most, "related to" jurisdiction,[1] while defendants contend

[1] Plaintiffs argue, in fact, that defendants have not established

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even "related to" jurisdiction (P. Remand Mem. 10-12), but their arguments in this regard are unpersuasive. Whether an action is "related to" a bankruptcy depends on whether there is "a significant connection" between the action and the underlying bankruptcy. *In re Turner,* 724 F.2d 338, 341 (2d Cir.1983) (citations and internal quotation marks omitted). The "proceeding need not necessarily be against the debtor or against the debtor's property." *In re WorldCom, Inc. Sec. Litig.,* 293 B.R. 308, 317 (S.D.N.Y.2003), quoting *Celotex Corp. v. Edwards,* 514 U.S. 300, 308 n. 6 (1995). In any ordinary sense, the connection between this case and the bankruptcy is obvious: the sale that is the subject of the litigation was an aspect of the bankruptcy proceeding. More importantly, the outcome of the action " 'could alter the debtor's rights, liabilities, options or freedom of action' " and affect " 'the handling and administration of the bankrupt estate.' " *WorldCom,* 293 B.R. at 317, quoting *Celotex,* 514 U.S. at 308 n. 6 (1995). Although plaintiffs have not named Old Winstar as a defendant, Impala allegedly has indemnification rights against Old Winstar. While plaintiffs claim that the indemnification cannot apply to this case because of an exclusion for "willful misconduct," and because (according to plaintiffs) there is no estate left to affect, the bankruptcy proceedings are on-going, as is litigation that could bring assets into the estate. The Court cannot assume the correctness of plaintiffs' assertions, which turn on facts yet to be found or even in some instances to occur. It is unquestionable that the outcome of this case "could" affect the debtor, and that is sufficient to invoke the "related to" jurisdiction. "Related to" jurisdiction exists where "the outcome of [the] proceeding could conceivably have any effect on the estate being administered in bankruptcy." *Pacor, Inc. v. Higgins,* 743 F.2d 984, 994 (3d Cir.1984) (citations and italics omitted); *In re Cuyahoga Equip. Corp.,* 980 F.2d 110, 114 (2d Cir.1992) (A litigation has a "significant connection with a pending bankruptcy proceeding" and "falls within the 'related to' jurisdiction of the bankruptcy court" if the outcome "might have any 'conceivable effect' on the bankrupt estate.") As the courts have recognized, " 'A key word in [the] test is 'conceivable.' Certainty, or even likelihood, is not required. Bankruptcy jurisdiction will exist so long as it is possible' " that

that the case comes within the "arising in" or "arising under" headings of jurisdiction.

A. *"Arising Under" Jurisdiction*

The most frequently cited explanation of the meaning of "arising under" jurisdiction can be found in the legislative history of the Bankruptcy Reform Act of 1978. The House Report accompanying the bill that became that Act noted that the phrase "arising under" has a well defined and broad meaning in the jurisdictional context. By a grant of jurisdiction over all proceedings arising under title 11, the bankruptcy courts will be able to hear any matter under which a claim is made under a provision of title 11. For example, a claim of exemptions under 11 U.S.C. § 522 would be cognizable by the bankruptcy court, as would a claim of discrimination in violation of 11 U.S.C. § 525. Any action by the trustee under an avoiding power would be a proceeding arising under title 11, because the trustee would be claiming based on a right given by one of the sections in subchapter III of chapter 5 of title 11.

H.R.Rep. No. 595, 95th Cong., 1st Sess. 445 (1977). As the leading commentator on bankruptcy law puts it, "What this language seems to mean is that, when a cause of action is one which is created by title 11, then that civil proceeding is one 'arising under title 11.' " 1 Collier on Bankruptcy ¶ 3.01[4][c][i] at 3-21 (15th ed. rev.2007).

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the proceeding may affect the debtor's rights or the administration of the estate. *In re Dow Corning Corp.,* 86 F.3d 482, 491 (6th Cir.1996), quoting *In re Marcus Hook Dev. Park Inc.,* 943 F.2d 261, 264 (3d Cir.1991).

The language of the statute is self-consciously patterned on that of the general federal question jurisdiction statute, which provides for federal court jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. *See also* U.S. Const. Art. III § 2, cl. 1 ("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."). While the precise meaning of "arising under" in the general federal question context has vexed courts and commentators, *see* 13B Wright, Miller and Cooper, Federal Practice and Procedure § 3562 (2d ed.1984), it has been suggested that an action arises under federal law "if in order for the plaintiff to secure the relief sought he will be obliged to establish both the correctness and the applicability to his case of a proposition of federal law." Bator, Mishkin, Shapiro & Wechsler, Hart & Wechsler's The Federal Courts and the Federal System 889 (2d ed.1973), quoted with approval in *Franchise Tax Bd. v. Construction Laborers Vacation Trust,* 463 U .S. 1, 9 (1983). Moreover, it is well established that a case does not arise under federal law unless "the plaintiff's statement of his own cause of action shows that it is based upon" federal law. *Louisville & Nashville R.R. Co. v. Mottley,* 211 U.S. 149, 152 (1908).

Applying these standards to this case, it is plain that the instant case does not arise under title 11. Simply put, plaintiffs' causes of action are based on state tort law, and rest on familiar common-law principles prohibiting fraud and misrepresentation. No proposition of bankruptcy law must be established

for plaintiffs to prevail, and no provision of the bankruptcy code is implicated in their allegations. The causes of action asserted in the complaint are in no sense "created by" title 11 of the United States Code.

Defendants argue that the case nevertheless arises under the bankruptcy code "because it will be necessary for the Delaware Bankruptcy Court to interpret" its own order approving the APA in the course of deciding the case. (D. Remand Mem. 9.) But this argument misconstrues what it means for a case to "arise under" bankruptcy law. It may be that provisions of the APA and of the Bankruptcy Court's order approving it will be relevant to the outcome of the case. However, as the Supreme Court held in *Mottley* in the context of general federal question jurisdiction, "[a]lthough such allegations show that very likely, in the course of the litigation, a question under [bankruptcy law] would arise, they do not show that the suit, that is, the plaintiff's original cause of action, arises under [title 11]." 211 U.S. at 153.

Accordingly, this is not a case of "arising under" jurisdiction.

B. *"Arising In" Jurisdiction*

The extent of the "arising in" jurisdiction is less clearly defined. The leading bankruptcy treatise refers to it as a "residual category of civil proceedings," that "includes such things as administrative matters, orders to turn over property of the estate and determinations of the validity, extent, or priority of liens." Collier on Bankruptcy, ¶ 3.01[4][c][iv] (15th ed.2004) (internal quotation

marks and footnotes omitted). Courts too have stated that

> [t]he meaning of 'arising in' proceedings is less clear, but seems to be a reference to those 'administrative' matters that arise only in bankruptcy cases. In other words, 'arising in' proceedings are those that are not based on any right expressly created by title 11, but nevertheless, would have no existence outside of the bankruptcy.

In re Wood, 825 F.2d 90, 96-97 (5th Cir.1987).

Defendants argue that this standard is met, pointing out that had Old Winstar not been in bankruptcy, the sale would never have taken place, the alleged misrepresentations would never have occurred, and so this action would have no existence absent the bankruptcy. (D. Remand Mem. 7-9.) This argument may be somewhat oversimplified. The courts and commentators using the "no existence outside of the bankruptcy" formulation seem to be referring to proceedings that by their nature cannot exist outside of bankruptcy, and not merely to actions that, as a factual matter, have their origins in events occurring during a bankruptcy proceeding. The Bankruptcy Court in this district, for example, in a case relied upon by defendants themselves, puts the matter this way:

> A claim "arises in" bankruptcy if, by its very nature, the claim can only be brought in a bankruptcy action, because it has no existence outside of bankruptcy. *See [In re] Riverside*

> *Nursing Home,* 144 B.R. [951,] 955 [S.D.N.Y.1992]; *176-60 Union Turnpike v. Howard Beach Fitness Center,* 209 B.R. 307, 311, n. 2 (S.D.N.Y.1997) (Sprizzo, J.). Matters involving the enforcement or construction of a bankruptcy court order are in this category.

In re Sterling Optical Corp., 302 B.R. 792, 801 (Bankr.S.D.N.Y.2003). Plaintiffs here sue for fraud. Such a claim is not one that *"by its very nature* ... can only be brought in a bankruptcy action." Rather, it is a garden-variety common-law claim that most usually is brought outside of bankruptcy.

The type of administrative matters cited in Collier, and in *Sterling,* as examples of "arising in" jurisdiction are closely tied to the administration of the estate itself. Actions such as motions for contempt of bankruptcy court orders, motions to change the composition of a creditors' committee or appoint or elect trustees or examiners, are matters that, while the cause of action is not created by title 11, could not "have been the subject of a lawsuit absent the filing of a bankruptcy case." Collier, ¶ 3.01[4][c][iv]. The mere fact that the cause of action would never have arisen absent this particular bankruptcy is not enough to confer jurisdiction.

Nevertheless, the claims at issue here are more closely connected to the administration of the bankruptcy than most garden-variety common-law claims. There is persuasive precedent for treating a state-law tort suit regarding the conduct of professionals involved in the administration of the bankruptcy estate as a matter that "arises in" a

bankruptcy case. *In re Southmark Corp.,* 163 F.3d 925 (5th Cir.1999), involved a professional malpractice action against an accounting firm that worked for the court-appointed Examiner in a bankruptcy reorganization. When the defendant removed the case to the bankruptcy court that had presided over the reorganization, the plaintiff argued, like plaintiffs here, that mandatory abstention applied because the bankruptcy court's jurisdiction was of the "related to" variety because the matter was not a "core" bankruptcy proceeding. *Id.* at 928-29. Like plaintiffs here, the plaintiff in *Southmark* argued that its claims were simple state common-law tort claims that were not the sort that could arise only in a bankruptcy action, since "Southmark could have sued any accounting firm that worked for it on similar grounds of disloyalty, non-disclosure and malpractice." *Id.* at 930-31.

The Fifth Circuit rejected the argument, finding that "the professional malpractice claims alleged against [the accounting firm] are inseparable from the bankruptcy context." *Id.* at 931. The court's reasoning is instructive, and is applicable here:

> A *sine qua non* in restructuring the debtor-creditor relationship is the court's ability to police the fiduciaries, whether trustees or debtors-in-possession and other court-appointed professionals, who are responsible for managing the debtor's estate in the best interest of creditors. The bankruptcy court must be able to assure itself and the creditors who rely on the process that court-approved managers of the debtor's estate are performing

their work, conscientiously and cost-effectively.

Id.

Here, too, plaintiffs' claims go directly to the proper performance of duties by professionals retained by the bankruptcy estate, with the approval of the Bankruptcy Court, to assist it in maximizing the assets of the estate. As the *Southmark* court pointed out, "[s]upervising the court-appointed professionals also bears directly on the distribution of the debtor's estate. If the estate is not marshaled and liquidated or reorganized expeditiously, there will be far less money available to pay creditors' claims." *Id.* Here, of course, the claim is not brought by the bankruptcy estate itself, and the claim is rather that the professionals advising the estate obtained *excessive* compensation by defrauding the purchaser of the estate's assets. But the matter is still intimately related to the administration of the bankruptcy. The Bankruptcy Court has a vital interest in policing the integrity of the bankruptcy process in general, and of the sales of estate assets under the court's supervision in particular.

The Bankruptcy Court itself recognized the importance of the sale to its on-going administration of the case. Its order approving the sale expressly provides that the Delaware Bankruptcy Court retains "exclusive jurisdiction to ... resolve any dispute arising under or related to the Asset Purchase Agreement." (Sale Order ¶ 15, Gold Decl. Ex. 2.) This language is broad, encompassing not merely contract disputes or disputes between the parties to the APA themselves, and at a minimum

expresses the Bankruptcy Court's keen interest in the resolution of disputes relating to the sale of Old Winstar's assets. It plainly covers the dispute at hand, which unquestionably is a dispute "related to" the APA.[2]

The Second Circuit has construed the core jurisdiction of the bankruptcy courts "as broadly as possible," because wide bankruptcy jurisdiction is "essential to the efficient administration of bankruptcy proceedings." *Luan Investment S.E. v. Franklin 145 Corp. (In re Petrie Retail, Inc.),* 304 F.3d 223, 229 (2d Cir.2002). Given this jurisdictional sweep, it is clear that this is a case "arising in" the Old Winstar bankruptcy case.

C. *Abstention*

Since this case "aris[es] in" a bankruptcy case and is not merely "related to" a bankruptcy case, mandatory abstention under 28 U.S.C. § 1334(c)(2) by its own terms does not apply. However, this Court may still, in its discretion, abstain from hearing the proceeding "in the interest of justice, or in the interest of comity with State courts or respect for

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[2] Plaintiffs cannot be surprised by being asked to litigate a matter relating to the APA in the Delaware Bankruptcy Court, as they themselves agreed in the APA to a choice of forum clause in which they "irrevocably submit to the exclusive jurisdiction" of that court "over any dispute arising out of or relating to this Agreement," and waived any objection to venue in that court. (APA § 9.10, Gold Decl. Ex. 1.) Defendants do not contend that this clause of the APA, to which they were not parties, of itself controls the outcome of this motion. At a minimum, however, it reflects plaintiffs' own understanding that the Delaware Bankruptcy Court is the proper forum for disputes about the sale of Old Winstar.

State law." 28 U.S.C. § 1334(c)(1). Such abstention is not appropriate here.

Federal courts should be "sparing" in their exercise of discretionary abstention. *In re Texaco Inc.,* 182 B.R. 937, 946-47 (Bankr.S.D.N.Y.1995), citing *New Orleans Public Serv., Inc. v. Council of the City of New Orleans,* 491 U.S. 350, 358 (1989), *Willcox v. Consolidated Gas Co.,* 212 U.S. 19, 40 (1909), and *Chicot County v. Sherwood,* 148 U.S. 529, 534 (1893). There is little basis to invoke comity to the state courts here, and every reason to invoke the federal jurisdiction. Although 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 New York law. As the case was promptly removed, the New York courts have invested no effort in the case.

In contrast, the matter is closely tied to the bankruptcy case. The very sale that is the subject of the proceedings was a central aspect and basic function of the bankruptcy proceedings. The sale of Old Winstar's assets was pursuant to directives issued by the Bankruptcy Court, and the APA was specifically approved by that court. The conduct of the debtor and its advisors (who were retained with the approval of the Bankruptcy Court) that is the subject of the plaintiffs' claims is post-petition conduct that took place under the Bankruptcy Court's auspices. Although the plaintiffs' claims are asserted as tort claims of fraud in the inducement, the evaluation of those claims will necessarily involve the interpretation of the Bankruptcy Court-approved APA, which contains provisions (including a merger clause, APA § 9.13; two disclaimers of

warranties, *id.* §§ 5.10, 9.3; and an "as is" clause, *id.* § 5.10) that are arguably inconsistent with plaintiffs' claims, and of the Bankruptcy Court's own orders and findings (including a finding that the consideration was fair and reasonable and a finding that the APA was negotiated in good faith, Order ¶¶ G, H). Most significantly, both the plaintiffs and the Bankruptcy Court expressly stipulated that the Bankruptcy Court would be the exclusive forum for resolving claims related to the sale.

Under all these circumstances, common sense dictates the conclusion that the Bankruptcy Court is the proper forum for resolving these disputes, and that the Court should exercise its discretion to direct the case to that forum.[3]

II. *Defendants' Motion to Transfer*

In light of the above discussion, little further need be said regarding defendants' motion to transfer the case to the United States District Court for the District of Delaware for referral to its Bankruptcy Court. The *only* reason why this case belongs in federal court is because of its close association to the Old Winstar liquidation proceedings in Delaware. The case "arises in" those proceedings, the Delaware Bankruptcy Court reserved its jurisdiction to deal with matters related to the bankruptcy sale that is the subject of this proceeding, and the defendants are accused of fraud in executing a sale that was ordered and approved by that court.

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[3] For the same reasons that abstention is inappropriate, the closely-related doctrine of equitable remand, 28 U.S.C. § 1452(b), is also inapplicable here.

There is a strong argument that venue must be laid in Delaware under the APA's mandatory choice of forum clause. As the Second Circuit has held, a contract clause electing a forum for all disputes "arising out of or related to" the contract encompasses claims of fraudulent inducement. *Turtur v. Rothschild Registry Int'l.,* 26 F.3d 304, 309-10 (2d Cir.1994). Although defendants are not parties to that clause, plaintiffs are. The plaintiffs agreed to resolve any disputes related to the APA in the Delaware Bankruptcy Court. Moreover, the defendants are sued for wrongdoing that essentially without exception is charged to have been committed jointly with the plaintiffs' counterparty in the APA, Old Winstar. *Weingrad v. Telepathy, Inc.,* No. 05 Civ.2024, 2005 WL 2990645, at *5-6 (S.D.N.Y. Nov. 7, 2005).

But even if transfer is not mandatory pursuant to 28 U.S.C. § 1406, discretionary transfer under § 1404(a) in the interests of justice is clearly appropriate. As noted above, the whole point of federal jurisdiction here is the close connection of the case to the bankruptcy proceedings. There is no plausible rationale for removing the case to federal court in order to decide it in a forum remote from the court where that proceeding is pending. Plaintiffs seek to avoid this obvious point by retreating to a conventional analysis of the factors ordinarily applicable in deciding transfer applications. Even if their convenience arguments did not ring hollow-and they do, where the physical distance between the courts involved is a short train ride and given that in real-world modern litigation the greatest expenditure of litigation effort in most cases takes

place away from court-the plain fact is that in entering the APA plaintiffs "irrevocably waive[d]" any objections to venue in the District of Delaware on grounds of inconvenience.

CONCLUSION

For the reasons stated above, plaintiffs' motion to remand is denied and defendants' motion to transfer the case to the United States District Court for the District of Delaware is granted.

SO ORDERED.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
No. 13-4713

In re: WINSTAR COMMUNICATIONS, INC., et al,
Debtors

WINSTAR HOLDINGS, LLC; IDT CORP.

v.

BLACKSTONE ADVISORY PARTNERS LP f/k/a BLACKSTONE GROUP LP; IMPALA PARTNERS, LLC; CITIGROUP INC., successor by merger to CITICORP

Winstar Holdings, LLC & IDT Corp.,
Appellants
(D.C. Civ. No. 1-10-cv-00839)

SUR PETITION FOR PANEL REHEARING

Present: SMITH, SHWARTZ, and ROTH, Circuit Judges

The petition for rehearing filed by Appellants in the above-entitled case having been submitted to the judges who participated in the decision of this Court, it is hereby

O R D E R E D that the petition for rehearing by the panel is denied.

BY THE COURT,
s/ Jane R. Roth
Circuit Judge

Dated: February 24, 2015
CND/cc: Brent W. Landau, Esq.
David S. Flugman, Esq.
Dennis A. Meloro, Esq.
Yosef J. Riemer, Esq.
Richard S. Cobb, Esq.
Andrew C. Gold, Esq.
James S. Green, Jr., Esq.
Stephen L. Saxl, Esq.

APPENDIX F

Supreme Court of the State of New York
County of New York

Winstar Holdings, LLC, and IDT Corp., Index No.
Plaintiffs,
-against-

The Blackstone Group, LP; Impala Partners, LLC; and Citicorp,
Defendants.

COMPLAINT

Plaintiffs, Winstar Holdings, LLC and IDT Corp., by and through its attorneys, Mound Cotton Wollan and Greengrass, as and for its complaint against Defendants, the Blackstone Group LPI, Impala Partners, LLC, and Citicorp, hereby allege as follows:

1. In 2001, Plaintiffs spent $42.5 million to acquire the business assets of Winstar Communications, Inc., and related entities ("Old Winstar"). In doing so, they relied on the oral and written misrepresentations of the Defendants regarding Old Winstar sales, customers, and other material information. As a result, the Plaintiffs lost hundreds of millions of dollars. The Plaintiffs bring this action to recover for those injuries.

PARTIES

2. Plaintiff Winstar Holdings, LLC, formerly known as IDT Winstar Acquisition, Inc. ("New Winstar"), is

a Delaware corporation. It acquired the business assets of Old Winstar in an Asset Purchase Agreement dated December 18, 2001.

3. Plaintiff IDT Corp. ("IDT") is a Delaware corporation. It is, among other things, a telephone company. It provided the funds for the purchase of Old Winstar, and bore most of the resulting subsequent losses.

4. Defendant the Blackstone Group LP ("Blackstone") is a Delaware limited partnership. Its principal office is at 345 Park Avenue, New York, NY 10154. In the sale of Old Winstar's assets, it acted as an investment advisor to various entities related to Old Winstar.

5. Defendant Impala Partners, LLC ("Impala") is a Delaware limited partnership. Its principal office is at 18 Marshall Street, Suite 112, Norwalk, Connecticut 06854. Upon information and belief, at the time of the sale of Old Winstar's assets, it was acting as a restructuring advisor for Old Winstar.

6. Defendant Citicorp ("Citicorp") is a Delaware corporation. Its principal office is at 399 Park Avenue, New York, New York 10043. It was the largest creditor of Old Winstar while Old Winstar was a debtor in bankruptcy. Impala's actions are, in large part, attributable to Citicorp because Citicorp acted as Impala's principal. Allegations regarding Citicorp include, but are not limited to, allegations regarding Impala that are impute to Citicorp.

JURISDICTION AND VENUE

7. The Supreme Court of the State of New York, as a court of general original jurisdiction, has subject matter jurisdiction of this action.

8. Personal jurisdiction exists in this action because, among other reasons: the Defendants transact business within the state or contracted to supply goods or services within the state; have committed a tortious act within the state; and own, use or possess real property within the state.

9. Venue lies in this County because Defendants Blackstone's and Citicorp's principal offices are located in this County, the cause of action arose in the county, and the Plaintiffs designate the county.

ALLEGATIONS

10. In and around 2001, IDT examined several potential acquisitions in the field of communications.

11. Through 2001, Old Winstar provided telephone service to customers using a "fixed wireless" system. This system carried calls locally by wireless means, from customer locations to Old Winstar's local "hubs."

12. On information and belief, Old Winstar maintained an office in New York City. It also maintained some of its books and records in New York City.

13. Old Winstar was a publicly traded company. On April 18, 2001, Old Winstar petitioned for protection under Chapter 11 of the U.S. Bankruptcy Code. The bankruptcy petition was filed in the U.S. Bankruptcy Court for the District of Delaware.

14. On information and belief, Blackstone was retained as a financial advisor, and Blackstone's responsibility was to obtain the highest possible sale price for the assets of Old Winstar. Upon information and belief, Blackstone's compensation varied with the sale price that it obtained for Old Winstar's assets. Specifically, Blackstone received, *inter alia*, a transaction fee equal to 1% of the first $200 million of consideration paid by an acquirer. This provided Blackstone with an incentive to maximize – or inflate – that consideration.

15. The division of Blackstone performing the financial advisory work for Old Winstar was Blackstone's Restructuring & Reorganization Advisory Group. This group claims to have provided advisory services in over 150 "distressed situations." On information and belief, it is an unincorporated division of Blackstone.

16. At all relevant times, the head of Blackstone's Restructuring & Reorganization Advisory Group was Arthur Newman ("Newman"). Newman also was a member of Blackstone's Executive Committee. The Executive Committee oversees all of Blackstone's policy decisions.

17. Upon information and belief, Old Winstar retained Impala as a restructuring advisor, for the

purpose of providing restructuring advice and other related services in connection with Old Winstar's Chapter 11 bankruptcy proceedings. As compensation, Impala charged Old Winstar $250,000 per month for the first two months of its services. Thereafter, Impala's compensation was $100,000 per month for the services of Paul Street, who acted as the Chief Restructuring Officer for Old Winstar. Impala charged various other amounts for other Impala personnel. In addition, upon the sale of all or substantially all of Old Winstar's assets, in one or more transactions, in which the aggregate consideration paid by the purchaser was less than $350 million, Impala earned a transaction fee of 0.25% of such consideration. Upon the sale of all or substantially all of the Old Winstar's assets, in one or more transactions, in which the aggregate consideration paid by the purchaser was equal to or greater than $350 million, Impala earned a transaction fee of 2.0% of such consideration. Thus Impala was motivated to obtain the highest possible sale price for the Winstar assets.

18. Upon information and belief, Citicorp, as Old Winstar's largest creditor, assisted Old Winstar in negotiating its contract terms with Impala. Citicorp acted as Impala's principal.

19. To promote the sale of Old Winstar's business assets, Blackstone prepared an officer statement. Upon information and belief, Impala assisted with the preparation of the offering statement. Blackstone, Citicorp, and Impala also controlled bidder access to Winstar staff, and Winstar records.

20. In connection with the sale of Old Winstar's business assets, Blackstone, Citicorp, and Impala assisted in the development of financial data and presentations to Old Winstar's Board of Directors, various creditor and other parties. Blackstone reviewed financial analyses generated by Old Winstar's finance staff and external advisors. Blackstone also performed various analyses, including case reconciliation of Old Winstar's actual performance vs. various sets of projections. Blackstone petitioned for payment for this work, and the petition was granted.

21. IDT was one of several entities that expressed an interest in acquiring Old Winstar's business assets.

22. An auction of Old Winstar's business assets was planned for December 2001. Leading up to that auction, Blackstone circulated an "offering book." Blackstone also met with IDT and, on information and belief, other entities interested in bidding in the auction. In meetings organized by Blackstone, several Winstar officials also met with IDT and, on information and belief, other interested entities. The meetings generally were held within this County. Certain Old Winstar business records also were made available to IDT at that time, generally in an area known as the "data room," which was located within this County. Collectively, this communication and review was known as "due diligence."

23. In accordance with the timing established for the auction, IDT's due diligence was conducted

between Friday, November 30, 2001, and Wednesday, December 5, 1001.

24. A number of IDT representatives engaged in this due diligence.

25. Blackstone's representatives included Arthur Newman. Newman engaged in substantive discussions about Old Winstar's business with representatives of IDT, Howard Jonas, *inter alia*.

26. Impala's representatives included Paul Street.

27. Old Winstar's representatives included Chief Financial Officer David Duncan, *inter alia*.

28. During this due diligence, Blackstone, Impala, and Old Winstar each made the following representations (*inter alia*) regarding the status of Old Winstar's business:

a. that Old Winstar's business was generating $16 million or more per month in revenue;

b. that Old Winstar's "cash burn" (*i.e.,* losses) had been reduced to $10-12 million per month;

c. that Old Winstar had 9,000 paying customers;

d. that Old Winstar had 50,000 revenue-generating telephone lines;

e. that Old Winstar's "churn rate" (the rate at which existing customers discontinued service) was only 3% per year; and

f. that Old Winstar was employing an intercity optical network built by Lucent (the "Lucent network") to serve Old Winstar's customers.

29. On occasions when Old Winstar made these representations, they were made in the presence of Blackstone, Citicorp, and Impala; and Blackstone, Citicorp, and Impala did not dispute them, even though they knew or should have known that the representations were false, and that the plaintiffs would rely on these representations.

30. Each of these representations was false and fraudulent. The truth, known to the Defendants but not to IDT, was as follows:

a. that Old Winstar's business was generating substantially less than $16 million per month in revenue, and its revenue was declining;

b. that Old Winstar's cash burn was materially higher than $10-$12 million per month;

c. that Old Winstar had far fewer than 9,000 paying customers, and indeed was providing service to many customers who were not paying Old Winstar;

d. that Old Winstar had far fewer than 50,000 revenue-generating telephone lines, and in fact was carrying and paying for many lines that were not generating any revenue;

e. that Old Winstar's "churn rate" was far higher than 3%, in part because Old Winstar continued to maintain and pay for telephone lines, and count them as revenue-generating, long after customers had discontinued service; and

f. that the Lucent network carried no Old Winstar customer traffic in or around December 2001 and, indeed, most of the Lucent network never would.

31. Notably, despite this information being solely within their possession, Blackstone, Impala, Citicorp, and Old Winstar did not provide client information in any detail that would have allowed IDT and New Winstar to uncover the Defendants' false statements and material omissions.

32. Indeed, Blackstone, Citicorp and Impala fraudulently withheld information within their possession, custody or control, including but not limited to the following: (a) that Winstar was required to continue to served federal and other customers without regard to profit, and (b) that local telephone companies could extort concessions from Old Winstar by threatening to discontinue termination of calls placed by Old Winstar customers.

33. On information and belief, Blackstone, Citicorp, Impala, and Old Winstar all hid and blocked IDT's access to material information about Old Winstar's finances and operations. Indeed, IDT had no access to this important information.

34. The figures in the documents that were offered to IDT, including receivables reports, historical financial statements and contract summaries, were heavily distorted by (*inter alia*) Old Winstar's recording of revenue – sometimes for years – from customers who had discontinued service.

35. Unaware of the true state of Old Winstar's affairs, IDT established New Winstar, for the purpose of acquiring Old Winstar's business assets. IDT injected a substantial amount of capital into New Winstar.

36. The information that Blackstone, Impala, and Old Winstar provided during due diligence regarding Old Winstar's business and operating was material to IDT's decision to acquire Old Winstar's business assets. Upon information and belief, Blackstone, Citicorp, and Old Winstar knew that this information was false, or they were negligent in not knowing that. Blackstone and Old Winstar intended that IDT and New Winstar would rely upon this information. IDT and New Winstar did rely upon this information. This reliance was reasonable. IDT and New Winstar were deceived by this information.

37. The information that Blackstone, Impala, Citicorp, and Old Winstar omitted to provide during due diligence regarding Old Winstar's business and operating was material to IDT's decision to acquire Old Winstar's business assets. Upon information and belief, Blackstone and Old Winstar knew that this information was material, or they were negligent in not knowing that. Blackstone and Old Winstar intended that IDT and new Winstar would

rely upon the absence of this information. IDT and new Winstar did rely upon the absence of this information. This reliance was reasonable. IDT and New Winstar were deceived by the failure to disclose this information.

38. As a direct and proximate result of the Defendants' misrepresentations and omissions, IDT and New Winstar submitted a bid in the auction for Old Winstar's assets, conducted on December 5, 2001. Absent the misinformation provided by Blackstone and Old Winstar, Plaintiffs would not have done so.

39. The apparent successful offeror in the auction was an entity other than IDT/New Winstar. That entity was related to William J. Rouhana, Jr., the former Chairman of the Board and CEO of Old Winstar. Despite this, Blackstone encouraged IDT to remain interested in purchasing Old Winstar's assets.

40. On information and belief, the Rouhana entity was unable or unwilling to close the transaction.

41. Between December 5, 2001 and December 17, 2001, there was no opportunity for any further due diligence by IDT because the Defendants did not permit it.

42. On or about December 17, 2001, IDT learned that the Rouhana entity had failed to purchase Old Winstar's assets. The bankruptcy court required IDT to sign an agreement for these assets (if IDT desired to purchase them) by noon on the following day.

43. As a result of the Defendants' misrepresentations and omissions, on or about December 18, 2001, Old Winstar and New Winstar entered into an Asset Purchase Agreement (the "Agreement") for the transfer of Old Winstar's business assets, and certain other assets.

44. On or about December 19, 2001, the bankruptcy court approved the Agreement.

45. On or about December 20, 2001, the Agreement closed, *i.e.,* payment was made and assets were transferred. On or around that date, New Winstar took over the operation of Winstar's business.

46. New Winstar appointed employees to collect on accounts receivable. In many cases, the purported "customers" told those employees that service had been canceled years earlier, yet Old Winstar had continued to bill for the service.

47. New Winstar learned that Old Winstar had inflated its reported revenue by a variety of means, including "swaps" (pairs of companies each reporting revenue from the other, without any actual payment), "dead" accounts, and "made-up" billing.

48. As a result of the misrepresentations and material omissions during due diligence, New Winstar's revenues were materially less than represented. Between August 1, 2001 and July 31, 2002, a period that included several months preceding the asset purchase, Winstar's revenue was only $79.6 million, or less than $7 million a month.

During the following year (8/02 – 7/03), revenue was only $87.5 million, and the year after that (8/03 – 7/04), revenue was only $71.6 million. In other words, Old Winstar's revenues had been overstated by over 200%.

49. Much later, Winstar's business was sold to an entity independent of IDT.

50. As a direct and proximate result of Blackstone's, Citicorp's, and Impala's tortuous misconduct, IDT and New Winstar have suffered losses of over $300 million.

FIRST CAUSE OF ACTION
<u>(Fraud)</u>

51. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1 through 50 as if fully set forth herein.

52. Blackstone, Citicorp, and Impala knowingly engaged in the various deceitful means enumerated above to deprive IDT and new Winstar of their property permanently.

53. More specifically, Blackstone, Citigroup, and Impala made numerous false representations of material fact and material omissions, as set forth above and below. The Defendants knew that these representations and material omissions were false, or they made them with reckless disregard for their truth or falsity. Blackstone, Citicorp, and Impala intended IDT and New Winstar to rely on these false statements and omissions. IDT and New Winstar

reasonably relied on them. As a result, IDT and New Winstar were injured.

54. The Defendants' false statements and material omissions were not mere projections or promises to perform, but actual representations of existing fact known only to the Defendants.

55. The representations were made by individuals acting as agents of Blackstone, Citicorp, and Impala, who acted within the scope of their employment.

56. The representations and omissions were made in New York, within this County. They were made during November and December 2001, by means of telephone, faxes, e-mail, in person, and indirectly through other authorized agents and through documents, as explained above.

57. Blackstone, Citicorp, and Impala knew that these misrepresentations were false and the omissions material, or acted in reckless disregard for their truth or falsity.

58. Blackstone, Citicorp, and Impala intended that IDT and New Winstar rely upon these misrepresentations and omissions, because they sought fraudulently to induce IDT and New Winstar to enter into the Agreement, and they sought to profit from that agreement. IDT and New Winstar reasonably relied on these misrepresentations and omissions.

59. Blackstone, Citicorp, and Impala also failed to inform IDT and New Winstar of numerous material

facts. For instance, Blackstone, Citicorp, and Impala failed to inform IDT and new Winstar that Old Winstar customers who had terminated service continued to be counted as Old Winstar customers, that Old Winstar continued to book revenue from such customers, and that Old Winstar continued to pay for telephone lines to service such customers. As alleged above, Blackstone, Citicorp, and Impala also fraudulently withheld the material information that Winstar was required to continue to serve federal and other customers without regard to profit, and that local telephone companies could extort concessions from Winstar by threatening to discontinue termination of calls placed by Winstar customers. These all were material fraudulent omissions that Blackstone, Citicorp, and Impala had a duty to disclose to IDT and New Winstar.

60. If IDT and New Winstar had known the truth regarding Winstar's finances and operations, they would not have entered into the Agreement. They would have retained the purchase price under that Agreement, and they would have avoided the losses that they necessarily experienced as a direct result of acquiring Old Winstar's business assets. Therefore they have been injured.

61. For the reasons alleged above, Blackstone, Citicorp, and Impala acted recklessly, willfully and wantonly. Their conduct was gross, and morally reprehensible. Blackstone, Citicorp, and Impala exhibited such wanton dishonesty as to imply a criminal indifference to civil obligations.

61. For the reasons alleged above, IDT and New Winstar are entitled to the following relief against Blackstone, Citicorp and Impala:

a. A monetary award of compensatory damages for fraud;

b. A monetary award of punitive damages in the maximum amount permitted by law;

c. Interest and costs; and

d. Such further relief as the Court deems just.

SECOND CAUSE OF ACTION
(Aiding and Abetting Fraud)

62. Plaintiffs repeat and reallege each and every allegations contained in paragraphs 1 through 61 as if fully set forth herein.

63. Based upon the allegations stated above, IDT and New Winstar are victims of fraud.

64. Blackstone, Citicorp and Impala knowingly aided and abetted in Old Winstar's commission of fraud, and participated in the fraud, in the manners alleged above.

65. Blackstone, Citicorp, and Impala's conduct was gross, and morally reprehensible. Blackstone, Citicorp and Impala exhibited such wanton dishonesty as to imply a criminal indifference to civil obligations.

66. IDT and New Winstar suffered significant injury as a direct result of the fraud.

67. For the reasons alleged above, IDT and New Winstar are entitled the following relief against Blackstone, Citicorp and Impala:

a. A monetary award of compensatory damages for aiding and abetting fraud;

b. A monetary award of punitive damages in the maximum amount permitted by law;

c. Interest and costs; and

d. Such further relief as the Court deems just.

THIRD CAUSE OF ACTION
(Negligent Misrepresentation)

68. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1 through 67 as if fully set forth herein.

69. Blackstone, Citicorp and Impala made the misrepresentations and omissions to IDT and New Winstar enumerated under the claim for fraud above, directly or indirectly.

70. The individuals who made the direct misrepresentations to IDT and New Winstar acted as agents for Blackstone, Citicorp and Impala.

71. Blackstone, Citicorp and Impala owed IDT and New Winstar a duty of care to ensure that its statements to IDT and New Winstar were true.

72. IDT and New Winstar reasonably and justifiably relied on Blackstone and Impala for accurate information.

73. Blackstone, Citicorp and Impala intended for IDT and New Winstar to rely upon the information that they provided.

74. The information that Blackstone, Citicorp and Impala provided to IDT and New Winstar was false, in the manner described under the claim for fraud above.

75. IDT and New Winstar were injured by the false information that Blackstone, Citicorp and Impala provided to them.

76. Blackstone, Citicorp and Impala's negligent misrepresentations were willful and wanton. They acted with such indifference as to whether IDT and New Winstar would be harmed as to be equivalent to an intent to harm them.

77. Blackstone, Citicorp and Impala's conduct was gross, and morally reprehensible. Blackstone, Citicorp and Impala exhibited such wanton dishonesty as to imply a criminal indifference to civil obligations.

78. For the reasons alleged above, IDT and New Winstar are entitled to the following relief against Blackstone, Citicorp and Impala:

a. A monetary award of compensatory damages for negligent misrepresentation;

b. A monetary award of punitive damages in the maximum amount permitted by law;

c. Interest and costs; and

d. Such further relief as the Court deems just.

FOURTH CAUSE OF ACTION
(Negligence)

79. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1 through 78 as if fully set forth herein.

80. Blackstone, Citicorp and Impala are experienced professional organizations in the field of finance.

81. Blackstone claims to be a world leader in private equity; among the largest in private equity real estate investments; a leader in private mezzanine and structured debt vehicles; and a leader in providing "unconflicted" advice and counsel to senior management. Blackstone's Restructuring & Reorganization Advisory Group claims to be a market leader, having advised in over 150 distressed situations, involving $350 billion of outstanding debt.

82. Arthur Newman, the head of Blackstone's Restructuring & Reorganization Advisory Group, has forty years of experience, including thirty years in reorganization. He claims to have served as advisor on some of the largest business restructurings in history.

83. Impala claims to be a world leader in restructuring advice to troubled companies. Impala claims to have been involved in transactions totaling over $7 billion since 1997.

84. As alleged above, Blackstone, Citicorp and Impala directly and indirectly made representations to IDT and New Winstar regarding Old Winstar's finances and operations. On information and belief, Blackstone, Citicorp and Impala did not exercise due care in ascertaining or disseminating this information.

85. Blackstone, Citicorp and Impala owed IDT and New Winstar a duty of care in ascertaining and disseminating this information. It was reasonable foreseeable to Blackstone, Citicorp and Impala that their negligence would injure IDT and New Winstar, because IDT and New Winstar would be induced to enter into the Agreement, and then to incur significant additional losses.

86. Blackstone, Citicorp and Impala failed to exercise reasonable care in this regard. To the contrary, their lack of care was willful and wanton. They acted with malice, intending to harm IDT and New Winstar, because (on information and belief)

the more that IDT and New Winstar paid under the Agreement, the more that Blackstone and Impala could receive as compensation. In the alternative, Blackstone, Citicorp and Impala acted with such indifference as to whether IDT and New Winstar would be harmed as to be equivalent to intent to harm IDT and New Winstar.

87. In all other respects, the Defendants failed to act with due care to provide accurate information to IDT and New Winstar.

88. The natural and probable consequence of the Defendants' negligence was that IDT and New Winstar were induced to enter into the Agreement, and to incur additional subsequent losses, which have caused significant injury to IDT and New Winstar.

89. Blackstone, Citicorp and Impala's conduct was gross, and morally reprehensible. Blackstone, Citicorp and Impala exhibited such wanton dishonesty as to imply a criminal indifference to civil obligations. They were reckless and willful.

90. For the reasons alleged above, IDT and New Winstar are entitled to the following relief against Blackstone, Citicorp and Impala:

a. A monetary award of compensatory damages for negligence;

b. A monetary award of punitive damages in the maximum amount permitted by law;

c. Interest and costs; and

d. Such further relief as the Court deems just.

FIFTH CAUSE OF ACTION
<u>(Civil Conspiracy)</u>

91. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1 through 90 as if fully set forth herein.

92. The Defendants engaged in a combination and conspiracy involving four conspirators:

a. the officers, employees and agents of Blackstone; and
b. the officers, employees and agents of Impala; and
c. the officers, employees and agents of Citicorp; and
d. the officers, employees and agents of Old Winstar.

93. These conspirators combined for the purpose of injuring IDT and New Winstar. Specifically, the conspirators sought to deprive IDT and New Winstar of their property interests in the purchase price of the Agreement, and the funds used to pay for subsequent Winstar losses. The Defendants did so not only in the manners alleged above, but also by means of the follow overt acts, *inter alia*:

a. announcing and conducting of the auction;
b. creating the data room, and the invitations to IDT and New Winstar representatives (and, on

information and belief, others) to examine its contents;

c. engaging in other communications relating to Old Winstar's finances and operations, as alleged above;

d. the negotiation, preparation and execution of the Agreement; and

e. actions taken to obtain bankruptcy court approval of that Agreement.

94. The Defendants' conspiracy has caused IDT and New Winstar injury, including the special damages of (*inter alia*) payment of the Purchase Price of $42,500,000 set forth in Section 3.1 of the Agreement. The Defendants' conspiracy deprived IDT and New Winstar of this amount. In addition to this, IDT and New Winstar have suffered special damages for losses incurred following the acquisition of Winstar's business assets, which total approximately $300 million.

95. The conspirators acted recklessly, willfully and wantonly. Their conduct was gross, and morally reprehensible. They exhibited such wanton dishonesty as to imply a criminal indifference to civil obligations.

96. For the reasons alleged above, IDT and New Winstar are entitled the following relief against Blackstone, Citicorp and Impala:

a. A monetary award of compensatory damages for civil conspiracy;

b. A monetary award of punitive damages in the maximum amount permitted by law;

c. Interest and costs; and

d. Such further relief as the Court deems just.

JURY REQUEST

97. The Plaintiffs request a jury for all issues that may be tried by a jury.

WHEREFORE, IDT and New Winstar see the following relief against Blackstone, Citicorp and Impala:

a. A monetary award of compensatory damages for fraud, aiding and abetting fraud, negligent misrepresentation, negligence, and civil conspiracy;

b. A monetary award of punitive damages in the maximum amount permitted by law for fraud, aiding and abetting fraud, negligent misrepresentation, negligence and civil conspiracy;

c. Interest and costs; and

d. Such further relief as the Court deems just.

Dated: New York, New York
May 10, 2007

MOUND COTTON WOLLAN & GREENGRASS
s/Philip C. Silverberg, Esq.
Gretchen Henninger, Esq.
One Battery Park Plaza
New York, NY 10004-1486

APPENDIX G

Asset Purchase Agreement

Among

IDT Winstar Acquisition, Inc.,

Winstar Communications, Inc.

And

Certain of Its Subsidiaries

Set Forth on Appendix I Hereto

Dated As Of December 18, 2001

Section 9.9 *Governing Law.* This Agreement shall be governed by and construed in accordance with the laws of the State of New York (regardless of the laws that might otherwise govern under applicable New York principles of conflicts law) as to all matters, including but not limited to matters of validity, construction, effect, performance and remedies.

Section 9.10 *Submission to Jurisdiction.* The parties hereto irrevocably submit to the exclusive jurisdiction of the Bankruptcy Court (or any court exercising appellate jurisdiction over the Bankruptcy Court) over any dispute arising out of or relating to this Agreement or any other agreement or instrument contemplated hereby or entered into in connection herewith or any of the transactions contemplated hereby or thereby. Each party hereby

irrevocably agrees that all claims in respect of such dispute or proceedings may be heard and determined in such dispute or proceedings may be heard and determined in such courts. The parties hereby irrevocably waive, to the fullest extent permitted by applicable law, any objection which they may now or hereafter have to the laying of venue of any such dispute brought in such court or any defense of inconvenient forum in connection therewith.