IT IS SO ORDERED.

Dated: October 31, 2024

John E. Hoffman, Jr.
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

In re:	:	
	:	Case No. 19-56885
MURRAY ENERGY	:	Chapter 11
HOLDINGS CO., *et al.*,	:	Judge Hoffman
	:	
Debtors.	:	(Jointly Administered)
	:	
Brenda L. Murray, *et al.*,	:	
	:	
Plaintiffs,	:	
	:	
v.	:	Adv. Pro. No. 24-2028
	:	
Dinsmore & Shohl, LLP *et al.*,	:	
	:	
Defendants.	:	

MEMORANDUM OPINION AND ORDER ON DEFENDANTS' MOTION TO DISMISS (DOC. 48)

I. Introduction

This adversary proceeding arises in the Chapter 11 cases of Murray Energy Holdings Co. ("Murray Energy") and its affiliated debtors and debtors in possession ("Debtors"). In state court,

the plaintiffs brought a legal malpractice claim ("Malpractice Claim") against the defendants—a law firm and certain of its partners. The plaintiffs allege that in negotiating and seeking confirmation of the Debtors' second amended Chapter 11 plan ("Chapter 11 Plan") (Doc. 2135-1),[1] the defendants (1) exposed the plaintiffs to billions of dollars of liability, and (2) failed to advise the plaintiffs on how to protect themselves from that liability. The defendants removed the Malpractice Claim to this Court, and the plaintiffs sought its remand, which the Court denied in an earlier decision. *See Murray v. Dinsmore & Shohl, LLP (In re Murray Energy Holdings Co.)*, 662 B.R. 604 (Bankr. S.D. Ohio 2024) ("*Dinsmore I*").

Before the Court now is the defendants' motion to dismiss this adversary proceeding under Rule 12(b)(6) of the Federal Rules of Civil Procedure ("Rule 12(b)(6)") for failure to state a claim upon which relief can be granted. The Court previously dismissed—for failure to state a claim—an adversary proceeding based on a similar malpractice claim brought by the plaintiffs against another law firm. *See Murray v. Willkie Farr & Gallagher LLP (In re Murray Energy Holdings Co.)*, 654 B.R. 469 (Bankr. S.D. Ohio 2023) ("*Willkie*"). For the reasons stated below, the result must be the same here.

II. Jurisdiction and Constitutional Authority

The plaintiffs contend that the defendants' motion to dismiss should be denied because the Court lacks subject-matter jurisdiction over this dispute. But as explained in *Dinsmore I*, the Court has arising-in jurisdiction to hear and determine this matter under 28 U.S.C. § 1334(b) and the general order of reference entered in this district under 28 U.S.C. § 157(a). *Dinsmore I*, 662 B.R. at 612–632.

[1] References to "Doc.__" are to docket entries in the main bankruptcy case, Case No. 19-56885, and references to "Adv. Doc.__" are to docket entries in this adversary proceeding. When citing documents in the record, the Court will cite the PDF page number.

Because the Court has arising-in jurisdiction, this is a core proceeding. *See Brown v. Harrington (In re Brown)*, No. 21-11284-GAO, 2022 WL 1200783, at *2 (D. Mass. Apr. 22, 2022), *aff'd*, 55 F.4th 945 (1st Cir. 2022); *S. Canaan Cellular Invs., LLC v. Lackawaxen Telecom, Inc. (In re S. Canaan Cellular Invs., LLC)*, 427 B.R. 85, 90 (Bankr. E.D. Pa. 2010). And because this dispute "stems from the bankruptcy itself," the Court has the constitutional authority to enter a final order. *Stern v. Marshall*, 564 U.S. 462, 499 (2011).

III. Procedural History

The complaint in this adversary proceeding was first filed in the Belmont County, Ohio Court of Common Pleas ("State Court"). As in *Willkie*, the plaintiffs here ("Plaintiffs") include Brenda L. Murray ("Mrs. Murray"), the widow of the Debtors' founder, Robert E. Murray ("Mr. Murray"), who died in October 2020. Mrs. Murray is a Plaintiff on her own behalf and in her capacities as executrix of Mr. Murray's estate and trustee of the Brenda L. Murray Trust. The other Plaintiff is Michael J. Shaheen, in his capacity as trustee of the Robert E. Murray Trust.

The State Court complaint alleges that the defendants—Dinsmore & Shohl LLP ("Dinsmore") and three of its current or former partners, Jerrad T. Howard, J. Michael Cooney and Kim Martin Lewis (collectively, "Defendants")—engaged in legal malpractice. The Defendants removed the State Court complaint to this Court under 28 U.S.C. § 1452(a), which provides for the removal of actions over which bankruptcy courts have jurisdiction under 28 U.S.C. § 1334, and Rule 9027 of the Federal Rules of Bankruptcy Procedure. Notice of Removal, Adv. Doc. 1. The parties then entered into an agreed order establishing deadlines for filing (1) the Defendants' motion to dismiss, (2) the Plaintiffs' opposition to that motion or an amended complaint, and (3) the Defendants' reply in support of their motion to dismiss. *See* Adv. Doc. 6.

Under the terms of the agreed order, the Plaintiffs filed an amended complaint ("Amended Complaint") (Adv. Doc. 47) in response to the Defendants' initial motion to dismiss this adversary

proceeding (Adv. Doc. 42). The Defendants then moved to dismiss the Amended Complaint ("Dismissal Motion") (Adv. Doc. 48). The Plaintiffs opposed the Dismissal Motion ("Objection") (Adv. Doc. 52), and the Defendants replied in support of it ("Reply") (Adv. Doc. 54).

IV. Background

Because the Defendants moved to dismiss the Amended Complaint for failure to state a claim, the following facts are taken in part from that complaint, and its allegations are accepted as true for the purpose of deciding the Dismissal Motion. *See Boudette v. Buffington*, No. 20-1329, 2021 WL 3626752, at *1 (10th Cir. Aug. 17, 2021) ("This factual background is taken from Plaintiffs' complaint . . . , the non-conclusory allegations of which we, like the district court, take as true when evaluating a motion to dismiss under [Rule 12(b)(6)]."); *Benzon v. Morgan Stanley Distribs., Inc.*, 420 F.3d 598, 608 n.5 (6th Cir. 2005) ("[B]ecause this case is before the Court on review from a grant of a motion to dismiss for failure to state a claim, we accept as true all of Plaintiffs' well-pleaded allegations."). And because the defenses on which the Dismissal Motion is predicated can be "plainly gleaned" from the Chapter 11 Plan, *Willkie*, 654 B.R. at 498 (quoting *Chavis v. Fuerst*, 62 F. App'x 116, 117 (6th Cir. 2003)), the background is also based on applicable provisions of the Chapter 11 Plan.

A. The Defendants' Representation of the Debtors and the Plaintiffs

On October 29, 2019, the Debtors filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code. Am. Compl. ¶ 26. For decades before the Debtors filed bankruptcy, the Defendants represented Mr. and Mrs. Murray and their trusts (collectively, "Murray Clients") in personal matters. *Id.* ¶ 18. In particular, the Defendants advised the Murray Clients on, among other things, estate planning matters. *Id.* ¶¶ 19–23. The Defendants continued to represent the Murray Clients in personal matters after the Debtors filed their bankruptcy petitions. *Id.* ¶ 24. But at the same time, the Defendants represented the Debtors as their local bankruptcy counsel. *Id.*

¶ 26. That is, the Defendants served as the Debtors' counsel in their bankruptcy cases while continuing to represent the Murray Clients in personal matters. *Id.* ¶ 27.

B. ERISA Withdrawal Liability

Before they filed their Chapter 11 cases, some Debtors were signatories to a collective bargaining agreement ("CBA") with the United Mine Workers of America. *Id.* ¶ 29. The CBA required the Debtors to contribute to the United Mine Workers of America 1974 Pension Plan and Pension Trust ("1974 Plan"), a multiemployer pension plan under the Employee Retirement Income Security Act of 1974 ("ERISA"). *See id.* ¶¶ 1, 12. While representing the Debtors during their bankruptcy, the Defendants sought and obtained Court approval for the Debtors to reject the CBA. *Id.* ¶ 29. Rejecting the CBA terminated the Debtors' contribution obligations to the 1974 Plan, but "[i]f an employer withdraws from a multiemployer pension plan, ERISA imposes 'withdrawal liability,' meaning that the withdrawing employer is liable to the plan for its proportionate share of the plan's unfunded vested benefits." *Id.* ¶ 13, 29. "As negotiated by [the] Defendants, the withdrawing [] Debtors paid only a small fraction of their resulting ERISA withdrawal liability, and the remainder of their withdrawal liability was discharged by the Bankruptcy Court." *Id.* ¶ 31.

ERISA withdrawal liability is not limited to employers—it can also be imposed on members of a "controlled group," including individuals who "carr[y] on an unincorporated 'trade or business.'" *Id.* ¶¶ 15–16. The Plaintiffs are defending a lawsuit stemming from the Murray Clients' alleged withdrawal liability to the 1974 Plan. *See Buckner, et al. v. Pers. Representative of the Est. of Robert E. Murray, et al.*, Case No. 1:24-cv-1268-TJK (D.D.C. filed Apr. 30, 2024). In that lawsuit, the 1974 Plan is seeking more than $6.5 billion from the Plaintiffs based on the Murray Clients' alleged withdrawal liability. Am. Compl. ¶ 1.

C. The Alleged Malpractice

The Plaintiffs contend that representing both the Debtors and the Murray Clients created a conflict of interest for the Defendants:

> Unbeknownst to Plaintiffs, a conflict arose in which Defendants knew that the interests of Plaintiffs and the . . . Debtors diverged on the critical issue of potential ERISA withdrawal liability. In the face of this conflict, Defendants willfully and deliberately breached their duties to Plaintiffs by exposing them to potential claims by the 1974 Plan for ERISA withdrawal liability and/or by failing to expose their conflict of interest, withdraw from the representation of the . . . Debtors, and warn and advise Plaintiffs of the potential liability Defendants created by their actions on behalf of Defendants' other clients.

Id. ¶ 28.

The Plaintiffs also allege that they were targeted for withdrawal liability "[d]ue to Defendants' legal malpractice[.]" *Id.* ¶ 1. As stated above, the Defendants' alleged malpractice arose from their actions in negotiating and seeking confirmation of the Chapter 11 Plan:

> Defendants included provisions in the Chapter 11 plan that personally exposed Plaintiffs to potential claims by the 1974 Plan to recover from Plaintiffs the remaining billions of dollars in ERISA withdrawal liability left unpaid by the withdrawing [] Debtors. . . . Defendants deliberately harmed Plaintiffs by advocating for the Bankruptcy Court to confirm the Chapter 11 plan that placed Plaintiffs at risk of billions of dollars in potential claims by the 1974 Plan for ERISA withdrawal liability without ever warning Plaintiffs of that risk or advising them on steps they could take to protect themselves from it, despite Defendants' long-standing representation of Plaintiffs.

Id. ¶¶ 32–33.

D. The Chapter 11 Plan's Exculpation Clause

The Dismissal Motion is partly based on the Chapter 11 Plan's "Exculpation Clause," which states:

> [N]o Exculpated Party shall have or incur, and each Exculpated Party is hereby exculpated from, any Cause of Action for any claim

> related to any act or omission based on the negotiation, execution, and implementation of any transactions approved by the Bankruptcy Court in the Chapter 11 Cases, including the . . . [Chapter 11] Plan . . . except for claims related to any act or omission that is determined by Final Order to have constituted actual fraud, willful misconduct, or gross negligence[.]

Chapter 11 Plan at 54–55.

The Exculpation Clause applies only if a defendant is an "Exculpated Party." According to the Chapter 11 Plan:

> "Exculpated Party" means collectively, and in each case solely in its capacity as such: (a) the Debtors; . . . and (s) with respect to each of the foregoing entities, such Entity and its current and former Affiliates, and such Entities' and their current Affiliates' directors, managers, officers, equity holders (regardless of whether such interests are held directly or indirectly), predecessors, participants, successors, and assigns, subsidiaries, and each of their respective current and former . . . attorneys[.]

Id. at 8.

E. The Chapter 11 Plan's Release

The Dismissal Motion is also based on a release ("Release") in the Chapter 11 Plan. In particular, the Chapter 11 Plan released the Debtors' attorneys, along with those of the "Murray Family Entities," from the same kinds of claims covered by the Exculpation Clause, subject to the same exceptions. The Release provides:

> [E]ach of the Releasing Parties shall be deemed to have conclusively, absolutely, unconditionally, irrevocably, and forever, released and discharged each Released Party from any and all claims . . . that such Entity would have been legally entitled to assert . . . based on or relating to, or in any manner arising from, in whole or in part, the Debtors . . . the Chapter 11 Cases, [and] the formulation, preparation, dissemination, negotiation, filing, or consummation of . . . the Plan . . . other than claims or liabilities arising out of or relating to any act or omission of a Released Party that constitutes actual fraud, willful misconduct, or gross negligence[.]

Chapter 11 Plan at 53–54.

The Releasing Parties include "each Murray Family Entity," *id.* at 14, which in turn is defined as "Robert E. Murray, his sons Ryan Murray, Robert Edward Murray, and Jonathan Murray, his wife Brenda Murray, and any of their affiliated trusts." *Id.* at 10.

The Release applies only to a "Released Party." According to the Chapter 11 Plan:

> "Released Party" means, collectively, and in each case in its capacity as such: (a) the Debtors . . . [and] such Entity and its current and former Affiliates, and such Entities' and their current Affiliates' . . . *attorneys* . . . and other professionals[.]

Id. at 13–14 (emphasis added).

F. The Order Approving Dinsmore's Fee Application

In its order approving Dinsmore's employment as counsel for the Debtors, the Court found, as required by § 327(a) of the Bankruptcy Code, that Dinsmore was a "disinterested person" as defined in § 101(14). Doc. 398 at 2. After confirming the Chapter 11 Plan, the Court approved Dinsmore's final fee application without objection. *See* Doc. 2252 ("Fee Application"). And in its order approving the Fee Application ("Fee Application Order") (Doc. 2454), the Court found that "the requirements of section[] 327," including the disinterestedness requirement, "have been satisfied[.]" Fee Application Order at 2.

V. Legal Analysis

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (cleaned up). In deciding motions to dismiss, courts must "accept as true all non-conclusory allegations in the complaint and determine whether they state a plausible claim for relief." *Id.*; *see also Buck v. Thomas M. Cooley L. Sch.*, 597 F.3d 812, 816 (6th Cir. 2010) ("We accept as true all non-conclusory allegations in the complaint and determine whether they state a

plausible claim for relief.") (cleaned up). For the purposes of this analysis, the Court therefore accepts the Amended Complaint's allegations as true.

In their Dismissal Motion, the Defendants contend that the Malpractice Claim should be dismissed under Rule 12(b)(6) for three reasons: (1) because it is barred by the Exculpation Clause and Release, Dismissal Mot. at 10–14; (2) because the Plaintiffs fail to adequately plead causation, *id.* at 15; and (3) because the Malpractice Claim is barred by the Fee Application Order, *id.* at 17.

A. The Exculpation Clause Applies to the Malpractice Claim.

The Defendants argue that they are Exculpated Parties under the Chapter 11 Plan because they are being sued in their capacity as counsel to the Debtors. *See* Dismissal Mot. at 10–11 (quoting Chapter 11 Plan provision that "defin[es] 'Exculpated Party' to include the 'Debtors . . . and . . . their respective current and former . . . attorneys"). The Plaintiffs respond that "if a party falls under one of the designated categories of 'Exculpated Part[ies],' the party is exculpated '*solely in its capacity as such*.'" Obj. at 7. "Consequently," they say, the fact "that [the] Defendants represented the [Debtors] does not make them 'Exculpated Part[ies]' in *this* case because Plaintiffs are not suing Defendants for malpractice that they committed against the Debtors in their 'capacity' as the Debtor's counsel." *Id.* at 7–8.

Despite their assertions to the contrary, the Plaintiffs are suing Defendants in their capacity as Debtors' counsel. *See* Reply at 16. As the Defendants point out, the Amended Complaint "specifically alleges that [the Defendants] harmed Plaintiffs by helping to 'negotiate' a Chapter 11 Plan that 'exposed Plaintiffs to billions of dollars in claims," and "[t]here is no other 'capacity,' other than as Debtors' counsel, in which [the Defendants] would have negotiated the Chapter 11 Plan." *Id.* In short, the Defendants are being sued because of work they performed for the Debtors, making them Exculpated Parties under the Chapter 11 Plan.

The Malpractice Claim also falls within the scope of the Exculpation Clause. Subject to certain exceptions discussed below, that clause exculpates each Exculpated Party (including the Defendants) from liability for "any Cause of Action for any claim related to any act or omission based on the negotiation, execution, and implementation of" the Chapter 11 Plan. Chapter 11 Plan at 54. "[T]he ordinary meaning of the phrase 'relating to' is a broad one—to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with." *United States v. Nelson*, 985 F.3d 534, 536 (6th Cir. 2021) (cleaned up). And the Malpractice Claim is not only related to, but "expressly predicated on [the Defendants'] alleged role in *negotiating and advocating* for confirmation of the Chapter 11 Plan." Dismissal Mot. at 18. The Amended Complaint makes abundantly clear that the Plaintiffs are suing the Defendants based on their negotiation of the Plan and other Plan-related efforts:

> As part of its representation of the [Debtors], Dinsmore sought and obtained the Bankruptcy Court's approval of the Chapter 11 plan that Defendant Lewis and, upon information and belief, Defendant Howard, helped to negotiate. The Chapter 11 plan rejected the CBA, which terminated the signatory [Debtors'] obligations to contribute to the 1974 Plan, thereby resulting in their withdrawal from the 1974 Plan. As negotiated by Defendants, the withdrawing [Debtors] paid only a small fraction of their resulting ERISA withdrawal liability, and the remainder of their withdrawal liability was discharged by the Bankruptcy Court.
>
> By contrast, Defendants included provisions in the Chapter 11 plan that personally exposed Plaintiffs to potential claims by the 1974 Plan to recover from Plaintiffs the remaining billions of dollars in ERISA withdrawal liability left unpaid by the withdrawing Murray Energy Debtors. Defendants took these affirmative actions at a time when they were personal counsel to Plaintiffs and knowing that these affirmative actions were directly adverse to the interests of Plaintiffs. This constituted a breach of Defendants' duty of loyalty to Plaintiffs.
>
> Defendants' willful intent to harm Plaintiffs is further demonstrated by the fact Defendants failed to exercise even the slightest care and diligence necessary to discharge their legal duties to protect the interests of Plaintiffs, their clients, with respect to

> potential ERISA withdrawal liability. To be sure, Defendants deliberately harmed Plaintiffs by advocating for the Bankruptcy Court to confirm the Chapter 11 plan that placed Plaintiffs at risk of billions of dollars in potential claims by the 1974 Plan for ERISA withdrawal liability without ever warning Plaintiffs of that risk or advising them on steps they could take to protect themselves from it, despite Defendants' long-standing representation of Plaintiffs.

Am. Compl. ¶¶ 31–33.

The Exculpation Clause applies here because the Plaintiffs' Malpractice Claim is at least "related to any act or omission based on the [Chapter 11 Plan's] negotiation[.]" Chapter 11 Plan at 54. Because the Defendants are Exculpated Parties, any liability they may have had on the Malpractice Claim is subject to the Exculpation Clause, and the Amended Complaint therefore must be dismissed. *See Hensley Mfg. v. ProPride, Inc.*, 579 F.3d 603, 613 (6th Cir. 2009) ("[T]here is no reason not to grant a motion to dismiss where the undisputed facts conclusively establish an affirmative defense as a matter of law."); *Est. of Barney v. PNC Bank, Nat'l Ass'n*, 714 F.3d 920, 926 (6th Cir. 2013) ("[I]f the plaintiffs' complaint contains facts which satisfy the elements of the defendant's affirmative defense, the district court may apply the affirmative defense."); *Willkie*, 654 B.R. at 498 (quoting *Barney*).

B. The Release Covers the Malpractice Claim.

The Release also bars the Malpractice Claim. It releases Dinsmore from claims "relating to" the Debtors, the Chapter 11 Plan, or the "pursuit of Confirmation." Chapter 11 Plan at 53–54.

In arguing that the Release is impermissible, the Plaintiffs rely on *Harrington v. Purdue Pharma, L.P.*, 144 S. Ct. 2071 (2024). *Purdue Pharma* held that bankruptcy courts lack statutory authority to approve nonconsensual third-party releases. *Id.* at 2088. But that is all *Purdue Pharma* held. *Id.* ("[W]e hold only that the bankruptcy code does not authorize a release and injunction that, as part of a plan of reorganization under Chapter 11, effectively seeks to discharge claims against a nondebtor without the consent of affected claimants."). And in the Sixth Circuit,

"[w]hen a release of liability with a nondebtor is a consensual provision," it is permissible. *Flake v. Schrader-Bridgeport Int'l, Inc.*, 538 F. App'x 604, 613 (6th Cir. 2013) (quoting *In re Arrowmill Dev. Corp.*, 211 B.R. 497, 506 (Bankr. D.N.J. 1997)); *see also In re Smallhold, Inc.*, No. 24-10267 (CTG), 2024 WL 4296938, at *8 n.36 (Bankr. D. Del. Sept. 25, 2024) ("[I]t has been settled law, even in jurisdictions that have always followed the *Purdue Pharma* rule and prohibited nonconsensual third-party releases, that consensual third-party releases were permissible."). *Purdue Pharma* did not abrogate *Flake* or otherwise alter the law governing consensual releases in Chapter 11 plans.[2] And here, as the Defendants explain, the Release was consensual:

> Plaintiffs not only failed to object to the Chapter 11 Plan but also affirmatively consented to (and benefitted from) the very provisions they now seek to unwind. As the Court found in confirming the Chapter 11 Plan, the Third-Party Release was "consensual because all parties to be bound by the Third-Party Release either (i) voted to accept the Plan or (ii) affirmatively agreed to be a Releasing Party," Murray Energy, ECF No. 2135 at 16, and Plaintiffs agreed to be Releasing Parties (and thereby release claims against Dinsmore) as consideration for being included as Released Parties themselves, *see* Chapter 11 Plan at 10, 14[.]

Reply at 10.

Even if the Release were nonconsensual (which is not the case), the *Purdue Pharma* Court never said that its ruling "would justify unwinding reorganization plans that have already become effective and been substantially consummated." *Purdue Pharma*, 144 S. Ct. at 2088. The Debtors' Chapter 11 Plan was substantially consummated about four years ago. And at confirmation, the Court found the Release to be "an integral and non-severable element of the Plan." Confirmation

[2] The Plaintiffs say that "*Purdue Pharma* makes clear that § 1123(b) only authorizes the inclusion of terms in Chapter 11 plans that 'concern the *debtor*—its rights and responsibilities, and its relationship with its creditors.'" Obj. at 4 (quoting *Purdue Pharma*, 144 S. Ct. at 2083). But the Supreme Court later clarified that "[n]othing in what we have said should be construed to call into question *consensual* third-party releases offered in connection with a bankruptcy reorganization plan." *Purdue Pharma*, 144 S. Ct. at 2087.

Order at 16. *Purdue Pharma* does not support unwinding a substantially consummated plan or nullifying an integral element of that plan. But again, the Release was consensual, so *Purdue Pharma* would not bar it in any event.

C. The Plaintiffs' Reliance on State Law Does Not Make the Exculpation Clause or the Release Inapplicable to the Malpractice Claim.

The Plaintiffs contend that applicable state law—the law of New York—governs the interpretation of the Chapter 11 Plan. Obj. at 5. And they argue that under New York law, releases and exculpation clauses are "strictly construed against the party seeking exemption from liability," must be "expressed in unmistakable language," and, unless so expressed, "will not be deemed to insulate a party from liability for his own negligent acts." *Id.* at 11.

Even if all that is true, none of it leads to the Plaintiffs' conclusion that New York law makes the Exculpation Clause and Release inapplicable to the Malpractice Claim. The Exculpation Clause states that "no Exculpated Party shall have or incur, and each Exculpated Party is hereby exculpated from, any Cause of Action for any claim related to any act or omission based on the negotiation, execution, and implementation of any transactions approved [in] the . . . [Chapter 11] Plan[.]" Chapter 11 Plan at 54–55. And "Cause of Action" is defined very broadly to include

> *any actions*, *claims*, cross claims, third-party claims, interests, damages, controversies, remedies, *causes of action*, debts, judgments, demands, rights, actions, suits, obligations, liabilities, accounts, defenses, offsets, powers, privileges, licenses, liens, indemnities, guaranties, and franchises of any kind or character whatsoever, . . . whether arising before, on, or after the Petition Date, in contract or in tort, in law or in equity, *or pursuant to any other theory of law or otherwise*.

Id. at 4 (emphasis added).

At the very least, the Malpractice Claim is a claim "arising pursuant to a theory of law" and is thus a Cause of Action within the meaning of the Exculpation Clause. *Id.* The Malpractice

Claim also clearly is "a claim . . . that [the Plaintiffs] would have been legally entitled to assert" within the meaning of the Release. *Id.* at 54.

The Plaintiffs also rely on Rule 1.8(h) of New York's Rules of Professional Conduct, which says that "[a] lawyer shall not . . . make an agreement prospectively limiting the lawyer's liability to a client for malpractice[.]" But as the Defendants point out, Rule 1.8(h) does not apply to bankruptcy plans. *See In re LATAM Airlines Grp. S.A.*, No. 20-11254 (JLG), 2022 WL 2206829, at *50 (Bankr. S.D.N.Y. June 18, 2022) (holding that New York's Rule 1.8(h) "has no bearing on the standard of care established in the Exculpation Provision"); *In re Stearns Holdings, LLC*, 607 B.R. 781, 791 (Bankr. S.D.N.Y. 2019) ("With respect to the UST's argument regarding the New York Rules of Professional Conduct, the Court finds that such a provision has no bearing on the standard of care established in an exculpation provision contained in a plan[.]").

For these reasons, New York law does not make the Exculpation Clause or the Release inapplicable to the Malpractice Claim.

D. The Carveouts from the Exculpation Clause and the Release Do Not Apply.

Although the Exculpation Clause and the Release both contain exceptions for "actual fraud, willful misconduct, or gross negligence," Chapter 11 Plan at 53–55, those exceptions do not apply to the Malpractice Claim. As the Defendants say, "the complaint does not mention 'actual fraud,' so that is no basis for an exception." Dismissal Mot. at 19.

Also, the Plaintiffs fail to plausibly allege willful misconduct or gross negligence that would bring the Defendants' conduct outside the scope of the Exculpation Clause and the Release. In the Amended Complaint, the Plaintiffs assert that the Defendants engaged in "willful misconduct" and "gross negligence," Am. Compl. ¶ 46, but these assertions are legal conclusions, which (unlike factual allegations) are "entitled to no weight." *Willkie*, 654 B.R. at 500. The Plaintiffs make other conclusory allegations. They say that the Defendants "committed

malpractice by taking deliberate steps to harm Plaintiffs." Obj. at 10. But an allegation of "intent to harm [is] conclusory." *Low v. Roser*, No. CV421-187, 2024 WL 3400550, at *2 (S.D. Ga. July 12, 2024). They then say that the Defendants placed the Debtors' interests over those of the Plaintiffs by "*personally* expos[ing] Plaintiffs to potential claims by the 1974 Plan[.]" Obj. at 10. But the Defendants did not expose the Plaintiffs to those claims—ERISA did. And as explained below, the Plaintiffs' exposure to withdrawal liability claims under ERISA was inevitable. The Plaintiffs further allege that the Defendants had an undisclosed conflict of interest, positing that once the issue of withdrawal liability arose, representing both them and the Debtors created a conflict of interest for the Defendants. *See id.* Yet the Plaintiffs do not—and cannot—allege any facts in support of the view that the Debtors' interests were adverse to the Plaintiffs' insofar as withdrawal liability is concerned. As the Defendants explain:

> The Debtors had nothing to gain by withdrawing from the 1974 Plan, which exposed the Debtors and their estates to $6.5 billion in withdrawal-liability claims. That is why the Debtors tried to sell their assets to a buyer willing to assume their legacy liabilities: such a sale would have avoided the need to withdraw from the 1974 Plan. When that marketing effort failed to turn up a viable buyer, the Debtors' withdrawal from the 1974 Plan was inevitable. The only question was whether the Debtors would withdraw by means of a liquidation or reorganization. By pursuing the latter approach, the Debtors secured confirmation of a Chapter 11 plan that provided Plaintiffs with broad releases from potential claims. The 1974 Plan insisted that its withdrawal-liability claims be carved out from those releases, but nowhere do Plaintiffs allege (nor could they allege) that the 1974 Plan's position in this regard was in any way attributable to a purported "conflict" between the interests of the Debtors and Plaintiffs.

Dismissal Mot. at 12–13 (cleaned up).

While the Plaintiffs make some factual allegations that the Court must accept as true, none establish that the Defendants' conduct rose to the level of willful misconduct or gross negligence. The Plaintiffs allege that the Defendants advocated for the confirmation of the Chapter 11 Plan

without warning them of the risk of withdrawal liability. Obj. at 10. Even assuming that is true, willful misconduct exists only if the defendant "intended to inflict harm" on the plaintiff. *Metro. Life Ins. Co. v. Noble Lowndes Int'l, Inc.*, 643 N.E.2d 504, 508 (N.Y. 1994). And "mere allegations that the defendant acted willfully or intentionally, *without facts sufficient to establish that the defendant's conduct was deliberately meant [to] cause harm*, will not defeat a motion to dismiss." *Greco v. Staten Island Univ. Hosp.*, No. CIV.A.CV-997401(DGT), 2000 WL 804634, at *2 (E.D.N.Y. May 1, 2000) (emphasis added) (cleaned up). Here, the allegation that the Defendants willfully harmed the Plaintiffs is not supported by the factual allegations in the Amended Complaint.

The Plaintiffs also contend that the Amended Complaint "plead[s] facts demonstrating that Defendants acted with actual malice warranting punitive damages because their conduct was so wanton and reckless as to constitute a conscious disregard for the rights and safety of Plaintiffs that had a great probability of causing substantial harm. Obj. at 10–11. To the contrary, the Plaintiffs have pleaded no facts in the Amended Complaint even suggesting that the Defendants' conduct was so wanton and reckless as to constitute a conscious disregard for the rights and safety of the Plaintiffs.

In short, plaintiffs "may not rely on conclusory allegations to proceed past the pleading stage[.]" *Viet v. Le*, 951 F.3d 818, 823 (6th Cir. 2020) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Stripped of their conclusory counterparts, the factual allegations in the Amended Complaint do not rise to the level of willful misconduct or gross negligence, so the carveouts in the Exculpation Clause and the Release do not apply.

E. The Plaintiffs Have Adequately Pleaded Proximate Causation.

The Defendants also move to dismiss this adversary proceeding on the ground that the Plaintiffs failed to adequately plead proximate causation—one of the elements of a malpractice

claim. *See Krahn v. Kinney*, 538 N.E.2d 1058, 1060 (Ohio 1989). Although it has already determined that the Dismissal Motion should be granted on other grounds, for the sake of completeness, the Court will address proximate causation.

The Court posited in *Willkie* that "had this case proceeded to summary judgment, the Plaintiffs would have had an uphill battle in attempting to establish proximate causation" because, for one thing, Mr. Murray almost certainly learned about his potential withdrawal liability during the Debtors' bankruptcy. *Willkie*, 654 B.R. at 504–05. Still, the Court forswore the failure to establish proximate causation as a basis for dismissal in *Willkie*. The Defendants argue that the Court erred in doing so, *see* Dismissal Mot. at 23, but this argument has little force.

In *Willkie*, the Court, relying on *Trollinger v. Tyson, Inc.*, 370 F.3d 602 (6th Cir. 2004), held that "[p]roximate causation is more appropriately decided on a motion for summary judgment than a motion to dismiss for failure to state a claim." *Willkie*, 654 B.R. at 503. The Defendants take issue with this based on another Sixth Circuit case, *City of Cleveland v. Ameriquest Mortg. Sec., Inc.*, 615 F.3d 496 (6th Cir. 2010), which held that "there is no per se rule against dismissing a complaint for failure to adequately plead proximate cause." *Ameriquest*, 615 F.3d at 503. But those cases are not in conflict; that something may be more appropriate in one context does not mean it is absolutely prohibited in another. And *Trollinger* never said it was *inappropriate* to consider proximate causation when deciding a Rule 12(b)(6) motion—just that it would be *more appropriate* to do so at summary judgment. Likewise, the Court never said it was categorically precluded from granting a motion to dismiss based on a failure to adequately plead proximate cause—it simply said it was more appropriate to decide causation issues in other contexts. And six years after *Ameriquest*, the Sixth Circuit once again held that "'causal weaknesses will more often be fodder for a summary-judgment motion under Rule 56 than a motion to dismiss under

Rule 12(b)(6).'" *Jackson v. Ford Motor Co.*, 842 F.3d 902, 908 (6th Cir. 2016) (quoting *Trollinger*, 370 F.3d at 615). In fact, the Sixth Circuit said that twice in *Jackson*, reiterating in its conclusion that "in light of our admonition that 'causal weaknesses will more often be fodder for a summary-judgment motion under Rule 56 than a motion to dismiss under Rule 12(b)(6),' Jackson has made sufficient allegations to "nudge[ ] [her] claim[ ] across the line from conceivable to plausible." *Id.* at 909–10 (quoting *Trollinger*, 370 F.3d at 615).

In *Willkie*, the Court held that "a district court may dismiss a complaint for failure to state a claim only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Willkie*, 654 B.R. at 503 (cleaned up). The Defendants contend that the Court was wrong to so hold because "the Supreme Court has overruled that any-set-of-facts standard, replacing it with the less plaintiff-friendly requirement that a complaint be 'plausible on its face.'" Dismissal Mot. at 24. Indeed, some courts have held that the "any set of facts" standard did not survive *Twombly* and *Iqbal*. *See Clevenger v. Raker*, No. 1:12-CV-00432, 2012 WL 5385607, at *2 (S.D. Ohio Nov. 1, 2012) ("Th[e] 'any set of facts' standard was expressly abrogated by [*Twombly*, 550 U.S. at 561–62]. As noted above, the Court must instead determine whether Plaintiff has set forth sufficient 'factual matter, accepted as true, to state a claim to relief that is plausible on its face.'"). And the Sixth Circuit has said:

> Bailey maintains that . . . the plausibility standard of *Twombly* and *Iqbal* does not apply. He insists that the 'no set of facts' pleading standard articulated in *Conley v. Gibson* . . . remains good law and applies to this claim. That is wrong. The Supreme Court overruled the *Conley* standard in [*Twombly*]. That means district courts may not rely on contrary language in *Petty v. County of Franklin*, 478 F.3d 341, 345 (6th Cir. 2007), which is inconsistent with the Supreme Court's more recent and precedentially superior decisions in *Twombly* and *Iqbal*.

Bailey v. City of Ann Arbor, 860 F.3d 382, 388–89 (6th Cir. 2017). But in 2015, eight years after *Twombly*, the Sixth Circuit held that a "complaint should only be dismissed if it is clear to the

court that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Herhold v. Green Tree Servicing, LLC*, 608 F. App'x 328, 331 (6th Cir. 2015) (cleaned up).

Perhaps *Herhold* simply overlooked *Twombly*. But whatever the case, it is indisputable that "[t]o survive a motion to dismiss, the plaintiff must allege facts that, if accepted as true, are sufficient to state a claim to relief that is plausible on its face." *Marvaso v. Sanchez*, 971 F.3d 599, 605 (6th Cir. 2020) (citing *Twombly*, 550 U.S. at 555–57). And in *Willkie*, the Court applied that standard, noting that to "survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Willkie*, 654 B.R. at 497 (quoting *Iqbal*, 556 U.S. at 678). It then discussed *Gorsuch v. OneWest Bank, FSB*, No. 3:14 CV 152, 2015 WL 2384110 (N.D. Ohio May 19, 2015), in which the district court found it "at least plausible that, had Gorsuch known [certain facts] . . . events would have played out differently," but went on to say that "[f]act-based issues like these should not be resolved on a motion to dismiss." *Gorsuch*, 2015 WL 2384110, at *7 (citing *Trollinger*, 370 F.2d at 615). The Court went on to determine that "[a]s in *Gorsuch*, the Complaint here raise[d] the issue of whether, had Mr. Murray been warned that he was subject to ERISA withdrawal liability, events would have played out differently." *Willkie*, 654 B.R. at 504. So, although it perhaps could have done so more explicitly, the Court held that the plaintiffs in *Willkie* adequately pleaded causation under the plausible-on-its-face standard.

Here, the Plaintiffs have done even more to plead proximate causation. The Amended Complaint provides the following example of how the Defendants could have protected the Plaintiffs from ERISA withdrawal liability:

> There are potentially numerous ways that Defendants could have protected Plaintiffs. As one such example, if the D.C. ERISA

> Lawsuit results in a determination that Mr. Murray has withdrawal liability to the 1974 Plan because he had unincorporated "trades or businesses" under common control with a withdrawing Murray Energy Debtor (an accusation that Mr. Murray's Estate denies), Defendants could have protected Mr. Murray by advising him to cease any such unincorporated "trades or businesses" prior to the withdrawal date. Instead, Defendants failed to warn or advise Plaintiffs to protect themselves despite Defendants' knowledge that Plaintiffs were in harm's way due to Defendants' own actions.

Am. Compl. ¶ 45.

For purposes of the Dismissal Motion, the Court must accept as true the allegation that "one such example" of the "potentially numerous ways that Defendants could have protected Plaintiffs" was by "advising [Mr. Murray] to cease . . . unincorporated 'trades or businesses' prior to the withdrawal date." *See Allstate Ins. Co. v. Red Diamond Med. Grp., LLC*, No. 1:23-CV-23661-KMM, 2024 WL 2797392, at *6 (S.D. Fla. Feb. 22, 2024) ("Accepting the allegations as true, as the Court must on a 12(b)(6) motion, Plaintiffs have sufficiently alleged proximate cause by pleading facts which show that they suffered damages as a direct result of Defendants' fraud."); *In re Sept. 11 Prop. Damage & Bus. Loss Litig.*, 468 F. Supp. 2d 508, 520 (S.D.N.Y. 2006), *aff'd sub nom. Aegis Ins. Servs., Inc. v. 7 World Trade Co., L.P.*, 737 F.3d 166 (2d Cir. 2013) ("Accepting all facts alleged in the Amended Complaint as true as required by Rule 12(b)(6), Fed.R.Civ.P., I find that plaintiffs have set forth sufficient facts to defeat the Port Authority's motion to dismiss for absence of proximate cause."). The Court therefore holds that the Plaintiffs' purported failure to plead proximate cause does not provide a basis for dismissal.

F. The Fee Application Order Does Not Bar the Malpractice Claim.

The Defendants also contend that the Fee Application Order bars the Malpractice Claim. Again, for the sake of completeness, the Court will address this issue, even though it has already determined that the Dismissal Motion should be granted.

To be employed by a debtor in possession, a professional must be a "disinterested person." 11 U.S.C. § 327(a). To be a disinterested person, a professional must not "have an interest materially adverse to the interest of the estate or of any class of creditors or equity security holders . . . ." 11 U.S.C. § 101(14). Further, "a valid appointment under § 327(a) is a condition precedent to the decision to grant or deny compensation under § 330(a)[.]" *Michel v. Federated Dep't Stores, Inc. (In re Federated Dep't Stores, Inc.)*, 44 F.3d 1310, 1320 (6th Cir. 1995). Thus, the Fee Application Order, by which the Court awarded Dinsmore's fees under § 330(a), contained a finding that "the requirements of section[] 327," which would have necessarily included the disinterestedness requirement of § 327(a), "have been satisfied[.]" Fee Application Order at 2.

According to the Plaintiffs, representing both the Murray Clients and the Debtors gave rise to a conflict of interest for the Defendants. If so, the Defendants posit, then they would not have been disinterested. But in the Fee Application Order, the Court found that the Defendants were indeed disinterested. Given this, the Defendants argue that the Fee Application Order should be given claim-preclusive effect, and its finding of disinterestedness should bar the Malpractice Claim. Dismissal Mot. at 24–27.

For claim preclusion to apply, there must be, among other elements, "an issue in the subsequent action which was litigated or which should have been litigated in the prior action." The Defendants have not shown that this element is met here.

The Defendants argue that "[w]hen Dinsmore filed its fee application, Plaintiffs knew or should have known the facts underlying the Malpractice Claim: that Dinsmore was representing Murray Energy in the bankruptcy and that the Chapter 11 Plan carved out the 1974 Plan's withdrawal-liability claims." Dismissal Mot. at 24. But the Court cannot decide whether the Malpractice Claim is barred by the claim-preclusive effect of the Fee Application Order at the

motion to dismiss stage, because the Court must accept as true the Amended Complaint's allegations that the

> Plaintiffs first learned of their exposure to potential ERISA withdrawal liability, and Defendants' potential malpractice, when Plaintiffs received letters, dated March 2, 2021, that the 1974 Plan sent to Mrs. Murray in her personal capacity and as the personal representative of Mr. Murray's Estate, demanding payment of over $6.5 billion in withdrawal liability from the Estate and Mrs. Murray and, *inter alia*, any related "trust."

Am. Compl. ¶ 35.

Given this allegation, the Defendants' contention that the Plaintiffs should have known the facts underlying the Malpractice Claim is an issue of fact that cannot be determined on a motion to dismiss for failure to state a claim. *See Penthouse Media Grp. v. Pachulski Stang Ziehl & Jones LLP*, 406 B.R. 453 (S.D.N.Y. 2009). In *Penthouse Media Group*, the district court found that the plaintiff had raised a genuine issue of material fact as to "whether it had a full and fair opportunity to litigate the malpractice issue and whether it should have known of the malpractice claim at the time of the fee hearing[.]" *Id.* at 463 n.70. As the district court said:

> PMG had no reason to suspect that Pachulski's work was inadequate and in fact made no objection to the fee application and continued to retain Pachulski as its advisor until a year after the fee hearing. I must therefore disagree with the bankruptcy court's conclusion that it could decide—as a matter of law—that PMG should have known of its malpractice claim[.]

Id. at 463. Just so here.

VI. Conclusion

Because the Amended Complaint fails to state a claim upon which relief can be granted, the Dismissal Motion is **GRANTED**, and the Amended Complaint is **DISMISSED WITH PREJUDICE**.

IT IS SO ORDERED.

Copies to:

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