

Melanie Gray (*admitted pro hac vice*)
Lydia Protopapas (LP 8089)
Jason W. Billeck (*admitted pro hac vice*)
WEIL, GOTSHAL & MANGES LLP
700 Louisiana, Suite 1600
Houston, Texas 77002
Telephone: (713) 546-5000
Facsimile: (713) 224-9511

Richard A. Rothman (RR 0507)
Bruce S. Meyer (BM 3506)
Lori L. Pines (LP 3005)
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, New York 10153
Telephone: (212) 310-8000
Facsimile: (212) 310-8007

James J. Dragna (*admitted pro hac vice*)
BINGHAM MCCUTCHEN LLP
355 South Grand Avenue, Suite 4400
Los Angeles, California 90071
Telephone: (213) 680-6400
Facsimile: (213) 680-6499

Duke K. McCall, III (*admitted pro hac vice*)
BINGHAM MCCUTCHEN LLP
2020 K Street, NW
Washington, DC 20006
Telephone: (202) 373-6000
Facsimile: (202) 373-6001

Counsel to Anadarko Petroleum Corporation and Kerr-McGee Corporation

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re)	Chapter 11
)	
TRONOX INCORPORATED, <i>et al.</i> ,)	Case No. 09-10156 (ALG)
)	
Debtors.)	Jointly Administered
TRONOX INCORPORATED, TRONOX)	
WORLDWIDE LLC f/k/a Kerr-McGee)	
Chemical Worldwide LLC, and TRONOX LLC)	
f/k/a Kerr-McGee Chemical LLC,)	
)	
Plaintiffs,)	
v.)	Adv. Pro. No. 09-1198
)	
ANADARKO PETROLEUM CORPORATION)	
and KERR-McGEE CORPORATION,)	
)	
Defendants.)	
THE UNITED STATES OF AMERICA,)	
)	
Plaintiff-Intervenor,)	
v.)	
)	
ANADARKO PETROLEUM CORPORATION)	
and KERR-McGEE CORPORATION,)	
)	
Defendants.)	

**NOTICE OF DEFENDANTS'
MOTION TO DISMISS THE COMPLAINT**



PLEASE TAKE NOTICE that upon the annexed Motion, dated July 31, 2009 (the "Motion"), Defendants Anadarko Petroleum Corporation and Kerr-McGee Corporation (collectively, the "Defendants"), will move for an order, pursuant to Fed. R. Civ. P. 8, 9, and 12(b)(6) (as incorporated by Federal Rules of Bankruptcy Procedure 7008, 7009 and 7012), seeking a dismissal of the Complaint, as more fully set forth in the Motion. A hearing will be held before the Honorable Allan L. Gropper, United States Bankruptcy Judge, in Room 617 of the United States Bankruptcy Court for the Southern District of New York, One Bowling Green, New York, New York 10004, at a date and time after September 21, 2009 to be determined.

PLEASE TAKE FURTHER NOTICE that any responses or objections to the Motion must be in writing, shall conform to the Federal Rules of Bankruptcy Procedure and the Local Rules of the Bankruptcy Court, set forth the legal and factual basis therefor, and shall be filed with the Bankruptcy Court (a) electronically in accordance with General Order M-242 (which can be found at www.nysb.uscourts.gov) by registered users of the Bankruptcy Court's filing system, and (b) by all other parties in interest, on a 3.5 inch disk, preferably in Portable Document Format (PDF), WordPerfect, or any other Windows-based word processing format (with a hard copy delivered directly to Chambers), in accordance with General Order M-182 (which can be found at www.nysb.uscourts.gov), and served in accordance with General Order M-242, and on (i) the chambers of the Honorable Allan L. Gropper, One Bowling Green, New York, New York 10004, Courtroom 601; (ii) Weil, Gotshal & Manges LLP, attorneys for the Defendants, 767 Fifth Avenue, New York, New York 10153 (Attn: Richard A. Rothman, Esq., Bruce S. Meyer, Esq., and Lori L. Pines, Esq.) and 700 Louisiana, Suite 1600, Houston, Texas, 77002 (Attn: Melanie Gray, Esq., Lydia Protopapas, Esq., and Jason W. Billeck, Esq.); (iii) Bingham McCutchen LLP, attorneys for the Defendants, 355 South Grand Avenue, Suite 4400,

Los Angeles, California 90071 (Attn: James J. Dragna, Esq.), and 2020 K Street, NW, Washington, DC 20006 (Attn: Duke K. McCall III, Esq.); (iv) Pillsbury Winthrop Shaw Pittman LLP, attorneys for the Official Committee of Equity Holders of Tronox Inc., 1540 Broadway, New York, New York 10036 (Attn: David A. Crichlow, Esq.); (v) Paul, Weiss, Rifkind, Wharton & Garrison LLP, attorneys for the Official Committee of Unsecured Creditors, 1285 Avenue of the Americas, New York, New York 10019-6064 (Attn: Robert N. Kravitz, Esq.); (vi) the United States Attorneys Office, 86 Chambers Street, New York, New York 10007 (Attn: Matthew L. Schwartz, Esq.); and, (vii) the Office of the United States Trustee, 33 Whitehall Street, 21st Floor, New York, New York 10004 (Attn: Susan D. Golden), so as to be filed and received no later than **September 1, 2009** (Prevailing Eastern Time) (the “Objection Deadline”).

If no objections are timely filed and served with respect to the Motion, the Debtors may, on or after the Objection Deadline, submit to the Bankruptcy Court an order dismissing the Complaint, which order may be entered with no further notice or opportunity to be heard or offered to any party.

Houston, Texas
Dated: July 31, 2009

Richard A. Rothman (RR 0507)
Bruce S. Meyer (BM 3506)
Lori L. Pines (LP 3005)
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, New York 10153
Telephone: (212) 310-8000
Facsimile: (212) 310-8007

Duke K. McCall, III (*admitted pro hac vice*)
BINGHAM MCCUTCHEN LLP
2020 K Street, NW
Washington, DC 20006

/s/ Lydia Protopapas
Melanie Gray (*admitted pro hac vice*)
Lydia Protopapas (LP 8089)
Jason W. Billeck (*admitted pro hac vice*)
WEIL, GOTSHAL & MANGES LLP
700 Louisiana, Suite 1600
Houston, Texas 77002
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Los Angeles, California 90071

Telephone: (202) 373-6000
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and Kerr-McGee Corporation*

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Jason W. Billeck (*admitted pro hac vice*)
WEIL, GOTSHAL & MANGES LLP
700 Louisiana, Suite 1600
Houston, Texas 77002
Telephone: (713) 546-5000
Facsimile: (713) 224-9511

Richard A. Rothman (RR 0507)
Bruce S. Meyer (BM 3506)
Lori L. Pines (LP 3005)
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, New York 10153
Telephone: (212) 310-8000
Facsimile: (212) 310-8007

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<u>4 Collier on Bankruptcy</u> ¶ 502.06[2][d] (15th ed. rev. 2003).....	59
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Anadarko Petroleum Corporation (“Anadarko”) and Kerr-McGee Corporation (a wholly-owned subsidiary of Anadarko (“Kerr-McGee,” or “New Kerr-McGee,”)) (collectively, “Defendants”) hereby file this motion to dismiss (the “Motion”) pursuant to Rules 8(a), 9(b), and 12(b)(6) of the Federal Rules of Civil Procedure (the “Federal Rules”), and Rules 7008, 7009, and 7012 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), seeking dismissal of each of the claims asserted in the Adversary Complaint filed on May 12, 2009 (the “Complaint”), by plaintiffs Tronox Incorporated (“Tronox Inc.”), Tronox Worldwide LLC f/k/a Kerr-McGee Chemical Worldwide LLC (“Tronox Worldwide”), and Tronox LLC f/k/a Kerr-McGee Chemical LLC (“Tronox LLC”) (collectively, “Plaintiffs”).¹

PRELIMINARY STATEMENT

This proceeding is Plaintiffs’ attempt to rewrite history in order to blame Plaintiffs’ financial condition and foist their environmental and other liabilities on Kerr-McGee and Anadarko. Through the prism of twenty-twenty hindsight, Plaintiffs assert that because Tronox Inc. and its affiliates filed chapter 11 petitions on January 12, 2009, Plaintiffs were doomed from the time of their incorporation more than three years earlier.

The gravamen of the Complaint is a so-called grand “scheme” by Defendants to set Plaintiffs up for failure. The “scheme” allegations, however, are insufficient as a matter of law: not only are they impermissibly conclusory, they are implausible and do not comport with reality. Furthermore, throughout the Complaint, the three distinct corporate Plaintiffs are impermissibly treated as one single “Tronox” entity; the two independent corporate defendants are improperly lumped together as one; and numerous transactions among many different

¹ In the Motion, the entity known as Kerr-McGee Corporation prior to August 1, 2001, is sometimes referred to as “Old Kerr-McGee,” to distinguish it from “New Kerr-McGee,” a Defendant and an entity that Anadarko acquired on August 10, 2006. New Kerr-McGee was not formed until May 2001. Tronox Worldwide is the successor by merger to Old Kerr-McGee.

corporate entities spanning a period of decades are impermissibly consolidated and poorly defined in an attempt to bring time-barred transfers into play. Use of these strategies in the Complaint makes the allegations not only misleading, but insufficient as a matter of law.

For several reasons, the Complaint fails to state any claim for relief and must be dismissed. As an initial matter, the entire Complaint is subject to dismissal in light of the Supreme Court's seminal decisions in Bell Atlantic v. Twombly, 550 U.S. 544, 570 (2007) and Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009). Stated simply, particularly when compared to the obvious alternative explanation for Tronox Inc.'s failure, the convoluted and speculative fraud "scheme" conjured up in the Complaint cannot overcome the plausibility threshold that the Supreme Court has now firmly mandated.

Here, Plaintiffs' theory of a grand "scheme" to destroy Plaintiffs' business, years before it ever even existed, disregards the more likely explanation for the bankruptcy: namely, the unprecedented and unanticipated collapse of the global economy in 2007-2008, along with the rise in commodity costs that impacted virtually all businesses, including Tronox Inc. and others operating in the specialty chemicals industry. Given the real world facts regarding the collapse of the economy and the chemical industry of which this Court can take judicial notice, and that Plaintiffs had extensive discovery before filing their Complaint -- including access to hundreds of thousands of Kerr-McGee and Tronox Inc. documents -- it is clear that Plaintiffs will never be able to overcome the Iqbal plausibility hurdle.

Like myriad other businesses, Tronox Inc. entered bankruptcy in early 2009 in the midst of the greatest national and global economic collapse since the Great Depression. This unprecedented worldwide economic disturbance has led to the bankruptcies of seemingly immune American institutions, not to mention more than 200 other major public companies in

addition to Tronox Inc. Numerous chemical companies have been hard hit, including those like Tronox Inc. whose specialty chemicals products are tied to demand in markets such as the housing and automotive sectors. Indeed, other players in the chemical industry, such as Chemtura, also filed for bankruptcy within weeks of Tronox Inc., while chemical giants DuPont and The Dow Chemical Co. suffered significant stock declines since late 2007.

Tronox Inc.'s public filings, and the Complaint itself, reflect that prior to this unforeseeable collapse of the economy, Tronox Inc. had been doing well -- both before and after its initial public offering in 2005. In fact, in its more than three years as a publicly traded company pre-bankruptcy, Tronox Inc. reported billions of dollars in sales, had no need to draw on its available lines of credit until early 2008, and distributed cash dividends to its stockholders during each and every quarter of 2006 and 2007. In addition, the amounts that Tronox Inc. paid on account of its environmental liabilities were entirely consistent with the earlier disclosures of such liabilities -- made by both Kerr-McGee before the Tronox Inc. initial public offering and by Tronox Inc. itself afterwards. While Plaintiffs now attempt to pinpoint historic environmental liabilities as the root of Tronox Inc.'s failure, it was only after Tronox Inc. filed for bankruptcy that it began to blame its deteriorating financial condition on these alleged liabilities.

Plaintiffs' allegation of a massive fraud on Plaintiffs' creditors was purportedly undertaken through a hodgepodge of unspecified fraudulent transfers and common law torts. These accusations are a clear effort to avoid the more likely explanation reached after considering the impact of rising costs, reduced demand, non-functioning credit and financial markets, and the global economic crisis as a whole on Plaintiffs' business. Plaintiffs' grossly inadequate factual allegations, coupled with the obvious and more likely reasons for Plaintiffs' financial woes, require the entire Complaint to be dismissed with prejudice under Iqbal.

Moreover, for all of the additional reasons detailed below, the individual claims for relief asserted in the Complaint have failed to state a claim upon which relief can be granted, and must be dismissed as a matter of law.

Fraudulent Transfer Claims (Counts I-III): Plaintiffs assert three claims alleging actual and constructive fraudulent transfers. Plaintiffs' first cause of action seeks to avoid actual fraudulent transfers. It must be dismissed because each Plaintiff fails to plead any actual fraudulent transfers with anywhere near the level of particularity required by Federal Rule 9(b). While the allegations of transfers and fraudulent intent are replete with rhetoric and faux detail, they are nonetheless wholly deficient. The allegations fail to state as required for each transfer, the purported transferor, transferee, what was transferred, when it was transferred, the consideration paid with respect to the asset transferred and, critically, how each alleged transfer was motivated by or consummated with fraudulent intent by each Defendant. The allegations also fail to identify the supposedly fraudulently conveyed liabilities allegedly responsible for causing Tronox Inc. to file for bankruptcy. Counts II and III seek to avoid constructive fraudulent transfers. Both of these claims must be dismissed for failure to adequately plead the "reasonably equivalent value" and "insolvency" elements of such claims. Also, Counts I and II, both brought under the Oklahoma Uniform Fraudulent Transfer Act ("Oklahoma UFTA"), are, in part, time-barred, and the requests for punitive damages for those claims should be stricken because punitive damages are not available under the Oklahoma UFTA or the Bankruptcy Code.²

Common Law Claims (Counts IV-VII): Plaintiffs also assert four common law claims, all of which must be dismissed as a matter of law. Plaintiffs' "Civil Conspiracy" claim, alleging

² For the same reasons that Plaintiffs' Complaint should be dismissed as to its actual and constructive fraudulent transfer claims, the United States' "Complaint in Intervention" in this adversary proceeding, filed May 21, 2009, Docket No. 25, should also be dismissed.

a conspiracy to “effectuate fraudulent transfers,” must be dismissed because it is barred by Section 550 of the Bankruptcy Code, and because Plaintiffs fail to plead the elements of conspiracy with requisite particularity. Equally defective is the “Aiding and Abetting Fraudulent Transfer” claim. This claim is not a recognized cause of action and, therefore, must be dismissed. Moreover, each Plaintiff has failed to plead the claim with requisite particularity. Plaintiffs’ “Breach of Fiduciary Duty As a Promoter” claim must be dismissed because it is time-barred, and because Plaintiffs fail to adequately allege the existence of a cognizable fiduciary duty. Moreover, there is no factual allegation whatsoever that Anadarko was a “promoter,” and thus Plaintiffs have failed to state any breach of fiduciary duty as a promoter claim against Anadarko. Furthermore, Plaintiffs’ claim for “Unjust Enrichment” must be dismissed because (i) Plaintiffs fail to state how and to what extent any Defendant was unjustly enriched; (ii) the claim is time-barred; and (iii) and the transactions at issue are governed by a contract.

Bankruptcy Claims (Counts VIII-XI): Finally, Plaintiffs seek to have any proof of claim filed by Defendants subordinated or disallowed pursuant to various provisions of the Bankruptcy Code or other bankruptcy precedents, but Plaintiffs’ requests are premature, are more appropriately raised as part of the claims resolution process, and are unsupported by the Bankruptcy Code. Specifically, Plaintiffs’ claim for “Equitable Subordination” should be dismissed because it is premature, and because Plaintiffs have not adequately pled the underlying claims which form the basis for their request. Plaintiffs’ claim for “Equitable Disallowance” should be dismissed because no such claim exists under the Bankruptcy Code or applicable law. The claim for “Disallowance” pursuant to section 502(d) of the Bankruptcy Code should be dismissed as premature absent a judicial determination of Defendants’ liability and other requisites for disallowance. And the claim for “Disallowance of Contingent Indemnity Claims”

pursuant to section 502(e)(1) of the Bankruptcy Code should be dismissed because it is premature, multiple judicial determinations must precede any disallowance under this provision, and because such determinations should be made as part of the claims resolution process.

For all of these reasons, and as explained in more detail below, the Complaint should be dismissed in its entirety.

BACKGROUND AND SUMMARY OF THE FACTS ALLEGED IN THE COMPLAINT³

At the heart of the Complaint is the allegation that New Kerr-McGee participated in a so-called “two-step scheme” to split Old Kerr-McGee Corporation into separate businesses so that New Kerr-McGee could escape responsibility for certain unenumerated liabilities. According to the Complaint, the two main steps consisted of “Project Focus” and the numerous transactions leading up to the initial public offering (“IPO”) of Tronox Inc. Compl. ¶¶ 5-6. More specifically, the Complaint alleges that: (a) Kerr-McGee came up with a plan to shed historical liabilities by incorporating them into its “Chemical Business” (Compl. ¶¶ 26-36); (b) after reaching that decision, Kerr-McGee decided to make the “Chemical Business” larger by acquiring more chemical plants and incurring additional potential liability (Compl. ¶¶ 37-42); (c) when the “Chemical Business” neared the top of its cyclical market, New Kerr-McGee considered both a sale and a possible spin-off of the business (Compl. ¶¶ 52-57); (d) New Kerr-McGee ultimately chose to do a so-called “spin-off” of the “Chemical Business” as an independent company, allegedly to avoid having to make disclosures and representations to

³ In evaluating this motion to dismiss, the Court may consider “any written instrument attached to the complaint, statements or documents incorporated into the complaint by reference, legally required public disclosure documents filed with the SEC, and documents possessed by or known to the plaintiff and upon which it relied in bringing the suit.” See *In re M Fabrikant & Sons, Inc.*, 394 B.R. 721, 731 (Bankr. S.D.N.Y. 2008); see also *Robles v. Copstat Sec., Inc.*, 2009 WL 1867948, at *2 (S.D.N.Y. 2009) (same). Accordingly, the Court may consider the Master Separation Agreement, Tax Sharing Agreement, and Employee Benefits Agreement, which are each incorporated in the Complaint by reference (see, e.g., Compl. ¶ 105), as well as the Securities Exchange Commission (“SEC”) filings and registration statements cited herein.

potential buyers (Compl. ¶¶ 76-80); and (e) after the separation, Tronox Inc. was eventually forced into bankruptcy, allegedly because of those liabilities. Compl. ¶¶ 121-122.

A. **Old Kerr-McGee And The Chemical Business**

Plaintiffs allege that Old Kerr-McGee was founded in 1929 as an oil and gas exploration company, and over the years expanded to include business in the uranium, forestry, nuclear, and other chemicals industries. Compl. ¶¶ 20-24. As of 2000, Old Kerr-McGee reported that it was the world's third largest producer and marketer of titanium dioxide ("TiO₂"). See Ex. A Old Kerr-McGee, Annual Report (Form 10-K), at F-14 (Mar. 30, 2000).⁴ The primary end-use markets for TiO₂ are coatings, plastic, and paper, with coatings and plastics currently representing 84% of industry demand. See Ex. B Tronox Inc., Annual Report (Form 10-K), at 7-9 (Mar. 14, 2008). The coatings and plastics end-use submarkets include new and existing home sales, construction and renovation, automotive sales, and home appliances, and demand is affected by growth factors including the housing and construction markets and durable goods and non-durable consumer goods spending Id.

B. **Project Focus: An Internal Corporate Reorganization**

Plaintiffs allege that the first step of the so-called "two-step scheme," was an internal corporate reorganization undertaken primarily in 2002, known as "Project Focus." Compl. ¶¶ 43-51. Plaintiffs allege that various assets were transferred from what the Complaint describes as the "Chemical Business" to Kerr-McGee Oil and Gas Corporation ("Kerr-McGee Oil and Gas"). Compl. ¶¶ 47-50.⁵

⁴ The Affidavit of Lydia Protopapas, Esq. ("Protopapas Aff.") is submitted herewith. All documents cited herein as "Ex. ___" are attached to the Protopapas Aff.

⁵ The "Chemical Business" is defined in the Complaint as a "small, cyclical chemical business, a handful of discontinued businesses, and more than 70 years of Legacy Liabilities." Compl. ¶ 5. "Legacy Liabilities" are defined to include "actual and contingent environmental, tort, retiree, and other liabilities." Compl. ¶ 1. In the

C. **The May 2005 Events Leading To The Separation of Tronox Inc.**

The Complaint alleges that to finalize “Project Focus,” the “Chemical Business” and Kerr-McGee Oil and Gas entered into an Assignment Agreement and a separate Assignment, Assumption and Indemnity Agreement (the “Cross Indemnity”) in May 2005 (two-and-a-half years after the completion of the alleged original “Project Focus” transfers). Compl. ¶¶ 67-72. Under the Cross Indemnity, Kerr-McGee Chemical Worldwide LLC (the successor to Old Kerr-McGee now known as Tronox Worldwide LLC) and Kerr-McGee Oil and Gas, an indirect wholly-owned subsidiary of New Kerr-McGee, provided each other with reciprocal indemnities. Compl. ¶ 66; see Ex. C Cross Indemnity § 3; see generally Ex. D Assignment Agreement.

The Complaint also alleges that New-Co Chemical Inc. (now known as Tronox Inc.) was incorporated in Delaware in May 2005 as an indirect, wholly-owned subsidiary of New Kerr-McGee, with New Kerr-McGee having acted as its corporate promoter. Compl. ¶ 168; Ex. E New-Co Chemical Inc.’s S-1 (June 6, 2005), p. 1. An Amended and Restated Certificate of Incorporation was thereafter filed on September 12, 2005, changing the name of the company to “Tronox Incorporated.” Compl. ¶ 168; Ex. F Tronox Inc., 424B4 Prospectus (Nov. 22, 2005) at 1.

D. **Consideration Was Given For The Separation Of Tronox Inc.**

The “spin-off” allegedly was ultimately accomplished through (i) the IPO of Class A common stock of one of the Plaintiff entities, Tronox Inc., and (ii) a subsequent distribution (the “Distribution”) by New Kerr-McGee of the Class B common stock received by New Kerr-McGee in the IPO to public shareholders. Compl. ¶¶ 83, 108.⁶ Plaintiffs admit that outside

Complaint, Plaintiffs admit that the “Legacy Liabilities” were never in fact transferred, but were instead “left behind” in the “Chemical Business.” Compl. ¶ 147.

⁶ Plaintiffs allege that at the time of the IPO on November 28, 2005, certain New Kerr-McGee officers served on “Tronox’s” Board of Directors. Compl. ¶ 108. At all times following the IPO, the Tronox Inc. Board was

counsel represented the “Chemical Business” and that diligence was performed. Compl. ¶¶ 82, 99-103; see also F Tronox Inc., 424B4 Prospectus (Nov. 22, 2005) at 139. The diligence process included evaluations of the public disclosures to be made in registration statements and other documents filed in accordance with SEC requirements. Compl. ¶¶ 99-103.

Furthermore, the Complaint describes the extensive consideration that was conveyed to “Tronox” pursuant to the separation. Based solely on Plaintiffs’ allegations and the documents properly before the Court on the Motion, Plaintiffs received the following consideration from New Kerr-McGee:

- assets comprising the world’s third largest TiO₂ producer which had “an estimated 13% market share of the \$9 billion global market in 2004 based on reported industry sales,” had net sales of \$1.3 billion in fiscal year 2004 and net sales of \$1.0 billion and net income of \$12.6 million for the first nine months of 2005, and significant intellectual property rights, including a proprietary chloride technology (Ex. F Tronox Inc., 424B4 Prospectus (Nov. 22, 2005) at 1);
- significant other assets comprising a “Chemical Business” that had been built up over Kerr-McGee’s 70 year history (Compl. ¶ 112);
- a \$100 million environmental “indemnity” (of which approximately \$4 million has already admittedly been paid) (Compl. ¶ 112);⁷
- an agreement to pay up to \$17 million in tax liabilities (see Ex. K Tax Sharing Agreement at § 3.04; Ex. G Tronox Inc. Annual Report (Form 10-K) at 84 (Mar. 29, 2006));
- the retention of \$40 million in cash (see Ex. J MSA at § 2.4(a); Compl. ¶ 87);

independent -- New Kerr-McGee had only two representatives out of six total Board members on Tronox Inc.’s Board during the four month period between the IPO and February 2006, at which time Tronox Inc.’s Board gained a seventh member, who was likewise not appointed by New Kerr-McGee. See Ex. G Tronox Inc., Annual Report (Form 10-K) at 114 (Mar. 29, 2006) (signed on behalf of Board of Directors); Ex. H Tronox Inc. Current Report (Form 8-K) (Feb. 6, 2006) (noting addition of Jerome Adams to Board); Ex. I Tronox Inc. Current Report (Form 8-K) (Apr. 5, 2006) (noting resignation of New Kerr-McGee officers Robert M. Wohleber and J. Michael Rauh from the Board).

⁷ While the Complaint alleges that Tronox Inc. received an “indemnity” worth \$100 million, under the actual terms of the Master Separation Agreement (“MSA”), Tronox Inc. received a “reimbursement” right. Ex. J MSA § 2.5.

- the transfer of certain pre-paid insurance policies, claims, choses in action and rights with respect to Tronox Insured Loss (as defined in the MSA), and pension assets (see Ex. J MSA at § 2.6(c));
- the release from \$2.1 billion in loan guarantees (see Ex. F Tronox Inc., 424B4 Prospectus (Nov. 22, 2005) at 63), and payment of at least \$5 million and up to \$18 million in fees by New Kerr-McGee in order to obtain these consents (see Ex. L Kerr-McGee Corp., Quarterly Report on Form 10-Q, at 20-21 (Nov. 9, 2005));
- the cancellation of intercompany notes owed by Tronox Inc. or its subsidiaries to New Kerr-McGee or its controlled affiliates and subsidiaries (see Ex. J MSA at § 2.4(b); Ex. G Tronox Inc., Annual Report (Form 10-K) at 64 (Mar. 29, 2006); Compl. ¶¶ 106, 112);
- the provision of certain transition services and benefits (see Ex. M Employee Benefits Agreement (“EBA”), and Ex. N Transition Services Agreement; Ex. G Tronox Inc., Annual Report (Form 10-K), at 72 (Mar. 29, 2006)); and
- the transfer of \$450 million in plan assets to Tronox Inc.’s newly established trust under the Employee Benefits Agreement (see Ex. M EBA § 4.03; Ex. O Tronox Inc., Annual Report (Form 10-K), at F-38 (Mar. 16, 2007)); and
- an experienced management team (see Ex. G Tronox Inc., Annual Report (Form 10-K), at 3, 108-109 (Mar. 29, 2006) (identifying directors and executive officers of Tronox Inc. and their backgrounds)).

Moreover, Tronox Inc. has received additional value from Kerr-McGee. See, e.g., Compl. ¶ 114. Plaintiffs admit that certain executives with expensive compensation packages were transferred from Tronox Inc. to New Kerr-McGee, making them New Kerr-McGee’s financial responsibility. Id. In addition, Tronox Inc. has been reimbursed by (or may be entitled to recover from) various third parties (including insurers, the federal government and other parties who may have owned or operated various sites) for the amounts allegedly spent to satisfy environmental remediation obligations, such that, according to Tronox Inc.’s public disclosures, its total dollar expenditures on these obligations -- the very obligations that the Complaint purports drove Tronox Inc. into bankruptcy -- appears to be at most approximately \$63.2 million from January 1, 2006 through September 30, 2008. See Ex. P Tronox Inc., Current Report

(Form 8-K), at Exh. 99.2 (9) (July 30, 2008); Ex. Q Tronox Inc., Quarterly Report (Form 10-Q), at 3, 20 (Nov. 7, 2008). This number is arrived at because Tronox Inc.’s SEC filings show that environmental remediation expenditures for that period were approximately \$137.6 million, and that reimbursements from third parties were approximately \$74.4 million. See Ex. P Tronox Inc., Current Report (Form 8-K), at Exh. 99.2 (9) (July 30, 2008); Ex. Q Tronox Inc., Quarterly Report (Form 10-Q), at 20 (Nov. 7, 2008). Public filings also show Tronox Inc. had itself projected higher gross environmental expenses than ultimately were incurred: \$95.4 million during 2007 and \$78 million during 2006. See Ex. O Tronox Inc., Annual Report (Form 10-K), at 11 (Mar. 16, 2007); Ex. G Tronox Inc., Annual Report (Form 10-K), at 16 (Mar. 29, 2006).

E. **Tronox Inc. Was A Successful Independent Company**

Notwithstanding Plaintiffs’ allegation that New Kerr-McGee knew Tronox Inc. was “destined to fail,” Tronox Inc.’s SEC filings demonstrate that it reported to the investing public “solid results” and billions of dollars in sales, and that it declared and paid dividends to its shareholders for more than two years following the IPO. See Compl. ¶ 12; Ex. R Tronox Inc. Current Report (Form 8-K/A), at Ex. 99.1 (May 5, 2006) (indicating that Tronox Inc. “generated solid results in the first quarter of 2006”). Specifically, SEC filings show that Tronox Inc. listed net sales of \$1.375 billion, \$1.422 billion, and \$1.426 billion in 2005, 2006 and 2007, respectively, and distributed dividends during each and every quarter of 2006 and 2007, totaling \$14.5 million. See Ex. B Tronox Inc., Annual Report (Form 10-K), at 27, 39-40 (Mar. 14, 2008). And, as noted above, Tronox Inc. also successfully maintained low net-cash environmental expenditures related to environmental remediation costs.

Also, prior to and following the IPO, Tronox Inc. was profitable, reporting that for the first nine months of 2005 (i.e., the three fiscal quarters preceding the initial public offering), they had net sales of \$1.0 billion and net income of \$12.6 million. See Ex. S Tronox Inc., Quarterly

Report (Form 10-Q), at 1 (May 15, 2006); Ex. T Tronox Inc., Quarterly Report (Form 10-Q), at 1 (Nov. 14, 2006). Furthermore, in the first quarter of 2006, Tronox Inc.'s net income was \$20.6 million, an increase of \$16.6 million over the net income earned during the same period in 2005. See Ex. S Tronox Inc., Quarterly Report (Form 10-Q), at 1 (May 15, 2006). In addition, in late 2006, Tronox Inc. was able to use excess cash flow to make an optional prepayment of \$8 million on its term loan. See Ex. O Tronox Inc., Annual Report (Form 10-K), at 41 and F-25 (March 16, 2007). Tronox Inc.'s business was clearly generating adequate cash flow to service Tronox Inc.'s debts and satisfy its cash needs, because in addition to making optional prepayments on its term loan, Tronox Inc. did not need to draw down any amounts available to it under its \$250 million revolving credit facility until early 2008. See Ex. B Tronox Inc., Annual Report (Form 10-K), at 18, 40 (Mar. 14, 2008) (indicating borrowings outstanding under the revolving credit facility as of Feb. 29, 2008, but no borrowings outstanding as of Dec. 31, 2007).

With respect to environmental liabilities, the public disclosures Tronox Inc. made after it had been an established independent public company were substantially the same as the disclosures made in the November 2005 S-1 registration agreement allegedly controlled by New Kerr-McGee. See Compl. ¶ 99; Ex. F Tronox Inc., 424B4 Prospectus (Nov. 22, 2005) at 63, 66-67 (disclosing notice of potential responsibility with respect to twelve Superfund sites and ten sites under Consent Orders); Ex. B Tronox Inc., Annual Report (Form 10-K), at 44, 46-47 (Mar. 14, 2008) (same).

F. **Allegations Relating To Anadarko**

Plaintiffs' allegations related to Anadarko demonstrate only that Anadarko engaged in the legitimate acquisition of New Kerr-McGee after the separation. Compl. ¶¶ 115-120. The only factual allegation in the Complaint of any purported wrongdoing by Anadarko is that the CEOs of Anadarko and New Kerr-McGee discussed Anadarko's potential acquisition of New Kerr-

McGee a “month before the [s]pin-off,” and that Anadarko offered to acquire New Kerr-McGee in June 2006. Compl. ¶¶ 115, 154-55. The Plaintiffs, however, make no allegations, other than those on “information and belief,” that Anadarko’s actions, even if true, constituted anything other than an ordinary and completely lawful corporate acquisition. Compl. ¶¶ 115-120, 154-158, 162-163.

G. The Global Economic Crisis Led To Numerous Bankruptcy Filings, Including Tronox Inc.

In 2008, there was a profound, worldwide financial crisis. Stock markets crashed, companies liquidated, and the financial and credit markets entered a period of nearly unprecedented contraction, high volatility and uncertainty.⁸ In particular, the national decline in the housing and automobile markets affected industries and customers that represent the primary end-use markets of TiO₂ and products incorporating TiO₂. See Ex. B Tronox Inc., Annual Report (Form 10-K), at 7-9 (Mar. 14, 2008). Within weeks of Tronox Inc.’s chapter 11 filings, other companies in the chemical sector also filed for bankruptcy, including Chemtura.⁹ By January 12, 2009, the market prices for the stocks for other top TiO₂ producers had dropped between 53% and 87%.¹⁰ Plaintiffs concede in the Complaint and in their public filings that they

⁸ See Ex. U (Timeline: Crisis on Wall Street, The Washington Post, [available at http://www.washingtonpost.com/wp-srv/business/economy-watch/timeline/index.html](http://www.washingtonpost.com/wp-srv/business/economy-watch/timeline/index.html)). The Court may consider, at the 12(b)(6) stage, matters subject to judicial notice, which includes facts that are either “generally known within the territorial jurisdiction of the trial court” or “capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” See Fed. R. Ev. 201(b); Francis v. Zavadill, 2006 WL 3103324, at *3 (S.D.N.Y. Oct. 30, 2006); see also Wachovia Corp. v. Citigroup, Inc., 2009 WL 2025328, at *1, n.2, 3 (S.D.N.Y. Jul. 13, 2009) (taking judicial notice of fact that “[b]y the end of September 2008, the nation had witnessed the collapse and bailout of an unprecedented number” of financial institutions).

⁹ See In re Chemtura, Case No. 09-11233 (Bankr. S.D.N.Y. Mar. 18, 2009) (chapter eleven petition filed). The Court may take judicial notice of a document filed in another court “to establish the fact of such litigation and related filings.” Int’l Star Class Yacht Racing Ass’n v. Tommy Hilfiger U.S.A., Inc., 146 F.3d 66, 70 (2d Cir. 1998) (citation omitted).

¹⁰ The number one global TiO₂ producer was DuPont, whose stock prices fell from \$52.62 a share on July 20, 2007 to \$24.93 a share on January 12, 2009. See Ex. B Tronox Inc., Annual Report (Form 10-K) at 9, (Mar. 14, 2008); Ex. V DuPont July 20, 2007 and Jan. 12, 2009 Prices, Bloomberg Prof’l Servs. & Data Prods.

were experiencing a “downturn” in demand in their sector. Compl. ¶ 121; see also Ex. B Tronox Inc., Annual Report (Form 10-K), at 9 (Mar. 14, 2008) (noting the “slowdown in the housing sector” and the softening U.S. TiO₂ market and its negative impact on “Tronox’s” performance). As the Complaint recognizes, “decreased demand” for Plaintiffs’ products due to exceptional global events including “recession,” will always lead to lower profits. Compl. ¶ 53.

Indeed, Tronox Inc. warned in its registration statement that “our performance, particularly of our pigment segment, is cyclical and tied closely to general economic conditions....For example, from 2000 through 2003, our business was affected when the titanium dioxide industry experienced a period of unusually weak business conditions as a result of a variety of factors, including the global economic recession.... Based on these factors, global and regional economic downturns.... may have an adverse effect on our financial condition and results of operations.” Ex. F Tronox Inc. 424B4 Prospectus (Nov. 22, 2005), at 20. But the challenges Tronox Inc. faced in 2008 proved to be unprecedented. In addition to a collapse in demand for its products, Tronox Inc. faced increased production costs, due to higher costs associated with raw materials, higher process chemicals and energy costs, and temporary production shutdowns. See Ex. B Tronox Inc., Annual Report (Form 10-K), at 35-36 (Mar. 14, 2008). Put simply, Tronox Inc.’s failure resulted from an increase in production costs, a loss of demand for its products, and dysfunctional credit and financial markets that ordinarily would

(Bloomberg Finance L.P.) (hereinafter “Bloomberg”). The fourth largest TiO₂ producer and marketer, Hunstman Corp., saw its shares fall from \$26.27 to \$3.24 a share during that period. See Ex. B Tronox Inc., Annual Report (Form 10-K) at 9 (Mar. 14, 2008); Ex. W Huntsman July 20, 2007 and Jan. 12, 2009 Prices, Bloomberg. The Dow Chemical Co.’s shares fell from \$47.22 to \$15.76 during the same period. See Ex. X Dow July 20, 2007 and Jan. 12, 2009 Prices, Bloomberg. The court may take judicial notice of “publicly quoted stock prices” on a motion to dismiss. In re Bausch & Lomb Inc. ERISA Litig., 2008 WL 5234281, at *1 n.1 (W.D.N.Y. Dec. 12, 2008); see also Virtual Countries, Inc. v. Republic of South Africa, 148 F. Supp. 2d 256, 267 n.12 (S.D.N.Y. 2001) (taking judicial notice of “the financial hardship experienced by Internet-based businesses operating in the electronic commerce industry . . . following the decline of the technology-laden NASDAQ stock market in mid-2000.”).

have been available to help a cyclical business experiencing a down cycle survive until their industry recovered. The Complaint ignores this global economic reality in its recital of facts leading up to Tronox Inc.'s chapter 11 bankruptcy filing on January 12, 2009. Compl. ¶¶ 10, 121-122. Plaintiffs filed this Adversary Proceeding on May 12, 2009.

STANDARD OF REVIEW

A complaint fails to satisfy Federal Rule 8(a) (“Rule 8(a)”) and warrants dismissal under Federal Rule 12(b)(6) when it does not contain sufficient factual allegations to “state a claim to relief that is plausible on its face.” Iqbal, 129 S. Ct. at 1949 (quoting Twombly, 550 U.S. at 570); Johnson v. Rowley, 2009 WL 1619401, at *2 (2d Cir. June 11, 2009). To be plausible, a claim must go beyond pleading facts that show a “mere possibility of misconduct,” to pleading facts sufficient to permit “the reasonable inference that the defendant is liable for the misconduct alleged.” Iqbal, 129 S.Ct. at 1949-50; see also Freidman v. Gen. Motors Corp., 2009 WL 1515031, at *1 (S.D.N.Y. May 29, 2009). Conclusions, unsupported assertions, and labels must be ignored when evaluating the adequacy of the pleading. Iqbal, 129 S.Ct. at 1949. Courts will not accept pleadings that offer mere “labels and conclusions” because “a formulaic recitation of the elements of a cause of action will not do.” Twombly, 550 U.S. at 555. Allegations that are “no more than conclusions, are not entitled to the assumption of truth.” Iqbal, 129 S. Ct. at 1950. Allegations of misconduct do not “plausibly establish” a plaintiff’s claims if there are “more likely explanations.” Id. at 1951.

The heightened pleading requirement imposed by Federal Rule 9(b) (“Rule 9(b)”) further requires that “[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake.” Fed. R. Civ. P. 9(b). Rule 9(b) applies to all claims relying on a purported fraud, “regardless of the cause of action in which they appear,”

because Rule 9(b) is needed “to provide [Defendants] with fair notice of a plaintiff’s claim, to safeguard [Defendants’] reputation from improvident charges of wrongdoing, and to protect a defendant against the institution of a strike suit.” Rombach v. Chang, 355 F.3d 164, 171 (2d Cir. 2004). Accordingly, the complaint must specify “particulars” of the alleged fraud, including, for example, the time, place, individuals involved and the specific conduct at issue, as well as facts giving rise to a “strong inference of fraudulent intent.” United Feature Syndicate, Inc. v. Miller Features Syndicate, Inc., 216 F. Supp. 2d 198, 221 (S.D.N.Y. 2002).

Because allegations of fraud must be pled with particularity, fraud pleadings cannot be based upon information and belief, where the fraud allegations are based on facts that are not peculiarly within the defendant’s knowledge. Segal v. Gordon, 467 F.2d 602, 608 (2d Cir. 1972). Even where facts pled on information and belief are peculiarly within the opposing party’s knowledge, they must be accompanied by a statement of the facts upon which the belief is based. Id.

ARGUMENT

I. THE ENTIRE COMPLAINT MUST BE DISMISSED UNDER IQBAL BECAUSE THERE IS A MORE LIKELY EXPLANATION FOR TRONOX INC.’S BANKRUPTCY

In Iqbal, 129 S.Ct. 1937 (2009), the Supreme Court ruled that the complaint failed to state a viable claim, and held that under the pleading principles announced in Twombly, a complaint’s theory of wrongful conduct is not “plausible” if there are “more likely explanations.” Id. at 1951. In Iqbal, the plaintiff, a Muslim Pakistani, sued several high-level government officials alleging that following September 11, 2001, he was unconstitutionally arrested, classified as a “high interest” detainee, and held under restrictive and harsh conditions, and that the senior government officials “knew of, condoned, and willfully and maliciously agreed” to subject him to those harsh conditions solely on account of his “religion, race, and/or national

origin.” Id. at 1943-44.

The Supreme Court held as an initial matter that certain conclusory allegations were “not entitled to the assumption of truth.” Id. at 1950. The Court then found that as to other well-pleaded allegations that could be taken as true, the plaintiff’s allegations were consistent with his theory that he was designated as “high interest” because of his race, religion, or national origin, but “given more likely explanations, [the allegations did] not plausibly establish this purpose.” Id. at 1951. As the Court explained, the September 11 attacks were perpetrated by Muslim hijackers. It therefore should come as “no surprise” that a “legitimate policy” to detain suspects linked to the attacks would produce a disparate impact on Muslims. Because of that “obvious alternative explanation” for his arrest and detention, plaintiff’s allegations of purposeful discrimination were “not a plausible conclusion,” and did not warrant relief. Id. at 1951-52.

The core of Plaintiffs’ claim is that New Kerr-McGee “devised a...fraudulent scheme” to set Tronox Inc. “on a path to an inevitable bankruptcy.” Compl. ¶¶ 1, 4. But the inferences Plaintiffs ask the Court to draw here, for each stage of the so-called “scheme” and each transfer alleged by Plaintiffs, are not “plausible” conclusions. They are not plausible because there is an “obvious” and “more likely” explanation for Tronox Inc.’s alleged injury than that it was caused by Defendants’ misconduct, and because in light of that “more likely” explanation, key allegations on which the claims are predicated are inherently implausible. The “obvious alternative explanation” is that New Kerr-McGee engaged in a common business transaction: a corporate restructuring and “spin-off” of one of its lines of business.¹¹ Then, after three years of

¹¹ Indeed, in early 2005, as New Kerr-McGee’s management was separately considering a sale or “spin-off” of the Chemical Business as one of a series of transactions to maximize shareholder value, well-known financier Carl Icahn also attempted to pressure the company to sell the Chemical Business and a portion of its oil reserves. Ex. Y Kerr-McGee Corp., Statement of Acquisition of Beneficial Ownership (Form 13D), at 9 (Mar. 3, 2005).

success as an independent, publicly-traded company with billions in sales, Tronox Inc. faced rising manufacturing costs, followed by a massive and unprecedented decline in the global economy, and the elimination of available financing through the traditional credit markets. These events combined to negatively impact both the specialty chemicals industry generally, as well as the primary customers and end-users of Tronox Inc.'s products, and devastated Tronox Inc.'s business, causing it to file for bankruptcy protection.¹²

The greater plausibility of this explanation is well supported. Plaintiffs' theory would require the Court to credit the far-fetched allegation that Defendants envisioned and embarked upon a "fraudulent scheme" -- first by an internal corporate restructuring beginning with "Project Focus" in 2001 (eight years before Tronox Inc.'s bankruptcy filing), and then by completing an IPO in 2005 (more than three years before the bankruptcy) -- knowing and purposefully intending, since 2001, that it would doom the hypothetical future Tronox Inc. Compl. ¶¶ 5-10, 43; see Fletcher v. Philip Morris USA Inc., 2009 WL 2067807, at *10 (E.D.Va. Jul. 14, 2009) (dismissing, under Iqbal, employee's retaliation claims as "in the realm of possibility, not plausibility," where termination did not take place until a year after filing of EEOC charge).

Indeed, Plaintiffs' allegations describing how Defendants allegedly carried out their "scheme" are not only completely implausible, but in many instances are absurd on their face. The pillars of Plaintiffs' conspiracy theory are that: (1) as far back as 2001, Kerr-McGee plotted to evade its responsibility for "Legacy Liabilities" which the Complaint never actually identifies,

¹² In fact, Plaintiffs' own counsel, who also represents the debtors in the Chemtura cases, has detailed the financial decline of the chemical industry in public filings in those cases, noting that other chemical companies, including LyondellBasell Industries AF SC, Tronox Inc., and Foamex International Inc., have filed for bankruptcy in early 2009, and that ratings agencies have reported that the North American chemical companies that they cover have been overwhelmingly rated as "high-yield" or "junk." See Ex. Z In re Chemtura, Case No. 09-11233 (Bankr. S.D.N.Y. Mar. 18, 2009) (Declaration of Stephen Forsyth, Executive Vice President and Chief Financial Officer of Chemtura Corporation, In Support of First Day Pleadings, filed Mar. 18, 2009, at ¶ 56).

by transferring them to the amorphously defined “Chemical Business,” in an internal corporate restructuring that the Complaint never establishes was in any way inappropriate; while (2) simultaneously plotting to either sell the “Chemical Business” to an unsuspecting buyer or spin it off. The Complaint next alleges that to accomplish this scheme, New Kerr-McGee (3) *increased* the size of the “Chemical Business”; (4) decided to spin off the “Chemical Business” in 2005 when the industry was doing well and could command a good price, while allegedly concealing those unidentified liabilities (notwithstanding that the IPO was conducted by some of the world’s most prominent law firms and investment banks and was subject to SEC laws and regulations); and (5) more than three years after Tronox Inc. had become independent and during which it performed well, the “Legacy Liabilities” finally came home to roost, causing Tronox Inc. to fail.

As an example of the inherent implausibility of the above theories for Tronox Inc.’s failure, Paragraphs 37-41 of the Complaint, pled on “information and belief,” make the nonsensical allegation that Old Kerr-McGee purchased more TiO₂ plants in 2000 as part of its grand “scheme,” and purposely plunged itself more deeply into a business with the liabilities it allegedly wanted to shed -- all while substantially overpaying for the privilege. Besides resting on mere speculation, the far-fetched inference that Old Kerr-McGee bought more TiO₂ plants in 2000 in order to “foist” more liabilities on the hypothetical future Tronox Inc. simply demonstrates the sheer implausibility of the Complaint’s so-called “scheme.”

As another example, Paragraphs 52-53 and 55 of the Complaint conclude that New Kerr-McGee’s decision to “delay” attempting a sale or “spin-off” of the “Chemical Business” until it was at the top of the market was part of its overall “scheme.” Compared to the rational explanation that New Kerr-McGee wanted to sell or spin off the business at the top of the market for a legitimate business reason, i.e., to obtain the best price possible in any deal, Plaintiffs’

allegations that the “delay” constituted misconduct are wholly implausible.

Similarly, the conclusory allegations in Paragraph 80 of the Complaint, alleging that New Kerr-McGee decided to do a “spin-off” so it could “avoid” disclosing the “Legacy Liabilities” and making representations, warranties, and indemnities, is absurd on its face. In making those allegations, Plaintiffs ask the Court to believe that New Kerr-McGee was afraid it could not dupe potential purchasers, so instead it implemented a process that would require it to dupe each of the sophisticated lenders, bondholders, and other investors who were to buy into the deal, along with the professional legal, banking, and accounting firms brought in as advisors.

Moreover, that Tronox Inc. was initially and for more than three years a solvent, independent company, renders implausible Plaintiffs’ conclusion that Defendants set Plaintiffs up to fail from their inception. The fact that Tronox Inc. successfully maintained low net-cash environmental expenditures further belies the plausibility of a conclusion that it was the “Legacy Liabilities” that led to its bankruptcy. See supra pp. 10-11. There are no allegations in the Complaint sufficient to exclude the most compelling inference that can be drawn from Plaintiffs’ more recent poor financial performance, namely that Plaintiffs’ failure was due to rising costs, the global economic crisis, and credit markets in turmoil -- not some nefarious and illegal scheme hatched in the guise of an ordinary corporate restructuring and spin-off. See supra pp. 13-15; see Jones v. Town of Milo, 2009 WL 1605409, at *5, *13 (D. Me. Jun. 5, 2009) (applying Iqbal and dismissing claim that defendant town board conspired to violate plaintiff’s constitutional rights by suspending her, where the pleadings allegedly showing the conspiracy in fact gave rise to the more plausible inference of lawful board activity).

Rising input costs, and the unprecedented global financial crisis that began in 2007 -- with its concomitant effect of lowering demand in Plaintiffs’ key markets, and eliminating

functional credit or equity markets to tap for “emergency” funds -- are the obvious alternative explanation for Tronox Inc.’s financial difficulties which ultimately caused it to file for bankruptcy. The Complaint does not contain facts plausibly showing that Plaintiffs’ injuries were caused by Defendants’ alleged “scheme,” as opposed to the market crash and the specific “downturn” in Plaintiffs’ sector, combined with its rising costs and the inability to obtain financing due to the credit market dysfunction. See Compl. ¶ 121 (failing to identify any specific “Legacy Liability” and related expenditure which supposedly caused Plaintiffs to fail); see also Burch v. Milberg Factors, Inc., 2009 WL 1529861, at *2 (D. Del. May 31, 2009) (holding that under Twombly and Iqbal standard, magistrate judge did not err in dismissing complaint where Plaintiff had ““at best...alleged a situation in which it is just as likely that the Defendants were independently responding to the reality of...deteriorating economic condition[s],”” as they were acting unlawfully) (citation omitted). Given the more compelling and obvious alternative explanation for Plaintiffs’ financial performance, Plaintiffs have failed to show more than a mere possibility of misconduct by Defendants, and thus have not shown they are “entitled to relief.” See Iqbal, 129 S.Ct. at 1950.

II. PLAINTIFFS’ CLAIM FOR AVOIDANCE OF ACTUAL FRAUDULENT TRANSFERS MUST BE DISMISSED (COUNT I)

Count One of the Complaint asserts that both Defendants are liable to all three Plaintiffs for actual fraudulent transfers in violation of 11 U.S.C. § 544(b) and the Oklahoma UFTA. Compl. ¶ 133.¹³ Actual fraudulent transfer actions are subject to the stringent pleading requirements of Federal Rule 9(b) and Bankruptcy Rule 7009(b). See Fabrikant, 394 B.R. at

¹³ Pursuant to § 544(b) of the Bankruptcy Code, a trustee may avoid “any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable state law....” See 11 U.S.C. § 544(b). Section 116 of the Oklahoma UFTA provides that a plaintiff may recover for an actual fraudulent transfer when: (1) a transfer is made or an obligation is incurred, (2) with “actual intent to hinder, delay, or defraud any creditor of the debtor....” See Okla. Stat. tit. 24, § 116.

733. As demonstrated below, the Complaint (a) fails to plead fraudulent transfers with particularity; and (b) fails to adequately allege any “actual intent to hinder, delay, or defraud.” As such, Count I must be dismissed.

A. No Actual Fraudulent Transfers Are Pled With Particularity

A complaint alleging actual fraudulent transfers must identify with particularity: (1) the transferor; (2) the transferee; (3) what was transferred; (4) the timing and frequency of each of the transfers; and (5) the consideration paid. See Fabrikant, 394 B.R. at 733-34.

In order to satisfy these requirements, Plaintiffs may not simply lump together various entities or disparate transactions, but must specifically state what was transferred by whom, to whom, and for how much. See id. at 734. In Fabrikant, the court found the alleged transferor was inadequately pled because “[t]here are two debtors in the case, but the Amended Complaint frequently lumps them together.” Id. Similarly, the court found the alleged transferee to be inadequately pled where “[t]he Fortgang Affiliates include 47 separate entities...[and] [t]he Amended Complaint lumps them together, without distinction” Id.¹⁴ Even if a complaint adequately pleads the transferor and transferee, it still must be dismissed if it does not specify what was allegedly transferred, when it was transferred, and what was paid for the transfer. See United Feature Syndicate, 216 F. Supp. 2d at 221 (even though complaint “clearly alleges” transferor and transferee, claims dismissed for failure to allege “the property that was allegedly conveyed, the timing and frequency of those allegedly fraudulent conveyances, or the consideration paid”).

¹⁴ The failure to allege the specific transferor and transferee in Fabrikant was so problematic that even in a transaction in which plaintiffs identified the exact amount transferred to the “the Fortgang Affiliates” and a date by which the various transfers had already occurred, the complaint still failed to state a claim because it “fails to identify which Fortgang Affiliates were the transferees or the dates of the transfers.” Id. at 734.

A complaint must also be dismissed if it:

- Lumps together a group of transfers. See Fabrikant, 394 B.R. at 734 (dismissing actual fraudulent transfer claim in part because plaintiff “challenged the ‘net’ transfers in the amount of \$175.3 million to the Fortgang Affiliates”);
- Aggregates the value of various transfers. See Fed. Nat’l Mortg. Assoc. v. Olympia Mortg. Corp., 2006 WL 2802092, at *9 (E.D.N.Y. Sept. 28, 2006) (dismissing claims alleging transfers, including, for example, transfer of “at least \$1,760,000” because it “aggregate[d] the transfers into lump sums”);
- Is imprecise in alleging the date of the transfers. See Alnwick v. European Micro Holdings, Inc., 281 F. Supp. 2d 629, 646 (E.D.N.Y. 2003) (dismissing fraudulent transfer claim that stated that transfer was “on or about” 2001).

The Complaint repeatedly fails to identify the necessary details of the alleged transfers as required by Rule 9(b). The Complaint is also replete with overbroad and unclear definitions that improperly lump together transactions that seem to include multiple transfers of multiple unspecified assets or obligations over what appears to be an approximately ten year period. Accordingly, it is impossible to glean information as simple as what entity transferred what asset or liability to what other entity, for how much, and on what date. It is manifestly unfair for Plaintiffs to proceed to discovery on claims to avoid transfers, when the amorphous allegations of their Complaint prevent Defendants from even knowing what it is that Plaintiffs seek to avoid.

1. *Plaintiffs’ Aggregated Definitions Of Transferors Fail To Satisfy Rule 9(b)*

Throughout the Complaint, Plaintiffs fail to allege the transferor for multiple transfers that are alleged to have been fraudulent. In their claim for relief, Plaintiffs allege that the “Tronox Entities” were the transferors. See Compl. ¶¶ 127-133. However, “Tronox Entities” is defined as “Tronox, Tronox Worldwide LLC, Tronox LLC and their affiliates and predecessors,” without any specificity as to whom these “affiliates and predecessors” are, or even how many

entities these may include. Compl. ¶ 127.¹⁵

Similarly, Plaintiffs repeatedly allege that the “Chemical Business” made transfers or assumed obligations. See Compl. ¶¶ 46-50, 66-72, 83, 87, 112. Yet, the “Chemical Business” is not a Plaintiff, nor is it clear from the Complaint that any or all of the various businesses within the “Chemical Business” are even predecessors to any Plaintiff. By describing the “Chemical Business” as “a small, cyclical chemical business, a handful of discontinued businesses, and more than 70 years of Legacy Liabilities,” Plaintiffs imprecisely define the “Chemical Business” as some unknown number of businesses or activities, which may or may not even be legal entities. Compl. ¶ 5. The Complaint simply moves from describing the group of companies comprising the “Chemical Business” to the group of companies defined as “Tronox,” but Plaintiffs have failed to plead or demonstrate with any factual allegations that the “Chemical Business” was succeeded by any or all of the multiple entities defined as “Tronox.”

2. *Plaintiffs’ Aggregated Definitions Of (i) Obligations Assumed (ii) And Property Transferred Fail To Satisfy Rule 9(b)*

Plaintiffs improperly conflate the property that was allegedly transferred with the obligations that were allegedly assumed, and also conflate the timing of these alleged transfers, many of which (to the extent they are identifiable) are separated by literally years in time, notwithstanding that they are lumped together as one amorphous group of “Transfers” in Plaintiffs’ allegations. In their claim for relief, Plaintiffs allege that the “Tronox Entities” made the “Transfers” and assumed the “Obligations.” See Compl. ¶¶ 127-133. But Plaintiffs never

¹⁵ Also, “Tronox,” the first listed term of the “Tronox Entities” is defined previously in the Complaint as “Tronox Incorporated, Tronox Worldwide LLC f/k/a Kerr-McGee Chemical Worldwide LLC, and Tronox LLC f/k/a Kerr-McGee Chemical LLC.” Compl. at pp. 1-2 Thus, it seems that in addition to Tronox Inc., “Tronox Entities” includes Plaintiffs Tronox Worldwide and Tronox LLC twice, and all the other unnamed “affiliate and predecessors.” Elsewhere in the Complaint, Plaintiffs allege that there are at least fourteen affiliates of Tronox Inc. Compl. ¶ 15. Curiously, as to Plaintiff Tronox LLC, there is no allegation anywhere in the Complaint that Tronox LLC transferred any asset or assumed any obligation.

define these terms with any level of specificity.

- “Transfers” are amorphously defined to include “valuable assets . . . , including valuable oil and gas assets and proceeds from Tronox’s secured and unsecured loans and IPO....” Compl. ¶ 127.
- “Obligations” globally includes “liabilities and debt, including the Legacy Liabilities and \$550 million in secured and unsecured loans....” *Id.*
- In turn, “Legacy Liabilities” are inadequately defined as “massive actual and contingent environmental, tort, retiree, and other liabilities during [Kerr-McGee Corp.’s] more than 70-year history.” Compl. ¶ 1.¹⁶

Throughout the Complaint, Plaintiffs focus repeatedly on the supposed transfer of the “Legacy Liabilities.” However, the Complaint fails to plead which particular liabilities of the various “Legacy Liabilities” were transferred to which particular entity or entities in the “Chemical Business,” or how any of these entities or liabilities relates to any Plaintiff.¹⁷ The Complaint further fails to identify *which* of these liabilities allegedly sent Tronox Inc. into bankruptcy, and *how* any “Legacy Liabilities” brought down the company -- especially given Tronox Inc.’s three years of doing well as an independent company before the impact of the sector-wide downturn and global recession began. *See supra* pp. 11-12.

3. *Plaintiffs’ Allegations Of Particular Transfers Are Not Pled With Particularity*

The particular transfers Plaintiffs appear to be alleging can be grouped into three categories: transfers related to Project Focus, to the Cross Indemnity, and at the time of the

¹⁶ Later in the Complaint, Plaintiffs incorporate even more into “Legacy Liabilities” by inexplicably adding to the definition “hundreds of service stations sites with environmental clean-up issues.” Compl. ¶ 47.

¹⁷ Adding to the confusion, the “Legacy Liabilities” that are included in the definition of the “Chemical Business,” are also included in the definition of the “Obligations” later transferred. *See* Compl. ¶¶ 5 (defining “Chemical Business” as “a small, cyclical chemical business, a handful of discontinued businesses, and more than 70 years of Legacy Liabilities”); 127 (defining the “Obligations” as “liabilities and debt, including the Legacy Liabilities and \$550 million in secured and unsecured loans.”).

IPO.¹⁸ However, as detailed below, no transfer is adequately pled with the particularity required by the Federal Rules. Moreover, no allegation specifically ties any alleged transfer to any well pled “badge” of fraud. See In re Verestar, Inc., 343 B.R. 444, 469 (Bankr. S.D.N.Y. 2006) (each transfer must be “adequately tie[d] . . . to one of the badges of fraud....”). The chart below lists both the allegations of each transfer purportedly pled in the Complaint and the ways in which that transfer fails to satisfy Rule 9(b) and/or the standards set forth in the governing caselaw.

Purported “Project Focus” Transfers

Allegation	Particularized Pleading Failure
“On December 31, 2002, Old Kerr-McGee’s Board ... approved by unanimous written consent numerous transactions...” Compl. ¶ 46.	<ul style="list-style-type: none"> • Improperly groups the purported transfers (“numerous transactions”) • Fails to allege: <ul style="list-style-type: none"> ○ transferor ○ transferee ○ any associated fraudulent activity
“New Kerr-McGee” caused “valuable oil and gas assets to be distributed to the Oil and Gas Business.” Compl. ¶ 47.	<ul style="list-style-type: none"> • Fails to allege: <ul style="list-style-type: none"> ○ transferor ○ what specific assets were transferred (“valuable oil and gas assets”) ○ that Plaintiffs ever had any interest in these “valuable ... assets.” ○ any associated fraudulent activity
“[A]ssets transferred out of the Chemical Business and into the Oil and Gas Business or other New Kerr-McGee entities were worth billions of dollars at the time they were transferred.” Compl. ¶ 48.	<ul style="list-style-type: none"> • Transferor, the “Chemical Business” includes some unknown number of businesses and/or entities • Fails to specifically identify transferee: “other New Kerr-McGee entities” is improperly aggregated • Fails to identify what assets were transferred • Improperly aggregates the alleged value of the “assets” transferred (“billions of dollars”) • Fails to allege any associated fraudulent activity

¹⁸ In an attempt to concoct some purported transfer within the two year limitation of Section 548 of the Bankruptcy Code, Plaintiffs also allege that certain payments with respect to obligations incurred by the time of the IPO were separate transfers. Compl. ¶147. However, for the reasons set forth, infra section III, those allegations fail to state a claim and are inadequately pled.

Allegation	Particularized Pleading Failure
“The shares of Devon Energy Corporation stock that were transferred out of the Chemical Business alone were worth more than \$200 million.” Compl. ¶ 48.	<ul style="list-style-type: none"> • Transferor, the “Chemical Business” includes some unknown number of businesses and/or entities • Fails to allege: <ul style="list-style-type: none"> ○ any transferee entity ○ date of transfer ○ any associated fraudulent activity
Various particular share movements alleged to have taken place on December 31, 2002. Compl. ¶ 49.	<ul style="list-style-type: none"> • Transferor, the “Chemical Business” includes some unknown number of businesses and/or entities • Fails to allege: <ul style="list-style-type: none"> ○ value transferred ○ any associated fraudulent activity
Additional “Project Focus” transfers were effected “throughout 2003 and 2004... until mid-2005 at the earliest.” Compl. ¶ 50	<ul style="list-style-type: none"> • Insufficient specificity as to the date • Fails to allege: <ul style="list-style-type: none"> ○ what assets were transferred ○ how many transfers took place ○ transferor or transferee ○ value transferred ○ any associated fraudulent activity

Purported “Cross Indemnity” Transfers

Allegation	Particularized Pleading Failure
In May 2005, the “Chemical Business” was “required” to “indemnify New Kerr-McGee for any losses relating to or arising out of the Legacy Liabilities” as of December 2002. Compl. ¶¶ 66-67.	<ul style="list-style-type: none"> • Transferor, the “Chemical Business” includes some unknown number of businesses and/or entities • “Legacy Liabilities” is overbroad and improperly lumped together • Fails to allege any associated fraudulent activity
The “Chemical Business irrevocably transferred, conveyed, assigned and delivered to the Oil and Gas Business ‘all properties . . . and any and all rights, benefit and privileges . . . arising out of’ New Kerr-McGee’s oil and gas exploration, production and development business.” Compl. ¶ 70.	<ul style="list-style-type: none"> • Transferor, the “Chemical Business” includes some unknown number of businesses and/or entities • Improperly aggregates the property transferred (“properties”) • Fails to allege: <ul style="list-style-type: none"> ○ what assets were transferred ○ value transferred ○ any associated fraudulent activity
“New Kerr-McGee continued to cause certain assets to be conveyed to the Oil and Gas Business . . . throughout the remainder of 2005.” Compl. ¶ 72.	<ul style="list-style-type: none"> • Improperly aggregates the property transferred (“certain assets”) • Insufficient specificity as to the date (“throughout the remainder of 2005”)

Allegation	Particularized Pleading Failure
“The assets transferred from the Chemical Business to the Oil and Gas Business were worth billions of dollars.” <u>Id.</u>	<ul style="list-style-type: none"> • Transferor, the “Chemical Business” includes some unknown number of businesses and/or entities • Improperly aggregates the value of the transfer (“billions of dollars”) • Fails to allege any associated fraudulent activity

Purported IPO Transfers

Allegation	Particularized Pleading Failure
“Pursuant to the Master Separation Agreement ..., on November 28, 2005, New Kerr-McGee caused 100 percent of its ownership interests in Kerr-McGee Chemical Worldwide LLC (which became known as Tronox Worldwide LLC) to be transferred, assigned and conveyed to Tronox Incorporated” Compl. ¶ 106. “... Tronox was required to indemnify New Kerr-McGee and other Kerr-McGee entities for the Legacy Liabilities.” <u>Id.</u>	<ul style="list-style-type: none"> • “Tronox” includes three different entities • Fails to specifically identify the transferor, as “New Kerr-McGee and other Kerr-McGee entities” include unknown number of entities • “Legacy Liabilities” is overbroad and improperly lumped together • Because Plaintiffs alleged that an indemnity was previously given by the “Chemical Business” for the “Legacy Liabilities,” Compl. ¶ 66, it is not clear what alleged obligation was being assumed by “Tronox” • Fails to allege any associated fraudulent activity
Certain liabilities were assumed by “Tronox” relating to employee benefits. The allegation references “various ... plans” and “employees.” Compl. ¶ 107.	<ul style="list-style-type: none"> • “Tronox” includes three different entities • Fails to allege: <ul style="list-style-type: none"> ○ specific liabilities assumed ○ transferor ○ consideration given ○ any associated fraudulent activity

As the above charts reflect, Plaintiffs have wholly failed to allege the preceding transfers with the requisite particularity. Consequently, Count I must be dismissed.

B. The Complaint Fails To Adequately Allege “Actual Intent” To Hinder, Delay Or Defraud

In addition, Rule 9(b) requires a complaint alleging actual fraudulent intent to plead such an allegation with specificity. See In re Sharp Int’l Corp., 403 F.3d 43, 56 (2d. Cir. 2005) (“As ‘actual intent to hinder, delay, or defraud’ constitutes fraud, it must be pled with specificity, as

required by Rule 9(b).”) (citations omitted).¹⁹ However, Plaintiffs’ claim for relief does nothing more than parrot the language of the Oklahoma UFTA, claiming that “[t]he Tronox Entities made the Transfers and incurred the Obligations with the actual intent to hinder, delay, or defraud the creditors or future creditors of the Tronox Entities.” Compl. ¶ 130. Merely copying the elements of a statute in a complaint is insufficient to satisfy federal pleading standards. See In re O.P.M. Leasing Servs., Inc., 32 B.R. 199, 204 (Bankr. S.D.N.Y. 1983); see also Iqbal, 129 S.Ct. at 1954 (“Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.”).

Under Oklahoma law (and New York federal pleading standards), Plaintiffs do not sufficiently plead the intent element of an actual fraudulent transfer unless they plead with specificity the existence of certain of the eleven “badges of fraud,” set forth in Okla. Stat. tit. 24, § 116(B).²⁰ See In re Adler, 372 B.R. 572, 581 (Bankr. E.D.N.Y. 2007) (dismissing claim of actual fraudulent conveyance because, *inter alia*, “Trustee [did] not set forth any facts to support the ‘badges of fraud’” which was required under 9(b)); In re Actrade Fin. Techs. Ltd., 337 B.R. 791, 808-10 (Bankr. S.D.N.Y. 2005) (applying 9(b) standard to badges of fraud).

¹⁹ Plaintiffs’ numerous fraud allegations based on “information and belief” cannot satisfy the Rule 9(b) pleading requirements as a matter of law. See, e.g., Compl. ¶¶ 37, 39, 41, 53-54, 65, 69, 104, 156-158; see also Segal, 467 F.2d at 608. The facts pled in these allegations either are not particularly within Defendants’ knowledge, or plead no statement of facts upon which the belief is based as required under Rule 9(b). Segal, 467 F.2d at 608. Plaintiffs have clearly failed to plead these allegations with the required specificity, despite having personal knowledge of events as the debtor-in-possession, and despite having retained restructuring professionals well in advance of the initiation of this adversary proceeding. See Tronox Inc. Case No. 09-10156, Docket No. 20 (Application for Order Authorizing Retention of Kirkland & Ellis LLP as Attorneys For the Debtors and Debtors In Possession, dated January 12, 2009).

²⁰ The badges are: “(1) the transfer or obligation was to an insider; (2) the debtor retained possession or control of the property transferred after the transfer; (3) the transfer or obligation was disclosed or concealed; (4) before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit; (5) the transfer was of substantially all the debtor's assets; (6) the debtor absconded; (7) the debtor removed or concealed assets; (8) the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred; (9) the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred; (10) the transfer occurred shortly before or shortly after a substantial debt was incurred; and, (11) the debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.” Okla. Stat. tit. 24, § 116(B).

However, nowhere in the Complaint do Plaintiffs state which badges of fraud, if any, they rely upon to support their claims. On this basis alone, the Complaint is not adequately pled and should be dismissed. See In re Norvergence, 405 B.R. 709, 733 (Bankr. D.N.J. 2009) (where “[o]n its face, the Complaint is bereft of specific badges of fraud pleading,” court ordered trustee to “to amend the Complaint to incorporate and plead the badges of fraud”); see also Actrade, 337 B.R. at 809-10 (dismissing actual fraudulent transfer claim where “[t]he Complaint contains few if any ‘badges of fraud’ in its various allegations”). Instead of stating with specificity which badges of fraud Plaintiffs rely on and specifically tying those purported badges to particular transfers -- as it must -- the Complaint presents a collection of conclusory statements about New Kerr-McGee’s supposed nefarious behavior which, even in the light most favorable to Plaintiffs, is not sufficient to sustain any claim for actual fraudulent transfer.²¹

To a large extent, the pleading of the intent element in the Complaint revolves around allegations that New Kerr-McGee “concealed” certain facts from Plaintiffs. See, e.g., Compl. ¶¶ 11, 80, 95-104. Yet the two main allegations regarding concealment are inadequately pled or contradicted by public filings showing disclosure of relevant information. See In re Fedders, 405 B.R. 527, 545 (Bankr. D. Del. 2009) (plaintiffs did not adequately plead badge of fraud of concealment where the alleged transactions were disclosed in public filings).

First, Plaintiffs allege that New Kerr-McGee concealed the true extent of the “Legacy Liabilities.” Compl. ¶¶ 11(2); 98. However, Plaintiffs fail to allege that any of the expenditures allegedly made on environmental matters relate to any of the supposedly “concealed” sites. Nor

²¹ The Complaint is replete with conclusory allegations of fraudulent intent, all of which fall far short of meeting Rule 9(b)’s requirement that fraudulent intent be pled with specificity. See, e.g., Compl. ¶¶ 12 (“... Tronox was destined to fail . . . [and] New Kerr-McGee knew it.”); 46 (“Project Focus . . . [was] simply a means to strip the oil and gas assets from Old Kerr-McGee....”); 104 (“On information and belief, New Kerr-McGee could not have subscribed the IPO if it had disclosed the true nature and extent of the Legacy Liabilities. So New Kerr-McGee simply did not disclose them.”).

do Plaintiffs allege that they are or will be held liable for any clean-up on these supposedly “concealed” sites. Moreover, the registration statement filed in connection with the IPO plainly discloses that “[i]n the past, Tronox Worldwide LLC, its subsidiaries and their predecessors engaged in, and as a result have liabilities associated with, other businesses, including businesses involving the treatment of forest products, the production of ammonium perchlorate, the refining and marketing of petroleum products, offshore contract drilling, coal mining and the mining, milling and processing of nuclear materials” and that Tronox Inc. as a result of its subsidiaries’ historic operations has “significant environmental remediation obligations” and that it had allocated roughly \$240 million in environmental reserves as of September 30, 2005. Ex. F Tronox Inc., 424B4 Prospectus, (Nov. 22, 2005) at 1, 16. Further, Tronox Inc.’s potential liability at Manville, New Jersey is specifically disclosed. See id. at 68. Tronox Inc.’s prospectus for the IPO further states that, for a variety of reasons, its remediation costs may be higher than anticipated. See id. at 17 (“The actual costs of environmental remediation and restoration could exceed estimates.”).

Public disclosures also directly contradict Plaintiffs’ allegation that New Kerr-McGee “failed to disclose numerous additional wood treatment sites where a Kerr-McGee entity potentially may be responsible...” as well as certain “agricultural chemical sites,” “chemical manufacturing sites,” “former fertilizer manufacturing sites,” and “several others.” Compl. ¶¶ 96, 97.²² In fact, New Kerr-McGee specifically disclosed in its public filings potential liability at former wood-treating sites, and indicated that “[i]n addition to the sites described above, the company is responsible for environmental costs related to *certain other sites*. These sites relate

²² Moreover, Tronox Inc.’s allegation in Paragraph 97 of the Complaint that it “only recently discovered these [260 undisclosed agricultural sites, two undisclosed former fertilizer manufacturing sites, and several other undisclosed sites] in preparation for this litigation,” demonstrates that they were not making any expenditures on environmental liabilities for these sites since 2005, or they would have “discovered” the sites sooner.

primarily to wood-treating, chemical production, landfills, mining and oil and gas production and refining distribution and marketing.” Ex. AA Kerr-McGee, Quarterly Report (Form 10-Q), at 18 (May 10, 2005) (emphasis added).

Second, Plaintiffs allege New Kerr-McGee “rushed to complete the Spin-Off near the top of the chemical sector business cycle” in an effort to defraud Tronox Inc.’s future creditors. Compl. ¶ 11(1). However, Tronox Inc.’s registration statement specifically discloses both that (a) “[h]istorically, regional and world events that negatively affect discretionary spending... have adversely affected demand for the finished products that contain titanium dioxide and from which we derive substantially all of our revenue [and] are likely to contribute to a general reluctance by the public to purchase ‘quality of life’ products, which could cause a decrease in demand for our chemicals and, as a result, may have an adverse effect on our results of operations and financial condition,” and (b) “the demand for titanium dioxide during a given year is subject to seasonal fluctuations” and that Tronox “may be adversely affected by existing or future cyclical changes.” Ex. F Tronox Inc. 424B4 Prospectus (Nov. 22, 2005), at 20.

* * *

Plaintiffs have taken a scattershot approach to pleading actual fraudulent transfers, hoping that smidgens of detail about particular corporate transactions, combined with convoluted and largely inscrutable defined terms and mixed with conclusory rhetoric about actual fraudulent intent, will somehow sustain their claim. However, given Plaintiffs’ total failure to adequately plead either element of their cause of action for actual fraudulent transfer -- any avoidable transfer or the requisite fraudulent intent -- Count I should be dismissed in its entirety.

III. THE CONSTRUCTIVE FRAUDULENT TRANSFER CLAIMS MUST BE DISMISSED (COUNTS II AND III)

The Complaint’s two constructive fraudulent transfer causes of action rely on the same conclusory, non-specific allegations that purport to establish Plaintiffs’ defective actual

fraudulent transfer claim. Count Two is based on sections 116 and 117 of the Oklahoma UFTA, whereas Count Three is based on section 548 of the Bankruptcy Code.²³ Compl. ¶¶ 144, 152.

Under both statutes, a transfer is constructively fraudulent only if Plaintiffs can establish that:

- (1) the debtor transferred an interest in property;
- (2) the debtor received less than a reasonably equivalent value in exchange for such transfer, and
- (3) the debtor was (a) insolvent at the time of the transfer or became insolvent as a result of the transfer, (b) was engaged in business or was about to engage in business for which the debtor's remaining property was an unreasonably small capital, or (c) intended to incur or believed that it would incur debts beyond its ability to pay as they matured.

See Okla. Stat. tit. 24, §§ 116, 117; 11 U.S.C. § 548(a)(1)(B).

To properly plead a constructive fraudulent transfer claim, courts have consistently required specific allegations identifying the property transferred, the dates of the transfers, and amounts paid by debtors. See, e.g., In re Motorwerks, Inc., 371 B.R. 281, 293-94 (Bankr. S.D. Ohio 2007); In re Global Link Telecom Corp., 327 B.R. 711, 718 (Bankr. D. Del. 2005). Several courts go further and impose the same heightened pleading standard found under Rule 9(b). See, e.g., In re Oakwood Homes Corp., 325 B.R. 696, 698 (Bankr. D. Del. 2005) (holding that Rule 9(b) applies to constructive fraudulent transfer claims).

Even under the pleading standard of Rule 8(a), Plaintiffs have not sufficiently pled an action for constructive fraudulent transfer. For example, in In re Ticketplanet.com, 313 B.R. 46, 67-68 (Bankr. S.D.N.Y. 2004), the complaint included specific allegations that the debtor had made payments in particular dollar amounts to specific transferee entities, made clear exactly which transfers were sought to be avoided, and referenced documents that specifically showed that the debtor was insolvent. In light of this specificity, this Court found that the Trustee had

²³ The primary difference between the two statutory schemes is the statute of limitations. The Oklahoma UFTA has a four year statute of limitations. Section 548 of the Bankruptcy Code only allows avoidance of constructive fraudulent transfers that occurred within the two years prior to the petition date.

provided the Defendants “with sufficient notice to prepare an answer, the opportunity to frame discovery and defend against the charges.” *Id.* at 68. Unlike the complaint in [Ticketplanet.com](#), Plaintiffs have not alleged underlying facts sufficient to support their boilerplate, conclusory allegations, so that even the Rule 8(a) standard is not met. *Cf. Twombly*, 550 U.S. at 555 (“[A] plaintiff’s obligation to provide the ‘grounds’ of his ‘entitlement to relief’ requires more than labels and conclusions, and [that] a formulaic recitation of the elements of a cause of action will not do”); *see also Iqbal*, 129 S.Ct. at 1950 (“Rule 8 ... does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions.”).

A. **The Complaint Fails To Adequately Allege Qualifying Transfers**

Plaintiffs fail to state a constructive fraudulent transfer claim in either cause of action, for several of the same reasons set forth above in section II, regardless of what pleading standard applies. Plaintiffs’ amorphous and inadequate allegations fail to support any constructive fraudulent transfer claim because they do not state even the most basic information about the purported transfer, including the parties to the transfer, what was transferred, when it was transferred and for how much it was transferred. *See Motorwerks*, 371 B.R. at 293-94 (holding that fraudulent transfer claim that failed to identify transfers by date or amount did not meet the “minimum information required by [Federal] Rule 8[(a)]”). At a minimum, the complaint must “reasonably identify the types of transfers sought to be avoided.” *Id.* at 293.²⁴ Moreover, even where a plaintiff has “pled facts to support its contentions in part, it must do so in whole” or dismissal is “mandated.” [Global Link](#), 327 B.R. at 718 (holding complaint failed to meet its burden to allege § 548(a)(1)(B) claim where the only facts offered were two lists of transfers

²⁴ *See also In re Lexington Healthcare Group, Inc.*, 339 B.R. 570, 575 (Bankr. D. Del. 2006) (constructive fraudulent transfer allegations were insufficient even under Rule 8(a) notice pleading standard where they did not provide details as to the alleged transfers, including identifying specific amounts paid by debtors).

made, with no information on the value of what was received in exchange); see also J & J Sports Prods., Inc. v. Torres, 2009 WL 1774268, at *3 (M.D. Fla. Jun. 22, 2009) (dismissing claims where ambiguous pleadings admitted of several possible scenarios under which the defendant would not be liable) (citing Iqbal, 129 at 1950-51 (plaintiff’s claim was not plausible where “more likely explanations” for defendant’s alleged conduct involve lawful behavior)). Plaintiffs’ inadequate pleading fails to provide Defendants with sufficient notice of the transfers Plaintiffs seek to avoid. Rather, Defendants will be prejudiced by having to guess which purported transfers allegedly were made in exchange for less than reasonably equivalent value. Therefore, Plaintiffs’ defective constructive fraudulent transfer claims must be dismissed.

While Plaintiffs window-dress Count Three with four broad categories of allegedly avoidable transfers, a cursory review of the Complaint immediately dispels any notion that the transfers have been adequately pled. Compl. ¶ 147. The first category relates to the “Legacy Liabilities” and the last three categories concern employee benefit payments. Id. The chart below details the pleading failures associated with each of these purported constructive fraudulent transfer allegations.

Purported “Section 548” Transfers

Allegation	Pleading Failure
<p>“Tronox” spent “more than \$118 million” to satisfy residual Legacy Liability obligations since the [s]pin-off,” and did not receive “reasonably equivalent value” in exchange for “[a]ll payments related to the Legacy Liabilities, in an amount to be determined at trial,” within two years of its bankruptcy filing. Compl.¶¶ 112, 147.</p>	<ul style="list-style-type: none"> • “Tronox” includes three different entities • “Legacy Liabilities” is overbroad and improperly lumped together • Improperly aggregates the property transferred (“all payments”) • Improperly aggregates the value (“more than \$118 million”) • Fails to allege dates of any payments
<p>Under the 2005 Employee Benefits Agreement “Tronox” assumed certain liabilities for “various” employee benefit plans, and did not receive “reasonably equivalent value” for benefits payments “in excess of the payments</p>	<ul style="list-style-type: none"> • “Tronox” includes three different entities • Fails to allege: <ul style="list-style-type: none"> ○ specific liabilities assumed ○ transferor ○ dates of any payments

Allegation	Pleading Failure
and obligations that would have accrued” absent the EBA “in an amount to be determined at trial,” within two years of its bankruptcy filing. Compl. ¶¶ 107, 147.	<ul style="list-style-type: none"> ○ amount expended on any payments ○ amount expended “in excess” of what would otherwise have “accrued” ○ consideration for assuming this liability.

Furthermore, the Complaint contains no plausible allegation that any transfer was made “within two years of the petition date,” which was January 12, 2009. Compl. ¶ 10; 11 U.S.C. § 548(a)(1). The payments or obligations referenced in Paragraph 147 of the Complaint are not “divisible transfers of the Debtor’s interest in property, separate from the Debtor’s execution” of either the EBA, dated November 28, 2005, the MSA, dated November 28, 2005, or the Cross Indemnity, dated December 31, 2002 and allegedly executed in May 2005 -- each well over two years prior to the bankruptcy filing. See In re Le Café Crème, Ltd., 244 B.R. 221, 234, 238 (Bankr. S.D.N.Y. 2000) (holding 548(a)(1) claims time-barred because the Debtor transferred its interest in its property when it executed Purchase Agreement, outside the then-one-year reach-back period under § 548, and not when it made each subsequent installment payment). On this additional basis, the § 548 constructive fraudulent transfer claim must be dismissed in its entirety.

B. The Complaint Does Not Adequately Allege That Any Qualifying Transfer Was Made For Less Than Reasonably Equivalent Value

The Complaint fails to adequately plead facts sufficient to show that the alleged constructive fraudulent transfers were for less than reasonably equivalent value. See 11 U.S.C. § 548(a)(1)(B)(i); Okla. Stat. tit. 24 §§ 116(A)(2), 117(A). Courts will dismiss constructive fraudulent transfer claims for failure to adequately plead that the debtor did not receive reasonably equivalent value. See Fedders, 405 B.R. at 547;²⁵ Global Link, 327 B.R. at 718

²⁵ While it is unclear whether Fedders applied Rule 9(b) or Rule 8(a) standards in determining that the complaint there failed to successfully plead that plaintiffs received less than reasonably equivalent value, 405 B.R. at

(dismissing claim for “simply alleg[ing] the statutory elements of a constructive fraud action” and presenting “no information on the...value of what was received in exchange”). Here, Plaintiffs’ allegations are hopelessly vague and conclusory and do not adequately plead that the debtors did not receive reasonably equivalent value.

With respect to transfers or obligations alleged to have taken place pursuant to the “spin-off,” Plaintiffs have alleged only that “Tronox received less than reasonably equivalent value in the [s]pin-Off,” Compl. ¶ 110, and that what it gave “far exceeded the value” of what it received from New Kerr-McGee. *Id.* The Complaint concedes that “Tronox” received consideration under the “spin-off,” including, among other things, “New Kerr-McGee’s interests in its Chemical Business,” Compl. ¶ 112, and a right under the MSA to be reimbursed for environmental remediation costs worth \$100 million. Compl. ¶ 106; MSA § 2.5. The allegations that such consideration was for less than reasonably equivalent value are completely conclusory, and do not set forth the amount of consideration received by “Tronox” for the alleged transfers supposedly covered by Counts Two or Three, or the amount of payments or obligations exchanged or assumed by “Tronox.”²⁶ That is not surprising since, as the documents properly before this Court on the Motion show, Plaintiffs received significant value as part of the separation. *See supra* p. 9-10.

Additionally, even if a debtor takes on an obligation, to the extent it is never paid out, that theoretical obligation does not qualify as a transfer for the purpose of avoidance. *See Fedders*,

546-47, in any event, here, Plaintiffs’ allegations are inadequately pled under either Rule 9(b) or the Rule 8(a) standard set forth in *Twombly* and *Iqbal*.

²⁶ Plaintiffs’ perfunctory dismissal of the reimbursement obligation under the MSA for environmental remediation costs as “illusory” and a “mirage” -- notwithstanding that the reimbursement obligation was worth approximately \$100 million, and Plaintiffs’ admission that approximately \$4 million in such reimbursement payments has already been paid by Kerr-McGee (Compl. ¶¶ 85, 112) -- cannot establish the requisite element of the applicable statutes.

405 B.R. at 546 (complaint was “left wanting for transfers” where it alleged that agreements created obligations to make severance payments, but payments were never actually made). Plaintiffs allege they have been saddled with various obligations, but the only number they allege they have paid out is the \$118 million for environmental liabilities, (Compl. ¶ 112), of which to date approximately \$74.4 million has been reimbursed by third parties.²⁷ The Complaint simply fails to allege the value of what “Tronox” received in the alleged transactions, and why it was not reasonably equivalent value to any obligations incurred or assumed.

With respect to any other alleged transfers, Plaintiffs are either silent as to any entity’s receipt of reasonably equivalent value, or simply allege that “no consideration” was received by the “Chemical Business.” See Compl. ¶¶ 48, 66, 70. However, none of these transactions support Plaintiffs’ claim. Plaintiffs’ allegation that “no consideration” was received for assets transferred “out of the Chemical Business and into the Oil and Gas business or other New Kerr-McGee entities” ignores that the “Project Focus” transactions were, even as Plaintiffs describe them, nothing more than common “internal transactions” among subsidiaries of one parent company in the ordinary course of business. Compl. ¶¶ 46, 48.

Plaintiffs’ other “no consideration” allegations are expressly contradicted by documents referenced in the Complaint, and are therefore insufficient to plead this element. Indeed, “[w]here a plaintiff’s conclusory allegations are clearly contradicted by documentary evidence incorporated into the pleadings by reference, however, the court is not required to accept them.”

Labajo v. Best Buy Stores, L.P., 478 F. Supp. 2d 523, 528 (S.D.N.Y. 2007). The allegation that

²⁷ As explained above, net reimbursements, Tronox Inc.’s total dollar expenditures on environmental remediation costs since the IPO are at best approximately \$63.2 million for the period from January 2006 through September 30, 2008. While it is unclear where Plaintiffs derive the \$118 million figure, Tronox Inc.’s SEC filings show that environmental remediation expenditures for that period were approximately \$137.6 million, and that reimbursements were approximately \$74.4 million. See Ex. P Tronox Inc., Current Report (Form 8-K), at Exh. 99.2 (9) (July 30, 2008); Ex. Q Tronox Inc., Quarterly Report (Form 10-Q), at 20 (Nov. 7, 2008).

“Tronox” received “no consideration” for the indemnity under the “Assignment, Assumption and Indemnity Agreement” ignores that the indemnity therein is reciprocal. See Compl. ¶ 66; Ex. C Cross Indemnity at § 3. And the allegation that the “Chemical Business” received no consideration for transfers of rights to “New Kerr-McGee’s” oil and gas business under the Assignment Agreement, Compl. ¶ 70, ignores that the Assignment Agreement is expressly tied to the Cross Indemnity under which New Kerr-McGee unquestionably gave value. Therefore, none of Plaintiffs’ allegations sufficiently plead the reasonably equivalent value element of the constructive fraudulent transfer claims.

Moreover, Plaintiffs fail to link their allegations that “Tronox” did not receive reasonably equivalent value to any *specific transfers* sought to be avoided in Counts Two and Three.²⁸ Compl. ¶¶ 135-136, 147(a)-(d); see In re Churchill Mortg. Inv. Corp., 256 B.R. 664, 681 (Bankr. S.D.N.Y. 2000) (“Section 548 is not a catch-all provision. It allows the trustee to avoid only the transfers prescribed by the statute. . . . The fact that [] transactions may be said to ‘exacerbate the harm to creditors and diminish the debtor's estate’ from an overall perspective does not mean that the debtor received less than reasonably equivalent value in respect of *each particular transaction*” (emphasis added)).

Finally, the Complaint admits that in return for transfers or obligations incurred in connection with the IPO, “Tronox” received the elimination of intercompany debt that “Tronox owed to New Kerr-McGee.” Compl. ¶¶ 106, 112. To the extent the alleged constructive fraudulent transfers involved the repayment of outstanding debt, such transfers constitute reasonably equivalent value. See In re MarketXT Holdings Corp., 361 B.R. 369, 397-400 (Bankr. S.D.N.Y. 2007); see also Okla. Stat. tit. 24, § 115 (“Value is given for a transfer or an

²⁸ The only Paragraphs in the Complaint that even mention “reasonably equivalent value” are the conclusory allegations in paragraphs 105, 110, 136, and 147.

obligation if, in exchange for the transfer or obligation, property is transferred or an antecedent debt is secured or satisfied....”). Therefore, to the extent Plaintiffs seek to avoid a portion of the transfers exchanged for repayment of that outstanding debt, Plaintiffs’ claim must fail.

C. The Complaint Merely Mimics The Elements Of The Insolvency Prongs Of Section 548 And Okla. Stat. tit. 24 §§ 116(A), 117(A)

The Complaint alleges no facts showing that, either with respect to alleged transfers made within two years of the bankruptcy filing, or otherwise, “the Debtors were engaged or about to engage in a business or transaction for which its remaining assets were unreasonably small,” “the Debtors were insolvent at the time of the transfers” or that the Debtors “intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor’s ability to pay as such debts matured.” 11 U.S.C. § 548(a)(1)(B)(ii)(I)-(III); Okla. Stat. tit. 24, §§ 116(A), 117(A). As to these elements, the Complaint merely parrots the elements of a claim for constructive fraudulent transfer. See Compl. ¶¶ 113, 139-141, 148-150.²⁹ Nowhere does the Complaint even state when “Tronox” allegedly became insolvent. In fact, Tronox Inc.’s own SEC filings disclosing that Tronox Inc. declared and paid cash dividends to its stockholders, was able to fund optional prepayments on its term loans, and did not need to borrow funds under its \$250 million revolving credit facility for at least two years after the IPO.³⁰ This demonstrates that Tronox Inc.

²⁹ Plaintiffs’ introductory allegations, in Paragraph 10 (“Tronox was simply broke. Overburdened with the Legacy Liabilities and debt, stripped of essential cash, and grossly undercapitalized, Tronox was doomed to fail.”) are likewise insufficient to plead the insolvency element. “Plaintiffs cannot meet their particularized pleading burden by artfully inserting modifiers . . . Pleading by adjective does not comply with Rule 9(b)” or “[e]ven . . . the more lenient pleading context of Rule 8(a)(2)” under Iqbal. In re Jamster Mktg. Litig., 2009 WL 1456632, at *5 (S.D. Cal. May 22, 2009).

³⁰ See Ex. R Tronox Inc. Current Report (Form 8-K/A), at Exh. 99.1 (May 5, 2006) (indicating that Tronox Inc. “generated solid results in the first quarter of 2006”); Ex. B Tronox Inc., Annual Report (Form 10-K), at 39-40 (Mar. 14, 2008) (stating that “Tronox” distributed dividends totaling \$8.3 million in 2007 and \$6.2 million in 2006); Ex. Q Tronox Inc. Annual Report (Form 10-K), at 41 and F-25 (March 16, 2007) (stating that in late 2006, Tronox was able to use excess cash flow to make an optional prepayment of \$8 million on its term loan); Ex. B Tronox Inc., Annual Report (Form 10-K), at 18 (Mar. 14 2008) and Ex. Q Tronox Inc., Annual Report (Form 10-K), at F-25, (Mar. 16, 2007) (together indicating that Tronox also chose not to draw down any amounts available to it under its \$250 million revolver until early 2008).

disclosed that it was solvent at the time of, and for a time after the IPO. See Lippe v. Bairnco Corp., 230 B.R. 906, 915 (S.D.N.Y. 1999) (dismissing fraudulent conveyance claim for inadequately alleging insolvency, where publicly filed annual reports confirmed that transferor remained financially healthy after purported fraudulent conveyances). Plaintiffs' conclusory allegations of insolvency are therefore "not entitled to the assumption of truth," under Rule 8(a), and are in any case insufficient to "nudge[]" Plaintiffs' constructive fraudulent transfer claims "across the line from conceivable to plausible." Iqbal, 129 S. Ct. at 1950 (citations omitted). See also O.P.M. Leasing, 32 B.R. at 204 (section 548 claims that merely parroted the statute were dismissed because such pleadings were insufficient); In re Commercial Fin. Servs., Inc., 322 B.R. 440, 450-51 (Bankr. N.D. Okla. 2003) (finding, under Rule 8(a), that it is "not fair to [defendants] to allow the Plaintiffs to proceed with claims for constructive fraudulent transfers if the Plaintiffs cannot declare that they have evidentiary support for an essential element of their claim," and requiring Plaintiffs to amend insolvency allegations that had invoked bare statutory elements).

Furthermore, unlike cases involving trustees (rather than debtors-in-possession), here the burden to properly plead insolvency falls upon the debtors-in-possession, which are in the best position to know whether they were insolvent when each transfer occurred. See Commercial Fin. Servs., 322 B.R. at 451. It would be manifestly unfair to Defendants to allow Plaintiffs to proceed with their constructive fraudulent claims without having alleged evidentiary support for the essential elements of these claims. See id. The constructive fraudulent transfer claims must be rejected as a matter of law.

IV. PLAINTIFFS' ACTUAL AND CONSTRUCTIVE FRAUDULENT TRANSFER CLAIMS CONCERNING THE "PROJECT FOCUS" TRANSACTIONS ARE BARRED BY THE STATUTE OF LIMITATIONS

The statute of limitations for Plaintiffs' actual and constructive fraudulent transfer claims under the Oklahoma UFTA is four years. Okla. Stat. tit. 24, § 121(1)(2). See In re Solomon, 299 B.R. at 629 n.8.³¹ Because Plaintiffs filed for bankruptcy protection on January 12, 2009, they are barred from pursuing actual and constructive fraudulent transfer claims that seek to avoid transfers that occurred before January 12, 2005. In the Complaint, Plaintiffs make a series of allegations concerning purported transfers as part of "Project Focus," which occurred primarily in December 2002. See Compl. ¶¶ 46-49. The Court may dismiss portions of fraudulent transfer claims that are barred by the statute of limitations. See Lippe, 230 B.R. at 915-16 (dismissing portion of the fraudulent conveyance claim as time barred); see also Bilello v. JPMorgan Chase Ret. Plan, 607 F. Supp. 2d 586, 600 (S.D.N.Y. 2009) (dismissing portions of various claims as barred by the statute of limitations). Given that these alleged "Project Focus" transfers occurred in 2002, long before January 12, 2005, these portions of Plaintiffs' fraudulent transfer claims are time-barred and must be dismissed.

V. PLAINTIFFS' REQUEST FOR PUNITIVE DAMAGES FOR THEIR ACTUAL AND CONSTRUCTIVE FRAUDULENT TRANSFER CLAIMS UNDER THE OKLAHOMA UFTA MUST BE DISMISSED (COUNTS I AND II)

Plaintiffs' request for punitive damages for their actual and constructive fraudulent transfer claims must be dismissed because punitive damages are not recoverable under (i) section

³¹ Under New York choice of law rules, when the plaintiff is not a New York resident, the applicable statute of limitations is the shorter of (1) New York's period of limitations or (2) the statute of limitations in the state where the cause of action accrued. See N.Y. CPLR § 202; In re Magnesium Corp., 399 B.R. 722, 743 n.50 (Bankr. S.D.N.Y. 2009). Generally, in cases involving purely economic injury, the injury accrues "where the plaintiff resides and sustains the economic impact of the loss." Cantor Fitzgerald v. Lutnick, 313 F.3d 704, 710 (2d Cir. 2002) (citations omitted). Oklahoma is Plaintiffs' principal place of business and where they sustained the alleged harm associated with their claims. See Compl. ¶ 15. Therefore, Oklahoma's four-year statute of limitations applies because it is shorter than New York's statute of limitations. See Solomon, 299 B.R. 626, 629 n.8 (B.A.P. 10th Cir. 2003).

550(a) of the Bankruptcy Code or (ii) the Oklahoma UFTA.³²

A. Section 550(a) Does Not Permit The Recovery Of Punitive Damages

Plaintiffs plead their actual and Count II constructive fraudulent transfer claims under Bankruptcy Code sections 544(b) and 550(a) and the Oklahoma UFTA. See Compl. ¶¶ 133, 144.³³ Section 550(a) governs the remedies available to a debtor if and when it succeeds in avoiding such transfers. See In re Andrews Velez Constr., Inc., 373 B.R. 262, 274 (Bankr. S.D.N.Y. 2007); In re Myers, 320 B.R. 667, 670 (Bankr. N.D. Ind. 2005). While section 550(a) allows for the recovery of fraudulently transferred property or the value thereof, it does not allow for the recovery of punitive damages. See 11 U.S.C. § 550(a); In re Berg, 376 B.R. 303, 311 (Bankr. D. Kan. 2007) (finding punitive damages unavailable under section 550); Myers, 320 B.R. at 670 (noting that section 550 is a “limitation upon the trustee’s ability to recover treble damages”).³⁴ Any contrary result would expressly contravene the remedial rather than punitive purpose of section 550(a). See In re Centennial Textiles, 220 B.R. 165, 176 (Bankr. S.D.N.Y. 1998) (explaining that section 550(a) is designed to “restore the estate to the financial condition it would have enjoyed if the transfer had not occurred”); In re Best Prods. Co., Inc., 168 B.R. 35, 57 (Bankr. S.D.N.Y. 1994) (stating that “[f]raudulent transfer laws are intended to promote payment to creditors; that is, the statutes are remedial, rather than punitive”).

B. Oklahoma Law Does Not Permit The Recovery Of Punitive Damages

Similarly, the Oklahoma UFTA does not provide for the recovery of punitive damages

³² In addition, all of Plaintiffs’ claims for punitive damages in connection with their fraud-based claims are merely conclusory, and therefore fail to satisfy the heightened pleading standard of Rule 9(b). See Compl. ¶¶ 134, 160, 166; AD Rendon Commc’ns, Inc. v. Lumina Americas, Inc., 2007 WL 2962591, at *8, (S.D.N.Y. Oct. 10, 2007).

³³ Plaintiffs do not seek punitive damages for their Count III constructive fraudulent transfer claim.

³⁴ As explained by the court in Myers, 320 B.R. at 670: “Section 550 of the Bankruptcy Code . . . specifies the transferee’s liability as the result of an avoided transaction. The trustee may recover ‘either the property transferred or . . . the value of such property.’ 11 U.S.C. § 550(a).”

for actual or constructive fraudulent transfer claims. See Okla. Stat. tit. 24, §§ 112-123 (not authorizing the award of punitive damages under Oklahoma fraudulent transfer laws). Moreover, under Oklahoma law, punitive damages may only be awarded in tort actions and are not available in contract actions. Okla. Stat. tit. 23, § 9.1 (punitive damages available only where: (i) the “action [is] for the breach of an obligation not arising from contract,” and (ii) the plaintiff demonstrates by “clear and convincing evidence” that the defendant has acted with “reckless disregard for the rights of others” or “intentionally and with malice toward others”); Weber v. GE Group Life Assurance Co., 541 F.3d 1002, 1008 (10th Cir. 2008) (punitive damages may only be awarded under Oklahoma law for tort actions); Wilspec Techs., Inc. v. Dunan Holding Group Co., Ltd., 204 P.3d 69, 75 (Okla. 2009) (noting that a party seeking punitive damages must first prove the elements of a tort). However, for the purposes of assessing associated punitive damages, fraudulent transfer actions are said to sound in contract, not tort.³⁵ Accordingly, because Oklahoma law does not permit punitive damages on claims arising in contract, and Oklahoma courts have found that fraudulent transfer actions sound in contract for the purposes of punitive damages assessment, Plaintiffs’ demand for punitive damages based on their claims for actual and constructive fraudulent transfers must be dismissed.

VI. PLAINTIFFS’ COMMON LAW CLAIMS MUST BE DISMISSED (COUNTS IV-VII)

A. Plaintiffs’ Civil Conspiracy Claim Must Be Dismissed (Count IV)

Plaintiffs’ civil conspiracy claim, premised on state law violations of the UFTA, is barred by the Bankruptcy Code, and must be dismissed in any event, because Plaintiffs fail to plead the

³⁵ See F.D.I.C. v. Hinch, 879 F. Supp. 1099, 1108-09 (N.D. Okla. 1995) (stating that the “weight of authority suggests that” fraudulent transfer claims “should be analyzed as a contract action”); Wortley v. Camplin, 2001 WL 1568368, at *16 (D. Me. Dec. 10, 2001) (finding that an award for punitive damages is not available under Maine’s UFTA because the “claim sounds in contract”); N. Tankers (Cyprus) v. Backstrom, 968 F. Supp. 66, 67 (D. Conn. 1997) (recognizing that Connecticut’s UFTA does not allow assessment of punitive damages); see also Okla. Stat. tit. 24, § 123.

elements of a conspiracy claim with the requisite particularity.

1. *Under The Bankruptcy Code, Plaintiffs Cannot Recover Damages For A State Law Claim For Conspiracy To “Effectuate Fraudulent Transfer”*

The Complaint alleges that “[o]n information and belief, Anadarko conspired with New Kerr-McGee to effectuate the fraudulent conveyance of the Transfers and Obligations...” Compl. ¶ 157. However, bankruptcy courts have refused to allow state law conspiracy claims alleging that the defendant conspired to effectuate a transfer that was fraudulent pursuant to section 544(b) of the Code. See Fedders, 405 B.R. at 548-49 (holding that even if state law allows claims for “conspiracy to commit a fraudulent conveyance,” it is “irrelevant” in a bankruptcy proceeding). Allowing plaintiffs to bring such claims would circumvent the specific remedy legislated by Congress. See id. Section 544(b) only permits plaintiffs to avoid the fraudulent transfer; it does not allow assertion of a claim for damages. See id. (citing In re Hamilton Taft & Co., 176 B.R. 895, 902 (Bankr. N.D. Cal. 1995)). Likewise, section 550 specifies that plaintiffs are only allowed to recover up to the amount of the transfer from the transferee, or a party for whose benefit the transfer was made. 11 U.S.C. § 550; Id. Thus, there is no separate and independent liability for conspiracy to commit a fraudulent transfer as a matter of federal law under the Bankruptcy Code. See Fedders, 405 B.R. at 548. Accordingly, Plaintiffs’ claim for civil conspiracy to “effectuate a fraudulent transfer” cannot stand.

2. *The Civil Conspiracy Claim Is Not Adequately Pled*

Even if such a claim were permissible, Plaintiffs’ civil conspiracy claim is not adequately pled. Under Oklahoma law, “civil conspiracy consists of a combination of two or more persons to do an unlawful act, or to do a lawful act by unlawful means.” Roberson v. Paine Webber Inc.,

998 P.2d 193, 201 (Okla. Ct. App. 1999).³⁶ To establish a cause of action for civil conspiracy, there must be concerted action sufficient to show that the parties entered into an agreement. See Shadid v. Monsour, 746 P.2d 685, 688-89 (Okla. Civ. App. 1987). Moreover, Plaintiffs must allege that an agreement existed between Anadarko and New Kerr-McGee and that one or more unlawful acts occurred. See Twombly, 550 U.S. at 555, 557 (under Rule 8(a), with respect to conspiracy claims, “conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality.”).

Plaintiffs allege that Anadarko agreed to purchase New Kerr-McGee thereby creating a “monetary incentive [for New Kerr-McGee] to complete the Spin-Off...” Compl. ¶ 157. Yet Plaintiffs fail to assert any facts regarding the alleged pre-spin-off “agreement,” even failing to identify when and where the alleged agreement was made. Indeed, while the Complaint alleges that the CEOs of Anadarko and New Kerr-McGee communicated “approximately one month before the Spin-Off,” it utterly fails to allege that the two individuals came to an “agreement” during that communication. See Compl. ¶ 154. Instead, the Complaint simply alleges “on information and belief” that the two parties “agreed prior to the completion of the Spin-Off that Anadarko would purchase New Kerr-McGee” at some point in the future. See Compl. ¶ 156. Furthermore, Plaintiffs merely speculate that it is “exceedingly unlikely if not impossible that Anadarko and New Kerr-McGee did not begin planning the acquisition prior to the Spin-Off.” Id. at ¶ 155. This type of speculation is exactly the type of inadequate pleading that courts reject.

See Twombly, 550 U.S. at 555, 557; see also Iqbal 129 S.Ct. at 1949 (pleadings that “are no

³⁶ Under New York choice of law rules, the location of the conspiracy determines the applicable law. See Steinberg v. Sherman, 2008 WL 2156726, at *3 (S.D.N.Y. May 8, 2008) (“with respect to . . . civil conspiracy claims, the location of the tort generally determines the applicable law.”). Kerr-McGee’s business and the majority of transferred assets were located in Oklahoma, and the Complaint alleges that Anadarko’s CEO contacted “New Kerr-McGee’s” CEO “to discuss Anadarko’s acquisition of New Kerr McGee.” Compl. ¶ 154. Because the allegations appear to plead that the alleged conspiracy occurred in Oklahoma, Oklahoma law most likely applies to Plaintiffs’ civil conspiracy claim.

more than conclusions” are not entitled to assumption of truth); Peterson v. Grisham, 2008 WL 4363653, at *9 (E.D. Okla. Sept. 17, 2008) (pleading of civil conspiracy claim was insufficient under Twombly because alleged agreement “appears to be nothing more than an allegation of independent action by the defendants . . . [and] . . . [t]here is nothing alleged that points to a preceding agreement by the defendants”); Medtech Prods. Inc. v. Ranir, LLC, 596 F. Supp. 2d 778, 795 (S.D.N.Y. 2008) (pleading of civil conspiracy was insufficient under Twombly because complaint “merely conclude[d] that an agreement existed without any factual basis to make the allegation plausible.”).³⁷

Rather than allege facts showing the existence of an agreement between Anadarko and New Kerr-McGee, Compl. ¶ 157, Plaintiffs have pled facts that actually belie the existence of any such agreement. Specifically, according to Plaintiffs, communications between Anadarko and New Kerr-McGee did not occur until one month before the Distribution, see Compl. ¶ 154. That is at least **three months** after the IPO, (see Compl. ¶ 106), **four months** after New Kerr-McGee’s Board approved the spin-off, (see Compl. ¶ 83), **eleven months** after New Kerr-McGee’s Board authorized the separation of the “Chemical Business”, (see Compl. ¶ 57), and at least **three years** after the alleged transfers associated with Project Focus occurred, (see Compl. ¶¶ 46-49). Further, **eight months** before the conversation, New Kerr-McGee advised that following completion of the IPO, it intended to distribute the Class B common stock to its shareholders. Ex. E New-Co Chemical Inc. (Form S-1) at 20 (June 6, 2005). Plaintiffs’ allegation that Anadarko somehow could have conspired with New Kerr-McGee to effectuate the

³⁷ Furthermore, to the extent Plaintiffs’ Civil Conspiracy claim is based on the allegations of fraud underlying the actual fraudulent transfer claims, Rule 9(b) applies to the pleadings, and the claim should be dismissed for failure to satisfy the heightened standard. See In re Harvard Knitwear, Inc., 153 B.R. 617, 628 n.3 (Bankr. E.D.N.Y. 1993) (holding the presence of fraud as part of a conspiracy charge brings the complaint under Rule 9(b)); see also Kearns v. Ford Motor Co., 567 F.3d 1120, 1127 (9th Cir. 2009) (holding that where a complaint is grounded in fraud, Rule 9(b) requires that the “entire complaint must be pleaded with particularity” and the failure to do so “merit[s] that complaint’s dismissal”).

separation of the “Chemical Business” at a time when that separation had already been approved by New Kerr-McGee’s Board and publicly announced in SEC filings defies “the obvious alternative explanation,” that Anadarko’s acquisition of New Kerr-McGee was an arm’s-length acquisition, independent of any decision with respect to the IPO and Distribution. See Iqbal, 129 S. Ct. at 1950 (plaintiffs are required to set forth specific facts that establish “a plausible conclusion” excluding “more likely explanations”); Twombly, 550 U.S. at 556-57; Fletcher, 2009 WL 2067807, at *10.

Plaintiffs have also failed to allege that Anadarko itself committed any independent unlawful act. A conspiracy itself does not create liability: a plaintiff must plead an independent unlawful act. See Brock v. Thompson, 948 P.2d 279, 294 (Okla. 1997) (“There can be no civil conspiracy where the act complained of and means employed are lawful.”). Circumstances that are equally consistent with lawful and unlawful activity are insufficient to establish conspiracy. Peterson, 2008 WL 4363653, at *8. At most, Plaintiffs allege that Anadarko contacted New Kerr-McGee to inquire about purchasing the company. Compl. ¶ 157. Exploring a business deal is a lawful activity and therefore the allegations made by Plaintiffs are insufficient to establish any conspiracy claim. See Peterson, 2008 WL 4363653, at *8 (“Disconnected circumstances, any of which, or all of which, are just as consistent with lawful purposes as with unlawful purposes, are insufficient to establish a conspiracy”).

Plaintiffs have failed to satisfy the elements of a claim for civil conspiracy, and thus Count IV must be dismissed.

3. *Plaintiffs’ Claim For Punitive Damages Under Count IV Must Be Stricken.*

Because neither the Bankruptcy Code nor the Oklahoma UFTA permit an award of punitive damages for fraudulent transfer claims (see supra section V), Plaintiffs’ claim for

punitive damages arising from “civil conspiracy” to commit such fraudulent transfers must also fail. See Compl. ¶ 160. Allowing Plaintiffs to characterize their fraudulent transfer claims as a tort of civil conspiracy “in order to gain the benefit of a punitive damages award would be ‘legal sophistry’ that would swallow the established rule that prohibits such damages.” Northern Tankers, 968 F. Supp. at 67-68 (citing Austin v. Barrows, 41 Conn. 287, 300-01 (1874) (an allegation of conspiracy “brings no strength” to an otherwise impermissible action for damages resulting from a fraudulent transfer)).

B. Plaintiffs’ Aiding And Abetting A Fraudulent Conveyance Claim Must Be Dismissed (Count V)

Plaintiffs’ claim against Anadarko for aiding and abetting a fraudulent transfer must be dismissed as a matter of law because there is no such claim under Oklahoma law.³⁸ No Oklahoma court has ever recognized the existence of a claim for aiding and abetting a fraudulent transfer. Indeed, other UFTA jurisdictions have explicitly rejected the existence of such a claim. See, e.g., In re Parmalat Sec. Litig., 377 F. Supp. 2d 390, 416-17 (S.D.N.Y. 2005) (Illinois law); Rohm & Haas Co. v. Capuano, 301 F. Supp. 2d 156, 161 (D.R.I. 2004); Freeman v. First Union Nat’l Bank, 865 So.2d 1272, 1275 (Fla. 2004) (Florida); see also Trenwick Am. Litig. Trust v. Ernst & Young, 906 A.2d 168, 203 (Del. Ch. 2006), aff’d, 2007 WL 2317768 (Del. Supr. Aug. 14, 2007).³⁹

Furthermore, Plaintiffs are barred from using a claim for aiding and abetting a fraudulent

³⁸ Under New York choice of law rules, the court applies the law of the state with the greatest interest in the aiding and abetting a fraudulent transfer claim. See Magnesium Corp., 399 B.R. at 742-43, 769-70; Advanced Portfolio Techs., Inc. v. Advanced Portfolio Techs. Ltd., 1999 WL 64283, at *5 (S.D.N.Y. Feb. 8, 1999). The jurisdiction with the greatest interest is that of the plaintiff’s principal place of business. See Magnesium Corp., 399 B.R. at 742-43, 769-70. Thus, Oklahoma law will likely apply to the aiding and abetting claim because Plaintiffs’ principal place of business is Oklahoma. See id.; Compl. ¶ 15.

³⁹ The stated purpose of Oklahoma’s UFTA is to make the law on fraudulent transfers uniform among the states that have enacted the UFTA. See Okla. Stat. tit. 24, § 123 (general purpose of Oklahoma’s UFTA is “to make uniform the law with respect to the subject of this act among states enacting it.”).

transfer to recover damages from Anadarko. Section 550 of the Bankruptcy Code forms the sole basis for Plaintiffs' remedy with respect to their fraudulent transfer claims (Counts I-III).

However, the law is clear that section 550 "does not permit recovery from one who merely aids and abets a fraudulent transfer." Centennial Textiles, 227 B.R. at 609-10; see also Fedders, 405 B.R. at 548-49 ("[T]here is no such thing as liability for aiding and abetting a fraudulent conveyance or conspiracy to commit a fraudulent transfer as a matter of federal law under the [Bankruptcy] Code."). Accordingly, the aiding and abetting claim must be dismissed.⁴⁰

Moreover, as with Plaintiffs' "civil conspiracy" claim, because Plaintiffs are barred from recovering punitive damages for their fraudulent transfer claims pursuant to the Bankruptcy Code and the Oklahoma UFTA, they cannot use a claim for "aiding and abetting fraudulent transfer" as an end-run around the limitations on recovery of punitive damages for the underlying fraudulent transfer claims. See supra section VI.A.3.

C. Plaintiffs' Breach Of Fiduciary Duty As A Promoter Claim Must Be Dismissed (Count VI)

Plaintiffs' claim for breach of fiduciary duty as a promoter is barred by Oklahoma's two year statute of limitations. See Okla. Stat. tit. 12, § 95(A)(3); see also F.D.I.C. v. UMIC, 136 F.3d 1375, 1380 (10th Cir. 1998) (applying Oklahoma's two-year period for breach of fiduciary duty claim); Slover v. Equitable Variable Life Ins. Co., 443 F. Supp. 2d 1272, 1282-83 (N.D. Okla. 2006).⁴¹ Two years prior to the bankruptcy filing was January 12, 2007. The Complaint

⁴⁰ Furthermore, to the extent the cause of action in Count V exists, and the basis of Plaintiffs' Aiding and Abetting claim is the allegations of fraud underlying its actual fraudulent transfer claims, Rule 9(b) applies to the pleadings, and the claim should be dismissed for failure to satisfy the heightened standard. See, e.g., Kearns, 567 F.3d at 1127.

⁴¹ Under New York choice of law rules, when the plaintiff is not a New York resident, the applicable statute of limitations is the shorter of (1) New York's period of limitations or (2) the statute of limitations in the state where the cause of action accrued. See N.Y. CPLR § 202; Magnesium Corp., 399 B.R. at 743 n.50. Generally, in cases involving purely economic injury, the injury accrues "where the plaintiff resides and sustains the economic impact of the loss." Cantor Fitzgerald, 313 F.3d at 710 (citation omitted). Here,

alleges that promoter activities ended on March 31, 2006. See Compl. ¶ 170. Accordingly, the entire claim is time-barred. See Slover, 443 F. Supp. 2d at 1282-83 (dismissing breach of fiduciary duty claim because alleged conduct occurred more than two years before plaintiffs filed suit).⁴²

In addition, as a parent corporation, New Kerr-McGee owed no fiduciary duties to its wholly owned subsidiaries. See Trenwick, 906 A.2d at 192-93 (dismissing breach of fiduciary duty claim for failure to state a claim because “under settled principles of Delaware law, a parent corporation does not owe fiduciary duties to its wholly-owned subsidiaries,” even where subsidiary later filed for bankruptcy) (citing Anadarko Petroleum Corp. v. Panhandle E. Corp., 545 A.2d 1171, 1174 (Del. 1988)).⁴³ While there are select cases that state that a parent may owe a fiduciary duty to a wholly-owned subsidiary if the subsidiary is insolvent, for the reasons

Tronox Inc.’s principal place of business is Oklahoma. See Compl. ¶ 15. Therefore, Oklahoma’s two-year statute of limitations would apply because it is shorter than New York’s statute of limitations. See N.Y. CPLR §§ 213, 214(4); Slover, 443 F. Supp. 2d at 1282-83.

⁴² Some Oklahoma authority has found that a breach of fiduciary duty claim is time barred after three years. See, e.g., Huffman v. Cohen, 2009 WL 1227648, at *6 (N.D. Okla. Apr. 29, 2009). Regardless of which limit applies, and despite Plaintiffs conclusory allegation of promoter activity until March 31, 2006, Plaintiffs’ breach of fiduciary duty claim is time-barred because every alleged breach of promoter fiduciary duty occurred more than three years prior to the bankruptcy, by the September 2005 incorporation of Tronox Inc., or at latest, the November 28, 2005 completion of the IPO. See Compl. ¶¶ 108, 168, 171 (“New Kerr-McGe[e’s] fail[ure] to disclose to Tronox...all material facts regarding Tronox, including but not limited to the true nature and scope of the Legacy Liabilities that were being foisted upon Tronox,” and “New Kerr-McGe[e’s] fail[ure] to act in good faith by creating and promoting Tronox...”). Plaintiffs all but admit this fact with their misplaced argument that the statute of limitations was tolled until March 2006 on the “adverse domination” doctrine. See Compl. ¶ 180. But the Oklahoma Supreme Court has expressly limited this doctrine to actions by a corporation against its officers and directors. Resolution Trust Corp. v. Grant, 901 P.2d 807, 811 (Okla. 1995) (“Adverse domination ... applies only in the context of an attempt to avoid the bar of the statute of limitations on a cause of action by a corporation against its wrongdoing officers and directors.”); see also Resolution Trust Corp. v. Greer, 911 P.2d 257, 265 (Okla. 1995) (refusing to extend “Oklahoma’s version of the adverse domination doctrine” to claims by creditors). Thus, the “adverse domination” doctrine has no applicability here.

⁴³ Under New York choice of law rules, the law of the state of incorporation determines the applicable law for a claim of breach of a fiduciary duty. See 380544 Canada, Inc. v. Aspen Tech., Inc., 544 F. Supp. 2d 199, 233 (S.D.N.Y. 2008) (“[U]nder the internal affairs doctrine, which provides that issues relating to the internal affairs of a corporation are governed by the law of the company’s state of incorporation, Delaware law governs the claims for breach of fiduciary duty and fraud....”). Because both Kerr-McGee and Plaintiffs are Delaware corporations, Delaware law governs Plaintiffs’ breach of fiduciary duty claim.

discussed supra section III, Plaintiffs' conclusory allegations relating to insolvency are insufficiently pled. See Iqbal, 129 S.Ct. at 1949 ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice"); Lippe, 230 B.R. at 915-16. Here, the entity that Plaintiffs claim was promoted, New-Co. Chemical Inc., n/k/a Tronox Inc., was a wholly-owned subsidiary of New Kerr-McGee until the IPO on November 28, 2005. See Ex. E New-Co Chemical Inc.'s S-1 (June 6, 2005), at 1; Ex. F Tronox Inc., 424B4 Prospectus (Nov. 22, 2005) at 1; Compl. ¶ 168; see also Compl. ¶ 108. Therefore, New Kerr-McGee owed no fiduciary duties, as a promoter or otherwise, to New-Co Chemical Inc. n/k/a Tronox Inc., prior to the IPO. See Anadarko, 545 A.2d at 1174-77 (former wholly-owned subsidiary could not bring claims for breach of fiduciary duty against former parent for actions that occurred in anticipation of former subsidiary's spin-off through stock dividend); see also Westlake Vinyls, Inc. v. Goodrich Corp., 518 F. Supp. 2d 918, 939 (W.D. Ky. 2007) (parent owed no fiduciary duty to subsidiary as its "promoter" when it incorporated wholly-owned subsidiary, transferred liabilities and assets into subsidiary, and offered shares of subsidiary to public in IPO); Aviall, Inc. v. Ryder Sys., Inc., 913 F. Supp. 826, 832 (S.D.N.Y. 1996) ("[T]hose who operate the parent company owe no fiduciary duties to the wholly owned subsidiary, []even when the parent company announces a proposed spin-off of the subsidiary"). As to the period following the IPO, but before the Distribution, Plaintiffs have not alleged any activities that New Kerr-McGee engaged in which could be construed as "promoter" activities, nor have they alleged any facts that could be construed as a breach of any duties, as a promoter or otherwise. See Compl. ¶ 171. Furthermore, there are no factual allegations in the Complaint (nor could there be) that Anadarko was a promoter, and thus no breach of fiduciary duty as a promoter claim can stand against Anadarko. See Compl. ¶ 174.

Additionally, while the Complaint purports to allege breaches as to Tronox Inc.'s future shareholders and future bondholders (Compl. ¶ 171), that allegation does not support Plaintiffs' claim because New Kerr-McGee did not owe any fiduciary duties to them as matter of law. See Bragger v. Budacz, 1994 WL 698609, at *6 (Del. Ch. Dec. 7, 1994) (dismissing breach of fiduciary duty claim for failure to state a claim because directors of a parent do not have a duty to make full and complete disclosure about a spin-off to subsidiary's future shareholders); see also Montgomery v. Aetna Plywood, Inc., 231 F.3d 399, 407 (7th Cir. 2000) ("Delaware law treats actual stockholders and prospective stockholders quite differently. Most significantly, prospective stockholders are not owed fiduciary duties."); Simons v. Cogan, 549 A.2d 300, 303-04 (Del. 1988) (dismissing claim because a fiduciary duty was not owed to debenture holders); Corporate Prop. Assoc. 14 Inc. v. CHR Holding Corp., 2008 WL 963048, at *4 (Del. Ch. Apr. 10, 2008) (dismissing breach of fiduciary duty claim because "directors do not owe fiduciary duties to future stockholders" (citations omitted)). As such, the breach of fiduciary duty claim cannot stand.

D. Plaintiffs' Unjust Enrichment Claim Must Be Dismissed (Count VII)

Plaintiffs allege that Kerr-McGee and Anadarko were "unjustly enriched" at "Tronox's" expense. Compl. ¶ 177. However, the only "benefit" Plaintiffs claim Defendants received were "from the Transfers and Obligations." See Compl. ¶ 178. As set forth above, both "Transfers" and "Obligations" are pled in a hopelessly vague manner and thus, like the fraudulent transfer claims, the claim for unjust enrichment must be dismissed.

Furthermore, even in the overly broad definitions of "Transfers" and "Obligations," every possible alleged "benefit" occurred at the latest, by the November 28, 2005 completion of the IPO. See Compl. ¶¶ 178, 108, 127 ("... [Kerr-McGee] transferred ... oil and gas assets and proceeds from Tronox's secured and unsecured loans and IPO ..., while simultaneously

transferring to and causing the Tronox Entities to assume liabilities and debt, including the Legacy Liabilities and \$550 million in secured and unsecured loans”) Plaintiffs’ unjust enrichment claim is subject to Oklahoma’s three year statute of limitations. See Okla. Stat. tit. 12, § 95(A)(2); Slover, 443 F. Supp. 2d at 1282-83. Because Plaintiffs have not pled any benefit that unjustly enriched Defendants after January 12, 2006 (three years prior to the bankruptcy filing), the claim is time-barred. See id.⁴⁴

Moreover, as a matter of law, an equitable claim for unjust enrichment must be dismissed where the parties’ rights and obligations are governed by a contract. See IDT Corp. v. Morgan Stanley Dean Witter & Co., 12 N.Y.3d 132, 142 (2009); see also Clark-Fitzpatrick, Inc. v. Long Island R.R. Co., 70 N.Y.2d 382, 389 (1987) (finding that a valid contract governing the subject matter of the dispute generally precludes recovery in quasi-contract for events based on the same subject matter).⁴⁵ Under these standards, Plaintiffs cannot use their unjust enrichment claim to avoid the transfers made pursuant to the MSA. By claiming Defendants were unjustly enriched by the “Transfers” and “Obligations,” which include “\$550 million” in debt and proceeds from “Tronox’s” “IPO”-- items also alleged to have been part of the MSA -- it is clear that Plaintiffs are improperly attempting to use their unjust enrichment claims to rewrite the MSA. See Compl. ¶¶ 106, 127, 178.⁴⁶ Accordingly, Plaintiffs’ claim for unjust enrichment must be dismissed.

⁴⁴ As with the breach of fiduciary duty claim, Plaintiffs’ attempt to toll their statute of limitations pursuant to the “adverse domination” doctrine is wholly misplaced. See supra section VI.C.

⁴⁵ Under New York law, the choice-of-law provision of an agreement determines the applicable law for an unjust enrichment claim arising under that agreement. See In re Lois/USA, Inc., 264 B.R. 69, 106 (Bankr. S.D.N.Y. 2001) (holding that unsecured creditors’ committee’s unjust enrichment claim should be governed by choice-of-law provision in agreement between creditor and debtor because consideration paid by debtor arose under agreement, and “the rights, if any, to the return of that consideration cannot be considered without at least some consideration of the Agreement and its terms”). Thus, New York law applies to Plaintiffs’ challenge of the MSA because the MSA includes a New York choice of law provision. Ex. J MSA § 12.3.

⁴⁶ In any event, to the extent any claims that would provide Plaintiffs with a legal remedy survive this motion, the unjust enrichment claim is doomed. The law in Oklahoma is clear that where an adequate remedy at law is available, a Plaintiff may not also recover for unjust enrichment. See Tillman v. Camelot Music, Inc., 408

VII. PLAINTIFFS' BANKRUPTCY CODE CLAIMS MUST BE DISMISSED (COUNTS VIII-XI)

A. The Equitable Subordination Claim Must Be Dismissed (Count VIII)

Plaintiffs seek to equitably subordinate “[a]ny and all claims” that may be asserted by Defendants for distribution purposes pursuant to section 510(c) of the Bankruptcy Code until such time as all of Plaintiffs’ other creditors are paid in full with interest. Compl. ¶ 188.⁴⁷

Equitable subordination is a drastic and unusual remedy that is to be applied sparingly and only under the most narrow circumstances. See In re Enron, 379 B.R. 425, 434 (S.D.N.Y. 2007).

To state a claim for equitable subordination, Plaintiffs must show that (1) the creditor against whom equitable subordination is sought engaged in some type of inequitable conduct; (2) the conduct resulted in injury to other creditors or conferred an unfair advantage to the creditor; and (3) equitable subordination of the claim is consistent with the bankruptcy law. See United States v. Noland, 517 U.S. 535, 538-39 (1996) (citing In re Mobile Steel Co., 563 F.2d 692, 700 (5th Cir. 1977)); MarketXT, 361 B.R. at 385 (collecting cases). With respect to Anadarko, which is not, nor is it alleged to have been, an insider or a fiduciary of Plaintiffs or their creditors, the standard for equitable subordination is even higher. See, e.g., In re Sunbeam Corp., 284 B.R. 355, 363-64 (Bankr. S.D.N.Y. 2002) (stating that the conduct of a non-insider or non-fiduciary must be “egregious and severely unfair to other creditors” in order to support a claim of equitable subordination and “[f]ew cases find that non-insider, non-fiduciary claimants meet this standard” (citations omitted)).

Plaintiffs’ request to equitably subordinate any claims filed by Defendants must be

F.3d 1300, 1309 (10th Cir. 2005) (granting summary judgment for unjust enrichment because an adequate legal remedy existed under Oklahoma’s insurance code).

⁴⁷ Section 510(c) provides that a bankruptcy court may, “under principles of equitable subordination, subordinate for purposes of distribution all or part of an allowed claim to all or part of another allowed claim” 11 U.S.C. § 510(c).

dismissed for two reasons. First, because Defendants have not yet filed a proof of claim in these chapter 11 cases, there is no claim that can be equitably subordinated, and Plaintiffs' claim should be dismissed as premature. See, e.g., In re Alliance Leasing Corp., 2007 WL 5595446, at *9 (Bankr. M.D. Tenn. July 3, 2007) (dismissing effort to equitably subordinate claims that had not yet been filed by the defendant); In re The Brown Schools, 368 B.R. 394, 414 (Bankr. D. Del. 2007) (dismissing equitable subordination count as "futile" in the absence of a filed proof of claim). Moreover, even once a proof of claim is filed, a claim for equitable subordination is still premature until the claim has been *allowed*. See In re Palombo Farms of Colorado, Inc., 43 B.R. 709, 712 (Bankr. D. Colo. 1984) (dismissing subordination claim as "premature because . . . there has been no determination as to the allowability of that claim"); see also In re Fox Hill Office Investors, Ltd., 101 B.R. 1007, 1022 (Bankr. W.D. Mo. 1989) (stating that "[s]ection 510(c) does not permit subordination absent an allowed claim"). Indeed, if the Defendants file a proof of claim, and if and when Plaintiffs object to such claim, this Court may determine all matters bearing on the validity of the claims asserted therein, including the propriety of equitable subordination. Accordingly, Plaintiffs' claim for equitable subordination should be dismissed at this stage and, to the extent necessary, reasserted and determined pursuant to the claims resolution process only upon the Debtors' filing of an objection to an actual claim filed by the Defendants.

Second, because Plaintiffs' equitable subordination claim is supported by the same inadequately pled allegations of wrongdoing as their underlying claims for fraudulent transfers and common law torts, see Compl. ¶¶ 182-188, Plaintiffs' claim for equitable subordination is legally insufficient and should be dismissed. See, e.g., In re Alphastar Ins. Group Ltd., 383 B.R. 231, 276 (Bankr. S.D.N.Y. 2008) (dismissing claim for equitable subordination where

underlying fraud-based claims were also being dismissed); In re Desmond, 334 B.R. 78, 85-86 (Bankr. D.N.H. 2005) (dismissing claim for equitable subordination where plaintiff had not pled facts sufficient to support underlying claims).

B. The Equitable Disallowance Claim Must Be Dismissed (Count IX)

Plaintiffs' claim for equitable disallowance does not exist. While such a remedy existed under the former Bankruptcy Act, since the enactment of the Bankruptcy Code, courts have consistently concluded that bankruptcy courts are not permitted to disallow claims: they can only subordinate claims. See, e.g., Mobile Steel, 563 F.2d at 699, n.10 (“[E]quitable considerations can justify only the subordination of claims, not their disallowance.”); In re Murgillo, 176 B.R. 524, 533 (9th Cir. B.A.P. 1994) (stating that “the proper exercise of equitable powers regarding *allowed* claims is through the equitable subordination provisions of § 510(c)”) (emphasis added); In re Sunbeam Corp., 284 B.R. 355, 369 n.3 (Bankr. S.D.N.Y. 2002) (declining to address the issue of equitable disallowance given the enactment of section 510(c)). Therefore, Plaintiffs have failed to state a claim for equitable disallowance.

Moreover, even if equitable disallowance were a viable remedy, the principles that apply to equitable subordination would also govern equitable disallowance. Sunbeam Corp., 284 B.R. at 369 n.3 (noting plaintiff's agreement that, if available, equitable disallowance would be based on the same principles as equitable subordination and holding that the allegations did not support equitable subordination, let alone equitable disallowance). As such, for all of the same reasons supporting dismissal of Plaintiffs' claim for equitable subordination, Plaintiffs' claim for equitable disallowance should be dismissed.

C. The Claim For Disallowance Of Claims Pursuant To Section 502(d) Of The Bankruptcy Code Must Be Dismissed (Count X)

Plaintiffs argue that any claims filed by Defendants should be disallowed pursuant to

section 502(d) of the Bankruptcy Code because any transfers made by Plaintiffs to Defendants are avoidable under sections 544 and 548 of the Bankruptcy Code and the Oklahoma UFTA.

See Compl. ¶¶ 133, 144, 152, 193-194. Section 502(d) of the Bankruptcy Code provides:

... the court shall disallow any claim of any entity from which property is recoverable under section [550] of this title or that is a transferee of a transfer avoidable under section [548] of this title, unless such entity or transferee has paid the amount, or turned over any such property, for which such entity or transferee is liable under section [550] of this title.

This provision is designed to “assure an equality of distribution of the assets of the bankruptcy estate” and “to have the coercive effect of insuring compliance with judicial orders.” Enron, 379 B.R. at 435. Section 502(d) was not intended to punish creditors, but to give them an “option to keep their transfers (and hope for no action by the trustee) or to surrender their transfers and their advantages and share equally with other creditors.” Id. Indeed, that the “Debtor merely commenced an adversary proceeding” is insufficient to allow Plaintiffs to avail themselves of section 502(d). In re Lids Corp., 260 B.R. 680, 684 (Bankr. D. Del. 2001).

In seeking to disallow any claims that may be filed by Defendants, Plaintiffs ignore that: (i) there must first be a final order determining that the transfers challenged by Plaintiffs are in fact avoidable and recoverable from Defendants, (ii) following the entry of such order, Defendants must have failed and refused to either pay the amounts, or turn over the property, which has been determined by the court to have been recoverable by the estates, and (iii) Defendants must have filed a claim based on their payment or turnover of the property recoverable by the estates. See Enron, 379 B.R. at 439 & n.70 (citing case which states that “section 502(d) ‘clearly envisions some sort of judicial determination of the claimant’s liability before its claim is disallowed, and in the event of an adverse determination, the provision of

some opportunity to turn over the property””(citations omitted)).⁴⁸

Moreover, to the extent that Defendants file a claim in the future, Plaintiffs must raise their claim for disallowance as an affirmative defense to any such claim. See In re Rhythms Netconnections, Inc., 300 B.R. 404, 409 (Bankr. S.D.N.Y. 2003); In re Stratton Oakmont, Inc., 257 B.R. 644, 656 (Bankr. S.D.N.Y. 2001), rev'd on other grounds, 2003 WL 22698876 (S.D.N.Y. Nov 14, 2003).

Accordingly, Plaintiffs' claim for disallowance must be dismissed as premature and, in any event, must be raised as part of the claims resolution process.

D. The Claim For Disallowance Of Contingent Indemnity Claims Pursuant To Section 502(e)(1)(B) Of The Bankruptcy Code Must Be Dismissed (Count XI)

Plaintiffs contend that any claims filed by Defendants for reimbursement, contribution or indemnification should be disallowed pursuant to section 502(e)(1)(B) of the Bankruptcy Code to the extent Defendants (i) are co-liable with Plaintiffs on the underlying claims for which they seek reimbursement and (ii) have not expended funds related to such underlying claims. See Compl. ¶ 197. Section 502(e)(1) of the Bankruptcy Code provides, in relevant part, that:

[T]he court shall disallow any claim for reimbursement or contribution of an entity that is liable with the debtor on or has secured the claim of a creditor, to the extent that...such claim for reimbursement or contribution is contingent as of the time of the allowance or disallowance of such claim for reimbursement or contribution....

11 U.S.C. § 502(e)(1)(B). This provision applies to a contingent claim for reimbursement or contribution by an entity that is liable with the debtor on a creditor's claim.⁴⁹ In addition to

⁴⁸ See also In re Lids Corp., 260 B.R. at 684 (holding that disallowance of a claim under section 502(d) requires a judicial determination that a claimant is liable); In re Davis, 889 F.2d 658, 662 (5th Cir. 1989) (section 502(d) “is designed to be triggered *after* a creditor has been afforded a reasonable time in which to turn over amounts adjudicated to belong to the bankruptcy estate”) (emphasis added).

⁴⁹ 4 Collier on Bankruptcy ¶ 502.06[2][d] (15th ed. rev. 2003) (explaining that a creditor to whom the debtor is liable may seek payment from a third party who guaranteed payment of the debt, and such third party guarantor may then seek reimbursement or contribution from the debtor; both the creditor and the third party

preventing potential double recoveries from the debtor's estate by both the debtor's creditor and the party with whom the debtor is co-liable to such creditor, this provision is also designed to prevent delays in the administration and distribution of the debtor's estate due to unresolved contingent claims. See, e.g., In re Alper Holdings USA, 2008 WL 4186333, at *7 (Bankr. S.D.N.Y. Sept. 10, 2008).

Plaintiffs have failed to sufficiently plead facts alleging that Defendants are co-liable with Plaintiffs on any potential claims that may be asserted against them. Under the MSA, Plaintiffs are contractually obligated to indemnify Defendants from and against all liabilities (other than certain enumerated liabilities) related to (i) any businesses, operations, or assets previously or currently conducted or owned by Plaintiffs and their predecessors, (ii) any business conducted by Plaintiffs after the effective date of the MSA, and (iii) any obligations of Plaintiffs under the MSA and any agreement entered into in connection therewith. See Ex. J MSA at § 5.1. In accordance with this provision, Plaintiffs are directly liable to any claimants asserting environmental, tort, personal injury, or other types of claims and nothing therein suggests that Defendants are co-liable with Plaintiffs on such claims. Accordingly, section 502(e)(1)(B) is inapplicable.

Furthermore, Defendants have not yet filed a claim seeking reimbursement or contribution from Plaintiffs for any claims on which they are co-liable with Plaintiffs. Because Plaintiffs cannot seek disallowance of a claim that does not exist, their request to disallow any such claim is premature. Further, to the extent that Defendants file such a claim in the future, there must first be a determination that (i) the claim is based on reimbursement or contribution,

guarantor will have a claim against the debtor arising from the same debt; in order to insure that the estate is not liable to both parties, section 502(e)(1)(B) requires disallowance of the third party guarantor's contingent claim for reimbursement or contribution).

(ii) Defendants are co-liable with Plaintiffs on the underlying claim, and (iii) Defendants have not yet paid such underlying claim. Such determinations should be made as part of the claims resolution process.

Accordingly, Plaintiffs' request pursuant to section 502(e)(1)(B) of the Bankruptcy Code to disallow any contingent indemnity claims filed by Defendants must be dismissed as it is premature and, in any event, must be raised as part of the claims resolution process.

CONCLUSION

For all of the foregoing reasons, Defendants request that the Court grant their motion to dismiss.

Houston, Texas
Dated: July 31, 2009

Richard A. Rothman (RR 0507)
Bruce S. Meyer (BM 3506)
Lori L. Pines (LP 3005)
Weil, Gotshal & Manges LLP
767 Fifth Avenue
New York, New York 10153
Telephone: (212) 310-8000
Facsimile: (212) 310-8007

Duke K. McCall, III (*admitted pro hac vice*)
Bingham McCutchen LLP
2020 K Street, NW
Washington, DC 20006
Telephone: (202) 373-6000
Facsimile: (202) 373-6001

/s/ Lydia Protopapas
Melanie Gray (*admitted pro hac vice*)
Lydia Protopapas (LP 8089)
Jason W. Billeck (*admitted pro hac vice*)
Weil, Gotshal & Manges LLP
700 Louisiana, Suite 1600
Houston, Texas 77002
Telephone: (713) 546-5000
Facsimile: (713) 224-9511

James J. Dragna (*admitted pro hac vice*)
Bingham McCutchen LLP
355 South Grand Avenue, Suite 4400
Los Angeles, California 90071
Telephone: (213) 680-6400
Facsimile: (213) 680-6499

*Counsel to Anadarko Petroleum Corporation
and Kerr-McGee Corporation*

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on July 31, 2009, a true and correct copy of the Defendants' Motion to Dismiss was served (i) by United States first class mail, postage prepaid, on the parties listed on the parties listed below; and (ii) by e-mail on the parties who receive electronic notice in this case pursuant to the Court's ECF filing system.

Richard M. Cieri
Jonathan S. Henes
Colin M. Adams
KIRKLAND & ELLIS LLP
601 Lexington Avenue
New York, New York 10022

Jeffrey J. Zeiger
KIRKLAND & ELLIS LLP
300 North LaSalle Street
Chicago, Illinois 60654

Susan D. Golden
OFFICE OF THE UNITED STATES
TRUSTEE
33 Whitehall Street
New York, New York 10004

Robert Trust
CRAVATH, SWAINE & MOORE LLP
Worldwide Plaza
825 Eighth Avenue
New York, New York 10019-7475

David A. Crichlow
Craig A. Barbarosh
Karen B. Dine
PILLSBURY WINTHROP SHAW PITTMAN LLP
1540 Broadway
New York, New York 10036

Alan W. Kornberg
Lewis R. Clayton
Brian S. Hermann
Robert N. Kravitz
PAUL, WEISS, RIFKIND, WHARTON &
GARRISON LLP
1285 Avenue of the Americas
New York, New York 10019-6064

Lev L. Dassin
U.S. ATTORNEY FOR THE
SOUTHERN DISTRICT OF NEW YORK
By: Matthew L. Schwartz
Assistant U.S. Attorney
86 Chambers Street
New York, New York 10007

Houston, Texas
Dated: July 31, 2009

/s/ Rene A. Olvera
Rene A. Olvera