No.

IN THE

Supreme Court of the United States

THE RENCO GROUP, INC., A DELAWARE CORPORATION, AND IRA LEON RENNERT,

Petitioners,

v.

LEE E. BUCHWALD, AS TRUSTEE FOR MAGNESIUM CORPORATION OF AMERICA AND RELATED DEBTOR, RENCO METALS, INC., ET AL.,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Langenkamp v. Culp*, 498 U.S. 42 (1990), this Court held that a creditor has "no Seventh Amendment right to a jury trial" when it "subject[s] [it]self to the bankruptcy court's equitable power." *Id.* at 44-45. In the Sixth and Seventh Circuits, a debtor (or bankruptcy trustee) correspondingly loses its right to a jury trial when it voluntarily submits its case to bankruptcy court. In the Second and Third Circuits, however, a debtor does *not* lose its right to a jury trial despite invoking the bankruptcy's court jurisdiction, unless a cause of action affects the allowance or disallowance of a claim. And the Fifth Circuit takes a hybrid approach, allowing a debtor a jury trial only in a proceeding where the opposing party is not a creditor who has filed a proof of claim.

The question presented is:

Whether, and under what circumstances, a debtor (or bankruptcy trustee) who has invoked the equitable jurisdiction of a bankruptcy court thereby loses its Seventh Amendment right to a jury trial?

PARTIES TO THE PROCEEDING

Petitioners, who were Defendants-Appellants below, are The Renco Group, Inc., a Delaware Corporation, and Ira Rennert.

Respondent, who was Plaintiff-Appellee below, is Lee E. Buchwald, as Trustee for Magnesium Corporation of America and Related Debtor, Renco Metals, Inc.

Respondents also include the Defendants-Conditional-Cross-Appellants below: Dennis Sadlowski, Michael C. Ryan, Michael H. Legge, Ron L. Thayer, Todd R. Ogaard, Lee R. Brown, Howard I. Kaplan, and (Estate of) Justin W. D'Atri.

CORPORATE DISCLOSURE STATEMENT

Petitioner The Renco Group, Inc., has no parent corporation, and no publicly held company owns 10% or more of its stock.

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INTRODUCTION

Each year, hundreds of thousands of bankruptcy petitions are filed—some years, over a million. The individuals and entities who invoke the bankruptcy court's protection seek a fresh start free from debilitating debt, or, in some cases, a soft landing to manage the end of an entity's existence. In short, the participants in a bankruptcy case seek equity.

For that reason, this Court has long held that "the proceedings of bankruptcy courts are inherently proceedings in equity," *Katchen v. Landy*, 382 U.S. 323, 336 (1966), to which the Seventh Amendment jury trial right for legal claims—i.e., "Suits at common law"—largely does not apply. In particular, the Court has explained that even claims against a bankruptcy estate that are legal in nature carry no jury trial right when asserted by a creditor of the estate: By triggering the process of "allowance and disallowance of claims," creditors "subject themselves" to the bankruptcy court's equitable power, *Granfinanciera v. Nordberg*, 492 U.S. 33, 58, 59 n.14. (1989), and thus have "no Seventh Amendment right to a jury trial," *Langenkamp v. Culp*, 498 U.S. 42, 45 (1990).

Debtors too invoke the bankruptcy court's equitable power when they file bankruptcy petitions. But remarkably, this Court has never addressed whether the debtor is subject to the same rule as the creditor. In that vacuum, the courts of appeals have become openly and intractably splintered. The Sixth and Seventh Circuits hold that debtors never have a jury right in bankruptcy proceedings. The Fifth Circuit holds that debtors lack jury rights only for claims against

creditors. The Second and Third Circuits, meanwhile, hold that debtors lack jury rights only for claims against creditors that "affect[] the allowance or disallowance of the creditor's proof of claim" or are otherwise "integral to restructuring the debtor-creditor relationship." *In re CBI Holding Co., Inc.*, 529 F.3d 432, 466 (2d Cir. 2008). Courts in each camp acknowledge the split and reject the positions of the others.

This case presents an ideal opportunity for the Court to resolve this circuit conflict. The dispute arises out of the bankruptcy of two subsidiaries of Petitioner Renco Group. When business was going well, Renco was paid dividends. But the market later fell out from under them, and they eventually filed for bankruptcy. The bankruptcy court appointed a Trustee—Respondent here—to oversee the dissolution of the subsidiaries' estates. The Trustee brought an adversary proceeding against Renco and various personnel (collectively "Renco"), seeking to claw back the dividends based on various theories, including fraudulent conveyance and breach of fiduciary duty.

The Trustee demanded a jury trial. Because the case arose within the Second Circuit, Renco could not argue that the Trustee was categorically barred from seeking a jury. Instead, Renco argued that the Trustee's fraudulent conveyance and transfer claims carried no jury right under even the Second Circuit's rule. But that argument was unsuccessful, and all of the claims proceeded to a jury trial.

The case proved challenging for the jury. It reported being deadlocked; the District Court gave an

Allen charge, which prompted a juror to suffer a panic attack; and the jurors then returned an inconsistent and incomprehensible verdict. The result was a $200 million judgment. The Second Circuit affirmed, explaining with respect to Renco's jury trial challenge that any error in trying the Trustee's fraudulent conveyance and transfer claims before a jury was harmless given that Renco did not (because, under Second Circuit law, it could not) object to the Trustee's demand for a jury on his fiduciary duty claims. Pet. App. 4a-5a.

The question presented thus infected all aspects of the proceedings below: If the parties' dispute had arisen in the Fifth, Sixth, or Seventh Circuits, the Trustee would have had no jury right to invoke on *any* of his claims, and the action would have proceeded to a bench trial at the outset.

The Court should take this opportunity to resolve this well-recognized split. A single, national rule is especially necessary where the Constitution itself recognizes the importance of having "uniform Laws on the subject of Bankruptcies." U.S. Const. art. I § 8. And when the Court answers this question, it should apply to debtors the rule it has repeated in several cases, that when parties submit themselves to the bankruptcy court's jurisdiction to obtain the benefits of the equitable bankruptcy process, they "subject[] themselves to *all* the consequences that attach to an appearance," *Granfinanciera*, 492 U.S. at 59 n.14 (emphasis added), including the loss of jury trial rights.

The petition should be granted.

OPINIONS AND ORDERS BELOW

The opinion of the Court of Appeals affirming the judgment is available at 682 F. App'x 24 and reproduced at Pet. App. 1a-10a. The District Court's bench ruling denying Renco's motion to strike the Trustee's jury demand is reproduced at Pet. App. 11a-14a.

JURISDICTION

The Court of Appeals entered judgment on March 8, 2017, Pet. App. 1a-10a, and denied a timely petition for rehearing on May 11, 2017, Pet. App. 17a-18a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Seventh Amendment to the United States Constitution provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved….

STATEMENT OF THE CASE

Renco's Subsidiaries Pay Dividends To Renco And Later File For Bankruptcy

The dispute in this case arises from $120 million of dividends paid upstream to Petitioner Renco. Renco is a closely held corporation owned largely by Petitioner Rennert. Renco owned Renco Metals, which, in turn, owned Magnesium Corporation of America

("MagCorp"). A544.[1] MagCorp ran a magnesium production facility. Between 1995 and 1998, Renco Metals paid dividends to Renco. A547-48.

When those dividends were paid, both subsidiaries were highly profitable and showed no signs of financial stress. But years later, the magnesium market crashed and the price of magnesium plummeted, along with MagCorp's revenues. A1727, 1732, 3031.

In August 2001, the subsidiaries filed for bankruptcy under Chapter 11 of the Bankruptcy Code, 11 U.S.C. § 1101 *et seq*. The bankruptcy court later converted the cases to Chapter 7 liquidation proceedings and appointed Respondent Lee Buchwald as the bankruptcy trustee responsible for administering the cases and creditors' claims. A1022-26.

In 2003, five years after the last dividend payment, the Trustee commenced this adversary proceeding. His complaint alleged more than 50 counts against dozens of individuals and corporations, including Renco and Rennert, as well as the subsidiaries' advisors. A1220-381. The bankruptcy court dismissed most of these claims, A1382-87, and granted summary judgment against the Trustee on others, A1389.

The relevant surviving claims were claims against Renco for fraudulent transfer under the

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[1] The Joint Appendix in the Court of Appeals is cited as "A__." The appendix to this petition is cited as "Pet. App. __." The Second Circuit's docket entries are cited as "C.A. __."

Bankruptcy Code, 11 U.S.C. § 548(a)(1)(B), similar claims for fraudulent conveyance under New York law, N.Y. Debt. & Cred. Law § 273, and related state claims for breach of fiduciary duty, aiding and abetting breach of fiduciary duty, and unjust enrichment. Pet. App. 2a. The underpinning for all these claims was the Trustee's allegation that the subsidiaries were already insolvent at the time of the challenged dividend payments, thus permitting the Trustee to claw those payments back.

The Trustee Moves To Withdraw The Reference To Bankruptcy Court

With the claims narrowed, the next question was whether the case would be tried before a jury or a judge, and whether in the bankruptcy court or the district court. The parties understood that the court was bound by Second Circuit law regarding a trustee's right to a jury trial. Although other circuits had held that a trustee never has the right to a jury trial, in the Second Circuit, a party "loses its jury trial right only with respect to claims whose resolution affects the allowance or disallowance of [a] creditor's proof of claim or is otherwise so integral to restructuring the debtor-creditor relationship." *CBI*, 529 F.3d at 466 (citing *Germain v. Connecticut Nat. Bank*, 988 F.2d 1323 (2d Cir. 1993)).

The Trustee invoked his right to a jury trial under Second Circuit law. A231. The bankruptcy court, however, could not conduct a jury trial without "the express consent of all the parties," 28 U.S.C. § 157(e), and Renco declined to consent, A231. The Trustee therefore "moved to withdraw the reference to the

Bankruptcy Court"—i.e., to transfer the proceeding back to District Court, 28 U.S.C. § 157(d)—"in order to pursue the Trustee's right to jury trial in the district court." A231.

Renco did not object to the motion to withdraw the reference, acknowledging that under binding Second Circuit law, "the Trustee is entitled to a jury trial." A241. The District Court granted the Trustee's motion. A244.

The District Court Denies Renco's Motion To Partially Strike The Jury Demand

Two months before trial was set to begin, Renco moved to partially strike the Trustee's jury demand. Renco argued that even under Second Circuit law requiring a claim to affect the allowance or disallowance of a proof of claim, the Trustee had no right to a jury trial with respect to his fraudulent transfer and conveyance claims. Specifically, Renco contended that a finding of liability for fraudulent transfer or conveyance would require the bankruptcy court to disallow Renco's own proofs of claim against the debtor under 11 U.S.C. § 502(d); thus, those claims affected the claims allowance process and deprived the Trustee of a jury trial right. A443-44, 451-58. Renco did not (and could not) make a similar argument with respect to the Trustee's fiduciary duty claims.[2] Renco thus requested a bench trial only on the fraudulent transfer

[2] On appeal to the Second Circuit following the jury trial, Renco attempted to argue that the Trustee made statements during trial indicating that he viewed his fiduciary duty claims

and fraudulent conveyance claims. Pet. App. 4a; A443-44, 451-52.

The District Court denied Renco's motion from the bench. Pet. App. 12a. The court ruled that, under Second Circuit law, the Trustee's claims "only incidentally implicate the provisions of the Bankruptcy Code" and thus did not bear sufficiently on the allowance or disallowance of claims to overcome the Trustee jury trial right under Second Circuit law. Pet. App. 13a (citing *Germain*, 988 F.2d at 1329). In the alternative, the court held that even if the fraudulent conveyance and transfer claims did not carry a jury trial right, it was too late for Renco to "withdraw [its initial] consent" to a jury trial on those claims. Pet. App. 14a.

The Jury Reaches An Incomprehensible Verdict

The key issue at trial was the subsidiaries' solvency: To prove that the dividends the subsidiaries paid to Renco could be clawed back under fraudulent transfer law, the Trustee had to establish that the subsidiaries were insolvent at the various points at which they paid the dividends, between 1995 and 1998. *See* 11 U.S.C. § 548(a)(1)(B); N.Y. Debt. & Cred. Law § 273. The case was tried to a jury, which heard eight expert witnesses testifying across more than 800 transcript pages in the nearly month-long trial. A3272-330; A3448-67; A3509-48; A3549; A3579-92;

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as seeking restitution, which would mean those claims were equitable in nature and thus not subject to a jury trial right. C.A. 164 at 16-17. The Second Circuit did not accept that argument.

A3592-602; A3611-24; A3626-75. After a day of deliberations, the jury reported that it was at "a temporary impasse with respect to solvency." The next day the jury reported: "Unfortunately, we cannot agree on No. 1 [solvency] and therefore we are hung. I'm sorry." A2222.

The court delivered an *Allen* charge, and within 40 minutes, the jury sent another note: "We need a break from the room. One juror is having a panic attack." A2228-30. Deliberations ended for the day shortly thereafter, and the next day, a Friday, the jury returned its verdict after a few more hours' deliberation. A2236, 2240.

The verdict was inexplicable. Literally. No one has ever been able to explain it. The verdict form first addressed fraudulent transfer under federal law, and asked, as to the dates of each of nine dividends, whether the subsidiaries were insolvent under three different definitions of insolvency. A760-63. The jury answered "no" to each question for each of the nine relevant dates. It unanimously confirmed—27 times over—that the subsidiaries were solvent throughout. Accordingly, the transfers were not fraudulent, and the jury awarded no damages on the Trustee's federal law claims. A764.

Yet the jury found Renco liable for fraudulent conveyances under New York law, even though that state-law claim requires the exact same findings as under federal law. A715-16, 764-65, 2207. The jury also found Renco liable for related claims for breach of fiduciary duty (and aiding and abetting) and

awarded the same damages as the state law fraudulent conveyance claim. A765-71. Including prejudgment interest, the jury's award exceeded $200 million. A1006-08.

The Second Circuit Affirms

The Second Circuit affirmed the District Court's decision to hold a jury trial. As relevant here, the court ruled that it did not need to address whether the District Court erred in denying Renco's motion to strike the Trustee's jury demand with respect to the fraudulent conveyance and transfer claims. It reasoned that any error on that front was harmless because Renco "did not move to strike the claims against [Renco] for aiding and abetting a breach of fiduciary duty" and "the jury awarded the same damages for these aiding-and-abetting claims as it did for the other claims specified in defendants' withdrawal." Pet. App. 4a. Because the panel was bound by the Second Circuit's idiosyncratic rule, Renco could not meaningfully argue—and the panel could not hold—that a trustee *never* has a right to a jury trial as to *any* claims, as other circuits have held.

The Second Circuit denied en banc review but stayed the mandate pending the disposition of a petition for a writ of certiorari. Pet. App. 18a.

REASONS FOR GRANTING THE WRIT

This Court has addressed on several occasions the extent to which *creditors* have a Seventh Amendment right to a jury trial in bankruptcy proceedings. *See Katchen*, 382 U.S. 323; *Granfinanciera,* 492 U.S. 33;

Langenkamp, 498 U.S. 42. But the Court has not yet considered the other side of the equation: when *debtors*[3] have a jury trial right. The courts of appeals are openly divided over that question. That split of authority is deeply entrenched, and the question has had adequate time to percolate. This case squarely presents this important and recurring question and is an ideal vehicle for answering it. This Court should grant review to resolve the conflict.

I. The Courts Of Appeals Are Irreconcilably Split Over When A Debtor Has A Jury Trial Right.

As courts have acknowledged, the "[c]ircuits are split on … [whether] any adversary proceeding filed by the representative of a debtor's estate in a bankruptcy court … categorically eliminates any and all of the estate's jury trial rights." *In re Oakwood Homes Corp.*, 378 B.R. 59, 70 (Bankr. D. Del. 2007); *see also Billing v. Ravin, Greenberg & Zackin, P.A.*, 22 F.3d 1242, 1250-51 (3d Cir. 1994) (surveying the circuit split). Five circuits have addressed the question, and they have reached three avowedly divergent approaches. This Court should resolve the confusion in this important area of bankruptcy law.

[3] For simplicity, the term "debtor" will be used to refer not just to the debtor or debtor-in-possession, but also to a trustee appointed to represent the bankruptcy estate. 11 U.S.C. § 323.

A. In the Sixth and Seventh Circuits, debtors have no jury right.

The leading case finding that debtors have no jury right is the Seventh Circuit's *In re Hallahan*, 936 F.2d 1496 (7th Cir. 1991). *Hallahan* holds that even when an "action [i]s legal in nature," a debtor "cannot claim a right to jury trial because … he voluntarily submitted his case to bankruptcy court," which holds proceedings that are traditionally rooted in equity. *Id.* at 1505. The Seventh Circuit explained that its conclusion follows from this Court's decision in *Granfinanciera*, which addressed a similar question respecting creditors. *Granfinanciera* held that when creditors "present[] their claims" to a bankruptcy court, they "subject[] themselves to all the consequences that attach to an appearance." 492 U.S. 33, 59 n.14. The Seventh Circuit reasoned that if creditors lose their jury right by submitting to the bankruptcy court's equitable jurisdiction, then "debtors who initially choose to invoke the bankruptcy court's jurisdiction to seek protection from their creditors cannot be endowed with any stronger right." *Hallahan*, 936 F.2d at 1505.

The Sixth Circuit subsequently agreed with the Seventh Circuit that "[e]ven if [a debtor] [i]s pursuing a 'legal' claim, by submitting it to the bankruptcy forum he lost any Seventh Amendment jury trial right he might have asserted." *In re McLaren*, 3 F.3d 958, 961 (6th Cir. 1993) (quoting *Hallahan*, 936 F.2d at 1506). After noting that the question "was recently

addressed by the Seventh Circuit," the Sixth Circuit adopted *Hallahan*'s reasoning wholesale. *Id.* at 960.[4]

Had the Trustee brought this case in either of these jurisdictions, he would not have had any jury right to invoke. The trial would have proceeded before the judge (rather than a jury so confused and conflicted that it deadlocked, had a member suffer a panic attack, and arrived at a verdict that was irreconcilable), and without any wrangling over which of the Trustee's causes of action affected the allowance or disallowance of claims.

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[4] The Ninth Circuit Bankruptcy Appellate Panel, whose decisions are "binding on all bankruptcy courts in the Ninth Circuit," has also adopted this position. *In re Proudfoot*, 144 B.R. 876, 878 (B.A.P. 9th Cir. 1992). The BAP "agree[d] with the Sixth and Seventh Circuits that the analysis does not differ as between debtor and creditor." *In re Hickman*, 384 B.R. 832, 839 (B.A.P. 9th Cir. 2008) (citing *Hallahan* and *McLaren*). It explained that a debtor "elects to pursue a remedial scheme in which a jury trial is not available and agrees to be bound by the result." *Id.* at 839 n.4. While declaring its holding limited to the circumstances before the court, which involved "a chapter 7 debtor's rights in bankruptcy litigation involving adjustment of the debtor-creditor relationship" rather than a trustee or a debtor under a different provision of the Code, *id.* at 840 n.5, the court also held broadly that "the filing by the debtor of the bankruptcy case is the most basic instance of invoking the equitable jurisdiction of the bankruptcy court." *Id.* at 839; *see also In re Simon*, 153 F.3d 991, 997 (9th Cir. 1998) (suggesting similar rule); *but see In re Conejo Enterprises, Inc.*, 96 F.3d 346, 354 n.6 (9th Cir. 1996) (favorably citing Second Circuit's rule); *Dunmore v. United States*, 358 F.3d 1107, 1116 (9th Cir. 2004) (same).

B. In the Fifth Circuit, debtors have no jury right if the opposing party has filed a proof of claim.

The Fifth Circuit takes a different tack. In *In re Jensen*, the court "agree[d] with the result in *Hallahan*, but not its reasoning with regard to why the debtor had no right to a jury trial, even if the claims against him were legal in nature." 946 F.2d 369, 374 (5th Cir. 1991), *abrogated on other grounds in In re El Paso Elec. Co.*, 77 F.3d 793, 794 (5th Cir. 1996).

The Fifth Circuit rejected the Sixth and Seventh Circuit's position, stating that a debtor does not "effectively subject[] his pre-petition claims to the bankruptcy court's equitable power when he files a petition for bankruptcy," nor does "the petition for bankruptcy somehow 'waive[]' the debtor's jury trial right." *Id.* at 373-74. Rather, in the Fifth Circuit's view, debtors retain their jury trial rights unless the litigation involves a creditor that has filed a proof of claim. If so, *both* parties—creditor and debtor—lose their right to a jury trial with respect to disputes between them. The court explained: "As we see it, the debtor was not entitled to a jury trial in *Hallahan*, not because the debtor had filed a petition in bankruptcy, but because the plaintiff [creditor] had submitted his claim against the debtor to the equitable jurisdiction of the bankruptcy court. Filing a proof of claim denied both the plaintiff and the defendant, debtor, any right to jury trial that they otherwise might have had on that claim." *Id.* at 374.

The Fifth Circuit recently reaffirmed *Jensen* in *U.S. Bank National Ass'n v. Verizon Communications, Inc.*, 761 F.3d 409 (5th Cir. 2014). It explained that "under *In re Jensen*, a creditor and a debtor alike are bound by the rule in *Langenkamp*." *Id.* at 420-21. The court noted that "the creditor … filed proofs of claim," which would suffice under *Jensen* to disentitle the trustee to a jury trial. *Id.* at 418. It also observed that "resolution [of the creditor's claims] will necessarily require the resolution of the debtor's fraudulent transfer claims," *id.*, which would make a jury trial improper even under the Second and Third Circuit rule discussed below.[5]

Had the Trustee brought this case in the Fifth Circuit under the *Jensen* rule, the Trustee would not have had any jury right to invoke because Renco filed proofs of claim. A1041-50; 1054-56.

C. In the Second and Third Circuits, debtors have jury trial rights unless the cause of action affects the allowance or disallowance of a claim.

The Second and Third Circuits take yet another approach. The Second Circuit rejected the Fifth Circuit's holding that "once a proof of claim is filed, both the creditor and debtor are assumed to have waived their right to a jury trial," concluding, "[w]e do not believe that to be the law." *Germain,* 988 F.2d at 1330

[5] Accordingly, the trustee's certiorari petition in *U.S. Bank* did not implicate the question presented here. Petition for a Writ of Certiorari, *U.S. Bank Nat'l Ass'n v. Verizon Commc'ns, Inc.* (No. 14-718), 2014 WL 7205178 (Dec. 15, 2014).

(citing *Jensen*, 946 F.2d at 374). The court stated that "neither precedent nor logic supports the proposition that either the creditor or the debtor automatically waives all right to a jury trial whenever a proof of claim is filed." *Id.* Instead, according to the Second Circuit, a party "loses its jury trial right only with respect to claims whose resolution affects the allowance or disallowance of [a] creditor's proof of claim or is otherwise so integral to restructuring the debtor-creditor relationship." *CBI*, 529 F.3d at 466 (citing *Germain*, 988 F.2d at 1327).

The Third Circuit follows the Second Circuit approach. Surveying the circuit split, the court explained that "[t]he Fifth Circuit in [*Jensen*] agreed with the result in *Hallahan* while disagreeing with the reasoning" and that "[t]he Second Circuit's opinion in [*Germain*] follows the reasoning of neither *Hallahan* nor *Jensen*." *Billing,* 22 F.3d at 1250-51. It rejected the Seventh Circuit's approach, observing that "[t]he waiver theory of *Hallahan*, rejected by *Jensen* and *Germain*, raises as many questions as it answers." *Id.* at 1251. Then it rejected the Fifth Circuit's "specific holding [in] *Jensen* that *any* dispute between a debtor and a creditor who has filed a proof of claim is equitable in nature." *Id.* at 1252. Instead, the court followed the Second Circuit: "The fact that the debtor may have voluntarily submitted itself to the bankruptcy court's equitable jurisdiction does not complete the analysis. A court must also ask whether the resolution of the particular dispute at issue is necessarily part of the process of the disallowance and allowance of claims." *Id.* at 1251 n.14.

Because this case arose in the Second Circuit, the Trustee was entitled to and did demand a jury trial with respect to his fiduciary duty claims—which ended up being dispositive on appeal.

II. The Question Presented Is Important And Recurring And The Division Of Authority Is Deeply Entrenched.

This split cries out for resolution. Whether a debtor may demand a jury trial is an important question that recurs frequently. Over the past nine years, bankruptcy petitions have been filed at the astounding rate of 800,000 to 1.5 million a year. United States Courts, *U.S. Bankruptcy Courts—Judicial Business 2016*.[6] Parties commenced 29,000 to 75,000 adversary proceedings in the same period. *Id.* Just in the last reported year, 5,243 adversary proceedings began in bankruptcy courts covered by the Second and Third Circuits; 1,671 adversary proceedings began in the Fifth Circuit under its different case law; and 6,728 cases were brought in the Sixth and Seventh Circuits under their rule. United States Courts, *U.S. Bankruptcy Courts—Adversary Proceedings Commenced, Terminated, and Pending Under the Bankruptcy Code During the 12-Month Periods Ending December 31, 2015 and 2016*.[7]

That left nearly 15,000 adversary proceedings in circuits with no definitive holding on the issue where

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[6] http://www.uscourts.gov/statistics-reports/us-bankruptcy-courts-judicial-business-2016

[7] http://www.uscourts.gov/sites/default/files/data_tables/stfj_f8_1231.2016.pdf

the lower courts had to fend for themselves. *Id.* Numerous district and bankruptcy courts in these jurisdictions have been forced to navigate the "myriad decisions all purporting to follow dictates from the highest court," *In re Ozier*, 132 B.R. 595, 603 (Bankr. E.D. Ark. 1991), and they continue to grapple with this issue today. Some follow the Second Circuit's approach,[8] some follow the Fifth Circuit's,[9] and the "vast majority of cases" follow the Seventh Circuit's.[10] *In re Hutchins*, 211 B.R. 322, 324 (Bankr. E.D. Ark. 1997). These divergent answers to the question presented are now firmly entrenched. Courts regularly approach the problem by simply laying out the circuit split and

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[8] *See, e.g.*, *In re Sears*, No. ADV A12-4034, 2014 WL 689883, at *3 (Bankr. D. Neb. Feb. 21, 2014); *In re Palm Beach Fin. Partners, L.P.*, 501 B.R. 792, 805 (Bankr. S.D. Fla. 2013); *In re Quarles*, 294 B.R. 729, 731 (Bankr. E.D. Ark. 2003); *In re Crown Vantage, Inc.*, No. C 02-03836 WHA, 2002 WL 32872440, at *4 (N.D. Cal. Dec. 16, 2002); *In re RDM Sports Grp., Inc.*, 260 B.R. 915, 925 (Bankr. N.D. Ga. 2001).

[9] *See, e.g.*, *In re Pearlman*, 493 B.R. 878, 885-88 (Bankr. M.D. Fla. 2013); *DePaola v. Nissan N. Am., Inc.*, No. CIV.A. 1:04CV267-W, 2005 WL 2122265, at *2 & n.8 (M.D. Ala. Aug. 29, 2005).

[10] *See, e.g.*, *In re Neves*, 500 B.R. 651, 659, 661-62 (Bankr. S.D. Fla. 2013); *In re Felice*, 480 B.R. 401, 435 (Bankr. D. Mass. 2012); *Carlson v. U.S. Dep't of Educ.*, No. CIV. 12-645 JNE/JJK, 2012 WL 4475300, at *12 n.4 (D. Minn. Aug. 9, 2012); *In re Charlotte Commercial Grp., Inc.,* 288 B.R. 715, 719 (Bankr. M.D.N.C. 2003); *In re Hutchins*, 211 B.R. 322, 324 (Bankr. E.D. Ark. 1997); *In re Ward*, 184 B.R. 253, 257 (Bankr. D.S.C. 1995); *In re Lyons*, 200 B.R. 459, 460 (Bankr. S.D. Ga. 1994); *In re Cummins*, 174 B.R. 1005, 1009 (Bankr. W.D. Ark. 1994); *In re Auto Imports, Inc.*, 162 B.R. 70, 72 (Bankr. D.N.H. 1993); *In re Parsons*, 153 B.R. 585, 588 (M.D. Fla. 1993); *In re Haile Co.*, 132 B.R. 979, 980 (Bankr. S.D. Ga. 1991).

picking a side. *See, e.g.*, *Oakwood Homes*., 378 B.R. at 70.

Resolving the question presented will settle, once and for all, whether those proceedings should be tried before a judge or a jury. And that question, in turn, will often dictate whether trials will be held in bankruptcy courts, which may only hold a jury trial "with the express consent of all the parties," 28 U.S.C. § 157(e), or instead in district court. This is why "most courts have held that the right to a jury trial constitutes sufficient 'cause' for withdrawal" of the reference, requiring the case to be transferred to district court. *In re Kenai Corp.*, 136 B.R. 59, 61 (S.D.N.Y. 1992). As this Court has recognized three times in recent years, the allocation of work between the bankruptcy courts and the district courts is an important matter worthy of this Court's attention. *See Stern v. Marshall*, 564 U.S. 462 (2011); *Exec. Benefits Ins. Agency v. Arkison*, 134 S. Ct. 2165 (2014); *Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932 (2015).

Uniform rules regarding whether a jury trial is required is particularly important in this context given the Constitution's recognition of the need for "uniform Laws on the subject of Bankruptcies throughout the United States." U.S. Const. art. I § 8. Thus this Court regularly grants certiorari to resolve circuit conflicts over even isolated provisions of the Bankruptcy Code. *See, e.g.*, *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973 (2017); *Husky Int'l Elecs., Inc. v. Ritz*, 136 S. Ct. 1581 (2016); *Baker Botts LLP v. ASARCO LLC*, 135 S. Ct. 2158 (2015); *Harris v. Viegelahn*, 135 S. Ct. 1829 (2015); *Bullard v. Blue Hills*

Bank, 135 S. Ct. 1686 (2015). Where there is disagreement on bankruptcy proceedings' compliance with the Constitution, the uniformity this Court can provide is even more essential.

Moreover, "this Court has long recognized that a chief purpose of the bankruptcy laws is 'to secure a prompt and effectual administration and settlement of the estate of all bankrupts within a limited period." *Katchen*, 382 U.S. at 328-29 (quoting *Ex parte Christy*, 44 U.S. 292, 312 (1845)). That is why "[t]he [Bankruptcy] Code is designed to enforce a distribution of the debtor's assets in an orderly manner." *Czyzewski*, 137 S. Ct. at 984 (quoting H.R. Rep. No. 103-835 at 33 (1994)). The question presented bears directly on those important interests: Which factfinder decides the dispute—and in which forum—has a considerable effect on a case's trajectory. A broad jury trial right for debtors significantly impacts the prompt and orderly administration of bankruptcy estates, given the greater complexity of and more intense preparations necessary for a jury trial, unlike a trial before a bankruptcy judge who is already familiar with the dispute and who needs neither jury instructions nor *Daubert* hearings.

III. This Case Is An Ideal Vehicle To Resolve The Question Presented.

This case is an ideal vehicle to resolve the question presented because the Second Circuit's approach infected all aspects of the proceedings below. But for the Second Circuit's rule, the Trustee would not have been able to demand a jury trial in the first place, and his action would have proceeded to a bench trial in

bankruptcy court rather than a jury trial in district court.

1. In the courts below, the parties were constrained by the Second Circuit's settled law with respect to a debtor's jury trial right. Thus, when the Trustee sought withdrawal of the reference in order to proceed with a jury trial in the District Court, Renco did not oppose the motion because *Germain* and *CBI* were binding precedent on that issue. A241-43. Under those decisions, Renco understood that "the Trustee is entitled to a jury trial" because some of his causes of action plainly did not affect the allowance or disallowance of Renco's bankruptcy claims. A241.

After the case was transferred to the District Court, Renco sought to carve out the Trustee's fraudulent transfer and conveyance claims from the jury trial on the theory that even under the Second Circuit's rule, those claims should not be tried before a jury because they affected the allowance or disallowance of claims. A443-44, 451. Renco could not make that argument with respect to the Trustee's fiduciary duty claims, which did not affect the allowance or disallowance of a creditor's proof of claim. *See* Pet. App. 4a.

The Second Circuit's rule played out in the disposition of the appeal as well. The Court of Appeals relied on Renco's decision—compelled by Second Circuit law—not to resist a jury trial on the fiduciary duty claims in affirming the District Court's eventual decision to try all claims to the jury. Because, in the panel's words, Renco's objection to a jury trial "was not complete," Pet. App. 4a, and because the jury

awarded the same damages on the fiduciary duty claims as it did on the fraudulent conveyance and transfer claims for which Renco did object to a jury trial, the panel concluded that the Trustee would have had a jury trial no matter what. Therefore, it held, any error in the District Court's decision to try the Trustee's fraudulent transfer and conveyance claims before a jury was harmless. *Id*. The panel's affirmance thus depended on the fact that Renco could not, consistent with binding Second Circuit precedent, object before the District Court to a jury trial on certain claims. Renco did, however, repeatedly note *Germain*'s constraints on its arguments in this case and its intent to seek review of the *Germain* rule in this Court. C.A. 150 at 63 n.9; C.A. 218-1 at 13 n.*; C.A. 222 at 2-7.[11]

Had this case arisen in the Sixth or Seventh Circuits, there would have been no need to attempt to parse which causes of action affect the allowance or disallowance of a claim and which do not. The issue would have been simple: A trustee has no jury right, so the Trustee here would never have been able to demand a jury trial in the first place. The question presented therefore controls how this adversary proceeding unfolded and whether it should have instead been heard by a different factfinder in a different forum.

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[11] The Second Circuit, in any event, does not require that arguments foreclosed by binding precedent be raised to avoid waiver. *Hawknet, Ltd. v. Overseas Shipping Agencies*, 590 F.3d 87, 91-92 (2d Cir. 2009).

2. Moreover, this case comes from a circuit that has staked out one side of an entrenched split. The unpublished decision below is premised on the Second Circuit's published and oft-cited decisions in *Germain* and *CBI*, and thus is a suitable vehicle for examining those decisions. This Court regularly grants review of unpublished opinions that rely on settled circuit precedent, including four cases from the October 2016 Term alone.[12]

When binding precedent dictates the outcome of a case, it is not uncommon that the first meaningful opportunity for a party to present its previously foreclosed arguments is before this Court. Yet that does not hinder this Court's review. In *California Public Employees' Retirement System v. ANZ Securities, Inc.*, 137 S. Ct. 2042 (2017), for example, the panel had not passed on the question presented because circuit precedent controlled. The case involved whether the statute of repose in § 13 of the Securities Act of 1933 could be tolled. *Id.* at 2047. The Second Circuit had previously held tolling did not apply to that provision in a case called *IndyMac*. *In re Lehman Bros*, 655 F. App'x at 15 (citing *Police & Fire Ret. Sys. of Detroit v. IndyMac MBS, Inc.*, 721 F.3d 95 (2d Cir. 2013)). Constrained by precedent before the Second Circuit, the

[12] *See, e.g.*, *Manuel v. City of Joliet*, 137 S. Ct. 911 (2017) (reviewing *Manuel v. City of Joliet*, 590 F. App'x 641 (7th Cir. 2015)); *Manrique v. United States*, 137 S. Ct. 1266 (2017) (reviewing *United States v. Manrique*, 618 F. App'x 579 (11th Cir. 2015)); *Beckles v. United States*, 137 S. Ct. 886 (2017) (reviewing *Beckles v. United States*, 616 F. App'x 415 (11th Cir. 2015)); *California Pub. Employees' Ret. Sys. v. ANZ Sec., Inc.*, 137 S. Ct. 2042 (2017) (reviewing *In re Lehman Bros. Sec. & ERISA Litig.*, 655 F. App'x 13 (2d Cir. 2016)).

appellant had attempted to distinguish *IndyMac*, but the court of appeals rejected that effort. *Id.* Before this Court, the petitioner then simply challenged the earlier *IndyMac* decision head-on. Despite the fact that the Second Circuit in an unpublished order had not reconsidered whether *IndyMac* was correctly decided, this Court took up that question. *See also, e.g.*, *Exec. Benefits*, 134 S. Ct. at 2174-75 (similar procedural posture); *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 125 (2007) (same). The same result is proper here.

IV. The Second Circuit's Approach Is Wrong And Should Be Reversed.

The Court should grant review also because the Second Circuit's rule is wrong and should be reversed. Under this Court's reasoning in *Langenkamp* and *Granfinanciera*, when debtors elect to submit themselves and their estates to the bankruptcy court's jurisdiction to obtain the benefits of the equitable bankruptcy process, they "subject[] themselves to *all* the consequences that attach to an appearance," *Granfinanciera*, 492 U.S. at 59 n.14, (emphasis added) (quoting *Alexander v. Hillman*, 296 U.S. 222, 241 (1935)), including the loss of jury trial rights.

A. This Court has "consistently interpreted the phrase 'Suits at common law'" in the Seventh Amendment "to refer to 'suits in which *legal* rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered.'" *Granfinanciera*, 492 U.S. at 41 (quoting *Parsons v. Bedford*, 28 U.S. 433, 447 (1830)).

Normally, determining whether a party has a jury trial right therefore entails a two-part inquiry: "First, we compare the statutory action to 18th-century actions brought in the courts of England prior to the merger of the courts of law and equity. Second, we examine the remedy sought and determine whether it is legal or equitable in nature." *Tull v. United States*, 481 U.S. 412, 417-18 (1987) (internal citations omitted).

In the bankruptcy context, however, that is not the end of the story. A party loses any jury right by "subjecting himself to the bankruptcy court's equitable power." *Langenkamp*, 498 U.S. at 44. Thus, "[b]y presenting their claims," creditors "subject[] themselves to all the consequences that attach to an appearance." *Katchen*, 382 U.S. at 335 (quoting *Alexander*, 296 U.S. at 241). "That requirement is in harmony with the rule generally followed by courts of equity that, having jurisdiction of the parties to controversies brought before them, they will decide *all* matters in dispute and decree complete relief." *Id.* (emphasis added) (quoting *Alexander*, 296 U.S. at 242).

Accordingly, in *Langenkamp*, this Court held that creditors who had "filed claims against the bankruptcy estate, thereby bringing themselves within the equitable jurisdiction of the Bankruptcy Court[,] … were not entitled to a jury trial" in an action brought by the trustee to avoid preferential transfers. 498 U.S. at 45; *see also id.* at 44 ("[B]y filing a claim against a bankruptcy estate … [the creditor] subject[s] himself to the bankruptcy court's equitable power. … As such, there is no Seventh Amendment right to a jury trial.").

That the creditors-defendants in *Langenkamp* had voluntarily subjected themselves to bankruptcy jurisdiction distinguished the case from this Court's earlier decision in *Granfinanciera*. In *Granfinanciera*, the Court considered defendants' right to a jury trial where a trustee sought to avoid a fraudulent transfer. The Court held that under the two-part *Tull* test, fraudulent transfer claims were legal in nature, and therefore the defendants had a right to a jury trial. *Granfinanciera*, 492 U.S. at 42-49. But in that case, the defendants were involuntary participants in the bankruptcy proceeding. The Court suggested the answer might be different had the defendants "filed claims against the estate"—the scenario the Court then took up in *Langenkamp*. *Id.* at 58.

B. *Granfinanciera* and *Langenkamp* involved the jury trial rights of non-debtors. But their reasoning dictates the conclusion that a voluntary debtor who submits to bankruptcy jurisdiction similarly has no jury trial right.

Creditors and debtors "subject[] themselves to the bankruptcy court's equitable power" in different ways. Creditors file proofs of claim. *Granfinanciera*, 492 U.S. at 59 n.14. A "claim" is broadly defined as a "right to payment" or a "right to an equitable remedy." 11 U.S.C. § 101(5). And a proof of claim is simply "a written statement setting forth a creditor's claim" against the estate. Fed. R. Bankr. P. 3001(a). Accordingly, when a creditor files a proof of claim, it "triggers the process of allowance and disallowance of claims." *Langenkamp*, 498 U.S. at 44 (citation omitted). The claim, once filed, is "deemed allowed" unless an objection is made, at which point the bankruptcy court

must determine whether or not to allow the claim. 11 U.S.C. § 502(a)-(b). By filing a proof of claim, a creditor thus elects to participate in the bankruptcy process to acquire a share of the assets—in other words, subjects himself to the bankruptcy court's equitable jurisdiction.

In contrast to creditors, debtors submit themselves to the bankruptcy court's jurisdiction simply by filing a bankruptcy petition. 11 U.S.C. § 301(a). By filing for bankruptcy protection, a debtor thus "invoke[s] the bankruptcy court's equitable jurisdiction in a more profound manner than a mere creditor who has the Hobson's choice either to submit to the equitable power of the court or to forego a bona fide claim. The act of filing … causes the equitable bankruptcy proceeding to come into existence." *Hickman*, 384 B.R. at 839.

Moreover, the voluntary petition itself "constitutes an order for relief," 11 U.S.C. § 301(b), which "effectively divests the debtor of his assets, creating an estate controlled by the bankruptcy court." *In re HealthTrio, Inc.*, 653 F.3d 1154, 1157 (10th Cir. 2011). Commencing a bankruptcy proceeding thus gives the court "exclusive jurisdiction of all the property, wherever located, of the debtor." 28 U.S.C. § 1334(e). That property includes "all" of the debtor's legal claims. 11 U.S.C. § 541(a)(1); 4 Collier on Bankruptcy § 541.07 (16th ed.) ("The estate created pursuant to section 541(a) includes causes of action belonging to the debtor at the time the case is commenced.").

Gaining jurisdiction over the debtor and its assets is a critical component of the bankruptcy process.

"[B]ecause the court's jurisdiction is premised on the debtor and his estate, and not on the creditors," the "bankruptcy court is able to provide the debtor a fresh start in this manner, despite the lack of participation of all of his creditors." *Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440, 447 (2004). The petition also gives rise to an automatic stay preventing, among other things, the commencement or continuation of judicial proceedings against the debtor that could have been brought before the petition and any action to obtain the debtor's property. 11 U.S.C. § 362.

The Sixth and Seventh Circuits were therefore correct to conclude that "debtors who initially choose to invoke the bankruptcy court's jurisdiction to seek protection from their creditors" lose their jury trial right—just as creditors do when they file a proof of claim. *Hallahan*, 936 F.2d at 1505; *McLaren*, 3 F.3d at 960. Debtors elect to submit themselves and their estates to the bankruptcy court's jurisdiction to obtain the benefits of the equitable bankruptcy process. By doing so, they "subject[] themselves to *all* the consequences that attach to an appearance," including the loss of a jury right. *Granfinanciera,* 492 U.S. at 59 n.14 (emphasis added) (quoting *Alexander,* 296 U.S. at 241). And that jurisdiction covers all proceedings "arising under title 11, or arising in or related to cases under title 11." 28 U.S.C. § 1334(b); *see* 28 U.S.C. § 157(a) (permitting district courts to refer such proceedings to bankruptcy court). A party "cannot initiate bankruptcy proceedings, thus forcing creditors to come to bankruptcy court to collect their claims, and simultaneously complain that the bankruptcy forum denies him or her a jury trial." *Hallahan*, 936 F.2d at 1505.

C. Practical considerations also recommend the Sixth and Seventh Circuit's test. For one thing, that test is far easier to administer—an important consideration, given that the consequence of a mistake is to vacate a trial and force a retrial before the right trier of fact. In general, determining whether a right to a jury trial exists requires an arduous analysis. Comparing the claim to 18th-century actions can require "rattling through dusty attics of ancient writs"—not always a straightforward exercise. *Pereira v. Farace*, 413 F.3d 330, 337-38 (2d Cir. 2005) (quoting *Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 575 (1990) (Brennan, J., concurring)). And determining whether a remedy is legal or equitable is no easy task either. Take an action for recovery of profits, for example. It is "not easily characterized as legal or equitable," because it is an "amalgamation of rights and remedies drawn from both systems" and so has a "protean character." *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962, 1967 n.1 (2014). Then after examining the historical prong and the remedial prong, a court must somehow "balance" the two to reach its ultimate conclusion. *Granfinanciera,* 492 U.S. at 42.

The Second Circuit's approach layers on top of this general test an even more difficult, bankruptcy-specific analysis: determining the extent to which the cause of action "affects the allowance or disallowance of the creditor's proof of claim or is otherwise so integral to restructuring the debtor-creditor relationship." *CBI*, 529 F.3d at 466. Delving into the historical English actions, the ambiguities of legal and equitable remedies, *and* intricacies of the bankruptcy code

can be challenging and time consuming in proceedings that are meant to be speedy and efficient. *See, e.g.*, *Oakwood Homes Corp.*, 378 B.R. 59 (engaging in that analysis). Adding to the complication, the analysis may not yield a uniform result even across a single debtor's related claims, as occurred here. Under the Sixth and Seventh Circuit's bright line rule, in contrast, the entire analysis can be avoided. The debtor, having subjected itself to the bankruptcy court's equitable jurisdiction, simply does not have a jury trial right.

Relatedly, jury trials are often incompatible with the predictability and efficiency that are paramount in bankruptcy proceedings. Jury trials are not only longer, more expensive, and less predictable, but they can require transferring the case to a different forum (the district court) before a judge with no prior familiarity with the case.

This Court should adopt the Sixth and Seventh Circuit's approach and reverse the Second Circuit.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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Dated August 9, 2017

APPENDIX A

SUMMARY ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT (MARCH 8, 2017)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

_____

IN THE MATTER OF MAGNESIUM CORPORATION OF AMERICA,

Debtor.

_____

LEE E. BUCHWALD, as Trustee for Magnesium Corporation of America and Related Debtor, Renco Metals, Inc.,

Plaintiff-Appellee-Cross-Appellant,

v.

THE RENCO GROUP, INC., a Delaware Corporation, IRA LEON RENNERT,

Defendants-Appellants-Cross-Appellees,

SABEL INDUSTRIES, INC., K. SABEL HOLDINGS, INC., KPMG PEAT MARWICK LLP, DONALDSONLUFKIN & JENRETTE SECURITIES CORPORATION, HOULIHAN LOKEY HOWARD & ZUKIN, CADWALADER, WICKERSHAM & TAFT, LLP, ROGER L. FAY, JUSTIN W. D'ATRI, DENNIS A. SADLOWSKI, MICHAEL C. RYAN, MICHAEL H. LEGGE, RON L. THAYER, TODD R. OGAARD, LEE R. BROWN, HOWARD I. KAPLAN, KEITH SABEL,

UNIDENTIFIED TRUSTEES, OF TRUSTS ESTABLISHED BY IRA LEON RENNERT, CREDIT SUISSE FIRST BOSTON LLC, KPMG LLP, HOULIHAN LOKEY,

Defendants.

Nos. 15-2691-bk, 15-2962-bk, 15-2971-bk

Appeal from a judgment of the United States District Court for the Southern District of New York (Alison J. Nathan, *Judge*).

PRESENT: REENA RAGGI, RAYMOND J. LOHIER, JR., CHRISTOPHER F. DRONEY, *Circuit Judges*.

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the September 25, 2015 judgment of the district court is AFFIRMED.

Defendants The Renco Group, Inc. ("Renco") and Ira Rennert appeal a $213,199,093.70 judgment entered against them following a jury's verdict of liability on plaintiff Lee Buchwald's (the "Trustee's") various state claims, including fraudulent conveyance, breach of fiduciary duty, and unjust enrichment. These claims, which the Trustee first brought in an adversarial proceeding before the bankruptcy court, relate to certain dividends paid to defendants in the late 1990s by debtor Magnesium Corporation of America and its then-parent, Renco Metals. On appeal, defendants challenge (1) the allowance of a jury trial, (2) various trial rulings, and (3) the return of a

compromise verdict. The Trustee cross-appeals, seeking prejudgment interest under Delaware law. In addressing these arguments, we assume the parties' familiarity with the facts and record of prior proceedings, which we reference only as necessary to explain our decision to affirm.

1. Jury Trial

Defendants argue that the Trustee was not entitled to a jury trial as a matter of law and that they were wrongly denied the right to withdraw their affirmative consent to a jury trial given when the matter was transferred from bankruptcy to district court. Our resolution of the second issue obviates the need to decide the first.

Although this court has not decided whether district courts have any discretion to reject withdrawals of consent to jury trials—a matter on which Fed. R. Civ. P. 39 is silent—defendants conceded discretion at oral argument. To the extent we would review the district court's withdrawal of rejection here only for abuse of discretion, defendants would have a difficult time demonstrating abuse given (1) defendants' initial consent was provided specifically "in order for a jury trial to be held with respect to the Trustee's claims," and with the understanding that, with such consent, the bankruptcy court reference in the Trustee's case would be withdrawn with respect to the adversary proceeding and the matter transferred to the district court. App'x 241-42. Moreover, (2) substantial motion practice had taken place before the district

court with the expectation of a jury trial, and (3) defendants' motion to withdraw was made almost a year after consent and only two months before trial.

We need not, however, decide whether abuse of discretion is the proper standard of review because even if we were to identify any error in the rejection of defendants' withdrawal, that error would be harmless because defendants' withdrawal was not complete. After the parties agreed to remove the proceeding to the district court for a jury trial on all of the Trustee's claims, the defendants moved to strike the jury demand with respect to some of the Trustee's claims. Notably, the defendants did not move to strike the claims against Rennert and the Renco Group for aiding and abetting a breach of fiduciary duty. *See* App'x 451 n.l. Thus, regardless of whether the Trustee had the right to a jury trial on these claims, the district court was authorized to try them before a jury on the prior consent that defendants never withdrew. *See* Fed. R. Civ. P. 39(c)(2). Moreover, the jury awarded the same damages for these aiding-and-abetting claims as it did for the other claims specified in defendants' withdrawal. App'x 768-71. The challenged judgment did not double count these identical damages and the defendants bring no other challenges to the aiding-and-abetting claims. Thus, defendants were not harmed by the fact that all of these claims were tried to a jury. *See Abou-Khadra v. Mahshie*, 4 F.3d 1071, 1080 (2d Cir. 1993) (concluding inconsistency in jury's answer to interrogatory specific to one claim was harmless where jury awarded identical amount of damages on different claim). Accordingly, any jury trial error in this case was necessarily harmless. *See Lore v. City of Syracuse*, 670 F.3d 127,

151 (2d Cir. 2012) (recognizing that harmless error cannot upset civil judgment).

Accordingly, we affirm the district court's denial of defendants' motion to strike.

2. Trial Rulings

Defendants challenge the exclusion of evidence relating to ongoing litigation between the EPA and MagCorp in Utah district court. We review "a challenge to [a] district court's evidentiary ruling[s] … for abuse of discretion, reversing only if we find manifest error," *United States v. Al Kassar*, 660 F.3d 108, 123 (2d Cir. 2011), which is not evident here.

The court concluded that evidence of a judicial opinion predicated on the invalidity of an EPA administrative interpretation (and subsequently vacated on that ground) would have had little probative value and been unduly confusing. *See Buchwald v. Renco Grp.*, 539 B.R. 31, 55-56 (S.D.N.Y. 2015). A "district court is in the best position to do the balancing mandated by Rule 403" in such matters, and it acted well within its discretion in doing so here. *United States v. Al Kassar*, 660 F.3d at 123 (internal quotation marks omitted). The same conclusion obtains with respect to its exclusion of testimony regarding the "proposed terms" of a settlement agreement reached only in principle that is not yet final and for which no written evidence was adduced. App'x 866-67. Insofar as such evidence was proffered to establish the value of the disputed Utah claims—and, in turn, the magnitude of contingent liabilities and, thus, Magnesium's insolvency—the district court reasonably concluded that

such evidence was barred by Fed. R. Evid. 408. *See Trebor Sportswear Co. v. The Ltd. Stores, Inc.*, 865 F.2d 506, 510 (2d Cir. 1989) (upholding exclusion of settlement evidence under Rule 408 where purported "other purpose" was "closely intertwined" with liability on underlying claim).

Defendants also challenge rejection of their proposed curative instruction relating to the Trustee's purportedly prejudicial summation comments suggesting that Rennert and MagCorp deliberately delayed the Utah litigation. The argument fails because the district court immediately instructed the jury to disregard the last of the three challenged comments and concluded that further instruction was unnecessary to avoid any possible prejudice but, rather, would seem to favor defendants. *See United States v. Thomas*, 377 F.3d 232, 245 (2d Cir. 2004) (recognizing role of trial court's judgment as to curative instructions). In any event, we cannot conclude that the challenged statements, viewed in the context of the Trustee's summation as a whole, "so infect[ed] [the] trial with undue prejudice or passion as to require reversal." *Patterson v. Balsamico*, 440 F.3d 104, 119 (2d Cir. 2006) (internal quotation marks omitted); *see Matthews v. CTI Container Transp. Int'l Inc.*, 871 F.2d 270, 278 (2d Cir. 1989) (stating new trial warranted only "if counsel's conduct created undue prejudice or passion which played upon the sympathy of the jury").

Accordingly, we identify no abuse of discretion in the district court's evidentiary decisions.

3. Compromise Verdict

Defendants argue that the jury's verdict reflects an impermissible compromise requiring a new trial. We review the denial of a new-trial motion for abuse of discretion, *see*, *e.g.*, *Atkins v. New York City*, 143 F.3d 100, 102 (2d Cir. 1998), which we will identify only where the decision rests upon an error of fact or law or otherwise "cannot be located within the range of permissible decisions," *Crawford v. Tribeca Lending Corp.*, 815 F.3d 121, 124 (2d Cir. 2016) (internal quotation marks omitted).

The district court's denial manifests no such error here because defendants conflate an *inconsistent* verdict with a *compromise* verdict. The former, which pertains to internally inconsistent verdicts on claims, must be raised "prior to the excusing of the jury." *Anderson Grp., LLC v. City of Saratoga Springs*, 805 F.3d 34, 46 (2d Cir. 2015) (internal quotation marks omitted). This strict standard not only allows inconsistencies to be resolved by the jury and thereby "head[] off a second lengthy trial," *id. at 47* [sic], but also discourages parties from "sit[ting] by silently" instead of timely raising the challenge, *Denny v. Ford Motor Co.*, 42 F.3d 106, 111 (2d Cir. 1994). Compromise-verdict claims, by contrast, may be raised after the jury is dismissed, but can succeed only where it is apparent that a verdict was reached "by means other than a conscientious examination of the evidence." *Maher v. Isthmian Steamship Co.*, 253 F.2d 414, 416 (2d Cir. 1958). The plainest example of a compromise verdict is "where damages are awarded in an amount inconsistent with the theory of liability offered at trial

together with other indicia." *Atkins v. New York City*, 143 F.3d at 104.

Defendants here concede that they failed to raise a timely inconsistency challenge. Nevertheless, they recast that forfeited challenge to the different verdicts on the Trustee's federal and state claims as one asserting a compromise verdict.[1] They cite no precedent recognizing a compromise-verdict claim predicated upon alleged inconsistency. Indeed, our case law has heretofore only identified impermissible compromise in the context of discrepant liability and damages clearly "inconsistent with the facts adduced at the trial." *Maher v. Isthmian Steamship Co.*, 253 F.2d at 416.[2] That is not this case. Defendants do not argue that the evidence was insufficient to support the finding in plaintiffs' favor on the state law claims. They

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[1] Defendants argue for the first time in their reply brief that the district court erred in finding their inconsistent-verdict challenge waived. Even were this argument not forfeited, *see, e.g.*, *Garcia v. Hartford Police Dep't*, 706 F.3d 120, 131 (2d Cir. 2013), defendants' repeated refusals to raise any objection to the verdict—even after being given multiple opportunities—prior to the jury's dismissal preclude identification of abuse of discretion, *see Kosmynka v. Polaris Indus., Inc.*, 462 F.3d 74, 83 (2d Cir. 2006) (stating waiver standard); *Diamond Shamrock Corp. v. Zinke & Trumbo, Ltd.*, 791 F.2d 1416, 1423 (10th Cir. 1986) (finding waiver when court inquired whether counsel had anything to raise before excusing jury and counsel replied negatively).

[2] *Stephenson v. Doe*, 332 F.3d 68 (2d Cir. 2003), relied upon by defendants, is not to the contrary. It reasoned that "the effect of having … an 'out' (by finding qualified immunity) *affected the care* with which the jury conducted the excessive force inquiry," *id.* at 80 (emphasis added) (citing *Atkins v. New York City*, 143 F.3d at 104); it did not suggest that the jury compromised.

argue only that such a verdict is at odds with the finding against plaintiffs on the federal claim. Thus, like the district court, we conclude that defendants cannot pursue a compromise-verdict claim because that would "sneak [a waived inconsistency claim] in through the back door," *Buchwald v. Renco Grp.*, 539 B.R. at 61-62, while undermining the principle that the jury must be given the opportunity to reconcile any apparent or alleged inconsistency in the first instance, *see Anderson Grp., LLC v. City of Saratoga Springs*, 805 F.3d at 46.

Finally, defendants' argument that the inconsistency represents an unwaivable "fundamental error" fails because we apply that standard only to purported errors in jury instructions or verdict sheets, as to which defendants here raise no objection. *See, e.g.*, *Jarvis v. Ford Motor Co.*, 283 F.3d 33, 62 (2d Cir. 2002).

Accordingly, we affirm the district court's denial of a new trial on compromise-verdict grounds.

4. Prejudgment Interest

On cross-appeal, the Trustee argues for the first time that the district court erred in failing to use Delaware law to calculate prejudgment interest on the breach of fiduciary duty claims. While the Trustee initially provided calculations under both New York and Delaware law, its memorandum in support of prejudgment interest requested only that it be "awarded consistent with the provisions of *New York law* applicable … and that judgment be entered on the jury's verdict *including interest at the New York statutory*

rate of 9% per annum." App'x 794 (emphasis added). In setting a rate of 6%, the district court stated that "Plaintiff's request to apply only New York law obviates the need to conduct further analysis under Delaware law" and that, "[i]f New York law is less generous than Delaware law, then Plaintiff has voluntarily chosen to forego additional prejudgment interest to which he may be entitled." *Id.* at 870 & n.1. We identify no error in this waiver determination, *see Olin Corp. v. Am. Home Assur. Co.*, 704 F.3d 89, 98 (2d Cir. 2012) (recognizing waiver reviewed for abuse of discretion), a conclusion reinforced by the Trustee's failure to contest that determination in its motion for reconsideration. Accordingly, we affirm the district court's award of prejudgment interest.

5. Conclusion

We have considered the parties' remaining arguments and conclude that they are without merit. Accordingly, we AFFIRM the September 25, 2015 judgment of the district court.

FOR THE COURT:
CATHERINE O'HAGAN WOLFE,
Clerk of Court

/s/ Catherine O'Hagan Wolfe

APPENDIX B

BENCH RULING OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DENYING MOTION TO STRIKE JURY DEMAND (DECEMBER 19, 2014)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LEE E. BUCHWALD,
Plaintiff,

v.

THE RENCO GROUP, INC., et al.,
Defendants.

No. 13 cv 7948

BEFORE: HON. ALISON J. NATHAN,
District Judge

* * *

[5]

Next, we will talk about mediation, settlement discussions. I'll hear what has been attempted in that regard. It is my intention, I'll tell you at the outset, to order you into some efforts before we put this matter

and the resources of the court and citizens and your clients to the test that stands ahead.

The last thing I have on my agenda is just to set some concrete dates with respect to the matters I've just discussed. I'll ask, with that basic agenda laid out, if we should simply turn to it, if there's anything to put in front of it; and I gather there is not?

MR. HAVELES: Not on our part, your Honor.

MR. SCOT STIRLING: We have nothing to add to that.

THE COURT: All right. On November 12, 2014, I received a letter from defendants' counsel containing three requests. First, that I strike plaintiff's jury demand for several of the claims in the case. Second, that I reopen summary judgment briefing to permit a motion for summary judgment on the statute of limitations defense. Third, that I grant defendants' leave to amend their complaint to assert a defense under Section 546(e) of the Bankruptcy Code.

The parties exchanged two rounds of letters on these issues, and I asked for some simultaneous briefing. I have reviewed the parties' letters and briefs and am prepared to resolve the issues as follows:

[6]

First, I will deny defendants' motion to strike the jury demand. The parties, it does not appear to me, dispute, in general, that a jury trial is available for the types of claims plaintiff has brought. Instead, defendants argue that what were legal claims became

subject to the equitable jurisdiction of the bankruptcy court because resolution of these claims will determine whether defendants' indemnity claims must be disallowed. They claim that the rule from *Langenkamp*, 498 U.S. 492, means that the claims are integral to restructuring the debtor/creditor relationship and therefore have become equitable claims to which there is no right to a jury.

I disagree. The Second Circuit has explained that legal claims are not, quote, "magically converted into equitable claims simply because they arise in equitable proceedings." Instead, in *Germain v. Connecticut National Bank*, 988 F.2nd 1323, the circuit court explained that the jury right is not lost when claims, quote, "only incidentally implicate provisions of the Bankruptcy Code," quoting there from page 1329.

While the outcome of this case could incidentally affect defendants' indemnity claims, the suit was not brought solely to meet those claims. This is an adversary action for damages and to avoid certain transfers. Moreover, I am persuaded by the explanation in *Picard v. Katz*, 825 F.Supp.2d [7] 484, that any lingering relationship to the bankruptcy court's equitable jurisdiction is substantially severed when the reference was withdrawn without opposition for the purpose of a jury trial. The case is now, one might say, for better or for worse, being adjudicated here and outside of the broader regulatory scheme.

Moreover, defendants clearly stated in their response to plaintiff's motion to withdraw that they agree that all remaining claims would be tried to a jury. Their response said, and I'm quoting here,

"Trustee is entitled to a jury trial." Under Rule 39(c), a court may conduct a jury trial even if there is no jury trial right if all parties consent. Given that the Second Circuit has read a failure to object as consent in the 2005 case, *Broadnax v. City of New Haven*, 415 F.3d 265, at pages 271 to 272, defendants' affirmative representation that they agree plaintiff had a jury trial right should suffice as consent.

At this point, I find plaintiff would be prejudiced by any attempt to withdraw that consent because he moved to withdraw the reference expressly for the purpose of seeking a jury trial and with defendants' full assurance that they were in agreement.

Additionally, and finally, I note that a court has the discretion to try a case with an advisory jury under Rule 39(c)(1). And if I didn't think a right to a jury were [8] here, I would still exercise my discretion to do so. Accordingly, I'll not order the case tried without a jury as defendants have requested, unless, of course, both parties were to consent.

* * *

APPENDIX C

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT GRANTING STAY OF THE MANDATE (MAY 18, 2017)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

_____

IN RE: MAGNESIUM CORPORATION OF AMERICA
Debtor.

_____

Lee E. Buchwald, as Trustee for Magnesium Corporation of America and Related Debtor, Renco Metals, Inc.,
Plaintiff – Appellee – Cross-Appellant,

v.

The Renco Group, Inc., a Delaware Corporation, Ira Leon Rennert,
Defendants – Appellants – Cross-Appellees.

_____

Nos. 15-2691(L), 15-2962(XAP), 15-2971(Con.)

BEFORE: REENA RAGGI, RAYMOND J. LOHIER, JR., CHRISTOPHER F. DRONEY, *Circuit Judges*.

_____

Appellants-Cross-Appellees move for an order staying the mandate pending the filing of a petition

for writ of *certiorari* in the Supreme Court. Appellee-Cross-Appellant opposes the motion.

IT IS HEREBY ORDERED that the motion is GRANTED.

For the Court:

Catherine O'Hagan Wolfe, Clerk of Court

/s/ Catherine O'Hagan Wolfe

APPENDIX D

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DENYING PETITION FOR REHEARING (MAY 11, 2017)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

_____

IN RE: MAGNESIUM CORPORATION OF AMERICA
Debtor.

Lee E. Buchwald, as Trustee for Magnesium Corporation of America and Related Debtor, Renco Metals, Inc.,
Plaintiff – Appellee, *Cross-Appellant*,

v.

The Renco Group, Inc., a Delaware Corporation, Ira Leon Rennert,
Defendants – Appellants, *Cross-Appellees*,

Sabel Industries, Inc., K. Sabel Holdings, Inc., KPMG Peat Marwick LLP, Donaldson, Lufkin & Jenrette Securities Corporation, Houlihan Lokey Howard & Zukin, Cadwalader, Wickersham & Taft, LLP, Roger L. Fay, Justin W. D'atri, Dennis A. Sadlowski, Michael C. Ryan, Michael H. Legge, Ron L. Thayer, Todd R. Ogaard, Lee R. Brown, Howard I. Kaplan, Keith Sabel, Unidentified Trustees, of Trusts Established By Ira Leon Rennert, Credit Suisse First Boston LLC, KPMG LLP, Houlihan Lokey,

Defendants.

Nos. 15-2691 (Lead), 15-2962 (Con), 15-2971 (XAP)

Appellant-Cross-Appellees, Ira Leon Rennert and The Renco Group, Inc., filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk of Court

/s/ Catherine O'Hagan Wolfe