No. ____

In the Supreme Court of the United States

DAEWOO MOTOR AMERICA, INC.,
Petitioner,
v.
GENERAL MOTORS CORPORATION,
SUZUKI MOTOR CORPORATION,
AMERICAN SUZUKI MOTOR CORPORATION, and
GM DAEWOO AUTO & TECHNOLOGY CO.,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a district court's dismissal of a lawsuit, under the doctrine of international comity and based on the preclusive effect of a foreign judgment, is reviewable *de novo* or only for abuse of discretion.

2. Whether the doctrine of international comity may be invoked, based on a prior order of a foreign bankruptcy court approving a plan of reorganization for a foreign debtor, to bar a lawsuit in U.S. courts, where the precluded claims are asserted against parties *other* than the foreign debtor and could not have been brought in the foreign proceeding.

RULE 29.6 STATEMENT

Daewoo Motor America, Inc., has since changed its name to StarPoint USA, Inc. Ninety-five percent of its stock is held by Credit Managers Association in trust for, and for the benefit of, the thousands of holders of unsecured claims in petitioner's Chapter 11 proceeding. Credit Managers Association does business as CMA Business Credit Services, a mutual benefit association incorporated in California. Credit Managers Association is a privately held corporation, and is not owned by any publicly held corporation.

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OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-47a) is reported at 459 F.3d 1249. The district court's order (*id.* at 48a-71a) is reported at 315 B.R. 148.

JURISDICTION

The judgment of the court of appeals was entered on August 11, 2006, and rehearing was denied on October 3, 2006 (App., *infra*, 74a-75a). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATEMENT

This case raises two recurring issues concerning the doctrine of international comity. Comity "is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws." *Hilton* v. *Guyot*, 159 U.S. 113, 164 (1895). The doctrine of comity arises in a variety of settings, including where litigation in a foreign forum (a) is merely a possibility, (b) is actually pending, or (c) has ended in judgment (in which case the American court is being asked either to enforce the judgment or to give it res judicata effect). See *Diorinou* v. *Mezitis*, 237 F.3d 133, 139-40 (2d Cir. 2001). This case involves the last situation. Specifically, it raises the question whether comity requires that an order approving a plan of reorganization for a foreign debtor in a foreign bankruptcy proceeding be given res judicata effect to bar the damages and other claims of a creditor against parties *other* than the foreign debtor, where such claims were not adjudicated – and could not even have been *raised* – in the foreign bankruptcy proceeding.

In upholding this expansive use of the comity doctrine, a panel of the Eleventh Circuit, with one judge disagreeing on this ground, has extended the principle of comity far beyond its traditional precincts. In so doing, the panel majority created a conflict with the Third Circuit's decision in *Remington Rand Corp.* v. *Business Systems Inc.*, 830 F.2d 1260, 1267 (3d Cir. 1987), which held that non-debtors (such as respondents) are *not* entitled, under comity principles, to use a foreign bankruptcy order "as a shield" against the claims of third parties (such as petitioner). Beyond that, the lower court's adoption of a deferential abuse-of-discretion standard of appellate review conflicts with the *de novo* standard adopted and applied by the Second Circuit. To resolve these conflicts, and clarify the recurring issues presented concerning the meaning and proper administration of the comity doctrine, further review is warranted.

A. Factual Background

This case arises out of the substantial destruction of the business of petitioner Daewoo Motor America ("Daewoo America") caused by the fraudulent representations and other tortious conduct of the respondents. Until 2002, Daewoo America, a U.S. corporation, was the exclusive United States distributor for certain vehicles, parts, accessories, and equipment manufactured by Daewoo Motor Co., Ltd. ("DWMC"), which at that time was Daewoo America's Korean parent company. Doc 144, Ex 7 – Pg 1-4. Daewoo America and DWMC were parties to a ten-year distributorship agreement executed in 1999 that was terminable only in limited circumstances (the "Distribution Agreement"). *Id.* at 2. From 1997 to 2001, Daewoo America grew from a fledgling company promoting and distributing these products into America's fastest-growing car company with over 500 franchised dealers. Doc 64 – Pg 5-7.

DWMC encountered financial difficulties and, on November 10, 2000, filed for court receivership and

reorganization under the Corporate Recovery Act of Korea in the Inchon District Court in South Korea ("Korean Reorganization Court"). Doc 64 – Pg 7; App., *infra*, 51a. Following his appointment, DWMC's receiver adopted the Distribution Agreement under Korean law by continuing to perform (selling more than $400 million worth of vehicles and parts to petitioner) and by receiving petitioner's performance. Doc 142 – Pg 28; Doc 144 – Pg 3. During DWMC's reorganization, the receiver also began acquisition negotiations with respondent General Motors Corp. ("GM"). Doc 64 – Pg 7. Throughout the negotiation process, GM repeatedly assured petitioner that GM's acquisition of DWMC's assets would not alter petitioner's exclusive distributorship. *Id.* at 9-11. Based on these representations, petitioner continued to invest in and expand its business, purchased additional vehicles from DWMC, entered into new dealer agreements, gave assurances to its dealers, and even offered the dealers enhanced sales incentives and warranty coverage. *Id.* at 10-11; Doc 144 – Pg 3.

But GM's representations proved to be false. On April 30, 2002, GM entered into an agreement – known as the Master Transaction Agreement ("MTA") – to acquire all of the assets, including the manufacturing facilities and brand name rights, of DWMC and to transfer those assets to a newly created entity, respondent GM Daewoo Auto & Technology Co. ("GMDAT"). Doc 64 – Pg 12. Pursuant to the MTA, GM and its affiliates, including respondent Suzuki Motor Corp. ("Suzuki"), held a two-thirds ownership stake in GMDAT. *Ibid.* Contrary to GM's repeated assurances, the MTA excluded petitioner from the acquisition, effectively cutting off petitioner's vehicle supply – and giving GM's designee the right to distribute identical vehicle models in petitioner's exclusive territory. *Id.* at 13-15.

In February 2003, GM and its affiliates, including Suzuki's U.S. subsidiary, respondent American Suzuki Motor Corp.

("American Suzuki"), announced their intention to begin selling identical vehicle models ("rebadged" as Suzukis and Chevrolets) in the United States. *Id.* at 14-15.

B. The Trial Court Proceedings

After the MTA was executed, the DWMC receiver threatened to terminate the Distribution Agreement. Faced with this threat, petitioner filed a voluntary petition under Chapter 11 of the U.S. Bankruptcy Code on May 16, 2002, in federal bankruptcy court in California. Doc 64 – Pg 13. That filing in turn triggered an automatic stay protecting petitioner's property rights under 11 U.S.C. § 362. At the time of petitioner's Chapter 11 filing, the property rights protected by the automatic stay included petitioner's rights under the Distribution Agreement.[1] Petitioner has thousands of U.S. creditors who have filed over $840 million in claims in the U.S. bankruptcy proceeding.[2]

Subsequent to petitioner's Chapter 11 filing, the Korean Reorganization Court on September 30, 2002 approved a plan of reorganization for DWMC and approved GM's purchase

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[1] See *Krystal Cadillac Oldsmobile GMC Truck, Inc.* v. *GM Corp.*, 142 F.3d 631, 637-38 (3d Cir. 1998) (order that effectively terminated debtor's franchise agreement violated Section 362(a)(3) and was not binding upon the bankruptcy court); *In re Computer Communications, Inc.*, 824 F.2d 725, 730-31 (9th Cir. 1987) (termination of contract violated stay). The automatic stay has extraterritorial effect and applies to foreign proceedings. See *In re Simon*, 153 F.3d 991, 996 (9th Cir. 1998). Actions taken in violation of the automatic stay are void. *In re Gruntz*, 202 F.3d 1074, 1082 (9th Cir. 2000) (en banc).

[2] Pursuant to petitioner's reorganization plan, any recovery from this lawsuit will be transferred to Creditors Management Association, for distribution to holders of unsecured claims in petitioner's Chapter 11 proceeding. See page ii, *supra*.

agreement embodied in the MTA. App., *infra*, 54a; Doc 123, Ex 5-A – Pg 1-9.

On July 22, 2003, petitioner filed this action against respondents in the bankruptcy court in California. Doc 1 – Pg 1-24. In its amended complaint, Daewoo America advanced (1) claims against GM for fraud, tortious interference with contract, tortious interference with prospective economic advantage, and aiding and abetting breach of fiduciary duty; (2) a claim against GMDAT for successor liability; and (3) claims against all respondents for violating various California, Florida, and Massachusetts statutes, for unauthorized post-Chapter 11 transfers, and for violating the automatic stay. Doc 64 – Pg 1-32.

In March 2004, the federal bankruptcy court dismissed certain of petitioner's claims, declined to dismiss certain others, and set forth a briefing schedule on respondents' comity defense. Doc 112 – Pg 2-3. Before the next scheduled hearing, however, the Judicial Panel on Multidistrict Litigation transferred the action to the U.S. District Court for the Middle District of Florida. Doc 107 – Pg 3-4.

In October 2004, the district court dismissed petitioner's amended complaint with prejudice based on the principle of international comity. App., *infra*, 48a-71a. It concluded that the Korean Reorganization Court's order approving the asset transfer and DWMC's reorganization plan precluded petitioner from pursuing the present litigation in the United States. *Id.* at 63a, 69a-71a. The district court reached that conclusion even though the Korean court's order made no mention of any of petitioner's claims against respondents or of petitioner's contractual rights under its agreement with DWMC. Denying a motion for clarification and reconsideration, the district court thereafter directed entry of judgment for respondents on all of petitioner's claims. App., *infra*, 72a-73a.

C. The Court of Appeals' Decision

1. A panel of the Eleventh Circuit affirmed. App., *infra*, 1a-19a. The panel majority acknowledged that under the governing treaty between the United States and Korea, "a Korean judgment is elevated to the status of a sister state judgment." *Id.* at 15a. And it recognized that a "sister state" (or federal) judgment receives only such preclusive effect as the principles of res judicata allow. *Id*. at 16a-18a. Notwithstanding the close tie between the comity issue in this case and res judicata analysis, the panel majority declined to apply to a comity ruling the *de novo* standard of appellate review that is applied to res judicata rulings by the Seventh and Ninth Circuits (as well as by the Eleventh Circuit itself). See, *e.g.*, *In re Atlanta Retail, Inc.*, 456 F.3d 1277, 1284 (11th Cir. 2006); *In re Piper Aircraft Corp.*, 244 F.3d 1289, 1295 (11th Cir. 2001); *Waid* v. *Merrill Area Public Schools*, 91 F.2d 857, 860 (7th Cir. 1996); *Clark* v. *Bear Stearns & Co., Inc.*, 966 F.2d 1318, 1320 (9th Cir. 1992). Instead, the majority declared without elaboration that "[t]he principle of international comity applied in this case is *an abstention doctrine*." App., *infra*, 10a (emphasis added). Because abstention rulings receive only abuse-of-discretion review in the Eleventh Circuit, the panel held that the district court's dismissal of petitioner's claims was likewise reviewable only for abuse of discretion. *Id.* at 10a (citing *Boyles* v. *Shell Oil Prods. Co.*, 199 F.3d 1260, 1265 (11th Cir. 2000)).

Applying that deferential standard of review, the majority next concluded that the trial court had not abused its discretion in holding that the Korean Reorganization Court's order barred all of petitioner's claims against respondents. App., *infra*, 13a-19a. In particular, the majority squarely rejected petitioner's argument that "the scope of the comity granted to the order of the Korean court should not extend to [petitioner's] claims against the defendants because those claims *were not and could*

not have been raised in the Korean bankruptcy proceeding." *Id.* at 16a (emphasis added).[3] The court of appeals explained:

> The claims of Daewoo America arise out of the same nucleus of operative facts considered by the Korean court. The claims of Daewoo America are based on the Modified Reorganization Plan and MTA, which were approved by the Korean court. The validity of the MTA was necessarily put at issue in the Korean proceedings and necessarily approved by the order of the Korean court. The complaint

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[3] As petitioner demonstrated with evidence of foreign law in the form of expert affidavits (see Pet. C.A. Br. 9-11), there are two independent reasons why petitioner's claims against respondents could not have been raised and adjudicated in the Korean bankruptcy proceeding. First, those claims qualify as general civil claims under Korean law and, as such, they fall outside of the limited jurisdiction of the Korean Reorganization Court. See Supplemental Cho Decl. 12-13 (¶ 16). Second, even petitioner's claims *against the debtor, DWMC*, qualify as "common benefit" claims under Korean bankruptcy law. Korean law distinguishes between two very different types of claims against a company under reorganization: (1) reorganization claims; and (2) "common benefit" claims. Reorganization claims primarily consist of monetary claims against the debtor arising *prior to* the commencement of reorganization proceedings (which, as noted above, occurred on November 10, 2000). Common benefit claims, in contrast, generally arise *after* commencement of reorganization proceedings. Petitioner's claims *against DWMC* for breach of the Distribution Agreement (an agreement which the DWMC receiver adopted) arose *after* the reorganization proceedings began and are thus common benefit claims. Significantly, in Korea holders of common benefit claims do *not* participate in reorganization proceedings; instead, they must pursue their claims *outside* of the reorganization plan in ordinary (*i.e.*, non-bankruptcy) courts. Thus, although a reorganization plan under Korean law binds reorganization creditors and may alter their rights as holders of reorganization claims, it does not bind holders of common benefit claims and cannot alter their rights as such.

> of Daewoo America regarding the effect of the MTA should have been raised before the Korean court. Daewoo America cannot now collaterally attack that order by bringing claims against the recipients of the property transferred based on the approval by the Korean court.

App., *infra*, 16a. Because the panel majority assumed that all of petitioner's claims could have been raised in the Korean proceeding, it emphasized petitioner's notice of those proceedings and faulted petitioner for not raising its claims there. *Id.* at 6a-7a, 14a-15a. In concluding that *all* of petitioner's claims against the respondents were precluded by the Korean bankruptcy court's order, the panel majority also relied on the fact that some of those claims sought injunctive relief (and one claim requested that "the transfer be set aside"). *Id*. at 16a.

Finally, the panel majority sought to distinguish several cases that had refused to apply the doctrine of res judicata to give an order confirming a plan of reorganization in a U.S. bankruptcy proceeding claim-preclusive effect with regard to legal claims brought by one creditor in the reorganization proceeding against other creditors or non-debtor parties. The Eleventh Circuit's prior decision in *Piper Aircraft* was distinguishable, the panel majority explained, because there the "'facts underpinning'" the creditor's claims – all of which arose out of a failed agreement to reorganize the debtor – "'were not at issue in the confirmation proceeding.'" App., *infra*, 17a (quoting *Piper Aircraft*, 244 F.3d at 1297). In contrast, the court explained, "the facts underpinning [Daewoo America's] complaint * * * *were* at issue in the Korean proceeding because those facts *relate to* the approval of the Modified Reorganization Plan and the MTA." *Id.* at 17a (emphasis added). The panel majority also distinguished *La Preferida, Inc.* v. *Cerveceria Modelo, S.A. de C.V.*, 914 F.2d 900 (7th Cir. 1990), on the ground that it involved a prior consent judgment

(which is not entitled to collateral estoppel effect). App., *infra*, 17a.

2. Judge Tjoflat wrote a lengthy opinion concurring in the judgment, in which he disagreed with the majority's decision to uphold the dismissal of all of petitioner's claims on the basis of international comity. App., *infra*, 19a-47a. In Judge Tjoflat's view, "it is patently clear that the [panel majority], like the district court, rushed into * * * dismissing Daewoo America's Amended Complaint in its entirety when, in fact, the international comity doctrine has only limited application." *Id.* at 47a.

As Judge Tjoflat explained, "most of Daewoo America's claims solely concern the [respondents'] dealings with Daewoo America, separate and distinct from the transfer of [DWMC's] manufacturing assets to GM and its partners." App., *infra*, 19a. "For the vast majority of Daewoo America's claims, the proceedings before the Korean bankruptcy court serve as little more than a factual backdrop." *Ibid.* Judge Tjoflat specifically disagreed with the majority's assumption that "the validity of the MTA, the Korean bankruptcy court's orders, or the Korean bankruptcy proceedings" was in any way relevant to the questions underlying petitioner's claim, which were "whether GM's promise to make Daewoo America its United States distributor was intentionally untruthful" and "whether the [respondents] eliminated Daewoo America's vehicle supply with tortious or anticompetitive intent." *Id.* at 36a.

Judge Tjoflat also disagreed with – and criticized as "misleading" – the majority's reliance on petitioner's request for injunctive relief on some of its claims, noting that petitioner was also seeking "*damages* on *thirteen*" of its fourteen claims. App., *infra*, 27a n.8 (emphasis in original). "Awarding Daewoo America damages pursuant to its claims," Judge Tjoflat explained, "would do nothing to disturb GM's ownership interest in GMDAT, nor would it affect GMDAT's continued control of the Daewoo Korea Plants and other assets." *Ibid.*

Moreover, even as to Daewoo America's successor liability claim against GMDAT, Judge Tjoflat observed, it cannot be said that Daewoo America was "trying to upset the bankruptcy order." App., *infra*, 33a n.15. "Far from attacking the validity of the Korean bankruptcy court's proceedings and the resultant asset sale," that claim "is simply seeking to enforce the bankruptcy court's order." *Id.* at 33a; see also *id.* at 33a n.15 (noting that the successor liability claim presupposed that "GMDAT has an obligation to Daewoo America that survives bankruptcy and is attempting to enforce it"); *id.* at 36a (noting that this claim "is entirely dependent on the validity of the Korean bankruptcy proceedings").

In sum, Judge Tjoflat noted, "this dispute simply is not part of the Korean bankruptcy, and granting international comity to the [Korean Reorganization Court]'s orders does little to resolve it." *Id.* at 20a. Because Judge Tjoflat ultimately concluded that petitioner's remaining claims were insufficient as a matter of law, however, he concurred in the court's disposition of the appeal. *Id.* at 47a.[4]

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[4] Although Judge Tjoflat ultimately concurred in the judgment, there is good reason to believe that the result would be different if this case were remanded to the Eleventh Circuit following a decision by this Court in petitioner's favor on the issues presented. First, the panel majority declined to adopt Judge Tjoflat's alternative rationale, and there is no reason to believe that it would adopt all of his conclusions if this Court disapproves the majority's comity ruling. Second, if and when there is a remand to the panel, petitioner will have an opportunity to explain that certain of Judge Tjoflat's alternative grounds are unsustainable. For example, Judge Tjoflat concluded that petitioner's fraud claim against GM should be dismissed because, in his view, petitioner cannot prove that GM's misrepresentations caused it any harm. App., *infra*, 45a-46a. But first, GM never made that argument below, petitioner never had a chance to address it, and the district court did not consider it; that rationale accordingly is unavailable as a basis for affirming dismissal of the complaint. What

REASONS FOR GRANTING THE PETITION

This case presents the Court with the opportunity to make sure that the doctrine of international comity has a uniform and sensible meaning. In "today's highly interdependent commercial world," *F. Hoffman-La Roche Ltd.* v. *Empagran S.A.*, 542 U.S. 155, 164-65 (2004), featuring the globalization of business and a corresponding rise in transnational litigation in American courts, the comity doctrine has assumed great importance. Further review would permit the Court to resolve conflicts in the circuits over the scope of the comity doctrine and over the proper division of authority between trial and appellate courts in administering this important principle, which implicates the Nation's relations with other countries.

This case is especially deserving of the Court's attention because it involves the application of the comity doctrine to consecutive foreign and domestic bankruptcy proceedings. As the decision below amply demonstrates, this setting presents special difficulties for generalist federal judges (who must grapple not only with unfamiliar bankruptcy-law concepts but also with unfamiliar issues of foreign law and unfamiliar foreign proceedings). Given "the exponential growth of multinational or transnational corporate enterprise," Eric W. Orts, *The Future of Enterprise Organization*, 96 MICH. L. REV. 1947, 1962-63 (1998), and the globalization of capital markets, it is hardly

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is more, this conclusion reflects a truncated understanding of the actual fraud claim, the entirety of which has never been reviewed. GM's misrepresentations led petitioner to continue investing in and expanding its business, see page 3, *supra*, and GM's exclusion of petitioner from the MTA saddled it with inventory which had lost significant value and forced it to buy back the vehicles it had sold to dealers. Doc 64 – Pg 13. In short, given the opportunity to return to the Eleventh Circuit following a favorable ruling, petitioner has every hope of persuading the court to reverse the dismissal of the action.

surprising that American courts are facing issues like those presented in this case with increasing frequency.

Congress has recognized this phenomenon and taken steps to provide greater certainty, predictability and uniformity to the businesses, investors, creditors, and consumers that might find themselves willing or unwilling participants in foreign insolvency regimes. Toward that end, Congress recently added an additional chapter – Chapter 15, 11 U.S.C. §§ 1501-1532 – to the Bankruptcy Code. See, *e.g.*, 11 U.S.C. § 1501(a) (explaining ways that Chapter 15 is intended to "provide effective mechanisms for dealing with cases of cross-border insolvency"). Chapter 15, however, addresses only *concurrent* U.S. and foreign insolvency proceedings for the *same* debtor. It does not address how domestic subsidiaries and their creditors are affected by orders entered in foreign insolvency cases involving their parent entities. That question is ordinarily answered through resort to the judge-made doctrine of international comity. This Court can provide greater clarity here by addressing the effect of a foreign parent's insolvency proceeding on a U.S. subsidiary's claims against parties *other than* the foreign parent. More generally, further review would allow the Court to provide much-needed clarification of how the comity doctrine should be applied to the important and recurring phenomenon of foreign bankruptcy proceedings.

In the decision below, a panel of the Eleventh Circuit has stretched the boundaries of international comity far beyond traditional limits, extending greater preclusive effect to a foreign judgment than is available to a domestic judgment under the principles of res judicata. In an unprecedented expansion of the comity doctrine, the panel ruled that an order of a foreign court approving a plan of reorganization for a foreign debtor barred not only claims against the foreign debtor but also claims against *parties other than the debtor* that *could not have been adjudicated* by the foreign bankruptcy court. Thus, the majority affirmed the dismissal of all of the claims brought by petitioner

Daewoo America against the four respondents, even though none was the debtor in the foreign insolvency proceeding to which the district court extended comity. And it reached that result even though, as Judge Tjoflat correctly pointed out, petitioner's damages claims were based in large measure on conduct of respondents extrinsic to the Korean bankruptcy proceeding – and success on those damages claims would in no way have called into question the Korean court's orders.

The panel majority's unwarranted expansion of the comity doctrine was accomplished in two separate steps. First, it applied the deferential abuse-of-discretion standard to the district court's blanket application of comity and dismissal of petitioner's claims, thereby elevating the status of a foreign judgment *above* that of a domestic judgment (the res judicata effect of which would have been reviewed *de novo* on appeal). In adopting this deferential standard of review, the panel went into conflict with the Second Circuit's well-reasoned decision in *Diorinou* v. *Mezitis*, 237 F.3d 133 (2d Cir. 2001), which adopted and applied *de novo* review for comity rulings of the kind involved here. The panel majority's deference to the district court effectively shut the courthouse doors to a U.S. debtor and its thousands of creditors, who hold over $840 million in claims. Yet, the panel majority offered no reason – other than a mistaken analogy to abstention cases – for affording such deference to the district court's application of comity to a foreign judgment.

The panel majority further elevated the status of the foreign reorganization court's order by extending comity to preclude claims brought by a creditor in the foreign proceeding against *non-debtor* parties. The majority's holding squarely conflicts with the Third Circuit's decision in *Remington Rand Corp.* v. *Business Systems Inc.*, 830 F.2d 1260, 1267 (3d Cir. 1987), which held that non-debtors are *not* entitled to invoke comity principles "as a shield" against the claims of third parties. As the Third Circuit recognized, to hold otherwise would be to

disregard the fundamental reasons for affording deference to a foreign reorganization court's order approving a plan of reorganization – namely, to allow a foreign debtor's assets to be distributed to its creditors fairly and ratably and to protect the foreign debtor by ensuring that claims that were discharged in the foreign proceeding cannot be reasserted against the foreign debtor.

But the panel decision strays even further from traditional reasons for comity and ordinary principles of res judicata: It sustained the dismissal even of claims that *could not have been* adjudicated in the Korean bankruptcy proceeding. See RESTATEMENT (SECOND) OF JUDGMENTS § 26(1)(c) (1982) (claim preclusion does not apply where "[t]he plaintiff was unable to rely on a certain theory of the case or to seek a certain remedy or form of relief in the first action because of the limitations on the subject matter jurisdiction of the courts"). In sharp contrast, this Court – and other courts of appeals – have consistently refused to apply res judicata to bar claims that could not have been raised in a prior proceeding. See, *e.g.*, *Marrese* v. *Am. Acad. of Orthopaedic Surgeons*, 470 U.S. 373, 382 (1985); *Brody* v. *Village of Port Chester*, 345 F.3d 103, 114 (2d Cir. 2003); *Waid* v. *Merrill Area Public Schools*, 91 F.2d 857, 866 (7th Cir. 1996); *Clark* v. *Bear Stearns & Co., Inc.*, 966 F.2d 1318, 1320 (9th Cir. 1992); see also *In re Birting Fisheries, Inc.*, 300 B.R. 489 (B.A.P. 9th Cir. 2003). The panel's emphasis on petitioner's actual notice of the Korean bankruptcy proceeding is beside the point because the claims at issue here simply could not have been raised and adjudicated in the foreign bankruptcy proceeding. To resolve these conflicts, clarify the comity doctrine, and correct the Eleventh Circuit's manifest errors, further review is warranted.

I. This Court Should Resolve The Conflicts In The Lower Courts Over The Proper Standard Of Appellate Review

The panel majority's threshold determination was that the district court's dismissal of all of petitioner's claims based on comity was reviewable only for an abuse of discretion. App., *infra*, 10a. The only explanation offered by the majority for adopting that standard of review – and rejecting the *de novo* standard urged by petitioner – was its statement that "[t]he principle of international comity applied in this case is an abstention doctrine" (and abstention rulings are reviewed for abuse of discretion). *Ibid*. As we explain below, the Eleventh Circuit's holding directly conflicts with the Second Circuit's well-reasoned decision in *Diorinou* v. *Mezitis*, 237 F.3d 133 (2d Cir. 2001), which applied *de novo* review and rejected the abuse-of-discretion standard in an identical setting. This Court should grant review of the first issue presented to resolve this direct conflict in the circuits, bring greater clarity to an issue that has spawned confusion in the lower courts, and correct the error below.

A. The leading case on standards of review relating to the doctrine of international comity is the Second Circuit's decision in *Diorinou*. See 2 VED NANDA & DAVID PANSIUS, LITIGATION OF INTERNATIONAL DISPUTES IN U.S. COURTS ¶ 15:8 (2006) (in section dealing with the "standard of review" for comity determinations, summarizing the *Diorinou* framework). In *Diorinou*, Judge Newman conducted a detailed review of the relevant case law and explained that the proper standard of appellate review of a comity ruling depends on the nature of the district court decision under review. 237 F.3d at 138-40. He proceeded to identify "three different contexts" in which "United States courts have said that they are deferring to foreign proceedings or adjudications as a matter of 'comity.'" *Id.* at 139. *First*, "domestic court[s]" are sometimes asked to refrain from "proceed[ing] with litigation within [their] jurisdiction because

of the *pendency or availability* of litigation in a foreign forum." *Ibid*. (emphasis added) (citing cases). Because a district court declining to adjudicate a lawsuit in this circumstance based on comity is "invoking a doctrine akin to *forum non conveniens*," Judge Newman explained, and because *forum non conveniens* rulings are reviewed on appeal for abuse of discretion, "the same standard of review has been held to govern a similar abstention" based on comity "in favor of foreign proceedings" that are either pending or yet to be initiated. *Ibid.*

"[A] *second* context," Judge Newman explained, is when "a domestic court considers whether *to enforce a foreign judgment*." 237 F.3d at 139 (emphasis added) (reviewing cases). Here, in contrast to the first setting, the foreign proceeding has ended and a final judgment has been entered. As Judge Newman explained, "domestic courts have not clearly articulated the standard of appellate review of the decision whether to enforce the foreign judgment, but appear to be applying a *de novo* standard * * * just as they would on review of a judgment in an action to enforce a judgment of a court within the United States." *Ibid*.; accord *Kwongyuen Hangkee Co.* v. *Starr Fireworks, Inc.*, 634 N.W.2d 95, 96 (S.D. 2001) (application of international comity in action to enforce a foreign judgment "presents a question of law, which is reviewed de novo"). In addition to citing illustrative decisions of the courts of appeals, Judge Newman cited this Court's decision in *Hilton* v. *Guyot*, 159 U.S. 113 (1895), as an example of *de novo* review being applied to this type of comity-based ruling.

Finally, Judge Newman identified "a *third* context," illustrated by the facts of *Diorinou* itself, where "a domestic court considers whether to *accept the adjudication* of a foreign tribunal *on a cause of action or a particular issue*." 237 F.3d at 139 (emphasis added) (citing cases). Here too, the foreign proceeding is not merely pending or anticipated but has resulted in an adjudication, and the application of the comity doctrine is thus entirely "retrospective." In this third context, "as in the

enforcement of foreign judgments context," Judge Newman explained,

> appellate courts have not explicitly articulated the standard of review, but we believe the standard is *de novo* review, * * * just as it would be on review of a judgment of a domestic court based on *res judicata* or collateral estoppel.

Id. at 140 (citing *SEC* v. *Monarch Funding Corp.*, 192 F.2d 295, 303 (2d Cir. 1999) (applying *de novo* review to district court's ruling based on collateral estoppel)). The *Diorinou* panel then proceeded to review *de novo* the lower court's decision.

This case falls squarely into the third category identified by Judge Newman. Respondents successfully obtained the dismissal of all of petitioner's claims based on the res judicata effect of the Korean bankruptcy proceedings and orders. Those proceedings have been completed and reduced to a final judgment. It is therefore beyond dispute that, had this appeal been heard by the Second Circuit, the court of appeals would have applied a *de novo* standard of review. The Eleventh Circuit's adoption of an abuse-of-discretion standard of review directly conflicts with the holding of *Diorinou*.[5]

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[5] In a more recent case, the Second Circuit has made clear that even in the first context identified in *Diorinou*, when reviewing a lower court's "decision to abstain from exercising jurisdiction" based on comity because of a pending or ongoing foreign proceeding, it will apply a "more rigorous" form of abuse-of-discretion review that is of "little practical distinction" from *de novo* review. *Royal and Sun Alliance Ins. Co. of Canada* v. *Century Int'l Arms, Inc.*, 466 F.3d 88, 92 (2d Cir. 2006). The Second Circuit applies this "more rigorous" standard to the review of abstention rulings generally because abstention is "an exception to a court's normal duty to adjudicate a controversy properly before it." *Hachamovitch* v. *DeBuono*, 159 F.3d 687 (2d Cir. 1998) (internal quotations omitted). On the other hand,

Nor is this all. The Second Circuit in *Diorinou* took pains to preserve parity between (a) the way the doctrine of international comity is applied to *foreign* judgments and proceedings, and (b) the legal standards that govern *domestic* judgments or proceedings. The reason is straightforward. The whole point of the comity doctrine is to accord *equivalent* – not preferential – treatment to foreign judgments and proceedings in comparison to the treatment accorded to domestic judgments and adjudications. As the panel majority acknowledged in this case, that bedrock principle is embodied in the Treaty of Friendship, Commerce and Navigation Between the United States of America and The Republic of Korea, which provides that "a Korean judgment is elevated to the status of a sister state judgment." App., *infra*, 15a (citing 8 U.S.T. 2217); see also *Vagenas* v. *Continental Gin Co.*, 988 F.2d 104, 106 (11th Cir. 1993). By adopting a more deferential standard of review than it would apply to a res judicata ruling concerning a prior *domestic* judgment, see *In re Atlanta Retail, Inc.*, 456 F.3d 1277, 1284 (11th Cir. 2006) (*de novo* review); *In re Piper Aircraft Corp.*, 244 F.3d 1289, 1295 (11th Cir. 2001) (same); see also *Int'l Transactions, Ltd.* v. *Embotelladora Agral Regiomontana*, *S.A. de C.V.*, 347 F.3d 589, 593 (5th Cir. 2003), the Eleventh Circuit has destroyed the parity that is at the heart of the comity doctrine.

Although this square conflict between two circuits that are important fora for transnational litigation is reason enough to grant review of the first issue presented, it is worth noting that there is considerable confusion in the lower courts over the

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the Second Circuit also recognizes "foreign bankruptcy proceedings" as a "category of foreign litigation" in which abstention in favor of parallel proceedings is usually necessary if maintenance of the plaintiff's claims would threaten the "equitable and orderly disposition of the debtor's property." *Royal and Sun Alliance Ins. Co.*, 466 F.3d at 93 (internal citations omitted). No such threat – or parallel proceedings – exists in this case.

proper standard of review. Some appellate courts have followed Judge Newman's lead in *Diorinou* by adopting a *de novo* standard of review in this setting. See, *e.g.*, *Velez* v. *Mitsak*, 89 S.W.3d 73, 79 (Tex. App. 2002) (reviewing the trial court's determination whether to give deference to an earlier Hague Convention petition *de novo*, citing *Diorinou*); *In the Interest of T.J.*, No. 12-03-00331-CV, 2005 Tex. App. LEXIS 1927, at *15 (March 14, 2005) (same) (citing *Velez*). In contrast, the Supreme Court of California has adopted the abuse-of-discretion standard for reviewing a lower court's decision whether to grant comity to a foreign judgment. See *In re Stephanie M.*, 867 P.2d 706, 716 (Cal. 1994).

The Fifth and Ninth Circuits, moreover, have endorsed approaches to the standard-of-review issue that differ from the approaches used in the Second and Eleventh Circuits. In *Overseas Inns S.A. P.A.* v. *United States*, 911 F.2d 1146 (5th Cir. 1990), the court of appeals suggested that appellate review of whether to grant comity to a foreign judgment *on a motion for summary judgment* is subject to the same *de novo* standard that applies *to other summary judgment rulings*. *Id.* at 1148 n.4. Although the Fifth Circuit also stated that it was "not necessary to decide the issue" in that case, its suggestion that the appropriate standard of review *turns on the procedural setting* of the lower court's ruling represents a manifestly different approach to the issue. Here, of course, petitioner's claims were dismissed by the district court. Like other circuits, the Eleventh Circuit "'ordinarily review[s] the grant of motions to dismiss or summary judgment *de novo*'" (App., *infra*, 10a (quoting *Parks* v. *City of Warner Robins, Georgia,* 43 F.3d 609, 612-13 (11th Cir. 1995)). Thus, if the panel had followed the Fifth Circuit's suggested approach in *Overseas Inn*, it would have applied a *de novo* standard of review in this case as well.

In a subsequent case, however, the Fifth Circuit, without citing *Overseas Inn*, stated that comity rulings are "reviewed for abuse of discretion." *International Transactions, Ltd.* v.

Embotelleradora Agral Regiomontana, S.A. de C.V., 347 F.3d 589, 593 (5th Cir. 2003). Thus, the state of the law in the Fifth Circuit is less than clear. The Fifth Circuit's decisions reflect the same confusion that is apparent when comparing the decisions in different circuits.

The Ninth Circuit has suggested that the standard of review may hinge not on the progress or timing of the foreign proceedings (as in *Diorinou*), but rather on the procedural posture of the ruling below as well as on the *legal basis* for the comity determination. In *Bird* v. *Glacier Electric Cooperative, Inc*., 255 F.3d 1136 (9th Cir. 2001), the court of appeals explained that "[b]ecause the decision to recognize a foreign judgment is discretionary, not mandatory, * * * some federal courts of appeals have concluded that a district court's decision to recognize a foreign judgment should be reviewed for abuse of discretion." *Id.* at 1140 (citing, *e.g.*, *Remington Rand Corp.* v. *Business Systems Inc.*, 830 F.2d 1260, 1266 (3d Cir. 1987)). But it went on to say that *de novo* review was appropriate because the decision to extend comity turned on whether the foreign judgment had been entered without adequate due process safeguards, and "we review de novo claims of due process violations." *Ibid*. *De novo* review was also "required," the Ninth Circuit explained, because it was "reviewing a district court's summary judgment" ruling. *Ibid*.

B. The standard of review applicable to a trial court's determination of whether to give effect to a foreign judgment based on international comity is a fundamental question that affects a growing number of cases as multinational companies increasingly dominate the global economy. The issue arises at the threshold of every appeal taken of a ruling in which the comity doctrine has been invoked as a basis for giving res judicata effect to a foreign judgment. Moreover, the issue is not limited to appeals taken to the courts of appeals. It also arises as a threshold matter when a district court reviews a bankruptcy court's determination whether to enforce a foreign judgment

based on comity. See, *e.g.*, *In re Travelstead*, 227 B.R. 638, 656 (D. Md. 1998) (reviewing for abuse of discretion bankruptcy court's decision that comity did not require yielding to Dutch court orders).

C. Review of the first issue presented is also warranted because the decision of the Eleventh Circuit is wrong. The Second Circuit's decision in *Diorinou* sets forth the correct framework for analyzing the standard-of-review question. This case involves the invocation of international comity as a basis for according res judicata effect to the orders of the Korean bankruptcy court. As Judge Newman correctly explained, that kind of retrospective use of the comity doctrine is properly subject to *de novo* review on appeal. It raises legal issues, not issues that are fundamentally discretionary in nature.

The *de novo* standard of review is also preferable because it preserves the parity principle animating the doctrine of international comity. *De novo* review applies to res judicata rulings concerning *domestic* judgments; there is no good reason why *foreign* judgments should receive different treatment.[6]

Finally, we note that use of an abuse-of-discretion standard of review is particularly inappropriate where, as here, a trial court has applied the comity doctrine to *dismiss* the lawsuit of

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[6] The Eleventh Circuit's suggestion that "[t]he principle of international comity applied in this case is *an abstention doctrine*" (App., *infra*, 10a (emphasis added)) is manifestly incorrect. As this Court has recognized, the "principles of equity, comity, and federalism" that underlie *Younger* abstention "have little force in the absence of a pending state proceeding." *Steffel* v. *Thompson*, 415 U.S. 452, 462 (1974) (internal quotations omitted). Equally inapposite, by definition, is *Pullman* abstention once unsettled questions of state law have been resolved by a final judgment. *Railroad Commission of Texas* v. *Pullman Co.*, 312 U.S. 496, 501 (1941). The use of comity by the district court thus bears no resemblance to abstention.

a U.S. litigant based on a foreign judgment. When a district court invokes comity as a basis for closing the courthouse doors, the argument for heightened appellate review is especially strong – particularly where, as here, it is not only petitioner's claims that have been extinguished (but also the claims of petitioner's many creditors in the U.S. bankruptcy proceeding that will be adversely affected by the trial court's dismissal). Whatever merit a deferential standard of review has when a motion to dismiss based on comity is *denied*, it has little to recommend it when comity is used to shut the courthouse doors entirely to a U.S. litigant. See note 5, *supra* (explaining that the Second Circuit applies a "more rigorous" standard of review even to rulings based on abstention because such rulings are in derogation of the duty of federal courts to exercise jurisdiction granted them by Congress). For all of these reasons, this Court should grant review of the first question presented.

II. The Court Of Appeals' Unwarranted Expansion Of The Scope Of The Comity Doctrine Also Deserves Review

The panel majority extended the principle of comity far beyond its traditional scope in two compounding respects. First, the court held that a foreign order approving a foreign debtor's plan of reorganization precluded all of petitioner's claims against *non-debtor* parties. In this respect, the Eleventh Circuit's decision squarely conflicts with a decision of the Third Circuit. Beyond that, the court sustained the application of comity to bar claims that were not, and could not have been, raised in the foreign proceeding. These dramatic expansions of the doctrine of comity warrant this Court's review.

A. To place this issue in context, it must be remembered that the fundamental purpose of the bankruptcy laws is to protect the *debtor* and its property – not to protect third parties who are not the debtors in the bankruptcy proceeding from claims against them. See, *e.g.*, *In re Jet Fla. Sys.*, *Inc.*, 883 F.2d 970, 975 (11th Cir. 1989); *In re Lowenschuss*, 67 F.3d 1394,

1401 (9th Cir. 1995). This principle is not unique to bankruptcy law in the United States; the Corporate Recovery Act of Korea ("CRA") is to the same effect. See CRA Art. 241 (providing that, upon plan approval, "the *company* shall be exempted" from specified liabilities) (emphasis added) (Doc 126, Ex 33-B).

Consistent with this overarching purpose of bankruptcy law, the comity doctrine has historically and consistently been applied only to claims against *the debtor or the debtor's property*. For example, in *Canada Southern Railway Co.* v. *Gebhard*, 109 U.S. 527, 539 (1883), this Court held that claims of U.S. creditors against a Canadian debtor were barred by the debtor's discharge in a Canadian insolvency proceeding. In *Victrix S.S. Co.* v. *Salen Dry Cargo A.B.*, 825 F.2d 709 (2d Cir. 1987), the court of appeals, in extending comity to a Swedish bankruptcy proceeding with respect to a claim against the Swedish *debtor*, explained the rationale for such deference:

> The equitable and orderly distribution of *a debtor's* property *requires assembling all claims against the limited assets in a single proceeding*; if all creditors could not be bound, a plan of reorganization would fail.

Id. at 713-14 (emphasis added). This theme of assembling in one proceeding all claims against the *foreign debtor* and *its* assets permeates the case law addressing the application of comity to foreign insolvency proceedings.[7]

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[7] See*, e.g., Finanz AG Zurich* v. *Banco Economico S.A.,* 192 F.3d 240 (2d Cir. 1999) (barring suit on claims against Brazilian guarantor that was subject to Brazilian liquidation proceeding); *Haarhuis* v. *Kunnan Enters., Ltd.,* 177 F.3d 1007 (D.C. Cir. 1999) (barring claims against Taiwanese corporation subject to Taiwanese insolvency proceeding); *Cunard S.S. Co.* v. *Salen Reefer Servs. AB*, 773 F.2d 452 (2d Cir. 1985) (holding that English creditor could not assert claims in New York against Swedish debtor subject to Swedish bankruptcy).

This rationale, however, has no application here. Respondents are not the debtors in a foreign bankruptcy. The assertion of petitioner's claims against the respondents would not affect the equitable, orderly and ratable distribution of DWMC's property to DWMC's creditors.[8] Nevertheless, the district court applied comity to the Korean Reorganization Court's plan approval order to bar claims against parties *other* than the foreign debtor, brought by a *different debtor* with a *different* set of creditors in a U.S. bankruptcy case. Such an unprecedented extension of comity was highly prejudicial to the interests of the creditors who are the real parties in interest in the U.S. proceeding – thousands of creditors of Daewoo America have filed over $840 million in claims against Daewoo America.[9]

Remarkably, the Eleventh Circuit did not even address the prejudice to petitioner's U.S. creditors in affirming this unprecedented expansion of comity. The Eleventh Circuit thus disregarded a critical component of the doctrine of international comity, as articulated by this Court over a century ago, when this Court instructed that judges applying the comity doctrine must "hav[e] due regard both to international duty and convenience, *and to the rights of its own citizens, or of other persons who are under the protection of its laws*." *Hilton* v. *Guyot*, 159 U.S. 113, 164 (1895) (emphasis added).

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[8] Indeed, the MTA specifically contemplated the possibility of a suit such as this one by petitioner against the respondents and indemnified the respondents against such suit. See note 12, *infra*.

[9] While this appeal was pending, the district court issued an opinion dismissing on comity grounds all of the complaints filed by Daewoo automobile dealers against respondents GM, GMDAT, and American Suzuki seeking to recover for financial losses the dealers suffered following the implementation of the MTA. See Order, *In re Daewoo Motor Co. Ltd., Dealership Litigation*, MDL-1510, 2005 U.S. Dist. LEXIS 43197, at *15 (M.D. Fla. Jan. 6, 2005).

B. The panel majority's extension of comity to preclude claims against parties *other* than the foreign debtor directly conflicts with the Third Circuit's decision in *Remington Rand Corp.* v. *Business Systems Inc.*, 830 F.2d 1260 (3d Cir. 1987). In that case, Remington Rand Corp. ("Remington U.S.") brought an adversary action in bankruptcy against two affiliated corporations, Business Systems Inc., B.V. ("BSI B.V.") and BSI Office Equipment, Inc., ("BSI U.S."). *Id.* at 1261. Remington U.S. alleged that BSI B.V. and BSI U.S. had misappropriated trade secrets on how to produce an electric typewriter that Remington U.S. had originally licensed to its Dutch subsidiary, Remington Rand B.V. ("Remington B.V."), to use in manufacturing the typewriters at its Dutch plant. *Id.* at 1262. After Remington B.V. entered into the Dutch equivalent of reorganization under Chapter 11 of the U.S. Bankruptcy Code, the Dutch trustees sold the Dutch plant, along with the know-how to produce the typewriter, to BSI B.V. *Ibid*. Remington U.S. claimed that BSI B.V. misappropriated its trade secrets when it bought the Dutch plant from Remington B.V., and subsequently filed an amended complaint that named BSI U.S. as an additional defendant. *Ibid.* The district court entered judgment against BSI B.V. and BSI U.S. *Id.* at 1263.

On appeal, BSI B.V. and BSI U.S. argued that the Dutch court's approval of the Remington B.V. trustees' sale to BSI B.V. of the trade secrets precluded Remington U.S.'s claims against them. *Id.* at 1265. The Third Circuit disagreed, holding, *inter alia*, that non-debtors in the foreign proceeding were not entitled to invoke comity principles designed to protect the foreign debtor. As the court explained, Remington B.V.'s bankruptcy "cannot be used as a shield" by BSI B.V. and BSI U.S., because it would not serve the rationale of granting comity, namely "to allow a foreign debtor's assets to be distributed equitably." *Id.* at 1267.

Other courts have reached the same conclusion. See, *e.g.*, *BDL International* v. *Sodetal USA, Inc.*, 377 F. Supp. 2d 518

(D. S.C. 2005) (rejecting defendants' arguments that plaintiff's complaint should be dismissed due to contemporaneous French proceedings because "[t]he French action only concerns the assets of the debtor Thalatrans and will not include issues important here, such as whether [defendant Sodetal USA, Inc.] is liable as consignee under the contract"); *Philadelphia Gear Corp.* v. *Philadelphia Gear de Mexico, S.A.*, No. Civ. A. No. 91-6250, 1995 U.S. Dist. LEXIS 15629, at *8 (E.D. Pa. Oct. 25, 1995) (Mexican bankruptcy of defendant not entitled to international comity because domestic action brought by plaintiff did not seek "any relief compelling [defendant] to part with property which would interfere with the Mexican Bankruptcy Court's equitable distribution of [defendant's] assets.").

The panel majority took a sharply conflicting path. It allowed respondents, none of which was the debtor in the Korean proceeding, to use DWMC's insolvency proceeding as a shield against petitioner's claims for damages and other relief. As in *Remington Rand*, the dismissal of petitioner's claims did nothing to serve the purpose of extending comity "[i]n matters concerning bankruptcy" – to "enable[] the assets of a debtor to be dispersed in an equitable, orderly, and systematic manner, rather than in a haphazard, erratic or piecemeal fashion." App., *infra*, 14a (internal quotation marks omitted). If allowed to proceed, petitioner's claims against respondents would *not* have disturbed the Korean Reorganization Court's distribution of *DWMC*'s assets. As Judge Tjoflat correctly noted, petitioner sought damages on thirteen out of fourteen claims, and "[a]warding Daewoo America damages pursuant to its claims * * * would *do nothing to disturb* GM's ownership interest in GMDAT, nor would it affect GMDAT's continued control of the Daewoo Korea Plants and other assets." App., *infra*, 27a n.8 (emphasis added).

Nor is this all. As Judge Tjoflat pointed out, Daewoo America's successor liability claim was "directed at GMDAT,

not [DWMC]. Far from attacking the validity of the Korean bankruptcy court's proceedings and the resultant asset sale, [Daewoo America's claim for successor liability] is simply seeking to *enforce* the bankruptcy court's order." App., *infra*, 33a (emphasis added). Thus, the panel majority was simply wrong in characterizing petitioner's claims as seeking "to redistribute the assets that were transferred with the approval of the Korean court." *Id.* at 18a.

C. The panel majority then stretched the doctrine of international comity one step further: it granted the foreign judgment preclusive effect even as to claims that the foreign court did not have authority to adjudicate. It is one of the "most basic principles of res judicata" that a party does not have to sue another "in a forum where it could not receive full relief." *Atlanta Retail*, 456 F.3d at 1285. It follows that a previous proceeding cannot be used as a bar to claims that could not have been adjudicated there. See RESTATEMENT (SECOND) OF JUDGMENTS § 26(1)(c) (1982).

The Eleventh Circuit's holding flatly contravenes this bedrock principle. It is also in serious tension if not outright conflict with this Court's decision in *Marrese* v. *Am. Acad. of Orthopaedic Surgeons*, 470 U.S. 373 (1985), and with the many courts of appeals' decisions that have articulated and applied this principle in non-bankruptcy cases. In *Marrese*, this Court held that res judicata cannot bar a federal antitrust claim that was not within the jurisdiction of the state court that adjudicated the plaintiff's other claims, despite the fact that the claims were all based on the same set of facts. *Id.* at 382 (citing RESTATEMENT (SECOND) OF JUDGMENTS § 26(1)(c)). To the same effect is the Second Circuit's decision in *Brody* v. *Village of Port Chester*, 345 F.3d 103 (2d Cir. 2003), that a landowner's constitutional challenges to the procedures used by the Village to condemn his property were not precluded on res judicata grounds based on the condemnation proceedings themselves because those challenges, by statute, fell under the exclusive

jurisdiction of the appellate division. Res judicata, the Second Circuit explained, "will not apply * * * where the initial forum did not have the power to award the full measure of relief sought in the later litigation." *Id.* at 114 (internal quotation marks omitted).[10]

In this case, the Eleventh Circuit expanded the claim-preclusive effect of the Korean Reorganization Court's order beyond matters that were within the foreign court's jurisdiction, and barred petitioner's claims against entities that were not the debtor, even though petitioner's claims were not, and could not have been, addressed by the Korean court's order approving the reorganization plan for DWMC. As explained in note 3, *supra*, although the Korean Reorganization Court had the ability to adjudicate and discharge claims against the debtor, DWMC, that arose *prior* to the commencement of DWMC's reorganization proceedings, it lacked the authority to adjudicate claims brought against *non-debtor parties* that arose *after* the commencement of the reorganization proceedings. Many of petitioner's claims[11] did not address the validity of the acquisition itself (the only

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[10] Other courts of appeals have reached the same result. See, *e.g.*, *Waid*, 91 F.2d at 866 (Title IX claim not precluded by res judicata because the Equal Rights Division had exclusive jurisdiction over appellant's state law claims, precluding the appellant from consolidating her claims into a single lawsuit); *Clark*, 966 F.2d at 1321 (arbitration award did not bar appellant's federal securities claims because of district court's refusal to compel arbitration of such claims). See also *In re Birting Fisheries, Inc.*, 300 B.R. 489 (B.A.P. 9th Cir. 2003) (res judicata does not apply to bar a claim that was not addressed in the prior foreign proceeding).

[11] These include petitioner's claims against GM for fraud, tortious interference with contract, tortious interference with prospective economic advantage, and violations of Florida law; against GMDAT for successor liability; and against all respondents for constructive termination of the Distribution Agreement and violations of Florida law. See App., *infra*, 30a-37a.

issue before the Korean Reorganization Court) at all, but were instead based on respondents' conduct in terminating petitioner's vehicle supply, the related collateral effects of that termination, and respondents' use of the assets acquired from DWMC.[12] See App., *infra*, 30a-37a. Thus, opposing the acquisition in the Korean Reorganization Court would not (and could not) have provided petitioner with "an adequate vehicle to assert fully [its damages claims]" against respondents – only this Court's review can afford the petitioner its "day in court." *Piper Aircraft*, 244 F.3d at 1304.

* * * * *

The implications of the Eleventh Circuit's decision are far-reaching. If the majority's opinion is allowed to stand, then foreign judgments will be afforded far greater preclusive effect in the Eleventh Circuit than judgments that are rendered by our own courts, in direct conflict with the precedents of other circuits. This Court should resolve these conflicts now and provide the lower courts with much-needed guidance concerning the scope of international comity.

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[12] As part of the asset transfer, respondents are indemnified from "any and all Damages incurred or suffered," backed by $215 million in assets, that arise out of

> (x) the consummation of any of the Transactions or otherwise arising out of the consummation of the Reorganization Plan, but only to the extent such Damages arise out of (i) the assertion of a claim by a wholly-owned Subsidiary of [DWMC] (other than the Acquired Subsidiary) with respect to such consummation.

Because petitioner was "a wholly owned subsidiary" of DWMC, this indemnity covers petitioner's claims against respondents arising from the "consummation of any Transactions" under the MTA or the Modified Plan. Thus, to allow petitioner's damages claims to go forward would not disturb the asset transfer, and indeed, such claims were anticipated (and indemnified against) as part of the transaction.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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