No. 06-926

IN THE

Supreme Court of the United States

DAEWOO MOTOR AMERICA, INC.,

Petitioner,

v.

GENERAL MOTORS CORPORATION,
SUZUKI MOTOR CORPORATION,
AMERICAN SUZUKI MOTOR CORPORATION,
GM DAEWOO AUTO & TECHNOLOGY CO.,

Respondents.

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

RESPONDENTS SUZUKI MOTOR CORPORATION'S AND AMERICAN SUZUKI MOTOR CORPORATION'S BRIEF IN OPPOSITION

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RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondent Suzuki Motor Corporation states that it is a corporation publicly traded in Japan.

Respondent American Suzuki Motor Corporation states that it is wholly owned by Suzuki Motor Corporation, which has no parent corporation.

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RESPONDENTS SUZUKI MOTOR CORPORATION'S AND AMERICAN SUZUKI MOTOR CORPORATION'S BRIEF IN OPPOSITION

Nothing in this case warrants this Court's intervention. The Eleventh Circuit ruled that Petitioner's claims amounted to a collateral attack on the judicially approved reorganization of Petitioner's Korean parent and that, on that basis, the district court had properly dismissed Petitioner's claims on grounds of international comity. However, it is important to note that the majority on the Eleventh Circuit panel also took care to review and reject Petitioner's Bankruptcy Code-based claims and its unjust enrichment claim *on the merits*. Moreover, the third judge on the panel, specially concurring in the dismissal of all of Petitioner's claims, wrote an extended opinion in which he demonstrated that, *regardless of comity issues*, none of Petitioner's claims were viable under applicable state law or the United States Bankruptcy Code.

The panel majority ruled that there had been no abuse of discretion in the district court's decision to extend comity to the final order of the Korean bankruptcy court – an order made at the conclusion of a major reorganization proceeding in which Petitioner had notice and an opportunity to be heard, was vigorously represented by Korean legal counsel, and received a monetary award on its claims. In so doing, the Eleventh Circuit neither created a circuit conflict nor impermissibly expanded the bounds of comity, as Petitioner now contends.

The Eleventh Circuit in this case applied an "abuse of discretion" standard of review, while noting that issues of law would be reviewed *de novo* since "an error of law constitutes an abuse of discretion." This standard of review derives from this Court's opinion in *Hilton v. Guyot*, 159 U.S. 113 (1895),

and is consistent with that used in recent cases in the Second, Third, Fifth, Ninth, Tenth and Federal Circuits.

Petitioner insists that the Eleventh Circuit created a conflict with the Second Circuit's articulation of the standard of review applicable to a district court's invocation of the doctrine of international comity in *Diorinou v. Mezitis*, 237 F.3d 133 (2d Cir. 2001). *Diorinou*, however, is equivocal about the proper standard of review and the Court ultimately deferred to the decision of the foreign (Greek) high court. Neither the Second nor any other circuit has adopted the *de novo* standard in subsequent opinions. In light of more recent, well-received, Second Circuit opinions applying an abuse of discretion standard, *Diorinou* simply does not pose a conflict on the issue.

Petitioner's secondary claim – that the Eleventh Circuit's decision conflicts with Third Circuit precedent on the appropriate scope of comity in the context of foreign bankruptcy proceedings – also fails. The Third Circuit did *not* hold, as Petitioner claims, that the application of comity principles in the international bankruptcy context is limited to claims against the foreign debtor. Instead, the Third Circuit, applying an abuse of discretion standard, only held that comity did not bar a lawsuit in the U.S. against a non-debtor transferee *when* the property in dispute was *not* included among the assets identified in the foreign bankruptcy court's order approving the sale of the debtor's property. *Remington Rand Corp. v. Bus. Systems Inc.*, 830 F. 2d 1260, 1266 (3d Cir. 1987).

Nor is the decision below called into question under *res judicata* principles. Not only was *res judicata* not the basis for the Eleventh Circuit's decision, the panel majority analyzed Petitioner's claims and determined that Petitioner could have raised those claims in the Korean bankruptcy proceeding and was thus precluded from asserting them in a subsequent, separate lawsuit. By claiming that the lower courts *incorrectly* determined that its claims could have been

raised in the foreign bankruptcy case in which it participated, Petitioner is really seeking to re-litigate that determination, essentially seeking mere error correction from this Court.

This case simply does not present an appropriate vehicle for certiorari. In light of its unusual facts and the paucity of cases addressing analogous circumstances, this case does not raise an important question of law with significant practical consequences.

Finally, the Eleventh Circuit's decision affirming dismissal on comity grounds was correct, and the concurring opinion included fully adequate, alternative grounds, based on state law and the Bankruptcy Code, for dismissal of all of Petitioner's claims, particularly those few that were asserted against Respondents Suzuki Motor Corporation and American Suzuki Motor Corporation ("the Suzuki Entities").

For these many reasons, therefore, the Petition should be denied.

STATEMENT OF THE CASE

Petitioner's recitation of the "facts" underlying this case is incomplete and misstates the factual record presented in the lower courts.[1] The alleged "destruction" of Petitioner Daewoo Motor America came about because its parent,[2] Daewoo Motor Co., Ltd. ("DWMC"), filed for bankruptcy in Korea and exited the car manufacturing business for reasons having nothing to do with the Respondents. The Eleventh

[1] Although the case was disposed of on a motion to dismiss, as noted by Judge Tjoflat (Pet. App. at 29a, fn 11), it was not necessary for the district court to convert the motion into a Rule 56 motion for summary judgment because the additional documents and materials outside the scope of Petitioner's complaint were not disputed.

[2] Although Petitioner is now controlled by Creditors Management Association, DWMC was its parent from the date Petitioner was incorporated throughout the time of the events underlying this case.

Circuit's detailed and accurate examination of the facts bears highlighting.

Petitioner is a Delaware corporation and was a wholly owned subsidiary of DWMC, a South Korean automobile manufacturer. (Pet. App. at 2a) In 1999, Petitioner and DWMC entered into an Automobile Purchase and Distribution Agreement ("the Distribution Agreement"). (*Id*.) Under the Distribution Agreement, DWMC agreed to sell to Petitioner automobiles manufactured by DWMC and granted to Petitioner the exclusive right to distribute and sell those automobiles in the United States. (*Id*. at 2a-3a) The Suzuki Entities were not parties to the Distribution Agreement or any other agreement between Petitioner and its Korean parent corporation.

Less than a year after Petitioner and DWMC entered into the Distribution Agreement, DWMC filed for protection in Korea under the Korean Corporate Reorganization Act; thereafter, the Inchon District Court in South Korea appointed a Receiver. (*Id*. at 3a) DWMC notified Petitioner, as a creditor of DWMC, of its insolvency and its plans to file for court receivership. The notification included a summary of Korean bankruptcy law as well as warnings that creditors were required to participate in the reorganization plan to be repaid and that failure to file a claim would result in the loss of creditor rights. (*Id*.)

Petitioner retained the law firm of Jin & Lee in Korea to act on Petitioner's behalf in the Korean judicial proceedings.[3] (*Id*.) From January 15, 2001 through May 2002, Petitioner filed proofs of claims with the Korean court totaling over $79 million. (*Id*.) When most of those claims were rejected, Petitioner filed a complaint in the Korean court against the Receiver and DWMC challenging the Receiver's rejection

[3] At a later stage of those proceedings, Petitioner also engaged the Korean law firm of Lee & Ko. (*Id.* at 67a, fn 39)

and seeking approval of all of its claims. (*Id*. at 4a) In May 2001, however, Petitioner dropped its suit. In 2002, Petitioner filed a supplemental claim for approximately $1.1 million, which the Receiver approved. (*Id*.)

Both before and during its reorganization proceedings, DWMC had negotiated with GM about the possibility of a sale of DWMC's operations. (*Id*.) In September 2001, DWMC and GM entered into a non-binding Memorandum of Understanding ("MOU") regarding the sale of certain of DWMC's assets. (*Id.* at 23a) The MOU contemplated that a new company would be formed to own and operate select assets and businesses of DWMC. (*Id.*) The Korean court approved the MOU. (*Id*. at 4a) The Suzuki Entities were *not* parties to the MOU and Petitioner does not allege that they ever made or adopted any representations with respect to the MOU or Petitioner's prospective status.

On April 30, 2002, DWMC and certain creditors negotiated and signed in Korea a Master Transaction Agreement ("the MTA") with GM in the Korean insolvency proceedings. (*Id*. at 5a) Under the MTA, "Newco A" (later known as GM Daewoo Auto & Technology Co. ["GMDAT"]) would acquire certain specified DWMC vehicle manufacturing assets, while other assets and liabilities, including certain existing distribution arrangements and, particularly, the Distribution Agreement, were to be excluded from the acquisition.[4] (*Id*.) The shares of Petitioner, which

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[4] Contrary to Petitioner's statement of facts, the MTA did <u>*not*</u> provide for the transfer of <u>*all*</u> of DWMC's assets. (*Compare* Pet. at 3 *with* Pet. App. at 5a, 24a, 54a-55a) For example, GMDAT was not acquiring the stock in certain distributors that was owned by DWMC. Nor did the MTA give "GM's designee the right to distribute identical vehicle models in petitioner's exclusive territory." (Pet. at 3) Similarly false is the statement that "[p]ursuant to the MTA, GM and … respondent Suzuki Motor Corp. … held a two-thirds ownership stake in GMDAT." (*Id.*) In fact, neither Suzuki nor American Suzuki was a party to the MTA.

were wholly owned by DWMC, were not among the assets to be acquired by GMDAT. (*Id*.)

On May 6, 2002, the Korean court held a creditor's meeting and approved a proposed reorganization plan for DWMC that did not reflect the terms of the MTA. (*Id*.) Petitioner, having received notice and attending the meeting through proxy, voted in favor of this original Reorganization Plan. (*Id*. at 2a, 53a) The Korean court approved the original plan, but requested that the Receiver file a modified plan that reflected the terms of the MTA. (*Id*. at 5a)

In April 2002, DWMC successfully sought permission from the Korean court for Petitioner to file its own bankruptcy proceeding in the United States. Accordingly, on May 16, 2002, Petitioner filed for bankruptcy in the Central District of California. (*Id*. at 6a) In August 2002, the California bankruptcy court granted a motion by the Official Committee of Unsecured Creditors of Petitioner to be appointed to prosecute claims against DWMC. (*Id*. at 6a, 54a) The creditors' committee received advice from Korean counsel regarding Petitioner's potential claims against DWMC related to the MTA. (*Id*. at 6a, 67a)

On September 12, 2002, DWMC filed with the Korean court a Modified Plan of Reorganization ("Modified Reorganization Plan"), which incorporated the terms of the MTA. (*Id*. at 6a) On September 17, 2002, Petitioner was sent notice of a September 30, 2002 creditors' meeting regarding a vote to be held on DWMC's Modified Reorganization Plan. (*Id*. at 7a, 54a, 66a-67a) On September 30, 2002, DWMC's creditors and the Korean court held the meeting to vote on the Modified Reorganization Plan. (*Id*. at 7a) Although Petitioner had notice of this meeting and could have attended or appointed another proxy to vote on Petitioner's behalf on the Modified Reorganization Plan, no representative of Petitioner attended the meeting or voted on the Modified Reorganization Plan. (*Id*.) The Korean court approved the Modified Reorganization Plan and the MTA that formed an

essential part of that plan on September 30, 2002 ("Plan Approval Order"). (*Id*.)

GMDAT was formed and it then acquired certain vehicle manufacturing assets from DWMC via an asset transfer agreement pursuant to the MTA. (*Id*.) Respondent Suzuki Motor Corporation currently owns a minority stake in GMDAT; Respondent American Suzuki Motor Corporation holds no interest in GMDAT.

In mid-2003, American Suzuki began to purchase vehicles manufactured by GMDAT for distribution in the U.S. (*Id*.)

Course of Proceedings and Disposition Below

On July 22, 2003, Petitioner filed this action against GM, GMDAT, Suzuki and American Suzuki as an adversary proceeding in the California bankruptcy court, alleging tort and Bankruptcy Code-based claims and seeking injunctive relief and damages. (*Id.*) At the outset, Petitioner sought a TRO against Respondents American Suzuki and GM, seeking to restrain them from importing any cars made by GMDAT. (*Id.* at 7a, 26a) Petitioner's request for injunctive relief was denied.

Petitioner filed an amended complaint on November 20, 2003, after motions to dismiss the original complaint had resulted in the dismissal of the claims for unjust enrichment and fraudulent transfer, without leave to amend, and the dismissal of various other claims, with leave to amend. A typical scattershot-style pleading, the amended complaint contained claims for fraud, tortious interference with contract, tortious interference with prospective economic advantage, aiding and abetting breach of fiduciary duty, violation of California's Cartwright Act, unfair competition, successor liability, unauthorized post-petition transfer, violation of the automatic stay, and several claims under Florida and Massachusetts statutes prohibiting wrongful termination of motor vehicle dealership agreements. Respondents moved to

dismiss the amended complaint on multiple grounds. (*Id*. at 8a)

The bankruptcy court dismissed the claims for violation of the Cartwright Act, unfair competition, and violation of the Massachusetts dealership statute without leave to amend; dismissed the claims under the Florida dealership statute with leave to amend; scheduled a later hearing on the motions concerning the claims of successor liability, unauthorized post-petition transfer, and violation of the automatic stay; and denied the motions as to the claims – asserted only against GM – of fraud, tortious interference with contract, tortious interference with prospective economic advantage, and aiding and abetting breach of fiduciary duty. (*Id*.)

In February 2004, the Judicial Panel on Multidistrict Litigation transferred the action to the District Court for the Middle District of Florida for consolidation with *In re Daewoo Motor Co., Ltd., Dealership Litigation*, MDL Docket No. 1510. (*Id*.) On August 26, 2004, after supplemental briefing and a hearing, the district court dismissed the remaining claims of the amended complaint with prejudice on the ground of international comity. (*Id.* at 49a-71a) Finding that "Korea has significant interest in regulating business activity on its shores," that Korean bankruptcy laws are consistent with U.S. notions of due process, that Petitioner "had notice, as well as a full and fair opportunity to participate in all facets of the Korean bankruptcy process," and could and should have raised its objections to the MTA and the sale of certain DWMC assets in the Korean bankruptcy proceedings, the district court concluded that Petitioner's claims constituted a collateral attack on the Korean bankruptcy court's order approving DWMC's Modified Reorganization Plan and the MTA. (*Id*. at 9a)

The district court also ruled that the Modified Reorganization Plan and the MTA approved by the Korean court did not violate the automatic stay in effect in Petitioner's own U.S. bankruptcy proceedings because the

Distribution Agreement with its parent, DWMC, did not give Petitioner property rights in vehicles manufactured by GMDAT. (*Id*.) Thus, Petitioner's claims for violation of the automatic stay and unauthorized post-petition transfer lacked merit, without regard to issues of comity.

The Eleventh Circuit affirmed the district court's decision. First, the panel majority determined that "the district court correctly concluded that the order of the Korean court approving the Modified Reorganization Plan of [DWMC] did not affect any property interest of [Petitioner] and did not violate the automatic stay [in Petitioner's U.S. bankruptcy]". (*Id.* at 13a) Petitioner does not challenge this finding.

Second, the panel majority ruled that the district court did not abuse its discretion in granting comity to the Korean bankruptcy court's Plan Approval Order, or err in determining that Petitioner's objections to the Modified Reorganization Plan and the MTA could have been raised in the Korean bankruptcy proceeding. Specifically, the panel majority found:

- That Petitioner's present claims are based on the Modified Reorganization Plan and the MTA, which were approved by the Korean court.
- That the validity of the MTA was necessarily put at issue in the Korean proceedings and necessarily approved by the order of the Korean court.
- That Petitioner's complaint regarding the effect of the MTA could and should have been raised before the Korean court.

(*Id.* at 16a) Based on these findings, the panel majority agreed with the district court that Petitioner's claims all rely entirely on the alleged invalidity of the transactions approved

by the Korean court.[5] (*Id.*) Citing *Miller v. Meinhard-Commercial Corp.,* 462 F.2d 358, 360 (5th Cir. 1972), for the proposition that "[e]ven though an action has an independent purpose and contemplates some other relief, it is a collateral attack if it must in some fashion overrule a previous judgment," the panel majority concluded that, "[b]ecause granting the relief sought would require the court to set aside the asset transfer to the defendants, which was approved by the Korean court, the complaint is a collateral attack on the order of the Korean court." (*Id.* at 16a-17a) Hence, the panel majority held that it was not an abuse of discretion for the district court to preclude such a collateral attack. (*Id.*) Petitioner challenges this conclusion in its petition to this Court.

In a separate opinion, Judge Tjoflat concurred in the panel majority's judgment.[6] (*Id.* at 19a) In Judge Tjoflat's view, four of Petitioner's claims directly attacked the validity of the Korean bankruptcy court's Plan Approval Order by alleging that the judicially approved asset transfer itself was the wrongful conduct. (*Id.* at 37a-38a) "Thus, [Petitioner] cannot attack the MTA without also attacking the [Korean] bankruptcy court's approval of it; the two are inextricably intertwined." (*Id.* at 38a) For that reason, Judge Tjoflat agreed with the panel majority "that [these claims] amount to nothing more than a collateral attack on the Korean

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[5] Contrary to Petitioner's characterization, the panel majority did not "assume" that all of Petitioner's claims could have been raised in the Korean proceeding. The issue was the subject of extensive document discovery and depositions in the California bankruptcy court proceedings, and was fully briefed, both in the district court and the Eleventh Circuit. (*See* Pet. at 7-8, fn 3, Pet. App. at 52a, fn 9, 54a, fns 14-16, 59a, fn 25, 66a, fn 36, and 67a, fns 38-39; *see also,* p. 3, fn 1, *supra*.)

[6] Although he recognized that the California bankruptcy court had already dismissed with prejudice several of Petitioner's claims due to their lack of legal merit, Judge Tjoflat reviewed the Florida district court's ruling as if it had dismissed all of the claims in Petitioner's amended complaint on comity grounds, and thus he considered each of Petitioner's claims on appeal.

bankruptcy court's order" and were therefore properly dismissed on grounds of international comity. (*Id.*) Judge Tjoflat determined that the remainder of Petitioner's claims were legally insufficient under the Bankruptcy Code and on state law grounds – primarily, that those claims relied on an erroneous and insupportable interpretation of the Distribution Agreement between Petitioner and DWMC.[7]

Petitioner petitioned the Eleventh Circuit for rehearing. That petition was denied. (*Id.* at 74a-75a)

REASONS FOR DENYING THE PETITION

I. The Eleventh Circuit's Decision Creates No Conflict Among The Circuits Over The Applicable Standard Of Review In International Comity Cases.

Petitioner's assertion that there is conflict between the circuits and confusion in lower courts on the standard of review in international comity cases ignores the one hundred-plus years of jurisprudence applying the clear instruction on international comity that this Court laid out in *Hilton v. Guyot*, 159 U.S. 113 (1895). As the Court stated there:

> "'Comity,' in the legal sense, is neither a matter of absolute obligation on the one hand, nor of mere courtesy and good will upon the other. But it 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."

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[7] "[T]he Distribution Agreement contains no guarantee that [Petitioner] would continue to receive Products after [DWMC] ceased manufacturing them, nor does the agreement restrict [DWMC's] ability to sell its manufacturing assets. ... To the extent [Petitioner's] claims rely on the existence of such guarantees, they must fail." (*Id.* at 45a)

Id. at 163-64. Since *Hilton*, the application of comity has been deemed a discretionary decision that deference to the act of a foreign government (or its courts) will best promote the mutual interests of the United States and the foreign sovereign.

The Eleventh Circuit in this case applied an "abuse of discretion" standard of review, but noted, "We review…questions of law *de novo*. 'An error of law constitutes an abuse of discretion.' The interpretation of a contract is a question of law that the court reviews *de novo*." (Pet. App. at 10a; citations omitted.)[8]

This ruling is entirely consistent with controlling decisions of the Second, Third, Fifth, Ninth, Tenth and Federal Circuits. *See, Int'l Transactions, Ltd. v. Embotelladora Agral Regiomontana, S.A. de C.V.*, 347 F.3d 589, 593 (5th Cir. 2003) (In reviewing the district court's grant of comity to a Mexican bankruptcy court's order with respect to an assignment of an arbitration award, the Fifth Circuit stated, "The court's decision to grant comity to the Mexican bankruptcy court's ruling is reviewed for abuse of discretion."); *Sarei v. Rio Tinto, PLC*, 456 F.3d 1069, 1087 fn 18 (9th Cir. 2006) ("We join our sister circuits in clarifying that this abuse of discretion review applies to dismissals on grounds of international comity …." [citing *JP Morgan*

[8] Petitioner implies that the standard of review was a hotly disputed issue below. In fact, the Eleventh Circuit's brief discussion of the standard of review occupied but three short paragraphs. (Pet. App. at 9a-10a) Moreover, Petitioner's treatment of the standard of review below was equally brief and was essentially based on a claim that various aspects of the review, such as the interpretation of the Distribution Agreement and issues of California state law on contract interpretation, should be *de novo* (Petitioner's Brief below at pp. 20-21), a proposition with which the Eleventh Circuit *agreed*. Indeed, Petitioner noted, "The result is the same even under an abuse of discretion standard, however, because the district court's ruling rested on multiple errors of law." (Petitioner's Brief below at p. 22, fn 12.)

Chase Bank v. Altos Hornos de Mexico, S.A. de C.V., 412 F.3d 418, 422 (2d Cir. 2005), discussed *infra*, at p. 13]); *Int'l Nutrition Co. v. Horphag Research Ltd.*, 257 F.3d 1324, 1329 (Fed. Cir. 2001) ("The district court's extension of international comity is reviewed for abuse of discretion."); *Remington Rand Corp. v. Bus. Systems Inc.*, 830 F.2d 1260, 1267 (3d Cir. 1987) ("Because the extension or denial of comity is discretionary, we review this issue by the abuse of discretion standard."); and *In re Colorado Corp.*, 531 F.2d 463, 469 (10th Cir. 1976) ("[W]e believe it was an abuse of discretion not to grant comity to the orders of the foreign courts.").

Petitioner relies on a lone Second Circuit opinion, *Diorinou v. Mezitis*, 237 F.3d 133 (2d Cir. 2001), to try to create an illusion of a circuit conflict. In fact, however, there is no conflict. Indeed, the Second Circuit has articulated an abuse of discretion standard for reviewing district court decisions based on international comity in a number of other, more recent cases.

The Second Circuit's recent discussion of the doctrine of international comity in *JP Morgan Chase Bank v. Altos Hornos de Mexico, S.A. de C.V.*, 412 F.3d 418, 422-23 (2d Cir. 2005) is illustrative. Without mentioning *Diorinou*, the Second Circuit asserted a traditional abuse of discretion standard for reviewing a district court's decision to abstain on international comity grounds:

> "Declining to decide a question of law on the basis of international comity is a form of abstention, and ***we review a district court's decision to abstain on international comity grounds for abuse of discretion***. *See, e.g., Finanz AG Zurich v. Banco Economico S.A.*, 192 F.3d 240, 246 (2d Cir. 1999); *Allstate Life Ins. Co. v. Linter Group Ltd.*, 994 F.2d 996, 999 (2d Cir. 1993). We recognize that in ***other*** abstention cases involving the 'act of state'

> doctrine and some forms of domestic federal-state abstention, we apply a 'somewhat more rigorous' standard of review than abuse of discretion that approaches *de novo* review. ... ***Because our international comity abstention cases rely on the abuse of discretion standard, we apply that standard in this case***."

Id. at 422-23 (citations omitted; emphasis added).[9]

Diorinou itself was a very complex and contentious case involving conflicting and contemporaneous child custody awards obtained in parallel proceedings brought under New York law, Greek law and the Hague Convention on Civil Aspects of International Child Abduction, which were litigated through the state and federal courts of New York and various courts of first instance and appeal in Greece.

The district court granted comity to what it found to be the determination of the highest court of Greece in the Hague

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[9] The abuse of discretion standard articulated in *JP Morgan* is not surprising in light of numerous recent Second Circuit decisions addressing the application of international comity and the appropriate standard of review. *See, Finanz AG Zurich v. Banco Economico, S.A.*, 192 F.3d 240, 246 (2d Cir. 1999) ("We review a district court's decision to extend or deny comity to a foreign proceeding for abuse of discretion."); *Jota v. Texaco, Inc.*, 157 F.3d 153, 160 (2d Cir. 1998) ("The District Court's dismissal on the ground of international comity is reviewed for abuse of discretion."); *Pravin Banker Assocs., Ltd. v. Banco Popular del Peru*, 109 F.3d 850, 856 (2d Cir. 1997) (denial of motion to stay U.S. proceedings in deference to pending foreign proceeding on international comity grounds is "reviewed only for abuse of discretion"); *Allstate Life Ins. Co. v. Linter Group Ltd*., 994 F.2d 996, 999 (2d Cir. 1993), *cert denied*, 510 U.S. 945 (1993) ("[S]ince the extension or denial of comity is within the court's discretion, we will reverse the court's decision only when we find an abuse of discretion."; extending international comity in cases involving foreign bankruptcy proceedings is "particularly appropriate"); *Cunard S.S. Co. v. Saleen Reefer Servs*., 773 F.2d 452, 460 (2d Cir. 1985) (district court did not abuse its discretion in vacating attachment in the U.S. and granting comity to pending Swedish bankruptcy proceedings).

petition litigation that the wife (Diorinou) had not wrongfully retained the children in Greece. Ultimately, the Second Circuit resolved the case "by deferring to the decisions of the Greek courts on the Greek Hague petition". 237 F.3d at 146.

It was in that context that the Second Circuit discussed the appropriate standard of review of a district court's decision to grant comity to a foreign court's judgment. Far from being explicit about a uniform answer to the question, Judge Newman acknowledged that there were various circumstances in which the issue of international comity arises and that the precise interface between *de novo* review of issues of law and discretionary review of the grant of comity was uncertain. Judge Newman noted that the abuse of discretion standard was applied to those situations in which there was pending litigation in a foreign forum because that was akin to a *forum non conveniens* analysis. *Id.* at 139. He then opined that the standard of review applicable to enforcement of a foreign judgment was "not clearly articulated" and that when the issue was one of adjudication of a particular issue, "appellate courts have not explicitly articulated the standard of review". *Id.* at 139-40. He concluded that he "believed" that in the latter two cases the standard was *de novo* review. Having reached that tentative conclusion, Judge Newman then examined the legal issues with respect to the varying determinations in the New York and Greek courts and ultimately deferred to the Greek decisions.

To the extent that *Diorinou* can be read as holding that the standard of review applicable to the grant of international comity is, in some cases, *de novo*, it is far from a seminal case. In fact, *Diorinou* has been followed only by one Texas state appellate court on the issue of the standard of review for decisions based on comity.[10] Moreover, as authority for

[10] *See Velez v. Mitsak*, 89 S.W.3d 73, 2002 Tex. App. LEXIS 6251 (Tex. App. El Paso 2002). It is important to note that, like *Diorinou*, *Velez* involved a child custody dispute under the Hague Convention on Civil Aspects of International Child Abduction, and the Texas appellate

general proclamations concerning the application of international comity, *Diorinou* has been largely ignored since its publication in 2001.[11]

In sum, the *Diorinou* decision cannot be read nearly as broadly or absolutely as Petitioner would read it, and it is far from "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."[12] (Pet. at 17) On the contrary,

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court reviewed *de novo* a trial court's application of full faith and credit to a foreign ruling on a Hague Convention petition. *Id.* at 81-82. Furthermore, the court in *Velez* applied the *de novo* standard of review with reservations, noting that the court in *Diorinou* had "concluded that ... the standard of review had not been explicitly articulated." *Id*. at 79.

[11] Aside from the Texas state appellate court opinion, only six opinions (of which three are unpublished) have referenced the *Diorinou* case in the context of comity, and *none* have mentioned its discussion of the standard of review for decisions based on comity: *ICC Chem. Corp. v. TCL Indus. (Malaysia) SDN*, 2006 U.S. App. LEXIS 29083, *4 (2d Cir. 2006) (citing *Diorinou* to explain the principles and considerations in extending comity to a foreign court's adjudication); *Hoblock v. Albany County Bd. of Elections*, 422 F.3d 77, 93 (2d Cir. 2005) (citing *Diorinou* for standard of review of a decision applying state law collateral estoppel and *res judicata* principles); *Paramedics Electromedicina Comercial, Ltda. v. GE Med. Sys. Info. Techs., Inc*., 369 F.3d 645, 654 (2d Cir. 2004) (citing *Diorinou*'s *dicta* that United States courts "may choose to give *res judicata* effect to foreign judgments on the basis of comity", but "are not obliged" to do so); *I.G. Farben S'holders Organization v. UBS AG*, 2006 U.S. Dist. LEXIS 63347, *15 (E.D.N.Y. 2006) (citing *Diorinou* for the proposition that, "[u]nder well established Second Circuit case law, 'American courts will normally accord considerable deference to foreign adjudications as a matter of comity.'"); *Films by Jove, Inc. v. Berov*, 341 F. Supp. 2d 199, 213 (E.D.N.Y. 2004) (citing *Diorinou* as an example of "established law that comity is not applied in contravention of public policy principles"); *Mackley v. Sullivan & Liapakis, P.C.*, 2001 U.S. Dist. LEXIS 21723, *20 (S.D.N.Y. 2001) (citing *Diorinou* for the principle that "[a] dismissal on grounds of *forum non conveniens* is reviewed for abuse of discretion").

[12] *Hachamovitch v. Debuono*, 159 F.3d 687 (2d Cir. 1998), cited by Petitioner for a "more rigorous" abuse of discretion standard in abstention cases (Pet. at 17, fn 5), did not involve the considerations of international

given the great weight of authority in the Second Circuit, including its recent opinion in *JP Morgan, supra,* specifically addressing the appropriate standard of review in the context of international comity, there is no indication that the Second Circuit would have reviewed this case under a different standard than did the Eleventh Circuit.

Finally, there is no indication that *de novo* review would have led to a different result. Asserting only that the Eleventh Circuit should have utilized the *Diorinou* court's framework, Petitioner identifies nothing that the panel majority should have done additionally or differently under a *de novo* analysis of the extension of comity to the Korean bankruptcy court's

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comity articulated in *Hilton*. Instead, the Second Circuit was called on to review a district court's application of the Rooker-Feldman and Burford doctrines to a dispute between a physician and New York's licensing board. Its holding appears to be limited to the Burford doctrine. *Id*. at 693 ("we review a district court's decision to abstain on Burford grounds for abuse of discretion").

Nor does the Second Circuit's decision in *Royal and Sun Alliance Ins. Co. of Canada v. Century Int'l Arms, Inc*., 466 F.3d 88 (2d Cir. 2006) present a circuit conflict. The case did not involve a foreign bankruptcy proceeding, which the court there admitted would require particular deference: "A foreign nation's interest in the 'equitable and orderly distribution of a debtor's property' is an interest deserving of particular respect and deference, and accordingly we have followed the general practice of American courts and regularly deferred to such actions." *Id*. at 92-93. Indeed, the *Royal and Sun Alliance* court adopted its "more rigorous" abuse of discretion standard of review from *Hachamovitch*, which similarly involved neither bankruptcy nor a foreign proceeding. *Id*. at 92.

Moreover, the Second Circuit clearly contemplated a distinction between a "more rigorous" abuse of discretion standard for review of a decision to abstain and *de novo* review, which it reserved for a district court's conclusions of law. *Id*. at 92. Whatever the difference between abuse of discretion and its "more rigorous" form, a form which has not been adopted by any other court, it is not a *de novo* standard. The standard of review applied by the Eleventh Circuit panel majority is therefore consistent with both *Hachamovitch* and *Royal and Sun Alliance*.

Plan Approval Order or how such an alternative analysis would have produced a different result. (*Id*. at 21) Indeed, given Judge Tjoflat's detailed analysis concurring in the dismissal of all of Petitioner's claims on state law and Bankruptcy Code grounds, having agreed in part with the majority's comity analysis as to certain claims, Petitioner cannot hope to obtain a different result from the court below, even if a *de novo* standard were to be applied.

II. The Eleventh Circuit's Comity Analysis Does Not Conflict With The Decision In *Remington Rand* Or Principles of *Res Judicata*.

Under the guise of a conflict with the Third Circuit's decision in *Remington Rand Corp. v. Bus. Systems Inc*., 830 F.2d 1260 (3d Cir. 1987), Petitioner claims that the Eleventh Circuit impermissibly expanded the application of the doctrine of international comity beyond judicially prescribed bounds.[13] In touting *Remington Rand* as delimiting the boundaries of international comity, Petitioner essentially seeks to have this Court confine the application of comity in United States courts to disputes involving the identical parties and claims as were directly involved in the foreign proceeding, per the requirements of *res judicata*. However, neither this Court nor any circuit court has limited the doctrine of international comity to the strictures of *res judicata*. Indeed, Petitioner's requested limitation is at odds with the oft-stated goal in transnational insolvencies of providing an orderly and systematic distribution of the debtor's estate.

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[13] Relative to the preceding discussion of Petitioner's primary point regarding the proper standard of review in international comity cases, it is to be noted that the Third Circuit, in *Remington Rand*, applied the abuse of discretion standard in reviewing the district court's decision on comity. *Id*. at 1266 ("Because the extension or denial of comity is discretionary, we review this issue by the abuse of discretion standard.").

Furthermore, by claiming a conflict with the "basic principle[] of *res judicata*" that a prior proceeding will not bar claims that could not have been brought there, Petitioner requests that this Court overturn the lower courts' determinations that Petitioner *could* have asserted its claims in the Korean bankruptcy proceeding of its Korean parent corporation. Such error correction affords no basis for review by this Court.

A. The panel majority's decision is consistent with the fundamental goal in transnational insolvencies. Petitioner's argument that "the fundamental purpose of bankruptcy laws is to protect the *debtor* and its property – not to protect third parties who are not the debtors in the bankruptcy proceeding" (Pet. at 22; emphasis in original) is a convenient, albeit misleadingly facile, spin on bankruptcy law of no consequence here. Federal courts discussing claims arising in transnational insolvencies agree that the overarching goal is 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". *Cunard S.S. Co. v. Saleen Reefer Servs.*, 773 F.2d 452, 457-58 (2d Cir. 1985); *see also Int'l Transactions, Ltd. v. Embotelladora Agral Regiomontana, S.A. de C.V.*, *supra*, 347 F.3d at 594; *Finanz AG Zurich v. Banco Economico S.A.*, *supra,* 192 F.3d at 246; *Allstate Life Ins. Co. v. Linter Group Ltd.*, *supra*, 994 F.2d at 999; *Remington Rand v. Bus. Systems Inc.*, *supra*, 830 F.2d at 1267; *Victrix S.S. Co., S.A. v. Salen Dry Cargo A.B.*, 825 F.2d 709, 713-14 (2d Cir. 1987) ("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."); *Cornfeld v. Investors Overseas Services, Ltd.*, 471 F. Supp. 1255, 1259-60 (S.D.N.Y. 1979), aff'd, 614 F.2d 1286 (2d Cir. 1979).

This goal is well served by applying comity to bar creditor claims against a non-debtor arising from its dealings

with the debtor's assets under a judicially approved plan of sale or reorganization. *See In re Met-L-Wood Corp.*, 861 F.2d 1012, 1018 (7th Cir. 1988) (suit against purchaser of debtor's assets and others involved in bankruptcy sale was a collateral attack on the judgment approving the sale in contravention of the goal of finality in judicial sales in bankruptcy; "the validity of the sale was established, even against non-parties to the sale proceeding"); *In re All Am. of Ashburn, Inc.*, 56 B.R. 186, 190 (N.D. Ga. 1986) (orders approving sales of debtor assets are free and clear and not subject to collateral attack by creditor who does not receive formal notice but has actual notice of the sale and chooses not to file claim).[14]

Against this background, Petitioner's claims seeking to *enjoin* Respondent American Suzuki from taking possession of and distributing vehicles manufactured by GMDAT constitute an obvious challenge to the Korean bankruptcy court's orderly and systematic disposition of DWMC's manufacturing assets.[15] Only slightly less obvious is the

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[14] This Court itself has suggested that a bankruptcy proceeding should culminate in a certain and final plan of distribution or reorganization, applicable to third parties as well as participants in the insolvency proceedings. In *Canada Southern Railway Co. v. Gebhard*, 109 U.S. 527 (1883), United States bondholders of a Canadian railroad company were held to be subject to a reorganization plan approved in Canada and precluded from initiating action in the U.S. against the Canadian debtor despite neither assenting to the Canadian debtor's reorganization plan nor subjecting themselves to the jurisdiction of any Canadian court with respect to the Canadian debtor's bankruptcy. *Id*. at 539 ("*Unless all parties in interest, wherever they reside, can be bound by the arrangement which it is sought to have legalized, the scheme may fail.* All home creditors can be bound. What is needed is to bind those who are abroad. Under these circumstances the true spirit of international comity requires that schemes of this character, legalized at home, should be recognized in other countries."; emphasis added).

[15] Tellingly, Petitioner implicitly admits, by omission of several of its claims from its footnote 11, that certain claims in its First Amended Complaint – the breach of fiduciary duty, California Cartwright Act, unfair competition, unauthorized post-petition transfer, and violation of

challenge that Petitioner's *damages* claims present to the orderly and systematic disposition of the Korean debtor's bankruptcy estate. Although such claims do not literally seek to overturn the court-approved sale of DWMC's assets to GMDAT, the claims certainly impair the unfettered rights the transferee expected to obtain from the judicially approved sale. Quite obviously, the prospect of future creditor lawsuits against third parties who participate in a bankruptcy court-approved sale of the debtor's assets would severely impair a trustee's ability to sell those assets (for the benefit of the debtor, all creditors and other stakeholders) or otherwise carry out corporate reorganization activities.

The equitable, orderly and systematic disposition of a debtor's assets is not promoted by permitting creditors to spring upon a non-debtor whose dealings with the debtor's estate were supervised and expressly approved by a foreign bankruptcy court having jurisdiction over the debtor's estate. The Eleventh Circuit's ruling is entirely consonant with the fundamental goal of promoting orderly administration, certainty and finality in transnational bankruptcy proceedings.

B. The panel majority's decision does not conflict with the Third Circuit's application of comity in *Remington Rand*. Contrary to Petitioner's bald assertion, the Third Circuit did not hold in *Remington Rand* that, as a matter of law, non-debtors are *always* precluded from relying on comity principles as a shield against the claims of third parties. Nor did the *Remington Rand* court hold – as Petitioner suggests – that comity principles are "designed to protect the foreign debtor". (Pet. at 25)

In *Remington Rand*, the Third Circuit was presented with a U.S. parent's (Remington U.S.) assertion of trade secret

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automatic stay claims – <u>do</u> in fact seek the invalidation of GMDAT's judicially approved acquisition of specific DWMC assets. *See* Pet. at 28, fn 11.

misappropriation claims against a Dutch purchaser (BSI B.V.) of assets from the parent's insolvent Dutch subsidiary (Remington B.V.). BSI B.V.'s purchase of enumerated assets of Remington B.V. was approved and ordered by the Dutch bankruptcy court. However, neither intellectual property generally nor the trade secrets in particular were mentioned in the enumeration. *Id.* at 1266. BSI B.V. claimed that comity should have been afforded to the Dutch bankruptcy court's order approving the sale of assets to BSI B.V. The Third Circuit affirmed the district court's refusal to invoke comity to bar the suit by Remington U.S. because, *inter alia*, the sale of the confidential know-how in the hands of Remington B.V. (under license from Remington U.S.) was *not* covered by the terms of the Dutch court's sale order. Moreover, Remington U.S. had *not* been provided notice or an opportunity to be heard on the eventual terms of the sale and thus was *not* afforded due process before the Dutch tribunal. *Remington Rand*, 830 F.2d at 1266.

Remington Rand is thus factually distinct from the matter reviewed by the Eleventh Circuit. The Third Circuit did not have to address whether the claims made by Remington U.S. would disrupt a properly approved and valid sale of its foreign subsidiary's assets; instead, the court held that the transfer of the know-how, taking place on terms that exceeded the Dutch court's approval order, was invalid and unenforceable as against Remington U.S. for want of due process. Hence, it is not surprising that the Third Circuit declined to recognize the unauthorized transfer in the Netherlands as a bar to Remington U.S.'s misappropriation claims against the non-debtor transferee. However, the *Remington Rand* court recognized that comity could be applied in appropriate cases to bar claims against a non-debtor party dealing with the debtor's estate and its property: "The rationale for granting comity in such a situation would be to allow a foreign debtor's assets to be distributed equitably. … In the foreign bankruptcy context, comity is

based on the additional rationales that the foreign debtor's assets will be distributed in an equitable fashion, … and that one who conducts his affairs with foreign corporations subjects himself to foreign bankruptcy laws." *Remington Rand*, 830 F.2d at 1267-68 (citations omitted).

Here, in contrast to the creditor-plaintiff (Remington U.S.) in *Remington Rand*, Petitioner concedes that it received notice and had an opportunity to challenge the Modified Reorganization Plan and the MTA before the Korean bankruptcy court and that the sale of DWMC's assets was consistent with the plan approved by the Korean court. Petitioner has never claimed that the MTA exceeded the scope of the Korean court's Plan Approval Order, nor was Petitioner denied its due process right to be heard on the effect of the proposed transaction between DWMC, GM and GMDAT. Rather, Petitioner is asserting claims against GMDAT, the purchaser of DWMC's manufacturing assets, and those who later purchased cars manufactured by GMDAT through the use of those assets, simply because Petitioner was excluded from the MTA. In short, Petitioner is objecting solely to the fact that the sale took place exactly as contemplated by the MTA and as approved by the Korean bankruptcy court. Thus, the Third Circuit's reasoning in *Remington Rand* is inapposite here,[16] and its denial of comity to bar a claim against a non-debtor in one particular scenario does not present a conflict with the Eleventh Circuit's grant of comity to the Korean court's order in this case.[17]

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[16] Furthermore, this case, unlike *Remington Rand*, implicates a friendship treaty between Korea and the United States, further underscoring the propriety of the Eleventh Circuit's comity decision. *See* Treaty of Friendship, Commerce and Navigation Between the United States of America and The Republic of Korea, 8 U.S.T. 2217.

[17] Petitioner's further reliance on *BDL International v. Sodetal USA*, 377 F. Supp. 2d 518 (D. S.C. 2005) is misplaced. *BDL* concerned a U.S. consignee's liability to its customs broker/inland shipper, where the district court rejected the consignee's attempt to bar the case in favor of

C. The Eleventh Circuit's determination that Petitioner's claims could and should have been adjudicated in the Korean bankruptcy proceeding does not conflict with principles of issue preclusion, specifically, that a ruling in a prior proceeding cannot bar claims that could not have been raised in a prior litigation. Petitioner misleadingly states that the panel majority ruled that "an order of a foreign court approving a plan of reorganization for a foreign debtor bar[s] 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". (Pet. at 12; emphasis in original)

First, the Eleventh Circuit did not rule as to "claims against the foreign debtor" for the simple reason that Petitioner did not assert claims against the foreign debtor, DWMC, in this case; Petitioner directed its claims only against the Respondents as beneficiaries, to varying degrees, of the sale of DWMC's assets under the MTA.

But, more importantly, the Eleventh Circuit's ruling was not a preclusion of claims that "could not have been raised" in the Korean bankruptcy court. (*Id.* at 12, 14) The panel majority expressly found that Petitioner's claims were in fact capable of adjudication in the Korean bankruptcy proceeding because, although dressed up as claims against third parties, the claims amounted to an objection to the MTA and the

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the pending bankruptcy of a French exporter who contracted with the broker/shipper. *BDL*, 377 F. Supp. 2d at 526 (holding that consignee's direct liability to broker/shipper under shipping contract was not an issue for the French bankruptcy court). Moreover, *Philadelphia Gear Corp. v. Philadelphia Gear de Mexico*, 1995 U.S. Dist. LEXIS 15629, at *8 (E.D. Pa. Oct. 25, 1995), is inapposite, as it involved a plaintiff's declaratory relief action for determination of its trademark ownership under its license to a Mexican debtor. That case did not concern a creditor's claim against a third party purchaser of assets under a foreign bankruptcy judgment.

Modified Reorganization Plan.[18] Reading between the lines, Petitioner's issue is not whether a court is precluded as a matter of law from applying comity to bar claims that *could not* have been raised in a prior proceeding; Petitioner's contention is that the panel majority wrongly found that Petitioner's claims *could and should have been raised in the Korean bankruptcy proceeding*. Far from seeking a review of a circuit "conflict," Petitioner seeks correction of an adverse legal determination by the lower courts, namely, that all of Petitioner's claims arose from the terms of the Modified

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[18] Whether Petitioner's claims could have been asserted in the Korean proceeding was litigated in the lower courts, and was expressly determined by the Eleventh Circuit:

> "[Petitioner] next argues that the scope of the comity granted to the order of the Korean court should not extend to its claims against the [Respondents] because those claims were not and could not have been raised in the Korean bankruptcy proceeding. [Petitioner] argues that ... [its claims] were not necessarily put at issue by the Korean proceedings. These arguments fail."

(Pet. App. at 16a)

> "[T]he facts underpinning [Petitioner's] complaint ... were at issue in the Korean proceeding because those facts relate to the approval of the Modified Reorganization Plan and the MTA. The claims of [Petitioner] rely entirely on the alleged invalidity of the transactions approved by the Korean court."

(*Id.* at 17a) In his concurring opinion, Judge Tjoflat also agreed that at least four of Petitioner's claims "by their nature, call the Korean bankruptcy court's orders and proceedings into question" because they "point to the asset transfer itself as the illicit conduct" and "amount to nothing more than a collateral attack on the Korean bankruptcy court's orders." (*Id.* at 37a-38a) Moreover, he agreed that "international comity is an appropriate basis for disposing of these four claims. ... Such a collateral attack should not be entertained, and the district court's abstaining from deciding the merits of these claims in no measure constituted an abuse of discretion." (*Id.* at 38a)

Reorganization Plan approved by the Korean court and could have been raised in the Korean bankruptcy court.

That Petitioner seeks error correction – instead of resolution of conflicting legal standards or answers to important statutory or constitutional questions – from this Court is most evident in the petition's lengthy footnote 4. Noting that Judge Tjoflat, on whose specially concurring opinion Petitioner otherwise so strongly relies, provided alternative state law and Bankruptcy Code-based grounds for dismissal of all of Petitioner's claims, Petitioner speculates that it could convince the panel to reach an entirely different conclusion regarding the viability of Petitioner's claims if given yet another bite at the apple. Petitioner would have this Court remand this case, not to iron out a circuit split, but rather so that Petitioner can try to persuade the Eleventh Circuit that its claims did not arise out of the terms of the Modified Reorganization Plan approved by the Korean bankruptcy court and could not have been heard by that court; should Petitioner be successful on those points, it then hopes to convince the judges that its claims are meritorious under various state law and Bankruptcy Code principles. That Petitioner hopes to obtain a different result, after the district court's original determination, an unsuccessful motion for reconsideration, the Eleventh Circuit's opinion and an unsuccessful petition for rehearing *en banc*, does not present a suitable basis for review by this Court.[19]

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[19] It is most unlikely that Petitioner would be able to persuade the Eleventh Circuit on remand that its claims do not all arise from the Korean bankruptcy court's order approving the transfer of DWMC's manufacturing assets. Indeed, Petitioner *admits* that its claims either "address the validity of the acquisition itself" or are "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." (Pet. at 28-29) Far from indicating that Petitioner's claims would be viewed in a different light on remand, such characterizations confirm that the lower courts correctly held that Petitioner's claims arose from the Korean court's order approving

The panel majority's determination that Petitioner *could* have brought its claims in the Korean proceeding also eliminates any supposed conflict with *Marrese v. Am. Acad. Of Orthopaedic Surgeons*, 470 U.S. 373 (1985), the holding of which Petitioner misstates. In *Marrese*, this Court reversed a Court of Appeals determination that the "full faith and credit" statute, 28 U.S.C. § 1738, permitted preclusion of a federal antitrust claim because of a prior Illinois state court judgment rendered on the same underlying events. In reaching that result, the appellate court failed to evaluate the preclusive effect that Illinois law would confer upon its own state court judgment. This Court reversed and remanded the case for a determination of "the content of Illinois preclusion law". *Id*. at 386-87. Although the Court noted that a federal antitrust claim is not within the jurisdiction of the state courts and thus such a federal antitrust claim would most likely *not* be barred by Illinois law on claim preclusion by virtue of the earlier state court judgment against the plaintiff, that observation and the *Marrese* case have no application here. Here, based on the factual record developed in the California bankruptcy court, both the district court and the Eleventh Circuit determined that Petitioner's claims *were* capable of adjudication by the Korean court and therefore could be barred under a grant of comity to the Korean court's order. Such a determination does not offend this Court's holding in *Marrese* or the principles of *res judicata*.[20]

GMDAT's acquisition of certain assets as part of DWMC's court-supervised and approved reorganization.

[20] Similarly, cases cited by Petitioner which discuss a prior court's lack of jurisdiction over the subject of a subsequently brought claim are inapposite. (*See*, Pet. at 28-29, fn 10, citing *Brody v. Village of Port Chester*, 345 F.3d 103 (2d Cir 2003); *Waid v. Merrill Area Public Schools*, 91 F.3d 857 (7th Cir. 1996); *Clark v. Bear Stearns & Co., Inc*., 966 F.2d 1318 (9th Cir. 1992); *In re Birting Fisheries, Inc*., 300 B.R. 489 (B.A.P. 9th Cir. 2003))

In the absence of any circuit conflict, or conflict with well established principles of international comity or *res judicata*, there is no reason to second-guess the lower court rulings. Review of Petitioner's second question should be denied.

III. The Case Presents Questions Of Limited Importance And Practical Utility.

A. This is not a case in which the Court is called upon to address issues of wide-ranging international importance. Perhaps appreciating the absence of any conflict with Second or Third Circuit precedent, Petitioner devotes substantial attention to an argument that the case poses an important question of federal law that warrants this Court's attention. Yet even cursory scrutiny of the reasons advanced by Petitioner reveals this argument to be without merit.

Petitioner's effort to instill this case with greater importance by invoking "the exponential growth of multinational or transnational corporate enterprise" (Pet. at 11) and raising the specter of "the Nation's relations with other countries" (*id*.) should be disregarded for the empty rhetoric it is. Far from being an "important and recurring phenomenon" (*id.* at 12), litigation regarding the application of comity to foreign bankruptcy proceedings, let alone "consecutive foreign and domestic bankruptcy proceedings" (*id.* at 11), is rare. The infrequency of disputes concerning district courts' deference to foreign bankruptcy courts on international comity grounds confirms that this case does <u>not</u> "implicate this Nation's relations with other countries".

Moreover, this Court spoke to both the discretionary extension of comity to foreign rulings (*Hilton, supra*) and the application of international comity in the transnational bankruptcy context (*Gebhard, supra*) over one hundred years ago. The calm within the federal court system on these issues over the last one hundred-plus years belies any need for further review by this Court.

B. This case presents a poor vehicle for certiorari based on its unusual facts. Review of the panel majority's conclusions concerning the doctrine of comity will be of limited utility given the fact-specific nature of those conclusions. Petitioner asks that this court "address[] the effect of a foreign parent's insolvency proceeding on a U.S. subsidiary's claims against parties other than the foreign parent". (Pet. at 12; emphasis omitted) As demonstrated above, the Eleventh Circuit's treatment of that issue depended in large part on its determination that the subsidiary's claims arose out of transactions that had been judicially approved and ordered in the foreign parent's insolvency proceeding, in which the U.S. subsidiary actively participated and was represented by foreign legal counsel. Thus, Petitioner's question cannot be answered by a rigid rule of law; the "effect" is dependent on the particular claims involved in relation to the foreign insolvency.

Because the Eleventh Circuit's decision was focused on Petitioner's activities in the foreign reorganization case and the scope of the Korean bankruptcy court's Plan Approval Order, it is unlikely to spawn recurring problems. It is, to be sure, an unusual case, yet Petitioner seeks to have this Court craft a blanket rule for the application of international comity out of only a few swatches of precedential cloth.

C. In any event, the Eleventh Circuit's decision was correct as to the Suzuki Entities. The claims pending against the Suzuki Entities at the time of the district court's dismissal on comity grounds were (1) Petitioner's Eighth Claim for violation of the automatic stay under 11 U.S.C. § 362, (2) the Ninth Claim for unauthorized post-petition transfer under 11 U.S.C. § 549, and (3) the Eleventh Claim for violation of the Florida motor vehicle dealer statute.[21]

[21] Petitioner's other claims directed against the Suzuki Entities – violation of California's Cartwright Act, unfair competition, violation of the Massachusetts motor vehicle dealer statute, and unjust enrichment –

All three appellate judges found that the claims based on the Bankruptcy Code lacked merit as a matter of law because, in view of the terms of the Distribution Agreement, Petitioner's bankruptcy estate simply did not include the assets transferred from DWMC to GMDAT under the Modified Reorganization Plan approved by the Korean court. (*Id.* at 12a-13a, 43a-45a) Petitioner does not challenge this finding in its Petition. Moreover, the panel majority and the concurring judge found that the "objective of these claims is the unwinding of the asset transfer"[22] that had been approved by the Korean court. By implication, Petitioner does not claim error as to that conclusion. (*See* p. 20, fn 15, *supra*; *see also* Pet. at 28, fn 11) Accordingly, all three appellate judges ruled that those claims should have been presented to the Korean court prior to its order of approval. (*Id.* at 16a-18a, 38a)

Lastly, although the majority and Judge Tjoflat differ in their reasoning, all three judges agreed that the Florida statutory claim fails as to all Respondents, including the Suzuki Entities. (Pet. App. at 16a-18a, 40a-45a)

Hence, even if this matter were to be remanded for *de novo* review, or for further determination of the application of comity to certain of Petitioner's damage claims, the result would be the same as to the Suzuki Entities.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be denied.

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were dismissed with prejudice by the California bankruptcy court, before this matter was transferred to the Florida district court. The bankruptcy court's dismissal of the unjust enrichment claim was upheld by the Eleventh Circuit and is not a subject of this Petition. Petitioner did not appeal the dismissal of the remaining claims listed above.

[22] Judge Tjoflat, specially concurring, Pet. App. at 38a; *see also* Pet. App. at 16a-17a.

Respectfully submitted,

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