No. 08-956

IN THE

Supreme Court of the United States

LARRY J. WINGET AND THE
LARRY J. WINGET LIVING TRUST,
Petitioners,

v.

JPMORGAN CHASE BANK, N.A. *et al.*,
Respondents.

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

RESPONDENT JPMORGAN CHASE BANK, N.A.'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the doctrine of claim preclusion should be altered to permit the relitigation of claims that were raised and subsequently withdrawn before entry of a final order in prior bankruptcy proceedings involving the same parties.

PARTIES TO PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT

Petitioner, plaintiff-appellant below, Larry J. Winget, is a Michigan resident and the trustee of petitioner, plaintiff-appellant below, the Larry J. Winget Living Trust, is a trust organized under the laws of Michigan.

Respondent, defendant-appellee below, JPMorgan Chase Bank, N.A., is a bank organized and operated as a national association and a wholly owned subsidiary of respondent, defendant-appellee below, JPMorgan Chase & Co., a Delaware corporation. No parent or publicly held company owns 10% or more of the stock of JPMorgan Chase & Co.

Respondent, defendant-appellee below, Black Diamond Commercial Finance, LLC, is a Delaware limited liability company.

Respondent defendant-appellee below, Black Diamond Capital Management, LLC, is a Delaware limited liability company.

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RESPONDENT JPMORGAN CHASE BANK, N.A.'S BRIEF IN OPPOSITION

Respondent JPMorgan Chase Bank, N.A. respectfully submits this brief in opposition to the petition for a writ of certiorari filed by petitioners Larry J. Winget ("Winget") and the Larry J. Winget Living Trust ("Trust").

COUNTERSTATEMENT OF THE CASE

Petitioners are guarantors of loans that were provided to companies that petitioners owned and controlled. Petitioners brought suit against respondent, the administrative agent for the lending group ("Agent"), in an attempt to avoid their obligations as guarantors. Petitioners alleged that

the Agent, in concert with members of the lending group, engaged in a "scheme" that diminished the value of certain companies owned and controlled by petitioners prior to and during the companies' bankruptcy proceedings. Substantially all of the companies' assets were eventually sold pursuant to an order of the bankruptcy court (the "Sale Order"). However, the proceeds from the sale did not cover the balance owed on the loans. As guarantors, petitioners remained obligated for the deficiency. Petitioners claimed that the alleged "scheme" had left them "wrongfully exposed" to liability under their guaranty, and that they should therefore be excused from their obligations.

Applying uncontroversial principles of claim preclusion, the district court concluded that petitioners' claims were barred by the Sale Order and dismissed the complaint. The Sixth Circuit affirmed.[1] The bankruptcy court Sale Order was a final order, disposing of all claims related to the relevant assets of the debtor companies. The parties in the prior action and this action are the same. The Sixth Circuit further concluded that the claims at issue here are not merely the sort of claims that *could* have been brought in the prior bankruptcy proceedings. Rather, they "attacked the heart of the Sale Order: the value of the assets." Pet. App. 33a. As such, they "should only have been brought before the bankruptcy court [that] issued the Sale Order." *Id.* Finally, the Sixth Circuit concluded that the claims at issue here are

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[1] In the proceedings below, the district court, Sixth Circuit, and the parties all used the traditional term "res judicata." In conformity with this Court's opinions on the doctrine, *e.g.*, *Migra* v. *Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 77 n.1 (1984), this brief employs the more precise term "claim preclusion."

identical to those that should have been brought before the bankruptcy court because the transactions and facts that form the basis of the current claims "were the same transactions and facts on which [petitioners had] based [an] objection to the Sale Order." *Id.* at 35a. Petitioners withdrew that objection before the Sale Order was entered without reserving the right to bring these claims in a later proceeding. Put simply, petitioners raised the very claims expressed in their complaint during the bankruptcy proceedings, chose not to press those claims in that forum (where they ought to have been have pursued, if at all, because of the impact on the value of the assets of the debtor companies and claims against those assets), did not reserve them for later assertion, yet now seek to raise them again. The claims fall squarely within the doctrine of claim preclusion.

Petitioners seek to create controversy where there is none, arguing that the Sixth Circuit adopted a broad and dangerous test for determining when a claim is barred by principles of claim preclusion after bankruptcy proceedings. The petition rests on a fundamental distortion of the Sixth Circuit's decision, which did not, as petitioners suggest, conclude that any claim which *can* be brought in a bankruptcy proceeding *must* be brought there or will be deemed precluded. See Pet. 2-3. In fact, the Sixth Circuit's rule is appropriately narrow: only those claims that *should* have been brought—as here, because the claims go to the heart of the value of the assets that were the subject of the Sale Order—are deemed precluded in subsequent litigation. Pet. App. 33a. Indeed, that is the standard *petitioners* advocated before the Sixth Circuit. *Id.* (observing that "on this point [petitioners are] correct").

When petitioners' distortions are removed, the supposed conflict between the decision below and the Third and Eleventh Circuits evaporates. The supposed danger to the orderly administration of estates in bankruptcy proceedings likewise evaporates. Indeed, it becomes clear that this case would make a poor vehicle for considering the proper test for claim preclusion stemming from prior bankruptcy proceedings. Under any conceivable test that is faithful to the fundamental purposes of both claim preclusion and bankruptcy law, petitioners' claims would be precluded. The petition should be denied.

A. The Parties' Commercial Relationship

Petitioner Winget owned and controlled—either directly or indirectly through the Trust—a worldwide network of companies that supplied plastic parts to automobile manufacturers. Venture Holdings Company, LLC and its affiliates (collectively, "Venture") along with Deluxe Pattern Corporation and its affiliates (collectively, "Deluxe") were the pillars of Winget's auto parts empire. Pet. App. 2a-4a.

The Agent is the administrative agent for a group of lenders that advanced credit to Venture pursuant to a 1999 Credit Agreement. On October 22, 2002, the Credit Agreement was amended in connection with a "workout" negotiation that was initiated in light of Venture's rapidly deteriorating financial condition and significant events of default under the Credit Agreement. Pet. App. 4a-5a. Pursuant to the "workout," Venture's lenders agreed (i) temporarily not to exercise available rights against Venture and the collateral supporting the loans, and (ii) to extend further credit to Venture. In exchange, Winget agreed to provide additional guaranties and additional collateral to support the repayment of Venture's debt.

One of these guaranties was executed by Winget and the Trust ("Guaranty"). The guaranties were in turn backed by—and in some cases enforceable solely through—pledges of certain collateral ("Pledge Agreements"). *Id.* at 5a.

B. The Bankruptcy Proceedings

Following the October 22, 2002 Amendment of the Credit Agreement, Venture continued to deteriorate financially. On March 28, 2003, Venture and certain of its affiliates filed Chapter 11 petitions. Pet. App. 8a. Venture and most of Winget's other companies continued to decline as the Venture bankruptcy proceedings progressed. On May 24, 2004, Deluxe and its affiliates filed Chapter 11 petitions. *Id.* at 11a. In light of the relationship between Venture and Deluxe, the Venture and Deluxe bankruptcy proceedings were assigned to the same bankruptcy judge and administered jointly.

The bankruptcy proceedings did not produce a plan of reorganization. Instead, it was proposed that substantially all of the assets of the debtors be sold pursuant to 11 U.S.C. § 363. On April 18, 2005, petitioners filed an objection to the proposed asset sale. In the objection, petitioners claimed that the Agent and the lenders had wrongfully diminished the value of Venture's and Deluxe's assets, and that they were entitled to money damages or rescission of the Guaranty and other agreements. Pet. App. 32a, 56a-57a. On April 19, 2005, petitioners withdrew their objection. That same day, the bankruptcy court ordered the sale of substantially all of the assets of Venture and Deluxe. *Id.* at 12a. The Sale Order reflected petitioners' reservation of some claims against the Agent and lenders, but only as to conduct "in relation to Winget's companies that were not parties to the Bankruptcy Proceeding." *Id.* at 35a-

36a. None of the claims at issue in this case was reserved.

The asset sale closed in May 2005. The proceeds of the sale were applied towards the balance due under the Credit Agreement. Following the sale, a substantial amount of the debt under the Credit Agreement remained outstanding. Pet. App. 12a.

C. The District Court Proceedings

On October 28, 2005, the Agent commenced an action against petitioners in the Eastern District of Michigan in order to (1) enforce its rights to monitor certain collateral under the Guaranty; and (2) obtain a declaratory judgment as to whether—in light of the outstanding deficiency on Venture's debt and the fact that no substantial assets remained through which that deficiency could be eliminated—the Agent had satisfied a condition for enforcement of the Pledge Agreements. Pet. App. 12a. Petitioners filed an answer, affirmative defenses, and counterclaims. The affirmative defenses and counterclaims filed in response to the Agent's claims were essentially the same as the claims at issue here. On June 29, 2006, the district court ordered that petitioners' counterclaims be severed from the case and litigated in a parallel proceeding. *Id*.

Petitioners complied with the district court's request to litigate their claims in a separate case, and filed what were their affirmative defenses and counterclaims as the claims in this case on August 3, 2006.[2] The complaint asserted: an alleged breach of

[2] After petitioners' affirmative defenses and counterclaims were severed from the original action, the district court, in the exercise of its discretion, declined to entertain the Agent's declaratory judgment claim, but subsequently granted the Agent's motion for judgment on the pleadings regarding its

the Guaranty and Pledge Agreements for which petitioners sought a declaration that they were no longer bound by their obligations thereunder (Count I), a declaratory judgment redefining the terms of the Guaranty (Count II), a setoff to decrease petitioners' liability as guarantors by the amount by which the defendants purportedly impaired the value of Deluxe (Count III), and a claim under a Michigan statute for a setoff to decrease petitioners' liability under the Guaranty because of alleged oppression of their interests as Deluxe shareholders (Count IV). Pet. App. 13a.[3]

The Agent and the other defendants filed motions to dismiss, arguing, among other things, that petitioners' claims were barred by the doctrine of claim preclusion. The district court agreed, and dismissed on that basis. Pet. App. 54a-61a. The district court concluded that because petitioners' claims were based on allegations that the Agent and lenders engaged in a "scheme" that decreased the value of Deluxe's and Venture's assets before the Sale Order, the claims should have been litigated in the bankruptcy proceedings before entry of the Sale Order. *Id*. at 54a-59a.

D. The Court Of Appeals' Ruling

The Sixth Circuit affirmed. It concluded that the district court correctly applied each element of claim

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claim for specific performance of its rights to monitor certain collateral. Petitioners appealed the judgment, and the Sixth Circuit affirmed. *JP Morgan Chase Bank, N.A.* v. *Winget*, 510 F.3d 577, 579 (6th Cir. 2007). Pet. App. 12a.

[3] Petitioners also named as defendants the Agent's corporate parent, JPMorgan Chase & Co., and two members of the lending group, Black Diamond Capital Management, LLC, and Black Diamond Commercial Finance, LLC.

preclusion, and that petitioners' claims were properly dismissed because they were barred. Pet. App. 27a-35a.

There was no dispute that the same persons or their privies were involved in both the bankruptcy proceeding and this action. Pet. App. 31a. The Sixth Circuit joined with other circuits in holding that bankruptcy sale orders are final orders for purposes of claim preclusion. *Id.* at 28a-30a. That conclusion is undisputed here.[4] The Sixth Circuit recognized that it served the purposes of both the doctrine of claim preclusion and bankruptcy law to treat a sale order as a final order: "with the execution of the sale order the debtor's assets are judicially sold and no further litigation can be brought regarding those assets without forcing the court to undo the sale, an action of the very kind res judicata seeks to prohibit." *Id.* at 30a.

The Sixth Circuit also concluded that petitioners "could have, and indeed should have, brought [their] action during the Bankruptcy Proceeding." Pet. App. 31a. Petitioners' claims that the Agent and lenders "deliberately devalued the assets of Deluxe prior to" its bankruptcy "would have had a direct effect on the assets in the bankruptcy proceeding." *Id.* at 32a. The claims "attacked the heart of the Sale Order: the value of the assets." *Id.* at 33a. As such, the "claims should only have been brought before the bankruptcy court issued the Sale Order." *Id.* The Sixth Circuit was clear that preclusion was not based on the mere *possibility* of bringing these claims in the bankruptcy

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[4] While petitioners describe sale orders as "interim" orders, Pet. 13, 18, petitioners do not challenge the Sixth Circuit's holding that sale orders are final orders for purposes of claim preclusion. *Id.* at 8-9.

proceeding. Indeed, the Sixth Circuit expressly concluded that that would not be sufficient to bar claims. *Id.* Rather, claim preclusion only "bars a party from bringing any claim that *should* have been litigated in the earlier proceeding." *Id.*

The Sixth Circuit also concluded that the claims raised here were identical to those that should have been raised in the bankruptcy proceeding. Pet. App. 35a. Petitioners' claims were based in the same transactions and the same core of operative facts as the claims that could have and should have been pursued in the bankruptcy court and that had been raised in petitioners' objection to the Sale Order. *Id.* In this regard, the Sixth Circuit rejected petitioners' argument that they had been unaware of all the facts needed to bring the claims in the bankruptcy court at the time of the asset sale proceedings. "[S]uch argument is belied by the fact that the claims Winget brings in the Complaint are largely identical to the arguments Winget made in its objection to the Sale Order, which it later withdrew." *Id.* at 32a.

REASONS FOR DENYING THE PETITION

The doctrine of claim preclusion protects parties and courts from "the expense and vexation attending multiple lawsuits, conserv[es] judicial resources and foste[rs] reliance on judicial action by minimizing the possibility of inconsistent decisions." *Taylor* v. *Sturgell*, 128 S. Ct. 2161, 2171 (2008) (internal quotation marks omitted). Claim preclusion bars the relitigation of claims where (1) there has been a final judgment in the first action; (2) the second action involves the same parties, or their privies, as the first action; (3) the second action raises an issue actually litigated or which should have been litigated in the first action; and (4) the claims or causes of action

share the same identity. *Sanders Confectionery Prods., Inc.* v. *Heller Fin., Inc.*, 973 F.2d 474, 480 (6th Cir. 1992). Claim preclusion applies fully when the prior action was a bankruptcy proceeding. *Katchen* v. *Landy,* 382 U.S. 323, 334 (1966); *First Union Commercial Corp.* v. *Mullins, Riley & Scarborough* (*In re Varat Enters., Inc.*), 81 F.3d 1310, 1314-15 (4th Cir. 1996).

Petitioners argue that the decision below breaks new ground with respect to how the third and fourth elements of claim preclusion are determined in cases arising out of bankruptcy proceedings. Pet. 9. Petitioners are wrong. The Sixth Circuit was neither required to adopt any novel principle of law to affirm the dismissal of the claims on that ground, nor did so in fact. Petitioners' argument that the Sixth Circuit has split with the Third and Eleventh Circuits regarding the preclusive effect of bankruptcy orders is based on a patent misreading of the Sixth Circuit's ruling. Nothing in the decisions of those courts even suggests a different outcome in this case.

Petitioners' argument that the Sixth Circuit's ruling here threatens to disturb the efficient administration of the bankruptcy laws is likewise based on a misreading of the court of appeals' actual ruling. To the contrary, were courts to refuse to apply preclusion to claims such as those at issue here, the power of bankruptcy courts to settle conclusively the estates of debtors would be undermined. In sum, there is no split of authority and no policy—of either claim preclusion or bankruptcy law—would be served by this Court's review of this case. The petition should be denied.

1. *There is no conflict between the decision below and those of the Third and Eleventh Circuits.* Petitioners argue that the Sixth Circuit has created

an "intractable" conflict with the Third and Eleventh Circuits. Pet. 2. But they do so only by distorting what the Sixth Circuit has actually held here, as well as the law of the Third and Eleventh Circuits.

Petitioners assert that the Sixth Circuit adopted a rule in which any claim within "the broad jurisdictional boundary of what a bankruptcy court *can* resolve" is precluded from subsequent litigation. *Id*. at 2, 12, 14. But that is quite clearly not what the Sixth Circuit concluded. To the contrary, the Sixth Circuit expressly acknowledged that petitioners were correct "on this point," and rejected such a broad view. Pet. App. 33a.

Instead, the Sixth Circuit here simply concluded that petitioners' claims could have *and should have* been litigated in the earlier bankruptcy proceedings, and that petitioners' claims are identical to the claims that should have been—and were—raised in the bankruptcy proceedings. Pet. App. 33a. This puts the Sixth Circuit squarely in line with other courts. *Plotner* v. *AT&T Corp.*, 224 F.3d 1161, 1173-74 (10th Cir. 2000); *Robertson* v. *Isomedix, Inc.* (*In re Int'l Nutronics, Inc.*), 28 F.3d 965, 969-70 (9th Cir. 1994); *Bank of Lafayette* v. *Baudoin* (*In re Baudoin*), 981 F.2d 736, 742 (5th Cir. 1993); *Sure-Snap Corp.* v. *State St. Bank & Trust Co.*, 948 F.2d 869, 875 (2d Cir. 1991); *Wallis* v. *Justice Oaks II, Ltd.* (*In re Justice Oaks II, Ltd.*), 898 F.2d 1544, 1552 (11th Cir. 1990); *In re Szostek*, 886 F.2d 1405, 1408 (3d Cir. 1989); *Gekas* v. *Pipin* (*In re Met-L-Wood Corp.*), 861 F.2d 1012, 1016 (7th Cir. 1988).

The Sixth Circuit expressly declined to adopt petitioners' request for a "narrow[]" definition of "identity" based on their reading of *Eastern Minerals & Chemicals Co.* v. *Mahan*, 225 F.3d 330 (3d Cir. 2000) and *Eastman Kodak Co.* v. *Atlanta Retail, Inc.*

(*In re Atlanta Retail, Inc.*), 456 F.3d 1277 (11th Cir. 2006). See Pet. App. 34a. Not only was that decision correct, but there is, in fact, no conflict between the Sixth Circuit ruling here and the law in the Third and Eleventh Circuits.

Petitioners argue that the Third Circuit has concluded that only claims that are *actually litigated* in a bankruptcy proceeding are precluded. Pet. 12. But that is not what the Third Circuit has said. According to the Third Circuit,

> a claim should not be barred unless the factual underpinnings, theory of the case, and relief sought against the parties to the proceeding are *so close* to a claim actually litigated in the bankruptcy that it would be *unreasonable not to have brought them both at the same time* in the bankruptcy forum.

E. Minerals, 225 F.3d at 337-38 (emphasis added).

As the emphasized language makes clear, the Third Circuit contemplates that there will be claims that were not brought in a prior bankruptcy proceeding, but that are nonetheless precluded because it was unreasonable not to do so. And a prior Third Circuit ruling, *CoreStates Bank, N.A.* v. *Huls America, Inc.*, 176 F.3d 187 (3d Cir. 1999), upon which *Eastern Minerals* expressly relied, "recognized that courts normally must scrutinize the 'totality of the circumstances' to determine whether two claims are based on the same cause of action." *E. Minerals*, 225 F.3d at 338 n.14. Indeed, *CoreStates* could not have more clearly rejected the very argument that petitioners press here. The Third Circuit, like the Sixth, recognizes that the "fundamental nature of the doctrine of claim preclusion [is that it] applies whether or not the particular issue was *actually*

raised or decided by the prior court." *CoreStates*, 176 F.3d at 195 & n.5 (emphasis added, internal quotation marks omitted). Like the Sixth Circuit here, the Third Circuit has (properly) concluded that if the circumstances indicate that a claim should previously have been brought in a bankruptcy proceeding, then the failure to do so will bar it from being litigated thereafter.[5]

In *Eastern Minerals*, the circumstances did not indicate that the claim should previously have been brought in a bankruptcy proceeding. Nothing in *Eastern Minerals* suggests that preclusion should not apply when, as here, the claim that a party presently seeks to litigate would effectively require reconsideration of a final order concerning the value of a debtor's assets.

Likewise, the Eleventh Circuit's decision in *Atlanta Retail*, nowhere suggests that a claim that effectively challenges a bankruptcy court's order regarding the value of a debtor's assets can be relitigated in a subsequent proceeding. Like other courts, the Eleventh Circuit follows the rule that claim preclusion "applies not only to claims which were actually brought before the previous court, but also to those claims which could have been raised in that action." *Atlanta Retail*, 456 F.3d at 1288 (internal quotation marks omitted). That is, the Eleventh

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[5] Petitioners' effort to read an actual litigation requirement into Third Circuit law amounts to accusing the Third Circuit of collapsing the distinction between claim preclusion and issue preclusion, which is at odds with settled law. *E.g.*, *Nevada* v. *United States*, 463 U.S. 110, 129-30 (1983) (claim preclusion bars both claims that were litigated and claims that could have been litigated). Nothing in *Eastern Minerals* or in subsequent Third Circuit decisions suggests that the court intended such a radical holding.

Circuit, too, does not support the proposition petitioners advance: that only claims actually litigated in a bankruptcy proceeding should be precluded.[6]

More importantly, *Atlanta Retail* applies the *same* transactional or "nucleus of operative fact" test for determining claim identity used by the Sixth Circuit. *Id*. And the Eleventh Circuit relied heavily on the fact that the underlying facts of the claims in *Atlanta Retail* had never been placed before the bankruptcy court in concluding that the claims in that case were not based on the same nucleus of operative fact as those that had been at issue in the bankruptcy proceeding. *Id.* By contrast, the very assertions that form the basis of the claims at issue here were raised by petitioners as an objection to the Sale Order, and then withdrawn before the Sale Order was entered. Pet. App. 32a, 56a-57a. Thus, petitioners' own objection to the Sale Order (which they withdrew of their own accord) strongly supports the conclusion that the claims are based on the same nucleus of operative facts, and thus were required to have been pursued in the bankruptcy proceeding, even under petitioners' characterization of Eleventh Circuit law.

2. *This case provides a poor vehicle to consider the limits of claim preclusion arising out of bankruptcy*

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[6] Indeed, this Court rejected a petition for certiorari filed by the creditor bank in *Atlanta Retail*. *Wachovia Bank, N.A.* v. *Eastman Kodak Co.*, 549 U.S. 1102 (2006). That petition asserted that the Eleventh Circuit's decision barred only those claims that "'explicitly'" became "'an essential part of the bankruptcy plan,'" thus creating a conflict among the circuits over how claim preclusion should apply to bankruptcy proceedings. Petition at (i), *Wachovia Bank*, No. 06-526 (filed Oct. 16, 2006). The same considerations that counseled against certiorari there—that the split was illusory—fully apply here.

proceedings. Even if there were a split of authority, this case would provide no occasion to resolve it. As the discussion above makes clear, the outcome in this case would be the same under any standard for applying claim preclusion to prior bankruptcy proceedings. See *Nevada* v. *United States*, 463 U.S. 110, 130-31 (1983) (finding it "unnecessary ... to parse any minute differences" among "[d]efinitions of what constitutes the 'same cause of action'").

Under any standard, petitioners' claims are identical to those that were asserted in petitioners' objection to the Sale Order. *CoreStates*, 176 F.3d at 200-01 (objecting equivalent to asserting claim for claim preclusion purposes); *Justice Oaks*, 898 F.2d at 1552 (claims that could have been raised in objection barred). Petitioners' current claims that the Agent and lenders engaged in a "scheme to devalue the Venture and Deluxe companies" (Pet. 6 n.8.), are not just similar or related to the claims that they previously raised in their objection to the Sale Order. Nor are the current claims merely based in the same set of transactions and facts as the objection. Rather, the "scheme" allegations in the complaint are mirror images of the arguments raised in petitioners' objection to the Sale Order. In their objection, petitioners argued that they had

> "meritorious claims against the Senior Lenders who, led by [the Agent] … engaged in a course of unlawful conduct resulting in damages to the Debtors' business; in essence, a precipitous decline in the value of the Venture Debtors' and Deluxe Debtors' businesses and assets and a corresponding devaluation of [petitioners'] interests. That conduct … also increased the risk that [the Agent] would call upon [petitioners'] guaranty and exercise remedies against the

> additional collateral provided by [petitioners] for that guaranty. As a result, [petitioners had] claims against the Senior Lenders and [the Agent] for either money damages or rescission with regard to the collateral provided and liens granted to [the Agent] pursuant to the [October 22, 2002] Amendment [to the Credit Agreement]."

Pet. App. 56a-57a.

The Sixth Circuit correctly concluded that the claims brought by petitioners in the complaint were "largely identical" to the claims asserted in their objection to the Sale Order. Pet. App. 32a. That factbound determination is not worthy of this Court's review, and conclusively establishes under any conceivable standard that the claims at issue here are "identical" to those that were before the bankruptcy court.

Indeed, it is difficult to imagine how the Sixth Circuit could have reached a different conclusion even if it had parroted, word-for-word, the standard of *Eastern Minerals*, and asked whether "the factual underpinnings, theory of the case, and relief sought" are "so close to a claim actually litigated in the bankruptcy that it would be unreasonable not to have brought them both at the same time in the bankruptcy forum." *E. Minerals*, 225 F.3d at 337-38. The "factual underpinnings" and "theory of the case" of petitioners' current claims are the same as those raised in the objection to the Sale Order. The relief sought by petitioners in the complaint—rescission of the Guaranty or a reduction of their obligations thereunder—parallels the relief identified in their objection to the Sale Order: "'either money damages or rescission.'" Pet. App. 57a. Yet petitioners acceded to the asset sale without resolving their claims and

without reserving any of the claims at issue in this case. *Id.* at 35a-36a. Petitioners simply cannot explain why it would be reasonable for them to have raised their claims in an objection—which went to the heart of the Sale Order insofar as it asserted that the debtors' assets had been wrongfully devalued by respondents—then withdraw that objection before entry of the Sale Order, and yet still expect to be permitted to litigate those claims after the Sale Order became final.

Petitioners argue that under *Atlanta Retail*, the standard for preclusion is "whether the [bankruptcy] court *needs* to resolve a claim as an integral part of the bankruptcy plan." Pet. 13. But to the extent that that different verbal formulation sets a different standard at all—and it is hardly clear that it does—there is no reason to believe the difference would matter here. Surely, resolution of petitioners' allegations that Venture's creditors had willfully destroyed the value of the debtors' estates prior to and during the bankruptcies would have been necessary and "integral" to many matters connected with the Sale Order, including whether the planned asset sale should have gone forward, whether the Agent's and lenders' priority to the sale proceeds should have been equitably subordinated to the rights of other creditors, and whether the alleged misconduct could reduce or eliminate the guaranteed debt. See *Capitol Bank & Trust Co.* v. *604 Columbus Ave. Realty Trust* (*In re 604 Columbus Ave. Realty Trust*), 968 F.2d 1332, 1362 (1st Cir. 1992) (bank misconduct justified equitable subordination under 11 U.S.C. § 510(c)); *Sure Snap*, 948 F.2d at 876.

There is good reason why no conceivable standard of claim preclusion from bankruptcy proceedings would support allowing petitioners to proceed with

their claims here: doing so would, contrary to petitioners' argument, actually undermine the policies behind both claim preclusion and bankruptcy law. Petitioners simply have it backward when they assert that "all parties in Sixth Circuit bankruptcies … will be forced to immediately pursue all conceivable non-core claims against other creditors … or face the risk of being held to have waived such claims in subsequent non-bankruptcy litigation," Pet. 18, and that bankruptcy courts will accordingly be burdened with "a mounting quagmire of co[-]creditors' claims having no, or only the most speculative, relationship to the debtor's estate." *Id*. at 2. If petitioners' claims are not deemed precluded, then the strong claim preclusion policy in favor of resolution of identical claims between parties in a single forum would be undermined, as would the important bankruptcy law policy in favor of empowering bankruptcy courts to settle with finality the value of debtors' estates and the rights of claimants.

As discussed above, petitioners' argument regarding the supposedly unwieldy burden the Sixth Circuit's decision will place on bankruptcy courts rests on a misreading of the Sixth Circuit's decision. The Sixth Circuit did *not* render the scope of claim preclusion coextensive with that of bankruptcy jurisdiction. Pet. App. 33a. Further, nothing in the decision below suggests that any concerned party is prevented from expressly reserving the right to bring certain claims following a bankruptcy proceeding. *D & K Props. Crystal Lake* v. *Mut. Life Ins. Co. of N.Y.*, 112 F.3d 257, 259-60 (7th Cir. 1997) ("litigant's claims are not precluded if the court in an earlier action expressly reserves the litigant's right to bring those claims in a later action"). This is precisely what

petitioners did with respect to *other* claims not at issue here. Pet. App. 35a-36a. That they chose not to reserve these claims does not in the slightest limit the rights of other parties to reserve claims in future cases.

It is petitioners who seek a rule with troubling consequences. A "chief purpose of the bankruptcy laws is 'to secure a prompt and effectual administration and settlement'" of bankrupt estates. *Katchen*, 382 U.S. at 328. The approach to claim preclusion espoused by petitioners would create opportunities and incentives for parties to hold claims in abeyance and to mount collateral attacks on sale orders long after the assets of an estate have been sold and the proceeds distributed to claimants. This would be neither just nor efficient. It would allow bankruptcy final orders (including asset sale orders and orders confirming reorganization plans) to be reopened by any party that belatedly asserts a claim that was not "actually litigated" during the bankruptcy or that was not "explicitly" made part of the bankruptcy plan. *Baudoin*, 981 F.2d at 740 ("Because of … increasingly congested … bankruptcy courts[,] and expanding theories of recovery, such as lender liability, it is more imperative than ever that the doctrine of *res judicata* be applied with unceasing vigilance."); *Sure-Snap*, 948 F.2d at 876; *Met-L-Wood*, 861 F.2d at 1019 ("Unless bankruptcy sales are final when made, rather than subject to being ripped open years later, high prices will not be offered for the assets …."); see also *Celotex Corp.* v. *Edwards*, 514 U.S. 300, 307-08 (1995).

In the end, there is no tension between traditional claim preclusion, as applied in the decision below, and the just and efficient administration of bankrupt estates. This Court has stressed that the doctrine of

claim preclusion, carefully developed over time in the common law, "is not a mere matter of practice or procedure inherited from a more technical time than ours. It is a rule of fundamental and substantial justice, 'of public policy and private peace[.]'" *Federated Dep't Stores, Inc.* v. *Moitie*, 452 U.S. 394, 401 (1981). Modifying the doctrine in the ways proposed by petitioners would undermine its fundamental purpose and frustrate the just and efficient administration of bankrupt estates.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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April 1, 2009

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