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., a national banking association, JPMORGAN CHASE & CO., a Delaware corporation, BLACK DIAMOND COMMERCIAL FINANCE, LLC, a Delaware limited liability company, BLACK DIAMOND CAPITAL MANAGEMENT, LLC, a Delaware limited liability company,

Respondents.

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

REPLY BRIEF

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I. INTRODUCTION

Petitioners Larry J. Winget and The Larry J. Winget Living Trust (collectively, "Winget") respectfully submit this Reply in support of their Petition for a Writ of Certiorari to address a "new point" raised by Respondent JPMorgan Chase Bank, N.A. ("Chase").[1] Chase's Opposition relies almost exclusively on the fact that Winget objected to certain aspects of the order (the "Sale Order") which, the Sixth Circuit held, barred Winget's claims against Chase in this action. Although Winget withdrew his objection before the hearing on the debtors' proposed Sale Order, Chase adamantly asserts that the objection demonstrates that there is no true conflict among the Third, Sixth, and Eleventh Circuits over the proper scope of res judicata relating to "interim" final orders in bankruptcy cases (the "Conflict") and that this case is a "poor vehicle" for resolution of any Conflict.[2]

Chase's new point cannot dissolve the Conflict or demonstrate that this case is "factbound" because Chase disregards the context and content of Winget's objection. Most importantly, Chase ignores the fact that the objection

1. Respondents Black Diamond Commercial Finance, LLC and Black Diamond Capital Management, LLC did not file an Opposition.

2. Winget uses the term "interim order" to refer to an order that is final as to a specific issue in the case, but which, unlike an order confirming a plan, does not resolve all issues among all parties to the bankruptcy proceeding. Winget also notes that Chase uses the more precise term "claim preclusion" in lieu of "res judicata." *See* Opposition at 2, n. 1. For consistency with the record in this case, however, Winget will continue to use "res judicata" as used first by Chase and later by the lower courts.

was not litigated in the bankruptcy case and cannot, therefore, form the basis for res judicata under the law of either the Third or Eleventh Circuits. Thus, Winget's withdrawn objection does not make the Conflict disappear but only draws it in greater relief.

Indeed, Chase's Opposition demonstrates that this case offers the best factual context for resolving the Conflict because the Sixth Circuit's blunt application of res judicata in complex bankruptcy cases is so draconian that it cannot be reconciled with the practical, reasoned doctrine of the Third and Eleventh Circuits. Indeed, Chase's current suit to enforce the Winget guaranty offers dramatic evidence of the difference in the laws of the Circuits. The decision below allows Chase to use a withdrawn objection to an interim section 363 order to shield Chase from defenses to a pending $500 million summary judgment motion against the Winget Trust. That shield would not be available to Chase in the Third or Eleventh Circuits.

II. WINGET'S UN-LITIGATED OBJECTION IS IRRELEVANT TO RESOLUTION OF THE CONFLICT.

A. The Sixth Circuit Explicitly Acknowledged The Conflict.

Chase avoids any discussion of the Sixth Circuit's express acknowledgement of the Conflict:

> Winget asks us to adopt tests that are used in the Third and Eleventh circuits, which narrowly define "identity" when res judicata is used in conjunction with bankruptcy proceedings. [Citations omitted.] ***Adoption of such tests would not, however, be in line***

> ***with current res judicata jurisprudence in this circuit, which has adopted the traditional view of identity as a res judicata element.***

(Pet. App., 34a, emphasis added.) Instead, Chase has made Winget's withdrawn objection both the theme and the foundation of its Opposition. It refers to the objection (or Winget's previous "litigation" in the bankruptcy court) at least 19 times in its 20 page Opposition. *See* Opposition at (i), 3, 5, 9, 11, 13, 14, 15, 16, and 17.[3]

B. Chase Mischaracterizes The Nature, Scope and Effect Of The Objection.

Chase's characterizations lack candor, however, when compared with the only part of the objection cited in the decision below, paragraph 17. Pet. App., 32a. Paragraph 17, when read in the context of paragraphs 16-20 (hereafter, the "Objection"), does not support Chase's position. The sole issue raised by those paragraphs is that language in the proposed Sale Order might have been interpreted to release claims against the lenders represented by Chase as agent (the "Lenders"). Contrary to Chase's rhetoric, the Objection does not constitute "the very claims raised in [Winget's] complaint" (Opposition at 3) because the Objection did not seek to reduce or eliminate Winget's liability to the Lenders.

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3. In light of Chase's extensive reference to the objections, Winget is supplementing its Appendix according to Supreme Court Rule 14(h)(vi) to add the relevant portion of Winget's objection (Pet. App. A hereto) and the Sale Order (Pet. App. B hereto).

Therefore, this Court can and should ignore the Objection because it is utterly irrelevant to resolving the Conflict and to the application of res judicata for at least the following reasons:

- *Different Issues.* The Objection did not "attack the value of the assets" to be sold or the good faith of the debtors advocating the sale,[4] but only the potential release of Chase and the Lenders from claims of Winget and other co-creditors.[5] In fact, the Sale Order as entered did not purport to release Chase and the Lenders from liability to Winget. *See* Pet. App. B at 6a-7a.

- *Different Parties.* The section 363 motion was made by the Venture and Deluxe debtors. Chase and the Lenders were not seeking relief under the motion.

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4. Those issues are the only relevant matters before the bankruptcy court under section 363. *See Eastman Kodak Co. v. Atlanta Retail, Inc.* (*In re Atlanta Retail, Inc.*), 456 F.3d 1277, 1289 (11th Cir. 2006).

5. Chase simply repeats the mistaken view of the lower courts on the nature of the debtors' section 363 motion. The Sale Order could and did say nothing about the value of the assets *before the bankruptcy proceeding was commenced.* The difference between reality and the lower courts' interpretation is the difference between a claim to impose liability for tearing the *Mona Lisa* and a determination of the fair value of the torn painting. Both require determining the value of the torn painting, but the latter, like the section 363 proceeding, does not require the bankruptcy court to determine who tore the canvas, whether the "tearer" was culpable, or what it was worth before it was torn.

- *Different Relief.* The Objection requested only that the proposed Sale Order be modified to reserve explicitly Winget's claims against the Lenders or to delay the sale while those claims were resolved. ¶¶ 17, 19, 20; Pet. App. at 3a-4a. Nothing in the Objection sought a declaration or other relief as to the Guaranty's enforceability or Winget's liability to Chase and the Lenders.

- *Not Litigated.* Unlike an objection to a plan of reorganization, which section 1128 of the Bankruptcy Code *requires* a party to assert, nothing in the Code *required* Winget to assert the Objection. Therefore, no analogy can be drawn to compulsory counterclaims or splitting causes of action. Instead, even if viewed most favorably to Chase, the withdrawn Objection was nothing more than the voluntary dismissal of third party complaint before an answer, which can never constitute res judicata. Fed. R. Civ. P. 41(a)(1); *Smith v. Potter*, 513 F.3d 781, 782-83 (7th Cir. 2008). For Chase to argue that res judicata should apply to an objection withdrawn the day after filing and before the court hearing contradicts Chase's own plea (Opposition at 20) for "efficient and just" bankruptcy administration.

C. Chase's Reliance On The Objection Ignores The Holdings And Analysis Of The Relevant Circuit Decisions As To The Third Element of Res Judicata.

In light of these undisputable facts, Chase ignores reality in relying on the Objection to support its argument that no Conflict exists. First, the Objection does not dissolve the Conflict as to third element of res judicata analysis, whether Winget "could have"/"should have" brought the present claims in the bankruptcy cases. It is indisputable that the Objection was *not* litigated, so its only potential relevance is that it *might* show what Winget "could have"/should have" litigated in the bankruptcy court. Opposition at 11. In Sixth Circuit parlance, however, that element is satisfied as long as the bankruptcy court had *jurisdiction* to hear the claim. *Sanders Confectionary Prods. v. Heller Fin., Inc.* 973 F.2d 474, 482 (6th Cir. 1992). In fact, the court below specifically used the jurisdictional construct of "related to" bankruptcy jurisdiction in holding that the third element of res judicata was satisfied. Pet. App. 31a-32a (citing *Lindsey v. O'Brien, Tanski, Tanze & Young Health Care Providers (In re Dow Corning Corp.)*, 86 F.3d 482, 389 (6th Cir. 1996), which addresses only jurisdiction.[6]

Thus, contrary to Chase's argument, the Objection cannot dissolve the Conflict. In the Sixth Circuit *any* non-core claim within the "related to" jurisdiction of a

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6. This ruling in itself extended the law of the Sixth Circuit because *Sanders* had addressed res judicata only in the context of a confirmation order, not an interim order.

bankruptcy court satisfies the third element of res judicata. In the Third Circuit, however, only claims "*so closely related*" to a claim actually litigated in the bankruptcy court will satisfy that element (*Eastern Minerals & Chemicals Co. v. Mahan*, 225 F.3d 330, 337-38 (3d Cir. 2000)); and in the Eleventh Circuit only claims that were an *essential part of the bankruptcy plan* will satisfy it. *Eastman Kodak Co. v. Atlanta Retail, Inc.* (*In re Atlanta Retail, Inc.*), 456 F.3d 1277, 1289 (11th Cir. 2006).

More specifically, Chase's attempt to show that *Eastern Minerals* does not conflict with the decision below fails because Chase concedes that the Third Circuit requires that a later claim be "so close to a claim actually litigated that it would be unreasonable not to have brought them at the same time." 225 F.3d at 337-38. In contradiction, the Sixth Circuit refused to recognize an "actually litigated" criterion. As demonstrated above, Winget did not *actually litigate* any "claim" in connection with the debtor's section 363 motion that addressed the *actions of Chase and the Lenders* with respect to the collateral or liability on the Guaranty. Absent actual litigation of at least a "so closely related" claim, the Third Circuit does not apply res judicata.

Chase's attempt to evade the Conflict between the Sixth Circuit and the Eleventh Circuit also fails. Chase argues that *Atlanta Retail* "nowhere suggests" that a creditor can "relitigate" a "claim that effectively challenges a bankruptcy court's order regarding the value of a debtor's assets." Opposition at 13. But Chase's premise is false. Winget's Objection did not "effectively"

challenge anything because it was withdrawn, and the Objection certainly did not challenge the value of the debtors' assets as of the date of sale, no matter how often Chase insists that it did. Moreover, contrary to Chase's reading, *Atlanta Retail* specifically held that (i) res judicata could not apply because Kodak (the co-creditor in Winget's position) could not have received the relief it sought (damages for breach of a subordination agreement) in the bankruptcy proceedings (including a section 363 sale proceeding) (456 F.3d at 1285) and (ii) "filing objections at the contested proceedings would not have provided Kodak with the requested relief" *Id.* at 1286. The decision below and *Atlanta Retail* cannot be reconciled.[7]

D. Chase's Reliance On The Objection Ignores the Holdings And Analysis Of The Relevant Circuit Decisions As To The Fourth Element Of Res Judicata.

Chase also disputes whether a Conflict exists as to the fourth or "identity of claims" element. Opposition at 11-14. Significantly, Chase does not even attempt to

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7. Chase argues (Opposition at 14, n. 6) that this Court's denial of the creditor's bank petition for certiorari in *Atlanta Retail* demonstrates that the split "was illusory." But the record shows just the contrary since the Petition cited by Chase addressed this same conflict. *See* Petition for Cert., *Wachovia Bank, N.A. v. Eastman Kodak Co.*, No. 06-526, 2006 WL 2982115, at *i and *15-16. Both bank creditors and non-bank creditors of bankrupt debtors see injustice in the application of res judicata in complex bankruptcy proceedings. Thus, the prior denial only demonstrates that the Conflict has sufficiently "percolated" and prompt resolution by this Court is required.

explain away the Conflict on this issue between *Eastern Minerals* and the decision below. And the best it can do with *Atlanta Retail* is to claim erroneously that the Court of Appeals "relied heavily" on the fact that "the underlying facts" had never "been placed before the bankruptcy court," while "by contrast" in this case Winget filed the Objection. Opposition at 14.

Of course, the Objection was never "before the bankruptcy court" here because it was withdrawn before the hearing. More fundamentally, the Eleventh Circuit held that "identity" must be determined in light of the issues properly before the bankruptcy court with respect to *specific interim proceedings*. In contrast, the Sixth Circuit held below that "identity" exists if Winget's claim arose out of the same facts and circumstances as *any* claim that could have been brought in the *entire* "*Bankruptcy Proceeding*." Pet. App., 35a. The two tests cannot be reconciled.

In any event, Chase's purported distinction cannot be found in *Atlanta Retail*. As the Eleventh Circuit specifically ruled, 456 F.3d at 1288-89, even if the underlying agreements (here Winget's Guaranty and pledges) were before the bankruptcy court, res judicata cannot apply *unless* (i) the *specific* claims of breach and *evidence of breach* were before the bankruptcy court or (ii) the bankruptcy court as a matter of law would have had to consider the evidence underlying the second action in determining the outcome of the interim order. *Id.* at 1289. Chase cannot show that Winget ever put the issues of Chase's scheme or evidence of the scheme before the bankruptcy court or that the bankruptcy court had to consider Winget's evidence to decide the

debtors' section 363 motion. Nothing could better prove the Conflict between the Sixth and Eleventh Circuits than this disparity in attitude toward the specific details of the interim bankruptcy proceedings.

III. Chase's Policy Argument Based on the Objection Demonstrates Why This Case Is Well-Suited To Resolve the Conflict.

Chase second primary argument is that the Objection makes this case a "poor vehicle" to resolve the Conflict because the Objection makes determination of this case "factbound." Opposition at 15-17. That argument fails for the same reasons as Chase's attempt to dissolve the Conflict. The Objection is irrelevant to the crucial differences that give rise to the Conflict. The Objection was not litigated, it did not seek the same relief as Winget's Complaint in this action, and its resolution was not essential to a decision on the debtors' section 363 motion.

Chase's argument is also unsupported by its authority. *CoreStates Bank, N.A. v. Huls America, Inc.*, 176 F.3d 187, 200-201 (3d Cir. 1999), and *Wallis v. Justice Oaks II, Ltd. (In re Justice Oaks II, Ltd.)*, 898 F.2d 1544, 1552 (11th Cir. 1990), do not apply because both involved objections to a proposed plan of confirmation, which sections 1128-29 of the Bankruptcy Code require the objector to file and litigate and the court to determine. No such statutory requirements applied to the Objection here. Indeed, the Third Circuit's decision in *CoreStates* is entirely consistent with its later decision in *Eastern Minerals* and in direct conflict with the Sixth Circuit's reasoning in this case:

> Because a "bankruptcy case" is fundamentally different from the typical civil action, however,

> comparison of a bankruptcy proceeding with another later proceeding is not susceptible to the standard res judicata analysis between bankruptcy cases and the typical civil action.

176 F.3d at 200.

Chase's attempt to reconcile *Atlanta Retail* with the decision below also proves that this case presents a perfect vehicle for resolving the Conflict. Chase asserts that the Objection "would have been necessary and 'integral' to many matters connected with the section 363 sale order including whether the planned sale should have gone forward, whether the Lenders should have been equitably subordinated and whether the alleged misconduct would reduce the guaranteed debt." Opposition at 17. This litany is fantasy, not fact. Resolution of the Objection could not be *essential* to a decision on the debtors' section 363 motion because the sale could be and was completed without resolution of the Objection.

Finally, Chase's naïve portrayal of what *could be* resolved in the context of a section 363 proceeding to sell assets that are rapidly deteriorating in value shows the need for the practical approach adopted by the Third and Eleventh Circuits. First, subordination of the Lenders' claims against the debtors was not relief Winget sought and would have only exacerbated Winget's exposure under the Guaranty. Second, if the sale had been postponed while Winget and Chase litigated the enforceability under the Guaranty and related Pledge Agreements, the debtors would have waited years before their section 363 sale motion could

have been heard, with untold loss to creditors.[8] Contrary to Chase's argument, continuance of the Conflict will result in wasteful delay in administration of estates and in unjust preclusion of claims among co-creditors that do not have to be litigated to sell assets or grant other interim relief.

IV. Conclusion

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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8. The present litigation over the Guaranty has now been pending for over three years.