No. 08-1232

In the Supreme Court of the United States

CARLYLE FORTRAN TRUST,
Petitioner,

v.

NVIDIA CORPORATION, et al.,
Respondents.

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

RESPONDENT'S BRIEF IN OPPOSITION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

SUMMARY

Respondent Richard Heddleson ("Heddleson") is the former chief financial officer of 3dfx Interactive, Inc. ("3dfx"), a publicly traded California corporation. In October of 2002, 3dfx filed for bankruptcy, approximately two years after entering into an agreement to sell the majority of its assets to a former competitor, nVidia Corporation ("nVidia").

This respondent submits this brief in opposition primarily to fulfill his obligation under Supreme Court Rule 15 to identify any perceived misstatements of fact or law contained in the petition. In this regard, this brief reiterates many of the arguments proffered by respondents Gordon Campbell, James Whims, James Hopkins, Sellers and Alex Leupp ("3dfx D&Os") in their brief in opposition.

The petition's recitation of the facts and proceedings below is misleading. Most critically, the petition improperly omits any reference to the settlement between 3dfx D&Os and the bankruptcy trustee. Indeed, the 3dfx D&Os agreed to pay $5.5 million to the 3dfx bankruptcy estate in a court approved settlement in order to buy peace and end the litigation against them. More specifically, as a result of the settlement the 3dfx D&Os, including Heddleson, received a full release of all claims against them, including the claims that petitioner now seeks to resurrect and reassert.

The petition presents four questions, only one of which has any bearing on petitioner's claims against the 3dfx D&Os: whether there exists an intra-circuit or inter-circuit conflict regarding the proper application of this Court's decision in *Caplin v. Marine Midland Grace Trust Co. of New York*, 406 U.S. 416 (1972).

In this regard, the petition erroneously contends that intra-circuit and inter-circuit conflicts exist concerning a bankruptcy trustee's standing to pursue redress for actions that in the first instance injured a debtor corporation, but that derivatively caused injury to the corporation's creditors. In reality, the decisions are unanimous in holding that the trustee has such standing.

The test for determining when a trustee is suing on behalf of a bankruptcy estate (as opposed to suing on behalf of creditors) is clear: if a trustee seeks to recover for harm or for the dissipation of assets that in the first instance impacted the bankrupt company, then the trustee may properly sue on behalf of the bankruptcy estate. This is true even if the same harm was also felt by creditors, or if the same transactions had a ripple effect that left the bankrupt company with insufficient funds to pay some creditors.

As a closer look at the case law demonstrates, the decisions of the courts, which have reviewed this issue, are not inconsistent. Because the cases that petitioner relies upon to demonstrate inter-circuit and intra-circuit conflicts do not actually conflict

with each other, no reason exists for this Court to grant the petition.

Petitioner has not, and cannot, make the showing required for the grant of review on *certiorari* pursuant to Supreme Court Rule 10. The petition should accordingly be denied.

STATEMENT OF THE CASE

In the summer of 2000, the 3dfx D&Os faced a crisis: their company was hemorrhaging cash at a rate that could only last a few months at most. Faced with few alternatives, 3dfx agreed to sell its 3dfx's assets to nVidia, another Silicon Valley company. Heddleson, 3dfx's chief financial officer, was not a board member, and, as such, did not vote on whether to approve the asset sale.

The 3dfx-nVidia transaction called for a combination of $70 million in cash and 1 million shares of nVidia stock. The deal included a caveat: nVidia would only transfer the million shares of stock if 3dfx was first successfully able to retire its debts and dissolve.

3dfx was *not*, however, successful in retiring its debts. It ceased paying rent to petitioner, its landlord, in January of 2002. On May 10, 2002, petitioner filed a lawsuit based upon its rent loss in the Superior Court of the State of California in and for the County of Santa Clara. The complaint included claims against 3dfx, nVidia and the directors and officers of nVidia. Contrary to petitioner's recitation of facts in its Statement of the Case, the complaint did *not* include any claims against the 3dfx D&Os.

On October 15, 2002, 3dfx filed a Chapter 11 bankruptcy petition. Despite the constraints imposed by the automatic bankruptcy stay, on December 20, 2002, petitioner filed an amended

complaint in the Santa Clara Superior Court against 3dfx, nVidia, the nVidia directors and officers and also the 3dfx D&Os.

Two weeks later, on January 3, 2003, nVidia removed the Santa Clara Superior Court action to the bankruptcy court.

On September 17, 2003, the bankruptcy trustee filed a complaint against Heddleson and the 3dfx D&Os in the Superior Court of the State of California in and for the County of San Mateo. The trustee's lawsuit complained about the structure of the nVidia transaction and asserted that in agreeing to the deal, the 3dfx D&Os had (among other things) breached their fiduciary duties.

After a year of intense litigation, in September of 2004, the 3dfx D&Os reached a settlement with the trustee, agreeing to pay $5.5 million in exchange for a full and complete release of all claims that had been or could have been asserted against them, including "any liability by Defendants for allegedly participating in the transfer of assets or sale or merger to/with Nvidia Corporation, whether as a fraudulent conveyance or otherwise."

The settlement was submitted to the bankruptcy court, with due notice of the settlement terms provided to all of 3dfx's creditors, including petitioner. Neither petitioner nor any other creditor objected to the proposed settlement. On November 19, 2004, the settlement was duly approved by the bankruptcy court. On December 13, 2004, the

bankruptcy trustee filed a dismissal with prejudice of his complaint against the 3dfx D&Os.

Following the dismissal and the full release provided by the bankruptcy trustee, the 3dfx D&Os then moved to dismiss the claims asserted by petitioner against them. On December 15, 2006, the 3dfx D&Os' motion to dismiss was granted without leave to amend.

The dismissal order was affirmed by the Ninth Circuit on November 25, 2008.

ARGUMENT

I. THE INTRA-CIRCUIT AND INTER-CIRCUIT CONFLICTS THAT PETITIONER ASSERTS DO NOT ACTUALLY EXIST

In *Caplin v. Marine Midland Grace Trust Co. of New York*, 406 U.S. 416 (1972), this Court first addressed the question of whether a bankruptcy trustee had standing to file a lawsuit on behalf of a debtor corporation's bond holders against a third party indenture trustee whose misconduct contributed to the losses sustained by those creditors. This Court concluded that a bankruptcy trustee does not have that standing.

The Court's analysis recognized the long-standing rule that a bankruptcy trustee has the authority to pursue any cause of action that the debtor corporation (Webb & Knapp) could have asserted prior to filing for bankruptcy. *Caplin*, 406 U.S. at 429. The Court's decision then noted that while Congress had recently enacted legislation that allowed bondholders themselves to sue a negligent indenture trustee, no such remedy was available to the debtor corporation itself. The Court observed:

> If petitioner could sue on behalf of Webb & Knapp, the statute that requires that he report possible causes of action to the court would require mention of this cause of action. Moreover, petitioner has brought every

> conceivable claim that is available to him as trustee. Not only has he brought this action against the indenture trustee, but he has also sued former officers of Webb & Knapp charging them with waste. [Record Citation.] Certain settlements have apparently been made in some of these actions.

Caplin, 406 U.S. at 429, fn. 20.

This Court's decision in *Caplin* recognized the authority of a bankruptcy trustee to sue and settle with the directors and officers of a debtor corporation. Yet petitioner posits that some courts have applied *Caplin* to prevent a bankruptcy trustee from suing various parties, including the respondents on this petition. In reality a bankruptcy trustee is not barred from suing and settling with the directors and officers of a debtor corporation.

Petitioner also errs in purportedly identifying conflicts within and between the circuit courts of appeals. No critical conflict exists. Rather, the pertinent decisions seek to differentiate between a debtor company's causes of action, which the bankruptcy trustee may properly pursue, and a creditor's individual cause of action, which the Trustee is barred under *Caplin* from pursuing.

CBS, Inc. v. Folks (In re Folks), 211 B.R. 378 (B.A.P. 9th Cir. 1997) explained the difference between what it labeled "general" (company) claims and "personal" (creditor) claims:

> "A cause of action is 'personal' if the claimant himself is harmed and no other claimant or creditor has an interest in the cause." *Citation.* A general claim exists "if the liability is to all creditors of the corporation without regard to the personal dealings between such officers and such creditors." *Citation.* "If a claim is a general one, with no particularized injury arising from it, and if that claim could be brought by any creditor of the debtor, the trustee is the proper person to assert the claim, and the creditors are bound by the outcome of the trustee's action."

In re Folks, 211 B.R. at 387.

Petitioner erroneously asserts that *Folks* conflicts with *Williams v. California First Bank*, 859 F.2d 664 (9th Cir. 1988). *Williams* involved a Ponzi scheme used by a seafood distributor to fund its business. The distributor sold investment contracts guaranteeing a high rate of return (10% per month), and then paid the returns by selling more investment contracts. Ultimately, of course, the pyramid collapsed, and the seafood distributor filed for bankruptcy protection.

Many of those who had purchased investment contracts that had not been repaid banded together to pursue California First Bank. The bank had been

the depository for the funds raised by the fraudulent investment contracts, and the bank was arguably complicit in the seafood distributor's fraud. The creditors who had banded together assigned their causes of action against California First Bank to the bankruptcy Trustee, who then endeavored to sue on behalf of the creditors as their assignee. This was, the Ninth Circuit held, barred by *Caplin*. And in discussing *Caplin*, the Ninth Circuit noted that a trustee lacks the authority to assert "general causes of action" on behalf of creditors. *Williams,* 859 F.2d at 667.

Petitioner posits that the *Williams* decision is inconsistent with *Folks,* suggesting that the phrase "general causes of action" used by the *Williams* court is the same thing as a "general claim, with no particularized injury arising from it" – the phrase used in *Folks*. But petitioner is plainly wrong.

The creditors in *Williams* who had purchased investment contracts were the *only* ones who were injured by the bank's failure to blow the whistle on the fraudulent Ponzi scheme. Every other creditor who dealt with the seafood distributor *benefited* from the Ponzi scheme, because the numerous investment contracts raised the operating capital that the distributor used to pay its bills. Applying the *Folks* test, the claims of those who had purchased investment contracts would be deemed personal claims based upon each contract holder's particularized injury. The assertion that California First Bank was complicit in the seafood distributor's Ponzi scheme was clearly not a "claim that could be brought by *any* creditor of the debtor." *Folks*, 211

B.R. at 387. It was, instead, only a claim that could be brought by those who had purchased the fraudulent investment contracts.

The *Folks* and *Williams* standard is premised upon the common sense notion that an injury to an insolvent corporation is felt by *all* of the company's creditors. *Smith v. Arthur Andersen*, 421 F.3d 989, 1004 (9th Cir. 2005). Simply put, when a party's acts or omissions harm a corporation or dissipate its assets, then the "claim is a general one, with no particularized injury arising from it . . . that could be brought by any creditor of the debtor." *Folks*, 211 B.R. at 387.

This concept was further developed by the Seventh Circuit in *Steinberg v. Buczynski*, 40 F.3d 890 (7th Cir. 1994). Contrary to petitioner's assertions, the *Steinberg* decision also does not present any intra- or inter-circuit conflicts, but rather demonstrates that the "conflict" that petitioner relies upon is actually merely an evolution in the legal terminology that is most helpful in understanding and following *Caplin*.

> The point is simply that the trustee is confined to enforcing entitlements of the corporation. He has no right to enforce entitlements of a creditor. He represents the unsecured creditors of the corporation; and in that sense when he is suing on behalf of the corporation he is really suing on behalf of the creditors of the corporation. But there

> is a difference between a creditor's interest in the claims of the corporation against a third party, which are enforced by the trustee, and the creditor's own direct -- not derivative -- claim against the third party, which only the creditor himself can enforce.

Steinberg, 40 F.3d at 893.

As *Steinberg* notes, *Caplin* prevents a trustee from asserting a creditor's *non-derivative* claims. Derivative claims, in contrast, arise from an injury, in the first instance, to the debtor corporation itself. Accordingly, even though that injury will inevitably be felt by the creditors, any causes of action arising from such an injury are owned by the debtor corporation, and are thus properly redressed by the trustee, not individual creditors.

The circuit courts agree that the bankruptcy trustee has standing under *Caplin* to pursue derivative claims – that is, claims arising from an injury caused in the first instance to the debtor corporation. *Folks* characterizes such derivative claims as being "generalized" or "general" ones, since a derivative claim harms all creditors. *Williams*, in contrast, uses the same word "general" to refer to a creditor's individual *non-derivative* causes of action.

But even at the level of semantics, the circuit courts are converging, not diverging. As part of its decision in *Steinberg*, the Seventh Circuit criticized its earlier attempt to distinguish between

"particularized injuries" and "general claims" as unhelpful. It thus shifted the focus to discern whether a cause of action arises, in the first instance, due to an injury to or dissipation of assets from a corporation.

The Ninth Circuit has also moved beyond its earlier use of the term "general" as a reference to derivative claims that impact all creditors, confirming the long established rule that a bankruptcy trustee has standing to assert derivative causes of action:

> Although creditors may attain standing to assert fiduciary duty claims upon a firm's insolvency as a matter of state corporate law, it does not follow that a trustee, who represents the debtor, lacks standing to assert such claims as a matter of federal bankruptcy law. Again, the ultimate question in determining whether a trustee has standing is whether the debtor corporation has been injured.

Smith, 421 F.3d at 1005.

Because no conflict exists, no valid grounds exist for issuance of a writ of *certiorari*.

II. THE REMAINING QUESTIONS PRESENTED IN THE PETITION DO NOT IMPACT HEDDLESON

In seeking review from this Court, petitioner presents three additional questions. None of the three questions impacts Heddleson.

A. Question 2 of 4 Does Not Apply

As its second question, the petition asks: "Was the Ninth Circuit correct in declining to follow the Second Circuit's *Wagoner* rule?"

According to petitioner, the *Wagoner* rule provides: "when a bankrupt corporation has joined with a third party in defrauding its creditors, the trustee cannot recover against the third party . . ." *Shearson Lehman Hutton, Inc. v. Wagoner*, 944 F.2d 114, 118 (2d Cir. 1991). The directors and officers of a bankrupt corporation, however, cannot be considered "third parties" since a corporation can only act through its officers and directors.

Indeed, the petition itself only presents the *Wagoner* rule as a bar to the trustee's ability to sue nVidia and nVidia's directors and officers. *Petition* at 24.

B. Question 3 of 4 Does Not Apply

As its third question, the petition asks: "As between a Chapter 11 reorganization trustee and a creditor of the estate, does the creditor (landlord) have standing to pursue interference claims against a third party for causing the debtor in bankruptcy (tenant) to breach the lease?"

Again, by its terms this question only relates to claims asserted against "third parties" – a term that does not include the 3dfx D&Os, including Heddleson. Indeed, hornbook law acknowledges that the directors and officers of a corporation cannot interfere with the corporations' own contracts. *Marin v. Jacuzzi*, 224 Cal.App.2d 549, 553-554 (Cal. 1964); *Crosstalk Productions v. Jacobson*, 65 Cal.App.4th 631, 646 (Cal. 1998).

Accordingly, as to Heddleson, the clear answer to petitioner's question is that *nobody* has standing to pursue claims for any interference with 3dfx's lease.

C. Question 4 of 4 Does Not Apply

As its fourth question, the petition asks: "If a purchase and sale agreement provides that the buyer is purchasing certain assets listed in an exhibit to the agreement, is the buyer's signature on the agreement alone sufficient to satisfy the statute of frauds (rather than requiring the buyer to sign the exhibit as well)?"

Heddleson was not a party to the asset purchase agreement, an agreement between nVidia and 3dfx. The last question presented by petitioner thus also does not apply to this respondent.

CONCLUSION

For the aforementioned reasons, Heddleson requests that the petition submitted by Carlyle Fortran Trust seeking the issuance by this Court of a writ of *certiorari* to the United States Court of Appeals for the Ninth Circuit be denied.

Respectfully submitted,

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