Application No. 19A1024

No. _____

In The

SUPREME COURT OF THE UNITED STATES

VIKTORIA BENKOVITCH

Petitioner,

v.

DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE FOR HOLDERS OF THE BCAP LLC TRUST 2007-AA3,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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May 13, 2020

QUESTIONS PRESENTED

In this case, there is a confirmed Chapter 11 bankruptcy plan, substantially consummated, and later, converted to a Chapter 7. "[T]he provisions of a confirmed plan bind the debtor . . . and any creditor . . . whether or not such creditor has accepted the plan." 11 U.S.C. Section 1141(a). The bankruptcy court's order confirming said plan is a final judgment which has not been appealed, not revoked nor voided, and not vacated.

Therefore, this case presents the following questions:

1. Which is worse, that a debtor obtains a real property that she already owns, free of any liens, because a secured creditor failed to timely comply with a bankruptcy court's final confirmation order; or, when that same bankruptcy court fails to enforce said final order? Subsequently, in the appeal proceedings below, should the courts have enforced the clear and unambiguous terms of a final order, including where the bankruptcy court failed to enforce its own order?
2. What makes a non-appealed and non-vacated bankruptcy court confirmation order - entered after meticulous and compliant attention to due process and proper notice, and which has not been voided - different from any other final order? Does said final judgment also have res judicata effect, precluding it from collateral attack? Is a secured creditor bound by the terms of a confirmed bankruptcy plan where it had notice, and did not

object to nor appeal, and did not move to void or vacate that confirmed bankruptcy plan?

3. Does a bankruptcy court have equitable discretion to ignore the clear terms of its own final order? And, can the Bankruptcy Code be over-ridden by equitable considerations and notions of fairness? Can a bankruptcy court find a confirmed bankruptcy plan fair and equitable, but then refuse to enforce it?
4. Does conversion from a Chapter 11 proceeding to a chapter 7 undo a bankruptcy confirmation order - which has not been appealed, not revoked nor voided, and also not vacated - and, everything that happened before such conversion?

PARTIES TO THE PROCEEDING

The caption contains the names of the parties to the proceedings.

LIST OF RELATED PROCEEDINGS

This case arises out of a directly related bankruptcy case filed by the Petitioner in the United States Bankruptcy Court for the Southern District of Florida (Miami Division):

U.S. Bankruptcy Court Southern District of Florida (Miami Division)

In re: Viktoria Benkovitch, Debtor

Case No. 14-36362-AJC

(i) The bankruptcy court entered a confirmation order confirming the Petitioner's [or the Debtor's] Chapter 11 Plan on September 21, 2015; Docket Entry 529; and,

(ii) The bankruptcy court entered an order granting the Petitioner's [or the Debtor's] Motion to convert her Chapter 11 proceeding to a Chapter 7 on May 13, 2016; Docket Entry 771.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner VIKTORIA BENKOVITCH (the "Petitioner"), appearing on a pro se basis, respectfully seeks a writ of certiorari to review a judgment of the United States Court of Appeals for the Eleventh Circuit, entered on September 23, 2019, and which affirmed an order entered by the United States District Court for the Southern District of Florida affirming three related bankruptcy court orders appealed to that district court by the Petitioner.

The relevant judgment is not only in conflict with decisions of other U.S. courts of appeals and the relevant holdings of this Court, but also sanctions departures by the noted respective lower courts in relation to the finality and res judicata effect of a final confirmation order in a bankruptcy proceeding; and, thereby, requiring the exercise of this Court's supervisory power.

In addition, while this Court has settled the applicability of a final bankruptcy court confirmation order in a bankruptcy Chapter 13 proceeding, it has not done so in a Chapter 11 proceeding that was later converted to a Chapter 7.

OPINIONS BELOW

The September 23, 2019 non-published opinion of the Eleventh Circuit Court of Appeals is reported as In re: Viktoria Benkovitch, Viktoria Benkovitch v. Deutsche Bank National Trust Co., 777 Fed. Appx. 968 (11th Cir. 2019); and, is reproduced as Appendix ("App.") A, infra, App. 1a-2a.

The March 30, 2018 opinion of the United States District Court Southern District of Florida affirming the three Bankruptcy Court orders on appeal to that District Court is unreported but is reproduced as Appendix B, infra, App. 3a-8a.

The opinion of the United States Bankruptcy Court Southern District of Florida June 1, 2017 Order [Denying] On Emergency Motion For Reconsideration of Order Granting Motion to Dismiss [and] Order On Motion for Summary Judgment In Favor Of Defendant, Or Alternatively, For Stay Pending Appeal is unreported but is reproduced as Appendix C, infra, App. 9a-10a.

The opinion of the United States Bankruptcy Court Southern District of Florida May 19, 2017 Order [Granting The Non-Movant Summary Judgment] is unreported but is reproduced as Appendix D, infra, App. 11a-12a.

The opinion of the United States Bankruptcy Court Southern District of Florida May 22, 2017 Order Granting [Defendant's] Motion To Dismiss is unreported but is reproduced as Appendix E, infra, App. 13a-14a.

JURISDICTION

The judgment of the Eleventh Circuit Court of Appeals was entered on September 23, 2019. The Petitioner then filed a Petition for Rehearing En Banc, on November 12, 2019. Said petition for rehearing was denied by the Eleventh Circuit on December 16, 2019, and which is reproduced as Appendix F, infra, App. 15a.

On March 13, 2020, the Petitioner timely filed to this Court [docketed by the Court on March 16, 2020] an Application for an Extension of Time Within Which to

file a Petition for a Writ of Certiorari, requesting a 60-day extension. The Application for an extension of time for 30 days up to and through April 14, 2020 was granted by this Court on March 19, 2020, and which is reproduced as Appendix G, infra, App. 16a.

On April 4, 2020, the Petitioner timely filed a second application for an additional 30-day extension from the Court, including due to the COVID-19 pandemic. However, such application was returned to the Petitioner by the Clerk of the Court because on March 19, 2020, as a result of the COVID-19 pandemic, this Court had also entered an administrative order providing applicable petitioners 150 days from the date of the lower court judgment or, as applicable, an order denying a timely petition for rehearing in which to timely file a petition for a writ of certiorari. Resultingly, this provided the Petitioner up to and through May 14, 2020 to file this instant Petition. The Court's administrative order titled "ORDER LIST: 589 [dated] Thursday, March 19, 2020" is reproduced as Appendix H, infra, App. 17a-18a.

This Court has jurisdiction under 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS INVOLVED

Pursuant to United States Supreme Court Rule 14.1(f), the applicable constitutional provisions, statutes, and rules involved in this case are listed below, and as set out fully in the Appendix. Their respective pertinent text is cited, as may be required, in the applicable argument(s).

STATEMENT

I. PROCEEDINGS BELOW

This instant Petition arises as a result of the U.S. Court of Appeals for the Eleventh Circuit's (the "Eleventh Circuit's") September 23, 2019 decision affirming the United States District Court Southern District of Florida's (the "District Court's") March 30, 2018 order, which had affirmed three respective United States Bankruptcy Court Southern District of Florida (the "Bankruptcy Court") orders [listed above and further described below], and which had been appealed to the two respective higher courts by the Petitioner. The Eleventh Circuit entered its September 23, 2019 non-published opinion after the Eleventh Circuit scheduled, and then subsequently held oral argument by the parties on September 18, 2019. During said oral argument, Petitioner's legal counsel at the time argued the finality and binding effect of the Bankruptcy Court's Confirmation Order.

This case initially arose because appellee/respondent Deutsche Bank National Trust Company, as Trustee for Holders of the BCAP LLC Trust 2007-AA3's ("Deutsche Bank") failed to timely complete a foreclosure proceeding to enforce its lien on a real property owned by the Petitioner within a 12-month period as specifically required by the Petitioner's confirmed Chapter 11 Plan, pursuant to a September 21, 2015 Bankruptcy Court Confirmation Order (the "Confirmation Order"). The Confirmation Order has not been appealed, was not revoked, and has not been voided nor vacated. As a result, the Petitioner timely filed an adversary proceeding to extinguish Deutsche Bank's lien. On May 22, 2017, the Bankruptcy Court not only declined to extinguish such lien as requested by the Petitioner but

rather, it, contemporaneously, granted summary judgment to the non-movant Deutsche Bank, and also dismissed the Petitioner's adversary proceeding with prejudice. Less than two weeks later, the Bankruptcy Court also denied the Petitioner's emergency motion for reconsideration of such rulings.

As outlined above, the Petitioner timely appealed all such Bankruptcy Court orders to the District Court. The District Court subsequently affirmed the appealed Bankruptcy Court orders. The Petitioner then timely appealed to the Eleventh Circuit, resulting in the Eleventh Circuit's September 23, 2019 one page, *per curiam* decision affirming the District Court decision. On December 16, 2019, the Eleventh Circuit also denied the Petitioner's Motion for Rehearing En Banc. The Petitioner's motion for a stay of the mandate was also subsequently denied by the Eleventh Circuit.

Then, on March 19, 2020, pursuant to Petitioner's March 13, 2019 Application for an Extension of time Within which to file a Petition for a Writ of Certiorari, this Court granted a 30-day extension through April 14, 2020; and, then a further 30-day extension as a result of the Court's March 19, 2020 COVID-19 pandemic-related administrative order providing all petitioner's a 60-day extension to file their respective petitions.

II. FEDERAL JURISDICTION IN THE LOWER COURTS

Pursuant to the Petitioner's appeal to the Eleventh Circuit, that court has jurisdiction over appeals of all final decisions of the district court, including final judgments in bankruptcy appeals. 28 U.S.C. Section 1291 and 28 U.S.C. Section

158(d), respectively. Thus, in the context of a bankruptcy case appeal, as in this case, the circuit court of appeals sits as a second court of review and reviews the bankruptcy court's decisions.

The District Court's jurisdiction to hear the Petitioner's initial appeal to the District Court is pursuant to 28 U.S.C. Section 158(a)(1).

On December 1, 2014, the Petitioner filed a voluntary petition under Chapter 11, of Title 11, of the United States Code. The Petitioner remained as a "Debtor-in-Possession" pursuant to the provisions of 11 U.S.C. Section 1107 until the Chapter 11 was confirmed by the Bankruptcy Court on September 21, 2015, and pursuant to which the Bankruptcy Court retained jurisdiction over the subject-matter of the proceedings in that court. The Bankruptcy Court proceeding is a core matter pursuant to 28 U.S.C. Section 157(b)(2)(A), (K), and (O).

The Bankruptcy Court also exercised jurisdiction in this case pursuant to 28 U.S.C. Section 1334(a); 28 U.S.C. Section 157; and, 11 U.S.C. Section 506. An adversary proceeding in bankruptcy is governed by Federal Rule of Bankruptcy Procedure 7001.

III. FACTUAL BACKGROUND

The facts in this case are not in dispute. The Petitioner filed her voluntary Chapter 11 petition on December 1, 2014. Deutsche Bank did not file a claim in the Petitioner's bankruptcy proceedings.

The Petitioner subsequently duly and timely noticed and served a Chapter 11 plan (Petitioner's "Plan") to all creditors and parties, including Deutsche Bank. Although Deutsche Bank orally objected to the confirmation of the Petitioner's Plan at the confirmation hearing, Deutsche Bank did not ever submit a written objection to the Petitioner's Plan.

The Bankruptcy Court found the Petitioner's Plan fair and equitable, and, resultingly, confirmed the Petitioner's plan in its September 21, 2015 Confirmation Order. The Confirmation Order was not appealed by any party including Deutsche Bank; and, the Confirmation Order also was not voided, vacated, nor modified.

Under the Petitioner's confirmed Chapter 11 Plan (the "Confirmed Plan"), the Petitioner became the owner, in fee simple, of the subject real property in this case; which is located at 445 Grand Bay Drive, Unit 1209, Key Biscayne, Florida 33149 (the "Real Property"). The Petitioner and her non-debtor spouse resided in and owned the Real Property as of her bankruptcy petition date; her interest in the Real Property was included in the property of the bankruptcy estate. The Real Property, an approximately $3.8 million condominium unit, was encumbered by a first mortgage in favor of Deutsche Bank.

Also, pursuant to her Confirmed Plan, the Petitioner assumed all the property of her bankruptcy estate. All real properties owned by the Petitioner and her non-debtor spouse immediately and irrevocably vested to the Petitioner, free and clear of any interests of her spouse, and subject only to the liens and encumbrances as provided in the Confirmed Plan.

Deutsche Bank's lien in relation to its mortgage [or Deutsche Bank's "claim"] was clearly dealt with by Benkovitch's Confirmed Plan, incorporated into the Confirmation Order. Pursuant to the Petitioner's Confirmed Plan and the Confirmation Order, still in effect, Deutsche Bank's claim shall be deemed satisfied and its liens shall be extinguished and satisfied of record by the Bankruptcy Court if Deutsche Bank did not complete foreclosure proceedings against the Real Property by November 19, 2016 [or 12 months from the "Effective Date" under the Confirmed Plan]; or, in the alternative, by Deutsche Bank seeking an extension of such 12-month time limit. Simply put, Deutsche Bank did not timely [start or] complete its foreclosure proceeding of the Real Property nor seek any extension to its 12-month time limit prior to November 20, 2016 - which is the first day after the its 12-month time limit from the Effective Date in the Confirmed Plan. As the record in the proceedings below evidences, there were at least two instances where Deutsche Bank acknowledged its looming deadline under the Confirmed Plan but did not take any timely required actions as it was supposed to.

Then, on May 16, 2016, after the Petitioner had commenced making payments under the Confirmed Plan to creditors other than Deutsche Bank, the Bankruptcy Court entered an order granting the Petitioner's motion to convert her Chapter 11 proceeding to a Chapter 7. The Confirmed Plan and the related Confirmation Order do not contain any provisions cancelling Deutsche Bank's obligations under the Confirmed Plan in the event of a conversion to a Chapter 7. Deutsche Bank also did not oppose the conversion motion. Deutsche Bank was not entitled to receive any

payments under the Confirmed Plan, and Deutsche Bank received all that it was entitled to under the Confirmed Plan.

The Petitioner remained as a debtor-in-possession through the confirmation date - the date on which the Bankruptcy Court entered its Confirmation Order. On June 15, 2016, the appointed bankruptcy trustee in her subsequent Chapter 7 abandoned all assets including the Real Property to the Petitioner.

As a result of the above, on March 14, 2017, the Petitioner filed an adversary proceeding (the "Adversary Proceeding") in the Bankruptcy Court to extinguish Deutsche Bank's lien because of Deutsche Bank's failure to complete its foreclosure proceeding. Even, as of that later date of the Adversary Proceeding, Deutsche Bank had still not completed a foreclosure proceeding against the Real Property as required by the Confirmed Plan and Confirmation Order.

On March 23, 2017, the Petitioner also served and filed a motion for summary judgment with respect to her complaint to extinguish Deutsche Bank's lien on the Real Property.

However, as already cited, on May 22, 2017, after oral arguments were held, the Bankruptcy Court entered two (2) contemporaneous but separate orders: (i) granting Deutsche Bank its motion to dismiss Petitioner's adversary proceeding with prejudice; and, (ii) granting summary judgment to non-movant Deutsche Bank. Then, on June 1, 2017, the Bankruptcy Court also denied the Petitioner's emergency motion

for reconsideration of its two described orders, or in the alternative, for a stay pending appeal.

REASONS FOR GRANTING THE PETITION

I. THE ELEVENTH CIRCUIT'S DECISION CONTRAVENES THE BANKRUPTCY CODE AND CONTROLLING PRECEDENTS

A. STATUTORY AND LEGAL FRAMEWORK

Where real property vested in the Debtor immediately upon confirmation of her Chapter 11 Plan, and where such Confirmed Plan required a secured creditor to take timely actions to preserve its lien, and where said creditor did not appeal the Bankruptcy Court's confirmation order and did not take the required timely actions to preserve its lien, and where the Bankruptcy Court then refused to enforce its own confirmation order after finding the Confirmed Plan fair and equitable; and, where the District Court [sitting as an intermediate appellate court] affirmed the Bankruptcy Court's described rulings by also failing to enforce the clear and unambiguous terms of a final, non-appealed order confirming a plan under Chapter 11 of Title 11 of the United States Code, the Eleventh Circuit failed to follow the controlling precedents of this Court, and its own binding precedents.

In this case, there is a confirmed plan. First, "the provisions of a confirmed plan bind the debtor...any creditor...whether or not the claim...of such creditor...is impaired under the plan and whether or not such creditor...has accepted the plan." 11 U.S.C. Section 1141(a) ("Section 1141(a)"). The Bankruptcy Court's September 21, 2015 Confirmation Order is a final judgment. *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 269, 130 S. Ct. 1367, 176 L. Ed. 2d 158 (2010) (citing *Finova*

Capital Corp. v. Larson Pharmacy Inc. (In re Optical Techs., Inc.), 425 F.3d 1294, 1300 (11th Cir. 2005)).

Plan confirmation as a final judgment is a fundamental tenet of bankruptcy law. "When the bankruptcy court confirms a plan, its terms become binding on debtor and creditor alike. Confirmation has preclusive effect, foreclosing relitigation of any issue actually litigated by the parties and any issue necessarily determined by the confirmation order." *Bullard v. Blue Hills Bank*, 135 S. Ct. 1686, 1692, 191 L. Ed. 2d 621 (2015) (internal quotations marks omitted) (citations omitted).

The policy favoring finality of confirmation orders is so strong that in *Espinosa*, this Court declined to grant relief from an order confirming a chapter 13 plan that contained a discharge provision flagrantly at odds with the proscriptions of the Bankruptcy Code and the Federal Rules of Bankruptcy Procedure. Despite finding that confirmation of the plan was legal error, this Court held that a confirmation order remains enforceable and binding on the creditor because the creditor had notice of the error and failed to object or timely appeal. *Espinosa* at 275.

The confirmed plan was not appealed by Deutsche Bank nor any other party. In *Travelers Indemnity Co. v. Bailey*, 557 U.S. 137, 152, 129 S. Ct. 2195, 174 L. Ed. 2d 99 (2009), this Court also recognized the finality of bankruptcy court orders and their res judicata effect, holding that they cannot be collaterally attacked. A bankruptcy court's order that is final and no longer subject to appeal becomes "res judicata to the parties and those in privity with them." *Id.*

Nor, was there, in this case, a motion to revoke the Bankruptcy Court's Confirmation Order, pursuant to 11 U.S.C. Section 1144 ("Section 1144"), by any party including Deutsche Bank. Pursuant to the pertinent part of Section 1144, "[o]n request of a party in interest at any time before 180 days after the entry of the order of confirmation, and after notice and a hearing, the court make revoke such order if and only if such order was procured by fraud." *Id.*

There was also no motion for relief by Deutsche Bank or any other interested party from the Bankruptcy Court's Confirmation Order pursuant to Federal Rule of Civil Procedure 60(b) ("Rule 60(b)"), titled "Relief from a Judgment or Order," and made applicable to bankruptcy cases by Federal Rule of Bankruptcy 9024 [titled the same]. Rule 60(b) provides and "exception to finality" that "allows a party to seek relief from a final judgment." *Gonzalez v. Crosby*, 545 U.S. 524, 528-29, 125 S. Ct. 2641, 162 L. Ed. 2d 480 (2005).

Notions of equity and fairness also do not override the binding effect of a bankruptcy court confirmation order. As this Court said in *Law v. Siegel*, 571 U.S. 415, 421, 134 S. Ct. 1188, 188 L. Ed. 2d 146 (2014), the Supreme Court has...."long held that 'whatever equitable powers remain in the bankruptcy courts must and can only be exercised with the confines of the Bankruptcy Code.' " (Citing *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 206, 108 S. Ct. 963, 99 L. Ed. 2d 169 (1988)). 11 U.S.C. Section 105(a) ("Section 105(a)") "does not allow a bankruptcy court to override explicit mandates of other sections of the Bankruptcy Code." *Id.*

Finally, pursuant to 11 U.S.C. Section 348 ("Section 348"), titled "Effect of Conversion," the final and binding effect of a bankruptcy court's confirmation order remains in place even upon conversion to a chapter 7 proceeding. That is, conversion of a chapter 11 case to a chapter 7 does not vacate the order confirming the plan. See Section 348 [at App.] which omits any reference to respectively, Section 1141 [titled, "Effect of Confirmation"] and 11 U.S.C. Section 1129 ("Section 1129") [titled, "Confirmation of a Plan"]. This Court's holding in *Harris v. Viegelahn*, 135 S. Ct. 1829, 191 L. Ed. 2d 783 (2015) that a confirmed plan in a chapter 13 – which was subsequently converted to a chapter 7 – has not been applied in a chapter 11 setting by this Court. However, the Eleventh Circuit's September 23, 2019 decision affirming the District Court's March 30, 2018 order conflicts with numerous other circuit courts which have held that a chapter 11 confirmed plan is binding even upon conversion to a chapter 7.

B. THE BANKRUPTCY COURT'S FINAL CONFIRMATION ORDER IS BINDING AND MUST BE ENFORCED

Pursuant to the statutory and legal framework cited and described above [and further detailed below], a confirmed Chapter 11 Plan of reorganization, such as the Petitioner's Confirmed Plan [as incorporated into the Bankruptcy Court's Confirmation Order] is binding and must be enforced. Neither the Eleventh Circuit nor the courts below have applied and effectuated the finality and enforceability of the Bankruptcy Court's September 21, 2015 Confirmation Order, which was not appealed, and not vacated nor voided. This is contrary to controlling law and precedents.

Again, the effect of confirmation under the plain language of Section 1141 of the Bankruptcy Code [titled "Effect of Confirmation"] is to bind all parties to the terms of a confirmed plan, including creditors and debtors alike. This Court has also specifically stated that "[w]hen the bankruptcy court confirms a plan, its terms become binding on debtor and creditor alike. Confirmation has preclusive effect, foreclosing...any issue necessarily determined by the confirmation order." *Bullard v. Blue Hills Bank*, 135 S. Ct. 1686, 1692, 191 L. Ed. 2d 621 (2015).

Further, even if a Chapter 11 plan contains provisions contrary to the requirements of the Bankruptcy Code, the provisions of a confirmed plan are binding and enforceable, provided all parties in interest had sufficient notice and an opportunity to object; and, the order confirming the plan is a final order not stayed or pending appeal. See this Court's ruling in *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 275 130 S. Ct. 1367, 176 L. Ed. 2d 158 (2010) ("the Bankruptcy Court's failure to find undue hardship before confirming [debtor's] plan was a legal error...But the order remains enforceable and binding on [creditor] because [creditor] had notice of the error and failed to object or timely appeal.").

In this case, Deutsche Bank received actual and adequate notice of the Petitioner's Plan and its confirmation; however, it did not formally object and did not move to appeal nor vacate the Confirmation Order. A party that makes "a considered choice not to appeal...cannot be relieved of such a choice because hindsight seems to indicate to him that his decision not to appeal was probably wrong." *Ackermann v. United States*, 340 U.S. 193, 198, 71 S. Ct. 209, 95 L. 2d. 207 (1950). Deutsche Bank

is, resultingly, bound by the terms of the Petitioner's Confirmed Plan. Subsequently though, Deutsche Bank did not pursue its "in rem" rights that it had under the 12-month time limit, nor did it seek any type of extension within such period.

Additionally, after confirmation of a chapter 11 plan - as in the case here - a creditor's lien rights are only those granted in the confirmed plan, and there is nothing in Section 1141 which suggests that the Petitioner's failure to achieve promises made in her Confirmed Plan reinstates Deutsche Bank's pre-confirmation lien rights.

C. Notions of Equity and Fairness Do Not Override the Provisions of The Bankruptcy Code

The Eleventh Circuit did not elaborate on its September 23, 2019 decision giving rise to this Petition. However, by affirming the three appealed Bankruptcy Court orders and the District Court's order affirming those three Bankruptcy Court orders [in the Petitioner's initial appeal to the District Court], the Eleventh Circuit effectively agreed with the Bankruptcy Court's stated equitable considerations. Any such basis for the Eleventh Circuit's decision is contrary to both bankruptcy law and controlling precedent in this Court.

With respect to bankruptcy law, this Court held in *Law v. Siegel*, 571 U.S. 415, 421, 134 S. Ct. 1188, 188 L. Ed. 2d 146 (2014) that the bankruptcy court's general statutory authority under 11 U.S.C. Section 105(a) ("Section 105(a)") "does not allow a bankruptcy court to override explicit mandates of other section of the Bankruptcy Code." *Id.* at 421. The Court also stated that "Section 105(a) confers authority to carry

out the provisions of the code, but it is quite impossible to do that by taking action that the code prohibits. That is simply an application of the axiom that a statute's general permission to take actions of a certain type must yield to a specific prohibition elsewhere." *Id.* at 421 (internal quotations, and citations omitted).

In this case, the Eleventh Circuit's decision has essentially permitted the Bankruptcy Court [and subsequently, the District Court] to override Section 1141(a) and Section 348, respectively. However, as outlined in *Law v. Siegel*, supra, this Court clarified that bankruptcy courts could use neither statutory nor inherent sources of broad, general authority to "contravene specific statutory provisions." Any "equitable powers [that] remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code." *Law v. Siegel* at 421 (quotation omitted). What the Bankruptcy Code provides, a judge cannot override by declaring that enforcement would be "inequitable." See *Toibb v. Radloff*, 501 U.S. 157, 162, 111 S. Ct. 2197, 115 L. Ed. 2d 145 (1991).

It is clear from its orders [that were appealed by the Petitioner] that the Bankruptcy Court deviated from the Bankruptcy Code in rendering those orders as that court believed that it was unfair that the creditor, Deutsche Bank, would lose its lien on the Real Property; and, that the Petitioner [as the Debtor] would gain as a result of Deutsche Bank's failure to comply with the terms of the non-appealed and final Confirmation Order, and resulting Confirmed Plan. However, as this Court also explained in *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 207 108 S. Ct. 963,

99 L. Ed. 2d 169 (1988), courts cannot deviate from the procedures "specified by the Code," even when they sincerely "believ[e] that...creditors would be better off."

Additionally, "[a] judgment is not void, for example, simply because it is or may have been erroneous." *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 270, 130 S. Ct. 1367, 176 L. ed. 2d 158 (2010) (quotation marks omitted). In this case, the Eleventh Circuit's decision [and the lower courts' orders before it] effectively voided the Bankruptcy Court's final Confirmation Order in contravention of controlling precedents.

D. THE RES JUDICATA EFFECT OF A FINAL CONFIRMATION ORDER

All the elements for res judicata are met by the Bankruptcy Court's Confirmation Order. It was not appealed, and not voided, nor revoked. "The preclusive effect of a federal court judgment is determined by federal common law." *Taylor v. Sturgell*, 553 U.S. 880, 891, 128 S. Ct. 2161, 2171, 171 L. Ed. 2d 155 (2008). Under federal issue-preclusion principles, "once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to that prior litigation." *Montana v. United States*, 440 U.S. 147, 153, 99 S. Ct. 970, 59 L. Ed. 2d 210 (1979).

That standard for issue preclusion is met in this case because of the Bankruptcy Court's final Confirmation Order. In *Bullard v. Blue Hills Bank*, 135 S. Ct. 1686, 1692, 191 L. Ed. 2d 621 (2015), this Court stated that "[w]hen the bankruptcy court confirms a plan, its terms become binding on debtor and creditor

alike. Confirmation has preclusive effect, foreclosing relitigation of any issue actually litigated by the parties and any issue necessarily determined by the confirmation order." *Id.*

Moreover, in *Travelers Indemnity Co. v. Bailey*, 557 U.S. 137, 152, 129 St. Ct. 2195, 174 L. Ed. 2d 99 (2009), this Court recognized the finality of a bankruptcy court orders and their res judicata effect, holding that they cannot be collaterally attacked. Because the confirmation order in said controlling case "became final on direct review," [as in this case] this Court held it was "res judicata to the parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose." *Id.* at 152 (internal quotation marks omitted). Also see *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398, 101 S. Ct. 2424, 69 L. Ed. 2d 103 (1981) (a final order "precludes the parties or their privies from relitigating" issues elsewhere.).

Thus, likewise, the Bankruptcy Court's Confirmation Order in this case is res judicata, and Deutsche Bank is bound by the terms of the Petitioner's Confirmed Plan which is incorporated into the Confirmation Order. Those terms state that Deutsche Bank's claim shall be deemed satisfied and its liens shall be extinguished and satisfied of record, by the Bankruptcy Court, if Deutsche Bank did not complete its foreclosure proceedings against the Petitioner's Real Property by November 19, 2016; or, by Deutsche Bank seeking an extension of such 12-month time limit. Deutsche Bank failed to do either within such required 12-month time limit in accordance with

the terms of the Confirmed Plan and the provisions of the Confirmation Order affecting Deutsche Bank's lien. Deutsche Bank received adequate due process notice of the Confirmed Plan, participated in the confirmation hearing, and did not move to seek any relief, including appeal, from the Confirmation Order whatsoever.

"The normal rules of res judicata and collateral estoppel apply to the decisions of bankruptcy courts." *Katchen v. Landry*, 382 U.S. 323, 334, 86 S. Ct. 467, 151 L. Ed. 2d 391 (1966).

The Eleventh Circuit's September 23, 2019 decision represents a willingness of the Eleventh Circuit to entertain, and, in fact, permit a collateral attack on the Bankruptcy Court's Confirmation Order and resulting Confirmed Plan. This cannot be squared with the doctrine of res judicata and the practical necessity served by that rule as clearly established by this Court. "It is just as important that there should be a place to end as that there should be a place to begin litigation," *Stoll v. Gottlieb*, 305 U.S. 165, 172, 59 S. Ct. 134, 83 L. Ed. 104 (1938).

II. AS A RESULT OF THE ELEVENTH CIRCUIT'S DECISION, THE CIRCUITS ARE NOW EVEN FURTHER SPLIT WITH RESPECT TO THE CONTINUING BINDING EFFECT OF A FINAL CHAPTER 11 CONFIRMATION ORDER AFTER CONVERSION TO CHAPTER 7

The Eleventh Circuit's September 23, 2019 decision affirmed the District Court's March 30, 2018 order which, in turn, had affirmed the three Bankruptcy Court orders appealed to that District Court. As clearly set out in the District Court order, that court relied on the conversion of the Petitioner's bankruptcy proceeding to a Chapter 7 to support its findings. The Eleventh Circuit did not provide any

reasoning nor opinion(s) for its decision affirming the District Court's order, but by affirming the District Court's ruling, the Eleventh Circuit has effectively agreed with the District Court's findings and conclusions.

However, the result of the Eleventh Circuit's decision is that it conflicts with other circuits' decisions in relation to the binding effect of a confirmed chapter 11 plan upon conversion to chapter 7, as in the case here.

First, other circuits have found that pursuant to Section 348 [again, titled "Effect of Conversion"], the final and binding effect of the Bankruptcy Court's Confirmation Order in a chapter 11 remains in place even upon conversion of such bankruptcy proceeding to a chapter 7. As cited below, the Fifth Circuit Court of Appeals (the "Fifth Circuit") and also the Tenth Circuit courts of appeals (the "Tenth Circuit"), both of which have squarely confronted the described issue, have respectively held that a later conversion to a chapter 7 proceeding after a chapter 11 plan has already been confirmed does not vitiate the binding nature of a confirmed chapter 11 plan:

(i) In *Bank of LA. v. Pavlovich (Matter of Pavlovich)*, 952 F.2d 114 (5th Cir. 1992), the Fifth Circuit relied on the Bankruptcy Code to consider the "interplay" between a chapter 11 confirmation and subsequent conversion to chapter 7. In its detailed and reasoned decision, the Fifth Circuit held that the creditor (a bank) was bound by the confirmed chapter 11 plan even upon conversion to chapter 7. *Id.* at 117-118.

(ii) In *Laing v. A.G. Johnson (In re Laing)*, 31 F.3d 1050 (10th Cir. 1994), the Tenth Circuit also held that a confirmed plan functions as a judgment with regard to the parties bound by that plan even though the chapter 11 bankruptcy was later converted to chapter 7. Id at 1051 (quotations and citations omitted).

Secondly, the Ninth Circuit Court of Appeals (the "Ninth Circuit") has held that Section 1144 [again, titled "Revocation of an order of confirmation"] is the only avenue for revoking a confirmed plan of reorganization, and, thus, overriding the implications of a conversion to a chapter 7 on a confirmed chapter 11 plan: *In re Orange Tree Assocs., Ltd.*, 961 F.2d 1445, 1447 n.6 (9th Cir. 1992) ("Section 1144 is the only avenue for revoking confirmation of a plan of reorganization"), (quoting *In re Longardner & Assocs., Inc.*, 855 F.2d 455, 460 (7th Cir. 1988) (citing *In re Newport Harbor Assocs.*, 589 F.2d 20, 22 (1st Cir. 1978)). It is noteworthy that the Ninth Circuit's binding decision was supported by relevant decisions of, respectively, the Seventh Circuit Court of Appeals (the "Seventh Circuit") and the First Circuit Court of Appeals (the "First Circuit").

Pursuant to the foregoing, and based on the Eleventh Circuit's unsupported decision in this case, there is not only an increasing conflict between the circuits on whether a confirmed chapter 11 plan remains binding after a conversion to a chapter 7, but also a lack of controlling case law from this Court with respect to this important bankruptcy law issue.

Moreover, this Court's holding in *Harris v. Viegelahn*, 135 S. Ct. 1829, 191 L. Ed. 2d 783 (2015) (that in a chapter 13 proceeding which had a confirmed plan and later converted to a chapter 7, the Chapter 13 confirmed plan was no longer binding) has not been applied in a chapter 11 setting; i.e. the binding effect of a confirmed plan in a chapter 11 proceeding that was later converted to a chapter 7, as in in the case here. This may be because, among other relevant considerations cited in the conflicting cases above [and further discussed in the next section of this Petition], Section 348 of the Bankruptcy Code omits any reference to Sections 1129 and 1141, respectively; and, as Section 1144 is the only avenue for revoking confirmation of a chapter 11 plan of reorganization, a chapter 11 plan's binding effect survives conversion to chapter 7.

The Eleventh Circuit's September 23, 2019 judgment did not include any reasoning nor citations for its decision, but that appellate court may have also misapplied this Court's holding in *Harris v. Viegelahn* in rendering its decision. In any event, this Court's intervention is also warranted because as highlighted above, the Eleventh Circuit decision in this case conflicts with the published and controlling holdings of the Fifth, Ninth and Tenth Circuits; and, perhaps those of the First and Seventh Circuits also.

III. THIS CASE PRESENTS AN IDEAL VEHICLE AS IT IMPACTS UNRESOLVED AREAS OF BANKRUPTCY LAW

As discussed in the "Reasons For Granting The Petition," section above, although the Eleventh Circuit did not provide any reasoning or support for its September 23, 2019 judgment affirming the Petitioner' appeal to that court, its

decision not only contravenes the Bankruptcy Code but also does not adhere to controlling law and precedent established by this Court. Additionally, as highlighted in the last section of this Petition, the Eleventh Circuit has also not abided by its own precedents in rendering its September 23, 2019 order, including after scheduling and holding oral argument in this case.

Also important for this Court is that this case does touch numerous bankruptcy law issues - one of which is unsettled between the circuits and has not yet been addressed by this Court. Moreover, the circuits themselves are also split as to their reasoning for their holdings. This case is on point as to the binding effect of a confirmed chapter 11 plan, subsequently converted to a chapter 7. As highlighted above, in this case, the District Court affirmed the three appealed Bankruptcy Court's orders based on the conversion of the Petitioner's chapter 11 case to a chapter 7; and, resultingly, disregarded the binding effect of Deutsche Bank's obligations under the Confirmed Plan. The Eleventh Circuit, in turn, affirmed the District Court's order. Although the Eleventh Circuit did not provide any bases nor support for its decision, by affirming the District Court's order, the Eleventh Circuit effectively agreed with the District Court's reasoning.

Subsequently, based on the Eleventh Circuit's decision in this case and as a number of circuits have not squarely confronted this issue before, there is a circuit split as to whether a confirmed chapter 11 plan remains binding after conversion to a chapter 7. In fact, as highlighted in the section above, there is a further split between the circuits as to why a confirmed chapter 11 plan remains binding after

conversion to a chapter 7. The Fifth Circuit, for example, in *Bank of LA. v. Pavlovich (Matter of Pavlovich)*, 952 F.2d 114 (5th Cir. 1992), analyzed the different components of the Bankruptcy Code including Sections 1141, 1144 and 348, respectively, to hold that the provisions of a confirmed chapter 11 plan remain binding after conversion to a chapter 7. *Id.* at 117-118. In contrast, the Ninth Circuit, in *In re Orange Tree Assocs., Ltd.*, 961 F.2d 1445 (9th Cir. 1992) stated that Section 1144, which permits the revocation of a confirmed Chapter 11 plan, is the only avenue to override the binding effect of a confirmed chapter 11 plan even upon conversion to a chapter 7. *Id.* at 1147, n.6.

Also, pertinently, in *In re State Airlines*, 873 F.2d 264 (11th Cir. 1989), the Eleventh Circuit itself touched on the effect of Section 348 in a conversion to chapter 7, stating that Section 348(a) "does not effect a change in the date of the filing of the petition, the commencement of the case, or the order for relief." *Id.* at 268. As discussed later below [in the last section of this Petition], pursuant to such finding by the Eleventh Circuit in the cited case, an argument can additionally be made that the Eleventh Circuit has now also disregarded its own precedent finding with respect to the continuing binding effect of a confirmed chapter 11 plan upon conversion to a chapter 7. For instance, it can be argued that in *In re State Airlines*, the Eleventh Circuit has held that Section 348 (i.e. a conversion to chapter 7) does not change the "order for relief," i.e. the confirmation order.

As a result of these noted and important circuit conflicts and due to the varying interpretation of the Bankruptcy Code by the circuit courts in relation to the same

issue, this case makes an excellent vehicle for this Court to address the materially significant question as to whether a confirmed chapter 11 plan remains binding after conversion to a chapter 7.

This is especially true considering this Court's decision in a chapter 13 conversion to a chapter 7 in *Harris v. Viegelahn*, 135 S. Ct. 1829, 191 L. Ed. 2d 783 (2015). However, because there other differences and also pursuant to Sections 348 and 1144, respectively, this case makes an excellent vehicle for this Court to analyze the "binding effect" differences between a confirmed chapter 13 conversion to a chapter 7 and a conversion after a chapter 11 has been confirmed.

In *Viegelahn*, this Court cited 11 U.S.C. Section 103(i), and held "that when a debtor exercises his statutory right to convert, the case is placed under chapter 7's governance, and no chapter 13 provision holds sway." *Id.* at 1838. Thus, an argument can be made for applying *Viegelahn*'s logic in the context of a case converted from chapter 11 to chapter 7 because, pursuant to Section 1141(a)'s provision that a confirmed chapter 11 plan "binds" falls within Section 103(g)'s scope, it can be advanced that Section 1141(a) would no longer apply after conversion to a chapter 7; and, if Section 1141(a) no longer applies, then, resultingly, confirmed chapter 11 plans can no longer bind the parties after conversion from chapter 11 to a chapter 7.

However, there are pertinent differences between the applicable provisions of the Bankruptcy Code that show that a conversion in a chapter 13 case cannot be applied with the same effect in a conversion of a chapter 11 case; and, hence, why this case is ideal for this Court to weigh in on.

First, while both chapter 13 and chapter 11 of the Bankruptcy Code contain a provision allowing a court to vacate a confirmation order procured by fraud, those respective provisions are markedly different. Section 1144 in a chapter 11 case provides that "on request of a party in interest at any time before 180 days after the date of the entry of the order of confirmation, and after notice and a hearing, the court may revoke such order if and only if such order was procured by fraud." *Id.* This contrasts with the language in the equivalent statute in a chapter 13 case. 11 U.S.C. 1330 ("Section 1330") on revocation of a confirmed chapter 13 plan states that: "On request of a party in interest at any time within 180 days after the entry of an order of confirmation under Section 1325 of this title, and after notice and a hearing, the court may revoke such order if such order was procured by fraud. *Id.*, Section 1330(a).

Thus, Section 1330 in a chapter 13 case allows revocation if plan confirmation was procured by fraud, but does not exclude other bases for reversing the binding effect of the confirmation order after conversion; i.e. Sections 103(i) and 348(e), respectively, which are thereby applicable. In contrast, Section 1144's specific use of the phrase "if and only if" restricts the basis for revocation of a chapter 11 confirmation order to the procuring of such order by fraud; and, this restriction thereby excludes other bases for revocation after conversion; e.g. Sections 103(g) and 348(a), respectively.

Secondly, unwinding the effect of a confirmed chapter 13 plan is more straightforward than unwinding the effect of a confirmed chapter 11 plan. After conversion from chapter 13, unwinding the effects of a confirmed but failed chapter

13 plan ordinarily is as simple as requiring the chapter 13 trustee to refund undistributed plan payments. See *Viegelahn, supra,* at 1837-40. Unlike chapter 13 plans however, chapter 11 plans are largely implemented by complex and numerous transactions that would be difficult, if not impossible, to disentangle after confirmation. It is perhaps for this reason that Congress enacted Section 1144 with its specific language to allow a chapter 11 confirmation order to be revoked under so very narrow circumstances.

These discussed Bankruptcy Code differences and related issues, and the circuit courts' varying interpretation of the applicable statutes of the Bankruptcy Code - all of which are material issues in this case - further highlight why this case is ideal for this Court's review and determination.

IV. THE ELEVENTH CIRCUIT'S DECISION IS WRONG AND INCONSISTENT WITH ITS OWN PRECEDENTS

A. RELEVANT CONSIDERATIONS IN THIS CASE THAT SHOW WHY THE ELEVENTH'S CIRCUIT'S DECISION WAS WRONG

As already discussed above, what makes the Bankruptcy Court's final Confirmation Order different from any other final and binding order (entered after meticulous attention to due process and proper notice); especially [as already cited above], pursuant to the Bankruptcy Code, confirmation of a reorganization plan is equivalent to final judgment in a civil action that extinguishes an existing claim and substitutes for a judgment, and defines the new obligations of the parties: in essence, a new contract between the Petitioner and her creditors is created.

Pursuant to such Confirmation Order, and as a result of Deutsche Bank's failure to comply with the terms of the Petitioner's Plan [incorporated into the Confirmation Order], Deutsche Bank's lien should have been extinguished by the Bankruptcy Court - and, it erred by failing to do so. As also highlighted above, the District Court's order affirming the appealed Bankruptcy Court orders is also erroneous because a conversion to a chapter 7 does not vitiate the binding terms of the Petitioner's Confirmed Plan on a creditor like Deutsche Bank, whose lien/mortgage was dealt with in the Confirmed Plan.

Although it held oral argument, the Eleventh Circuit did not provide any reasoning in affirming the above-cited District Court order, including with respect to that oral argument. However, the following considerations are relevant in further highlighting that the Eleventh Circuit's decision is wrong with respect to the Petitioner's appeal to that court:

1. Although Deutsche Bank's counsel orally objected to confirmation at the Bankruptcy Court's confirmation hearing on the basis that Deutsche Bank could not be forced to take the Real Property back, it never filed a written objection to the confirmation of the Petitioner's Chapter 11 Plan and how that Plan would address Deutsche Bank's lien.
2. Deutsche Bank's treatment in the Petitioner's Confirmed Plan was not modified, by the Petitioner, as she is entitled to do, at any time after the Bankruptcy Court entered its Confirmation Order; and, as provided for in 11

U.S.C. Section 1127(b) ("Section 1127(b)") [titled, "Modification of plan"] of the Bankruptcy Code.

3. As reiterated numerous times above, there was also no appeal taken from the Bankruptcy Court's order of confirmation by Deutsche Bank or any other party in the bankruptcy proceedings. A motion to reconsider the Confirmation Order under the applicable bankruptcy and/or local rules was also not made by Deutsche Bank or any other party.
4. As shown above, there was no motion to revoke the Bankruptcy Court's Confirmation Order pursuant to Section 1144 submitted by any party, including Deutsche Bank.
5. There was no motion for relief by Deutsche Bank or any other interested party from the Bankruptcy Court's Confirmation Order pursuant to Rule 60(b), made applicable to bankruptcy cases by Bankruptcy Rule 9024.
6. Deutsche Bank did not file any complaint nor objection to avoid any dischargeability afforded to the Petitioner in the bankruptcy outcome, prior to confirmation of the Petitioner's Chapter 11 Plan, or at any time thereafter.
7. Deutsche Bank's lien/mortgage in relation to the Real Property was fully dealt with by the Petitioner's Confirmed Chapter 11 Plan. The plain language of the Bankruptcy Code provides that the Real Property transferred to the Petitioner as of the entry of the Confirmation Order. Pursuant to Section 1141(b), except as provided in the plan, all property of the bankruptcy estate is vested in the

debtor upon confirmation. Even conversion to a Chapter 7 does not bring that property back into the converted case.

8. The Petitioner's Confirmed Plan conditionally preserved Deutsche Bank's lien [or claim], subject to Deutsche Bank exercising any "in rem" rights it had in relation to its lien/mortgage on the Real Property within 12 months of the Effective Date of the Confirmed Plan, or by seeking an extension of such 12-month time limit for good cause prior to the expiration of such 12-month period. Simply put, Deutsche Bank did neither. The consequences of Deutsche Bank's failure to timely seek a foreclosure on the Real Property or seek an extension are plainly stated in the Confirmed Plan:

> "If [Deutsche Bank] does not complete its pending foreclosure proceedings on or before the first day of the 12th month after the Effective Date, its claims shall be deemed satisfied of record, by order of the Bankruptcy Code in recordable form to be filed in the public records of Miami-Dade County."

9. Neither any section of the Bankruptcy Code, nor any order subsequent to the Bankruptcy Court's Confirmation Order changed the result of Deutsche Bank's failure to either complete a foreclosure or seek an extension of time to do so, as required by the Petitioner's Confirmed Plan. Consequently, Deutsche Bank's rights are fully based on what treatment it was accorded in the Confirmed Plan - nothing else.

10. Deutsche Bank admits in its pleadings [and the lower court record evidences] that it was aware of the looming deadline but failed to comply with the provisions of the Petitioner's Confirmed Plan because it did not have to. The record and Deutsche Bank's pleadings also evidence that Deutsche Bank received proper notice and service throughout the proceedings below.
11. Nowhere in the Petitioner's Confirmed Plan does it state that Deutsche Bank's provided 12-month time limit to commence its foreclosure proceedings or request an extension is voided, vacated or nullified by a conversion to a Chapter 7, through default or otherwise.
12. The Petitioner's Confirmed Plan was substantially consummated as all the property in the Plan [including the Real Property] was transferred to the Petitioner; the Petitioner assumed and managed said property; and, there was commencement of distribution under the Confirmed Plan to creditors.

B. THE ELEVENTH CIRCUIT DISREGARDED ITS OWN PRECEDENTS

In view of the relevant considerations highlighted just above and the law and precedents already shown and described in this Petition, the Eleventh Circuit's September 23, 2019 decision is contrary to all such cited controlling law and precedent. Also important to this Petition and further warranting review by this Court is that the Eleventh Circuit's judgment disregards the Eleventh Circuit's own precedents.

The Petitioner attempted to also highlight such issues and precedents to the Eleventh Circuit in a timely filed petition for rehearing en banc. However, said

petition was denied by the Eleventh Circuit on December 16, 2019, and, thereafter, has also let to this instant Petition to this Court.

Also pertinent to this Petition is that, in addition to conflicting with the decisions of other circuits and also this Court [as shown above], there are also a number of prior Eleventh Circuit opinions that directly conflict with its decision in this case. Moreover, a recent Eleventh Circuit opinion (which is not published but reported as cited below), entered shortly after the Eleventh Circuit denied the Petitioner's request for a rehearing en banc, further evidences the errors and conflicts in this case by the appellate court.

1. **The Eleventh Circuit's Judgment in This Case Conflicts With Its Prior Decisions Regarding The Finality, And The Binding And Res Judicata Effects Of A Bankruptcy Confirmation Order**

In, *In re Optical Technologies, Inc.*, 425 F.3d 1294, 1300 (11th Cir. 2005), the Eleventh Circuit held that "[i]t is established that a confirmation order satisfies the requirements of a judgment that be given [preclusive] effect.'" (Citing and quoting *In re Justice Oaks II, Ltd.*, 898 F.2d 1544, 1549 (11th Cir. 1990)).

In *First Nat'l Bank of Oneida, N.A. v. Brandt*, 887 F.3d 1255, 1260 (11th Cir. 2018), the Eleventh Circuit held that pursuant to Section 1141(a), once a chapter 11 plan is confirmed, it is binding on both the debtor and creditor. Pertinently, in the cited case, the Eleventh Circuit cited Section 1144 and specifically stated that "[t]he plan cannot be revoked unless, within 180 days after confirmation, it is shown that the plan was procured by fraud." *Id.* at 1260. Such conflicting finding by the Eleventh Circuit [when compared to its judgment in this case] and the discussions in the above

sections II and III, respectively, further support why this Petition should, respectfully, be granted by this Court.

Also see the Eleventh Circuit's holding in *Iberiabank v. Geisen (In re FFS Data, Inc.)*, 776 F.3d 1299, 1306 (11th Cir. 2015), where that court recognized the finality of a bankruptcy court's confirmation orders and their res judicata effect, holding that such final orders cannot be collaterally attacked.

Additionally, in *IRT Partners, L.P. v. Winn-Dixie Stores, Inc. (In re Winn-Dixie Stores, Inc.)*, 639 F.3d 1053 (11th Cir. 2011), the Eleventh Circuit agreed with the Seventh Circuit, and stated that the creditor's [Deutsche Bank's] rights are based on whatever treatment is accorded to [the creditor] in the plan itself. *Id.* at 1056 (citation and quotations omitted).

The above examples of the Eleventh Circuit's precedent findings further highlight that court's erroneous judgment in this case with respect to the finality, and binding and res judicata effect of the Bankruptcy Court's Confirmation Order.

Equally important is that approximately ten (10) days after entering its December 16, 2019 order denying the Petitioner's noted petition for rehearing en banc, the Eleventh Circuit rendered another [non-published] opinion which conflicts with its decision in this case. In *In re Westport Holdings Tampa*, 789 Fed. Appx. 207 (11th Cir. 2019), the Eleventh Circuit stated that "[a] bankruptcy court's confirmation order that is final and no longer subject to appeal [is] 'res judicata to the parties and those in privity with them'....[o]nce a confirmation order is no longer appealable,

either because the appellants have exhausted their direct appeal or the deadline to appeal has passed, it becomes a final, binding judgment....[a]nd once the confirmation order is final, any alleged defects in it cannot be collaterally attacked." *Id.* at 208 (citing and quoting *Travelers Indem. Co. v. Bailey*, 557 U.S. 137, 152-153, 129 S. Ct. 2195, 2205-2206, 174 L. Ed. 2d 99 (2009) (internal quotations omitted). Clearly, such more recent decision by the Eleventh Circuit conflicts with its decision in this case.

2. The Eleventh Circuit's Judgment in This Case Also Conflicts With Its Precedents Regarding The Notions Of Equity and Fairness

In *Welzel v. Advocate Realty Invs., LLC (In re Welzel)*, 275 F.3d 1308 (11th Cir. 2001), the Eleventh Circuit specifically held that "[t]the statutory language of the Bankruptcy Code should not be trumped by generalized equitable pronouncements." *Id.* at 1318.

Likewise, in *Chemical Bank v. First Trust of New York (In re Southeast Banking Corp.)*, 156 F.3d 1114, 1122 (11th Cir. 1998), the Eleventh Circuit asserted that "whatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code." *Id.* at 1122 (quoting this Court's findings in *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 2016, 108 S. Ct. 963, 969, 99 L. Ed. 2d 169 (1988).

3. The Eleventh Circuit's Judgment Additionally Disregards Its Prior Finding in The Conversion of a Confirmed Chapter 11 Case to a Chapter 7

As already described in a preceding section above, in *In re State Airlines*, 873 F.2d 264 (11th Cir. 1989), the Eleventh Circuit outlined that the effect of Section 348

in a chapter 11 conversion to a chapter 7 "does not effect a change in the date of the filing of the petition, the commencement of the case, or the order for relief." *Id.* at 268. It can be inferred that the "order for relief" is the confirmation of the chapter 11 case; and, therefore, a Chapter 11 confirmation order remains in effect upon conversion to a chapter 7.

As a result of its prior decisions, the Eleventh Circuit's order in this case also cannot be squared with its own controlling precedents.

4. Additional Considerations With Respect The Eleventh Circuit's Decision

Importantly, the Eleventh Circuit did not find this case moot in its decision. Otherwise, it would have stated so. In addition, it scheduled and held oral argument, further reinforcing that this case is not moot. Moreover, as this court has held, "[a]s long as the parties have a concrete interest, however small, in the outcome of litigation, the case is not moot." *Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 298, 132 S. Ct. 2277, 2287 183 L. Ed. 2d 281 (2012) (internal quotation marks and alteration omitted). Also see *Campbell Ewald Co. v. Gomez*, 136 S. Ct. 663, 669, 193 L. Ed. 2d 571 (2016), as revised, (Feb. 9, 2016).

In this entire proceeding [including the proceedings in the courts below], there still exists a case and controversies for this Court to consider especially in view of the conflicts associated with the Eleventh Circuit decision in this case, and the relevant circuit conflicts identified earlier above. *North Carolina v. Rice*, 404 U.S. 244, 246, 92 S. Ct. 402, 404, 30 L. Ed. 2d 413 (1971). This Court can remand the case with

instructions to enter judgment in favor of the Petitioner which will void the mortgage judgment *ab initio*, at which time any foreclosure of the Real Property would be void, and the Petitioner would, resultingly be restored to title, less the mortgage of Deutsche Bank. In the alternative, other appropriate relief can still be fashioned by the Bankruptcy Court as it continues to have jurisdiction with respect to the Real Property.

CONCLUSION

For the foregoing reasons, the Petitioner, appearing pro se, respectfully requests that the Honorable Court grant her Petition for a Writ of Certiorari.

Respectfully Submitted,

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