IN THE SUPREME COURT OF THE UNITED STATES

No. 23A___

CAPITAL CARTRIDGE, LLC, APPLICANT

v.

J. MICHAEL ISSA, AS TRUSTEE OF THE HMT LIQUIDATING TRUST

ROYAL METAL INDUSTRIES, INC., APPLICANT

v.

J. MICHAEL ISSA, AS TRUSTEE OF THE HMT LIQUIDATING TRUST

APPLICATION FOR AN EXTENSION OF TIME
WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

To the Honorable Elena Kagan, Circuit Justice for the Ninth Circuit:

Pursuant to Rules 13.5 and 30.2 of the Rules of this Court, Capital Cartridge, LLC, and Royal Metal Industries, Inc., apply, respectively, for a 59-day and 31-day extension of time, to and including June 28, 2024, within which to file a joint petition for a writ of certiorari to review the judgments of the Ninth Circuit in these cases. Pursuant to this Court's Rule 12.4, the parties intend to file a "single petition for a writ of certiorari" because the "judgments * * * sought to be reviewed" are from "the same court and involve identical or closely related questions." Sup. Ct. R. 12.4.

In *Capital Cartridge*, the court entered its judgment on December 11, 2023 (App., *infra*, 1a), and denied rehearing on January 31, 2024 (App., *infra*, 33a); unless extended, the time for filing a petition for a writ of certiorari will expire on April 30, 2024.[1] In *Royal Metal*, the court entered its judgment on February 28, 2024 (App., *infra*, 35a), and no rehearing petition was filed; unless extended, the time for filing a petition for a writ of certiorari will expire on May 28, 2024.[2] The jurisdiction of this Court would be invoked under 28 U.S.C. 1254(1).

1. This case presents an important and recurring question under the Bankruptcy Code that has squarely divided the lower courts: whether a creditors' committee has "derivative standing" to bring suit on behalf of the estate, and if so, under what conditions derivative standing is ever permitted. In the proceedings below, the Ninth Circuit cemented its practice of authorizing creditors' committees to assert avoidance claims belonging to the estate -- even though the Bankruptcy Code

[1] In *Capital Cartridge*, the opinion of the court of appeals (App., *infra*, 1a-5a) is unreported but available at 2023 WL 8542624. The opinion of the district court (App., *infra*, 6a-28a) is unreported but available at 2022 WL 2134089. The order of the bankruptcy court (App., *infra*, 29a-32a) is unreported.

[2] In *Royal Metal*, the opinion of the court of appeals (App., *infra*, 35a-39a) is unreported but available at 2024 WL 837043. The opinion of the district court (App., *infra*, 40a-62a) is reported at 642 B.R. 312. The order of the bankruptcy court (App., *infra*, 63a-66a) is unreported.

explicitly assigns that critical power to the trustee alone. See, *e.g.*, 11 U.S.C. 544(b)(1) ("the *trustee* may avoid any transfer of an interest of the debtor in property"); 11 U.S.C. 548(a)(1) ("[t]he *trustee* may avoid any transfer"); 11 U.S.C. 550(a) ("the *trustee* may recover * * * the property transferred") (emphases all added).[3]

a. This "significant" and "important" question (*In re Baltimore Emergency Servs. II, Corp.*, 432 F.3d 557, 560-561 (4th Cir. 2005)), has sharply divided the lower courts. There is a meaningful conflict regarding whether derivative standing is allowed at all. For example: The practice has been outright forbidden by the Tenth Circuit BAP. *United Phosphorous, Ltd.* v. *Fox (In re Fox)*, 305 B.R. 912, 914 (B.A.P. 10th Cir. 2004) ("obey[ing] the [Code's] literal language" and disavowing contrary decisions from other circuits).[4] A four-judge dissent (including then-Judge Alito) flatly rejected the doctrine when it was

[3] A debtor in possession can also bring these suits due to its separate textual grant of authority to exercise the same powers assigned a trustee: "a debtor in possession shall have all the rights * * * and powers, and shall perform all the functions and duties * * * of a trustee serving in a case under this chapter." 11 U.S.C. 1107(a). There is no similar assignment of authority to creditors or any creditors' committee.

[4] This Court routinely considers decisions of bankruptcy appellate panels in describing conflicts warranting the Court's review. See, *e.g.*, *Schwab* v. *Reilly*, 560 U.S. 770, 778 & n.4 (2010); *Grogan* v. *Garner*, 498 U.S. 279, 283 & n.7 (1991).

considered by the en banc Third Circuit. *Official Comm. of Unsecured Creditors of Cybergenics Corp. ex rel. Cybergenics Corp.* v. *Chinery*, 330 F.3d 548, 580 (3d. Cir. 2003).[5] The Fourth Circuit sharply limited the practice while expressing heavy skepticism it was allowed in the first place. *Baltimore Emergency Servs.*, 432 F.3d at 561 (calling its validity "far from self-evident"). And multiple experts have repudiated the trustee's ability to assign away the Code's rights, while other experts have reached the opposite conclusion. See, *e.g.*, *id.* at 561 (flagging conflicting commentary).

Even if derivative standing is (somehow) authorized, the circuits disagree over *where* it is authorized. Some circuits (including the Fifth and Seventh Circuits) flag this as a *limited* exception solely where a trustee shirks his or her duties and "unjustifiably" refuses to file suit. *E.g.*, *In re Consolidated Indus. Corp.*, 360 F.3d 712, 716 (7th Cir. 2004) ("Bankruptcy law does allow a creditor to bring a derivative claim on behalf of the

[5] "In this case, the majority interprets the phrase 'the trustee may,' in § 544(b)(1) of the Bankruptcy Code, to mean that the trustee *and* a creditors' committee may seek recovery under the statute. Although the majority does not conclude that the phrase is ambiguous or that its meaning is in any way obscure, it has, nonetheless, broadened the statute to add a party that Congress specifically omitted. * * * The majority's view is inconsistent with the plain and natural reading of § 544, is not supported by the Code provisions it cites, is not adequately grounded in prior practice and, perhaps more importantly, is inconsistent with the Supreme Court's plain meaning analysis of the identical phrase in *Hartford Underwriters*." 330 F.3d at 580 (Fuentes, J., dissenting).

estate, but only in limited circumstances. To do so, a creditor must show that the trustee has *unjustifiably refused* the creditor's demand to pursue a colorable claim and obtain leave from the bankruptcy court to proceed.") (emphasis added; citations omitted); see also *In re Cleveland Imaging & Surgical Hosp., LLC*, 26 F.4th 285, 297 (5th Cir. 2022) ("'the debtor-in-possession' [must have] refused unjustifiably to pursue the claim'"). Yet other circuits (like the Ninth Circuit) endorse a sweeping rule where derivative standing is effectively rubber-stamped whenever a trustee simply signs off and greenlights a committee's authority. See, *e.g.*, *Avalanche Maritime, Ltd.* v. *Parekh (In re Parmetex, Inc.)*, 199 F.3d 1029, 1031 (9th Cir. 1999) ("where the trustee stipulated that the Creditors could sue on his behalf and the bankruptcy court approved that stipulation[,] the Creditors had standing to bring the suit").

This Court has expressly reserved the question before (*Hartford Underwriters Ins. Co.* v. *Union Planters Bank, N.A.*, 530 U.S. 1, 13 n.5 (2000)), and it continues to generate endless confusion among lower courts and expert commentators. In the meantime, some circuits recognize strict limits designed to cabin the practice (if it is allowed at all), whereas others (like the Ninth Circuit) simply brush aside any meaningful restrictions.

b. The issue is accordingly important, and this is the ideal vehicle for (finally) resolving the split. The question is a pure

question of law. It was outcome-determinative below, and it was squarely resolved at each level. If respondent lacks "derivative standing," the suits must be dismissed -- and applicants will necessarily prevail because the estate's claims are otherwise time-barred. App., *infra*, 11a, 45a. Nor could respondent possibly satisfy the conflicting standard applied in other circuits: whereas those circuits demand a showing that the trustee *unjustifiably refused* to pursue the action, respondent here *conceded* the debtors "'themselves would have prosecuted avoidance claims against [petitioners]'" had they not abandoned their statutory duties to the creditors' committee. *Id.* at 20a, 54a. In short, if this dispute had arisen in Illinois or Texas, this case would have come out the opposite way.[6]

In short, this is a critical question that affects significant litigation with massive stakes in countless bankruptcies nationwide, and this is a perfect opportunity for the Court to impose a uniform rule in an area generating needless confusion. There is a reasonable prospect of the Court granting review, and

[6] The fact that respondent's claims would be time-barred underscores the overwhelming importance of the question presented. Parties need to know with certainty whether derivative standing exists; otherwise, parties can litigate to judgment only to discover years later on appeal that such standing is categorically unavailable; that standing was approved under an incorrect iteration of this judge-made standard; or that the standard (whatever it is) was not met. This Court's guidance is essential in crafting a uniform rule for this outcome-determinative issue.

an extension would materially assist applicants in preparing a comprehensive, responsible petition on this important question.

2. a. This case involves two related appeals arising from the same Chapter 11 bankruptcy case.[7] In those proceedings, the debtors appointed a chief restructuring officer (responsible for administering the bankruptcies), and the U.S. Trustee appointed "an official Committee of Unsecured Creditors" under 11 U.S.C. 1102(a). App., *infra*, 7a-8a, 41a-42a.

Nearly two years into the bankruptcy, the chief restructuring officer entered into a stipulation "purport[ing] to grant the Committee derivative standing to commence, prosecute, and resolve certain claims and causes of action on behalf of the Debtors," including "the authority to pursue claims relating to certain pre-petition transactions between certain Debtors and a list of third-party targets." App., *infra*, 8a, 42a. That stipulation covered both applicants and the adversary proceedings filed below.

b. The bankruptcy court approved the stipulation "two days later," granting the creditors' committee "derivative standing" to

[7] The bankruptcy proceedings below involved the separate bankruptcy filings of eight companies "in the business of manufacturing, assembling, and selling small arms ammunition." App., *infra*, 7a, 41a. Although the debtors were separate companies, the same individual "was the principal of each Debtor," and the debtors accordingly "coordinated extensively throughout their respective cases." *Ibid.* "The orders giving rise to both appeals were argued together before the Bankruptcy Court, and both appeals present the same legal questions." *Id.* at 7a n.2, 41a n.2.

pursue these claims. App., *infra*, 8a, 42a. The committee itself prepared the order, and the stated basis for its approval was unspecified "good cause." *Id.* at 8a-9a, 42a-43a. In authorizing derivative standing, there accordingly was no explanation why the debtors could not pursue these claims themselves; there was no indication the debtors refused (or would have refused) to pursue these claims; "'there was no hearing held,'" "'no discussion that any causes of action were colorable or viable,'" "'no analysis of the cost of pursuing the causes of action vers[u]s the potential recovery,'" and "'no discussion as to whether or not the Debtor[s] had looked into the potential claims,'" much less "'whether the Committee had made demand on the Debtor[s] to file suit against [petitioners], or whether the Debtors refused to file suit despite a demand.'" *Id.* at 9a, 43a. In short, the court authorized derivative standing without any indication the debtors "unjustifiably refused" (or would have refused) to pursue these claims on their own.

The committee then immediately filed separate adversary proceedings against each applicant, seeking "to avoid transfers and recover previously transferred property" under 11 U.S.C. 544, 548, and 550. App., *infra*, 9a, 43a. These suits sought hundreds of thousands of dollars in recovery.

c. Applicants filed motions to dismiss the adversary proceedings, asserting the committee lacked standing to pursue the

claims. The bankruptcy court granted those motions and dismissed the proceedings. App., *infra*, 29a-33a, 63a-66a.

d. The committee appealed to the district court, which ultimately reversed. As the district court confirmed, the appeals "turn[] on the propriety of a debtor granting 'derivative standing' to another for the purpose of pursuing adversary claims." App., *infra*, 14a, 48a. And the court found "[l]ong-established Ninth Circuit and Ninth Circuit BAP precedent authorizes a debtor-in-possession to stipulate to derivative standing for unsecured creditors' committees, subject to a bankruptcy judge's approval." *Ibid.* It thus rejected applicants' argument that "this grant of derivative standing * * * exceeded the scope of the Debtors' and the Bankruptcy Court's authority under the Bankruptcy Code." *Ibid.*

In so holding, the district court recognized that "[s]ome circuits" limit derivative standing to "narrow[er] circumstances than those allowable in the Ninth Circuit." App., *infra*, 16a, 50a (citing cases in the Fourth, Fifth, and Seventh Circuits). It also recounted how the Tenth Circuit BAP found "derivative standing agreements were impermissible under the Bankruptcy Code." *Id.* at 26a, 60a. But it declared those decisions at odds with "the majority view," and concluded Ninth Circuit law authorized "derivative standing": "'[i]t is well settled that in appropriate situations the bankruptcy court may allow a party other than the trustee or debtor-in-possession to pursue the estate's

litigation." *Id.* at 15a, 25a, 27a, 49a, 59a, 61a; see also *id.* at 26a, 50a ("the Ninth Circuit has reiterated its approval of derivative standing stipulations").

e. The Ninth Circuit affirmed. App., *infra*, 1a-5a, 35a-39a. It rejected applicants' argument that "the grant of derivative standing to the Committee violated the Bankruptcy Code." App., *infra*, 3a, 37a. Although admitting "the Bankruptcy Code contains no explicit authorization for the initiation of an adversary proceeding by a creditors' committee," it found "implied" authorization in other Code provisions, and it declared itself bound by prior circuit authority: In *Parmetex*, *supra*, "we rejected the proposition that creditors 'have no standing to sue because only the * * * trustee has authority to bring adversary proceedings under' the Bankruptcy Code"; instead, "[w]e held that, 'where the trustee stipulated that the Creditors could sue on his behalf and the bankruptcy court approved that stipulation[,] the Creditors had standing to bring the suit.'" *Id.* at 4a, 38a (quoting 199 F.3d at 1030-1031). It thus held the committee below "had derivative standing pursuant to the stipulation between it and the Debtors, as approved by the bankruptcy court." *Ibid.*

The Ninth Circuit denied Capital Cartridge's petition for rehearing en banc; despite the petition directly flagging the circuit conflict, no judge requested a vote. App., *infra*, 33a-34a. Royal Metal did not seek rehearing.

3. Applicants respectfully request an extension of time, to and including June 28, 2024, within which to file a petition for a writ of certiorari. As established above, these cases present a significant question of federal bankruptcy law: whether derivative standing is ever allowed, and if so, under what conditions derivative standing is permitted. The district court (acting in its appellate capacity) recognized the division below (see App., *infra*, 16a, 50a), and the same split has been flagged by courts and commentators nationwide. Any forthcoming petition, in short, will be substantial.

Applicants' new lead counsel was recently retained (after the Ninth Circuit's decisions were issued), and has multiple competing obligations, including merits briefing and oral argument in this Court. In light of the calendar, any extension (sought by applicants or respondent) would push this case into the summer recess; the case is thus exceedingly unlikely to be conferenced until next Term in any event, and an extension will not prejudice either side.[8] This additional time is necessary for applicants' counsel to prepare a comprehensive, useful petition on these important questions.

[8] Applicants' counsel approached respondent's counsel after being retained, asking if respondent would commit to filing a response without extensions (with applicants, in turn, waiving their full Rule 15.5 reply period) in order to facilitate a June conference. Respondent's counsel declined.

Respectfully submitted.

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