No. 23-1373

IN THE

Supreme Court of the United States

CAPITAL CARTRIDGE, LLC,
Petitioner,
v.

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

ROYAL METAL INDUSTRIES, INC.,
Petitioner,
v.

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

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

When a Bankruptcy Court's confirmation order substitutes a liquidating trust for the creditors' committee that initially brought timely avoidance actions, and the liquidating trust's authority under 11 U.S.C. 1123(b)(3)(B) has not been questioned, may a defendant in the avoidance action continue to challenge the creditors' committee's derivative standing under 11 U.S.C. § 544(b)(1) in order to manufacture a statute of limitations defense?

RULE 29.6 STATEMENT

Respondent J. Michael Issa appears in his capacity as Trustee of the HMT Liquidating Trust, and is not a corporation subject to disclosure requirements. See Sup. Ct. R. 29.6.

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INTRODUCTION

Petitioners frame the determinative issue in overly simplistic terms. Because this Court construed the statutory language "the trustee may" in *Hartford Underwriters Insurance Co. v. Union Planters Bank,*

N.A., 530 U.S. 1 (2000) ("*Hartford Insurance*") to have an exclusive meaning (*i.e.*, only the trustee may) with regard to permissible claims under another bankruptcy provision, Petitioners claim the same exclusive meaning *must* apply to the statutory language "the trustee may" in Chapter 11 bankruptcy provisions commonly invoked in grants of derivative standing to creditors' committees, 11 U.S.C. §§ 544(b)(1), 548, 550. Respondent disagrees with that framing and on the merits; there was no procedural defect in the granting of derivative standing to the creditors' committee consistent with longstanding Ninth Circuit law. But this Court need not reach that issue. Even if there was a defect, it was cured long ago.

Any conceivable derivative standing issue was resolved by the Bankruptcy Court's *preceding* October 1, 2020 confirmation order, which—pursuant to the terms of the approved bankruptcy plan and with notice to all parties—transferred all rights and interest in pursuing causes of action to the Liquidating Trust. Pet. App. 14a, 56a–57a. That is why the Trustee for the HMT Liquidating Trust (the "Liquidating Trust") appears now as Respondent instead of the creditors' committee. Section 1123(b)(3)(B) expressly authorizes such appointments via bankruptcy confirmation plans, and the Petition does not challenge Respondent's authority thereunder. Because derivative standing does not implicate a bankruptcy court's subject-matter jurisdiction, this substitution of a proper party with direct standing ended any debate as to whether the creditors' committee appropriately possessed derivative standing.

Yet even if the derivative standing issue were ripe, the Petition presents neither a true circuit conflict over the existence of derivative standing nor an important question of federal law that requires this Court's attention. See Sup. Ct. R. 10.

Indeed, each circuit confronted with the issue has uniformly permitted derivative standing under Section 544 or related provisions, with the Third Circuit's en banc decision in *Official Committee of Unsecured Creditors of Cybergenics Corp. v. Chinery*, 330 F.3d 548 (3d Cir. 2003) ("*Cybergenics Corp.*") carefully distinguishing derivative standing on behalf of a debtor's estate—and its unique statutory bases and tradition—from the direct claims rejected in *Hartford Insurance* under 11 U.S.C. § 506(c). *Hartford Insurance* itself had distinguished derivative standing in a footnote. 530 U.S. at 13 n.5. A single BAP decision, a few unpublished lower court decisions, and then-Judge Alito's joinder in a four-Judge dissent in *Cybergenics Corp.*, respectfully, do not comprise a "clear" and "intractable" split. See Pet. 9.

Further, Petitioners' assertion of an outcome-determinative issue is illusory. The creditors' committee brought timely avoidance claims in reliance on Ninth Circuit precedent and the Bankruptcy Court-approved stipulation that it had derivative standing to bring those claims. Thereafter, the Bankruptcy Court ignored this precedent (and its own orders approving the stipulation and confirming the bankruptcy plan) in dismissing those claims without explanation, causing substantial harm to the bankruptcy estates and creditors. The District Court reversed, criticizing the Bankruptcy Court's summary dismissal orders and Petitioners' misleading claims about Ninth Circuit law, and the Ninth Circuit applied its precedent in affirming the District Court's judgment. This is the correct application of the law. But Petitioners cannot deny that other proper parties stood willing and ready to bring those avoidance actions at that time.

Indeed, before they filed their motions to dismiss, Petitioners had advance notice that the Liquidating Trust would be appointed and assigned the estates' adversary proceedings, including these specific adversary proceedings. Neither Petitioner objected. Further, the debtors represented that had the creditors' committee been denied derivative standing, they would have filed and prosecuted the actions themselves.

Regardless, because the transfer of claims and substitution of the real party in interest actually took place, these appeals do not provide a proper vehicle for examining the outer boundaries of derivative standing. Respectfully, the Petition should be DENIED.

STATEMENT OF THE CASE

Respondent agrees that this Petition arises from two related appeals stemming from the same Chapter 11 bankruptcy case. Pet. 5. Respondent initially was appointed as the debtors' Chief Restructuring Officer ("CRO"). On June 1, 2020, Respondent, acting as CRO on behalf of the debtors, entered into a stipulation consenting to and conferring derivative standing upon an unsecured creditors' committee that had been established under 11 U.S.C. § 1102(a). As noted in the Petition, the Bankruptcy Court approved the stipulation on June 3, 2020, and the creditors' committee timely filed adversary proceedings against Petitioners on June 5, 2020, seeking to recover certain allegedly fraudulent transfers made by debtors to Petitioners. Pet. App. 7a–9a, 50a–52a.

Respondent agrees that Petitioners filed motions to dismiss in September 2020 challenging the creditors' committee's derivative standing, see Pet. 7 & Pet. App. 9a, 53a, but the Petition omits important context. Before Petitioners filed those motions, the debtors

filed a Chapter 11 plan of liquidation and a related disclosure statement. Pursuant to the plan, all of the debtors' assets, including causes of action (defined to include already-filed adversary proceedings), would be transferred to the HMT Liquidating Trust ("Liquidating Trust") administered by Respondent. The disclosure statement specifically gave notice that the adversary proceedings filed against Petitioners would be assigned. (No. 18-50609-hlb, R. 974 at 89, 119 (Bankr. D. Nev. July 17, 2020).) Upon approval of the plan, the estates' causes of action would transfer to and vest in the Liquidating Trust, which would be substituted for the debtors as the party in interest in pending matters. Pet. App. 13a–14a, 56a–57a. Petitioners never objected to the bankruptcy plan (indeed, Capital Cartridge voted to accept it (*id.* R. 1033 at 3 (Bankr. D. Nev. Sept. 9, 2020)), and the Bankruptcy Court entered an order confirming the bankruptcy plan on October 1, 2020. Pet. App. 14a, 57a.

The Bankruptcy Court's summary orders granting Petitioners' motions to dismiss, issued on October 21 and 23, 2020, neither explained the reasons for the court's decisions nor addressed the transfer of claims and substitution of parties that it had already approved, with notice to all parties, by confirming the bankruptcy plan on October 1, 2020. Pet. App. 37a–41a, 80a–84a.

The District Court reversed the dismissal orders in two thorough opinions, faulting Petitioners for "misleading" the court as to binding Ninth Circuit authority permitting derivative standing and distinguishing the concept from Article III standing. Pet. App. 26a–31a, 34a–35a, 69a–71a, 74a–78a. The District Court further noted the Bankruptcy Court's failure to consider joinder issues on reconsideration

and the debtors' willingness to prosecute the actions—facts it deemed "knowable to the Bankruptcy Court at the time it issued the Dismissal Order[s]"—citing Respondent's declaration that but for the stipulation of derivative standing for the creditors' committee, the debtors would have prosecuted the avoidance actions against Petitioners themselves. Pet. App. 24a–25a, 68a.

On further appeal, the Ninth Circuit affirmed the District Court's judgments. Pet. App. 1a–4a, 44a–47a.

REASONS FOR DENYING THE PETITION

Ninth Circuit law dictates that the granting of derivative standing to the creditors' committee by Bankruptcy Court-approved stipulation was proper, as recognized by the District Court and Ninth Circuit on appeal. The Petitioner challenges the availability of this equitable remedy, which is uniformly permitted in the circuits that have considered the matter, as contrary to the authorizing Bankruptcy Code provisions. But Petitioners target a perceived procedural issue that no longer exists.

A Liquidating Trust now stands in the debtor's shoes, courtesy of the Bankruptcy Court's confirmation of the bankruptcy plan in October 2020. Petitioners never challenged the propriety of the Liquidating Trust's appointment under 11 U.S.C. § 1123(b)(3)(B), nor could they in light of its express language. And the debtors' and creditors' committee's reliance on derivative standing at the beginning of the avoidance cases does not present a jurisdictional flaw. Thus, Petitioners' challenge to derivative standing under 11 U.S.C. § 544(b)(1) has become moot.

Yet even if the Section 544 derivative standing issue were ripe, no circuit split or federal issue of exceptional importance presents.

I. The Bankruptcy Court's Appointment of the Liquidating Trust in the Confirmation Order Permissibly Substituted a Proper Party, Effectively Mooting Petitioners' Derivative Standing Challenge Under Section 544(b)(1).

Petitioners focus on the origination of the adversary proceedings by the creditors' committee in order to challenge derivative standing under Section 544(b)(1). That challenge lacks merit given the Bankruptcy Court's approval of a derivative standing stipulation in accordance with Ninth Circuit precedent. But even if derivative standing had not properly been granted, the Bankruptcy Court long ago substituted the Liquidating Trust for the creditors' committee in its October 2020 order confirming the bankruptcy plan, and the Liquidating Trust has pursued the adversary proceedings on behalf of the estate ever since.

Derivative standing does not implicate subject matter jurisdiction. *E.g.*, *In re Isaacs*, 895 F.3d 904, 915 n.2 (6th Cir. 2018) (Chapter 7 bankruptcy context); *Nat'l Credit Union Admin. Bd. v. U.S. Bank*, 898 F.3d 243, 258 n.97 (2d Cir. 2018) (credit union failure litigation, distinguishing derivative standing from Article III standing). Thus, even if improperly granted, derivative standing assignments present the sort of procedural flaw that can be cured. The substitution of the Liquidating Trust resolved any improper-party issue because 11 U.S.C. § 1123(b)(3)(B) permits such assignments in the bankruptcy plan.

Petitioners never challenged the Liquidating Trust's authority under 11 U.S.C. § 1123, nor could they. Subsection (b)(3)(B) states that the bankruptcy plan may "provide for . . . the retention and enforcement by the debtor, by the trustee, or by a representative of

the estate appointed for such purpose, of any such claim or interest," referring to the bankruptcy plan's designated "classes of claims" and "classes interests," in subsection (a)(1). 11 U.S.C. § 1123(a)(1), (b)(3)(B).[1] That is what the bankruptcy plan did here: it designated a representative of the estates—the Liquidating Trust—to retain and enforce the estates' claims and interests, including avoidance actions. The bankruptcy plan in the main bankruptcy proceeding provides in pertinent part:

- Section 6.1: "This Plan provides that, from and after the Effective Date, a Debtor's Assets, including, without limitation, any Causes of Action of such Debtor, shall be transferred to and vest in the Liquidating Trust, for the benefit of Creditors of such Debtor . . .";
- Section 6.8.3: "[T]he Liquidating Trust Trustee shall be, and hereby is, appointed as the representative of each Debtor's Estate pursuant to sections 1123(a)(5), 1123(a)(7) and 1123(b)(3)(B) of the Bankruptcy Code and, as such, shall be vested with the authority and power . . . to take, among others, the following acts on behalf of each Debtor: . . . **(b) file, litigate, prosecute, settle, adjust, enforce, collect and abandon Causes of Action of the Debtor in the name of, and for the benefit of, the Debtor's Estate** . . . . As the representative of each Debtor's Estate, the Liquidating Trust Trustee **shall succeed to all of the rights and**

[1] Indeed, an amicus opposing derivative standing in *Cybergenics Corp.* actually offered post-confirmation appointments under Section 1123(b)(3)(B) as an appropriate vehicle for avoidance actions, and one that obviated the necessity for derivative standing under another provision. *Cybergenics Corp.*, 330 F.3d at 579.

> **powers of each Debtor and its Estate** with respect to all Causes of Action of the Debtor, and **shall be substituted for, and shall replace, the Debtor as the party-in-interest** in all such litigation pending as of the Effective Date";
>
> - Section 6.11: "**All right, title and interest in and to all Causes of Action of each of the Debtors**, and the right to enforce, file, litigate, prosecute, settle, adjust, enforce, collect and abandon on behalf of each of the Debtors and their Estates any and all Causes of Action, **including, but not limited to, any Avoidance Actions**, **are deemed automatically transferred** . . . from the Debtors' Estates **to the Liquidating Trust**," whereupon "only the Liquidating Trust Trustee shall have the right to enforce, file, litigate, prosecute, settle, adjust, enforce, collect and abandon any Cause of Action."

(No. 18-50609-hlb, R. 973 at 33, 36–37, 39–40 (Bankr. D. Nev. July 17, 2020).) See also Pet. App. 13a–14a, 56a–57a.

Not only did the Bankruptcy Code authorize such an assignment, but Petitioners were put on notice that the contemplated assignment included their avoidance actions before they even filed their derivative-standing-challenge / statute-of-limitations motions to dismiss.[2] Specifically, Exhibit B to the disclosure statement accompanying the bankruptcy plan identified known avoidance actions filed by the debtors and/or the creditors' committee, including, relevant here, the avoidance actions against Petitioners. (No. 18-50609-

[2] Petitioners both filed their motions to dismiss in the Bankruptcy Court on September 2, 2020, more than a month after the filing of the bankruptcy plan and disclosure statement.

hlb, R. 974 at 119 (Bankr. D. Nev. July 17, 2020) (listing "Preference claim, fraudulent transfer claim and other claims" against Capital Cartridge, LLC and Royal Metal Industries).) The Bankruptcy Court approved the disclosure statement by order of July 29, 2020. Despite notice that the avoidance actions would be transferred to the Liquidating Trustee, Petitioners did not object to the bankruptcy plan—indeed, Capital Cartridge, LLC voted *for* the plan (*Id.* R. 1033 at 3 (Bankr. D. Nev. Sept. 9, 2020))—and the Bankruptcy Court confirmed the plan on October 1, 2020. The plan became effective on or about October 26, 2020. Pet. App. 14a, 57a.

Notwithstanding the approval of the Chapter 11 plan, as well as its own approval of the debtors' and creditors' committee's stipulation of derivative standing, the Bankruptcy Court summarily granted Petitioners' motions to dismiss, apparently unaware that it had *already* approved the transfer of claims and substitution of a party with direct standing to prosecute the estates' claims under 11 U.S.C. § 1123(b)(3)(B). The consequence of the confirmed Chapter 11 plan is that the derivative standing issue has been rendered moot.

Permitting substitution of a proper party to avoid the forfeiture of claims is consistent with Federal Rule of Civil Procedure 17, made applicable to bankruptcy proceedings by Bankruptcy Rule 7017. Rule 17 provides that "the court may not dismiss an action for failure to prosecute in the name of the real party in interest until, after an objection, a reasonable time has been allowed for the real party in interest to ratify, join, or be substituted into the action." Fed. R. Civ. P. 17(a)(3); see also Fed. R. Bankr. P. 7017. As explained in the advisory committee notes to the 1966 amendment, the substitution-instead-of-dismissal provision

in subpart (a)(3) reflects the preference for a procedural cure "when determination of the proper party to sue is difficult or when an understandable mistake has been made." Fed. R. Civ. P. 17 advisory committee note to 1966 amendment.[3]

Here, Petitioners did not make their objection to the creditors' committee until *after* the Bankruptcy Court approved of the disclosure statement advising of the intended substitution, and Petitioners never objected to the bankruptcy plan that would effectuate the substitution. (Again, one voted to accept it.) Thus, Rule 17(a)(3) obliged the Bankruptcy Court to allow a "reasonable time" for the real party in interest to substitute in. It *did just that* in the October 1, 2020 order confirming the Chapter 11 plan that substituted the Liquidating Trust.

When such substitutions occur, the claims (otherwise remaining the same) relate back to the original filing, preventing an opportunistic defendant from asserting a statute of limitations defense arising solely from an alleged improper party bringing the case. This remedy flows from the text of Rules 15 and 17. Rule 15(c)(1)(B) provides that an amended pleading "relates back to the date of the original pleading when," *inter alia*, "the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out . . . in the original pleading." That would apply here, where the alleged claims and defendants remain the same; the only thing that has changed is the substitution

[3] A similar approach appears in Rule 19(a)(2), which instructs courts to order the joinder of indispensable parties. Fed. R. Civ. P. 19(a)(2) ("If a person has not been joined as required, the court *must* order that the person be made a party.") (emphasis added); Fed. R. Bankr. P. 7019 (adopting Rule 19 for bankruptcy proceedings).

of a proper party plaintiff. Rule 17(a)(3), meanwhile, states that "[a]fter ratification, joinder, or substitution, the action proceeds as if it had been originally commenced by the real party in interest." See also *Ratner v. Sioux Nat. Gas Corp.*, 770 F.2d 512, 520 (5th Cir. 1985) (recognizing that Rule 17 substitution relates back to original filing, for statute of limitations purposes).

In sum, the unchallenged substitution of the Liquidating Trust, as permitted by 11 U.S.C. § 1123(b)(3)(B), effectively moots Petitioners' meritless, backwards-looking challenge to derivative standing under Section 544(b)(1).

II. Even if the Derivative Standing Issue Were Ripe, No Circuit Split Justifies *Certiorari*.

Even if the issue were presented in an appropriate vehicle, no circuit split requires resolution by this Court.

A. The Cases Cited in the Petition Show Uniformity Among the Circuits Allowing Some Form of Derivative Standing.

Contrary to Petitioners' assertion of an "intractable" circuit split, the cases cited in the Petition actually show remarkable uniformity amongst the circuits in recognizing derivative standing, of some form, for creditors' committees under analogous provisions of the Bankruptcy Code. *E.g.*, *In re Adelphia Commc'ns Corp.*, 544 F.3d 420, 424 (2d Cir. 2008); *Cybergenics Corp.*, 330 F.3d at 580; *Kreit v. Quinn (In re Cleveland Imaging & Surgical Hosp., LLC)*, 26 F.4th 285, 297 (5th Cir. 2022); *In re Blasingame*, 920 F.3d 384, 389 (6th Cir. 2019); *In re Consol. Indus. Corp.*, 360 F.3d 712, 716 (7th Cir. 2004); *In re Racing Servs., Inc.*, 540 F.3d 892, 898–99 (8th Cir. 2008); *Avalanche Maritime, Ltd. v. Parekh (In re Parmetex, Inc.)*, 199 F.3d 1029, 1031 (9th Cir. 1999).

As recognized by a leading treatise (and the Petition), "'[m]ost courts' have embraced some form of derivative standing." Pet. 9 (quoting Hon. Joan N. Feeney et al., 2 Bankr. L. Manual § 9:2 (5th ed. June 2024)).

B. The Non-Binding Tenth Circuit BAP Decision Neither Creates a Circuit Split Nor Persuades.

The Tenth Circuit BAP decision in *United Phosphorous*—which is not even precedent[4]—does not create a circuit split. *United Phosphorous, Ltd. v. Fox (In re Fox)*, 305 B.R. 912, 914 (B.A.P. 10th Cir. 2004). Nor is it particularly persuasive, as it superficially describes the *Cybergenics Corp.* majority's decision as a "policy" decision at odds with this Court's textual approach in *Hartford Insurance*. *United Phosphorous*, 305 B.R. at 915 ("The decision is largely based upon the majority's reasoning that it is better policy to allow creditors to bring such complaints in order to enhance the value of bankruptcy estates in cases where a trustee or debtor in possession will not act.").

That does not fairly describe the holistic textual analysis undertaken by the seven judges in the *Cybergenics Corp.* majority, who applied the *Hartford Insurance* analytical framework and identified numerous aspects of the surrounding statutory framework that led to a different interpretation of similar language in Section 544(b)(1). *Cybergenics Corp.*, 330 F.3d at 559–66 (evaluating Section 544(b)(1) in context of related Bankruptcy Code provisions 11 U.S.C. §§ 503(b)(3)(B),

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[4] *E.g.*, *In re McGrath*, 621 B.R. 260, 263 (Bankr. D.N.M. 2020) (recognizing that BAP decisions are not accorded precedential weight in the Tenth Circuit); *In re Silverman*, 616 F.3d 1001, 1005 n.1 (9th Cir. 2010) (recognizing that BAP decisions may be persuasive authority).

1103(c)(5), 1109(b)). For instance, Section 503(b)(3)(B) expressly provides for recovery of administrative expenses by "a creditor that recovers, after the court's approval, for the benefit of the estate any property transferred or concealed by the debtor"—a provision that makes no sense if the creditor cannot, subject to bankruptcy court approval, stand in the shoes of the estate to recover "property transferred . . . by the debtor."

From the surrounding statutory provisions, the *Cybergenics Corp.* court concluded:

> the most natural reading of the Code is that Congress recognized and approved of derivative standing for creditors' committees. Sections 1109(b) and 1103(c)(5), taken together, evince a Congressional intent for [creditors] committees to play a robust and flexible role in representing the bankruptcy estate, even in adversarial proceedings.

330 F.3d at 566.

On top of the textual analysis, the *Cybergenics Corp.* majority also relied on, *inter alia*, the different Chapter 11 context, the purpose of the relevant code provisions, the history of derivative standing (in bankruptcy and other contexts) as an equitable procedural remedy, and an undisturbed pre-Code history of courts permitting derivative standing in bankruptcy suits. See *id.* at 559–80.

Considering that the interpretive task is whether to read the statutory text "the trustee may" as: (i) exclusive, *i.e.*, *only the trustee may*, as in *Hartford Insurance*, or (ii) permissive, *i.e.*, *the trustee may, in addition to others having such authority*, the differing statutory contexts bear great weight. As the *Cybergenics Corp.* majority explained, contrary to the "unique role" that

trustees play in Chapter 7 proceedings, "nothing could be further from the truth in Chapter 11, where trustees rarely exist." *Id.* at 560. Thus, a strict application of *Hartford Insurance*, without consideration of the differing statutory contexts, "leads immediately to incoherence." *Ibid.*[5]

The fundamentally different remedy sought in *Hartford Insurance* also merits attention. Whereas the creditors' committee in both *Cybergenics Corp.* and this case (and countless others) seek derivative standing, an equitable remedy, to assert the estate's claims for the benefit of the estate (and eventually the creditors, in order of priority), the administrative claimant in *Hartford Insurance* attempted to bypass statutory priority by asserting a direct claim (its own) under Section 506(c).

Thus, *Hartford Insurance* had no cause to examine either (i) the additional statutory provisions discussed in *Cybergenics Corp.* in the Chapter 11 context; or (ii) the circumstance where a court-approved party asserted derivative standing to bring the *estates*' claims. Understandably, *Hartford Insurance* distinguished the derivative standing issue from its ruling. 530 U.S. at 13 n.5.

To be sure, the four dissenting judges in *Cybergenics Corp.*, and the handful of lower court decisions cited by Petitioners reach different conclusions. But, respectfully, that dissenting viewpoint does not present a circuit split.

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[5] The Petition acknowledges additional textual support for a non-exclusive interpretation of "the trustee may" in the Chapter 11 context: a separate provision authorizes the debtor in possession to exercise the same rights as the trustee, meaning that the debtors could have brought the avoidance actions themselves. Pet. 3 n.1 (citing 11 U.S.C. § 1107(a)).

C. Different Circuit Approaches to Derivative Standing Need Not Be Decided Here, Where Other Proper Parties Stood Ready to Bring the Avoidance Actions (and Ultimately Did Substitute In).

Unable to identify a circuit split on the existence of derivative standing *vel non*, Petitioners seize on the differing approaches to derivative standing among the circuits, ranging from circuits allowing derivative standing by consent of the debtor (like the Ninth Circuit) to those limiting derivative standing to circumstances where the debtor improperly refuses to bring avoidance claims on behalf of the estate (like the Third Circuit). See Pet. 12–13. But this Court need not resolve those differences here, because they were not material below.

At the time Petitioners moved to dismiss the avoidance actions in September 2020, Petitioners knew or should have known that:

> (i) Ninth Circuit precedent permitted derivative standing stipulations for creditors' committees, see, *e.g., Estate of Spirtos v. One San Bernardino Cnty. Superior Ct. Case Numbered SPR 02211*, 443 F.3d 1172, 1176 (9th Cir. 2006);
>
> (ii) Petitioners nevertheless failed to disclose this case law to the Bankruptcy Court and the District Court, Pet. App. 29a (Petitioner "misstated current Ninth Circuit law"), 72a (same);

> (iii) the debtors and the creditors' committee reasonably relied upon Ninth Circuit precedent and the stipulation of derivative standing approved by the Bankruptcy Court on June 3, 2020, that precipitated the June 5, 2020 filing of the adversary proceedings;
>
> (iv) the proposed bankruptcy plan and related disclosure statement, both filed on July 11, 2020, advised all interested parties that the estate's claims (including the adversary proceedings against these two Petitioners) would be transferred to the Liquidating Trust, who would be substituted for the estate in pending litigation, under 11 U.S.C. § 1123(b)(3)(B); and
>
> (v) Petitioners nevertheless did not object to the proposed transfer of claims and substitution of the Liquidating Trust (with Capital Cartridge subsequently accepting the plan).

Importantly, Petitioners never disputed that the debtors stood ready and willing to bring the avoidance actions in the first place if the Bankruptcy Court had denied derivative standing. Cf. Pet. 24 (stressing debtors' ability to bring claims as a purported weakness in allowing derivative standing). Nor can they deny that the substitution of a proper party (the Liquidating Trust) approved via the October 1, 2020 confirmation order, took place within a reasonable amount of time. See Fed. R. Civ. P. 17(a)(3). Thus, Petitioners knew that there was always a proper vehicle for pursuing these avoidance actions in a timely manner, and they suffered no prejudice from

inter-circuit variances concerning the proper derivative standing standard.

Petitioners have exploited these differing approaches to derivative standing in an attempt to manufacture a statute of limitations defense and derail timely adversary actions currently pursued by proper parties. That is not the sort of "circuit split" demanding resolution by this Court.

III. No Federal Issue of Exceptional Importance Demands this Court's Review.

Finally, Petitioners' claims of judicial overreach and an outcome-determinative split of authority are illusory.

First, as detailed above, the purported split of authority as to the existence of derivative standing does not exist, and the various derivative standing standards were not outcome-determinative. Rather, a proper vehicle for pursuing these timely adversary claims always existed, and Petitioners had *advance* notice that a proper party would be substituted for the debtors' estates before they ever objected to the creditors' committee's derivative standing. The substitutions took place within a reasonable amount of time (mere days), and Petitioners do not contest the Liquidating Trust's authority to pursue these avoidance claims under 11 U.S.C. § 1123(b)(3)(B).

Second, Petitioners' assertion of judicial overreach is hyperbole. As noted, there is remarkable uniformity among the circuits in recognizing some form of derivative standing for bankruptcy proceedings. And this is not a new phenomenon. The equitable remedy of granting derivative standing in bankruptcy proceedings dates back more than 100 years. *Cybergenics Corp.*, 330 F.3d at 569–71 (citing first *Chatfield v. O'Dwyer*, 101 F. 797 (8th Cir. 1900), then *In re Stearns*

Salt & Lumber Co., 225 F. 1, 3 (6th Cir. 1915), then *In re Eureka Upholstering Co.*, 48 F.2d 95, 96 (2d Cir. 1931) (Hand, J.)). That is the historical context against which Congress adopted the Bankruptcy Code in 1978. Petitioners' grasping attempt to undo derivative standing—in a case where any deficiency in this regard has long been cured—would be highly disruptive to the bankruptcy process nationwide.

Though good-faith disputes may remain regarding the proper scope of derivative standing, they do not present an issue of exceptional importance demanding Supreme Court oversight here. See Sup. Ct. R. 10.

CONCLUSION

For these reasons, Respondent respectfully submits that the Petition should be DENIED.

Respectfully submitted,

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