No.

IN THE

Supreme Court of the United States

VINCENT CUSANO, p/k/a Vinnie Vincent and d/b/a Streetbeat Music and d/b/a Vinnie Vincent Music,

Petitioner,

v.

GENE KLEIN, PAUL STANLEY nee STANLEY EISEN, THE KISS COMPANY, GENE SIMMONS WORLDWIDE, INC., SIMSTAN MUSIC LTD., KISSTORY LTD., and POLYGRAM RECORDS, INC.,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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Dated: May 22, 2006

QUESTION PRESENTED

Under a Chapter 11 bankruptcy plan of reorganization, properly scheduled assets of the estate that are assigned to the Debtor, and as to which no competing claims by Creditors are accepted or reserved, revert to the Debtor free and clear of claims by Creditors upon confirmation of the plan. 11 U.S.C. § 1141. The question presented by this Petition is:

> Whether the Ninth Circuit committed plain error in reviving and accepting competing claims and defenses by former Creditors that were barred by *res judicata* – in that they could have been, but were not, raised during the bankruptcy proceedings – thereby denying the former Debtor his ownership rights to reverted assets?

PARTIES TO THE PROCEEDINGS BELOW

Plaintiff/Appellant in the courts below was the current Petitioner, Vincent Cusano.

Defendants/Appellees in the courts below were Respondents Gene Klein, Paul Stanley *nee* Stanley Eisen, The KISS Company, Gene Simmons Worldwide, Inc., Simstan Music Ltd., KISStory Ltd., and Polygram Records, Inc.

Horipro Entertainment Group was a defendant at an earlier stage in the case but the claims against Horipro were transferred to New York and Horipro was not a party to the instant appeal that is the subject of this Petition.

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Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

A prior decision of the Ninth Circuit in this case, reversing in part an earlier summary judgment in favor of defendants and providing necessary context as to the reversion to Petitioner of assets from the bankruptcy estate, is reported at 264 F.3d 936 and is reproduced herein as Appendix B (pages B1-B21). The decision of the district court granting summary judgment for defendants on the claims at issue here is re-

ported at 280 F. Supp.2d 1035 and is reproduced herein as Appendix C (pages C1-C14). The decision of the Ninth Circuit affirming the district court is unpublished but available at 153 Fed. Appx. 998, 2005 WL 3046418, and is reproduced herein as Appendix A (pages A1-A3). The Ninth Circuit's denial of rehearing *en banc* is unpublished and is reproduced herein as Appendix D (pages D1-D2).

JURISDICTION

The Ninth Circuit issued its opinion on November 15, 2005 and denied rehearing *en banc* on December 23, 2005. Justice Kennedy granted Petitioner an initial extension of time to file this Petition through April 24, 2006, and a second extension of time through May 22, 2006. This Court has jurisdiction to hear this Petition pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves 11 U.S.C. § 1141, which provides, in relevant part:

> **(a)** Except as provided in subsections (d)(2) and (d)(3) of this section, the provisions of a confirmed plan bind the debtor, any entity issuing securities under the plan, any entity acquiring property under the plan, and any creditor, equity security holder, or general partner in the debtor, whether or not the claim or interest of such creditor, equity security holder, or general partner is impaired under the plan and whether or not such creditor, equity security holder, or general partner has accepted the plan.
>
> **(b)** Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor.
>
> **(c)** Except as provided in subsections (d)(2) and (d)(3) of this section and except as otherwise provided in the plan or in the order confirming the plan, after confirma-

> tion of a plan, the property dealt with by the plan is free and clear of all claims and interests of creditors, equity security holders, and of general partners in the debtor.
> * * *

STATEMENT OF THE CASE[1]

1. Petitioner Vincent Cusano, professionally known as Vinnie Vincent, was the lead guitarist for the rock band KISS from 1982 to 1984. During that time Petitioner co-authored and performed, *inter alia*, eight songs on 1983's "Lick It Up" album (hereinafter the LIU compositions).[2] The Lick It Up Album was a tremendous success for KISS, quickly going platinum and revitalizing the band, whose momentum had stalled by the early 1980s. The album and its songs continue to produce considerable revenues to this day.

Under the Copyright Act, 17 U.S.C. § 201, jointly authored works are co-owned equally by the co-authors, absent an agreement to the contrary. Petitioner's undisputed co-authorship of the LIU compositions thus gave him an undivided 50% ownership interest in the copyrights for those compositions, which includes a right to 50% of any royalties from those compositions. The royalty streams for musical compositions are ordinarily divided equally into so-called "songwriter's" and "publisher's" shares. Petitioner was both a co-author and co-publisher of the LIU compositions. Thus, absent a different agreement, Petitioner was entitled to 25% of the royalties as his songwriter's share and 25% of the

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[1] Unless otherwise noted, the facts are taken from the Ninth Circuit's 2001 decision from a previous appeal in this case, attached as Appendix B, and from the subsequent decisions of the district court and the Ninth Circuit that are the direct objects of this Petition, attached as Appendices C and A, respectively.

[2] While with the band, Petitioner also co-authored and performed three songs on 1982's "Creatures of the Night" album, and, after leaving the band, co-authored another three songs for the KISS album "Revenge." Those songs are not at issue in this Petition.

royalties as his publisher's share, for a total 50% of the royalties commensurate with his 50% copyright ownership.

Beginning in 1982, Petitioner and KISS entered into a series of agreements regarding ownership of copyrights and royalties.[3] As relevant to the LIU compositions, the first applicable agreement is a December 8, 1983 employment agreement (the "1983 Employment Agreement"), which purports to govern Petitioner's and Respondents' rights concerning the LIU compositions. [Appellant's Supplemental Excerpts of Record ("ASE"), Tab 79, at 1533-37.][4] The 1983 Employment Agreement, paragraph 5(a), initially provided that KISS

> shall exclusively own and control one hundred percent (100%) of all right, title and interest, including the copyrights, all rights under such copyrights and all rights to the so-called "publisher's share" of income [from the LIU compositions]. All of the types of rights described in the preceding sentence are sometimes hereinafter referred to as the "Publishing Rights" * * *. You shall be entitled to your so-called "songwriter's share" of income derived from the [LIU compositions].

1983 Employment Agreement ¶ 5(a). [ASE Tab 79, at 1534.] That transfer of rights, however, was expressly conditioned

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[3] Over the course of this litigation there have been disputes as to precisely what agreements were actually executed. Respondents and the courts below have treated all of the relevant agreements as being validly executed. Without taking a position on such prior matters, this Petition will assume that each of the agreements was properly executed and binding, as such matters are not relevant to the issue presented herein.

[4] The record excerpts in the court of appeals had a number of volumes and supplements. The initial Appelant's Excerpts of Record will be abbreviated "AE." Appellant's Supplemental Excerpts of Record will be abbreviated "ASE." Appellees' Supplemental Excerpts of Record, in contrast, will be the less-abbreviated "Appellees' SE." All specific references will be to the Tab number of the section and bates number of the page of the relevant set of excerpts.

upon the timely payment, by a date certain, of the $50,000 purchase price, as provided in paragraph 5(b) of the agreement:

> Notwithstanding the foregoing [paragraph 5(a)], within twelve (12) months after the initial commercial release of the Current LP in the United States, * * * we must elect to either [reassign your rights to the LIU compositions or pay you $50,000]. In the event we make such [$50,000] payment to you prior to the expiration of such twelve (12) month period, we shall retain the Publishing Rights in your Lick It Up Compositions, in perpetuity. In the event we elect not to make such payment *or otherwise fail to make such payment prior to the expiration of such twelve (12) month period*, then the Publishing Rights in your Lick It Up Compositions shall be deemed to have been *automatically reassigned to you, ab initio* (i.e., just as if such Publishing Rights had, from creation of your Lick It Up Compositions, remained with you and subparagraph 5(a) had never been in effect) * * *. *In such latter event, you shall be entitled to receive all income attributable to the so-called "publisher's share" of your Lick It Up Compositions, whenever earned*, and we and you shall promptly enter into a co-publishing agreement [regarding the LIU compositions in the same form as a previous such agreement regarding a prior album] and * * * *we shall immediately pay over to you [your share of any] income theretofore received* and/or credited to us [for the LIU compositions] * * *.

Id. ¶ 5(b) (emphasis added). [ASE Tab 79, at 1535.]

Finally, the agreement incorporated such parts of an earlier employment agreement as were not inconsistent with the new agreement, including provisions providing a two-year period to object to royalty statements and rights to audit KISS's books and records in connection with royalty statements or payments. *Id*. ¶ 5(a). [ASE Tab 79, at 1534.]

In 1984 the parties entered into a Settlement Agreement to resolve various disputes that arose in connection with the 1983 Employment Agreement. The Settlement Agreement reaffirmed the relevant elements of the 1983 Employment Agreement, stated KISS's intent to exercise the purchase option contained in ¶ 5(b) of the Employment Agreement, and amended the required payment date for that option to September 19, 1984. [ASE Tab 79, at 1582-84.]

Despite Respondents' *intent* to exercise their purchase option for all the LIU composition rights other than Petitioner's 25% songwriter's share of royalties, Petitioner has consistently maintained that Respondents failed *in fact* to exercise that purchase option when they "otherwise fail[ed] to make such payment prior to" September 19, 1984. 1983 Employment Agreement ¶ 5(b) [ASE Tab 79, at 1535]; Complaint ¶¶ 51-53 [AE Tab 1, at 16-17].[5] Respondents thus forfeited their rights under ¶ 5(a) of the Employment Agreement and Petitioner's *full* 50% ownership rights (including copyright ownership and rights to his additional 25% publisher's share of royalties) thus automatically reverted to him on that date as if ¶ 5(a) "had never been in effect." 1983 Employment Agreement ¶ 5(b). [ASE Tab 79, at 1535.] Furthermore, because both parties failed thereafter to execute a co-publishing agreement, as they agreed to do in

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[5] While there seems to be no dispute that the required payment was not received in the time specified in the Settlement Agreement, Respondents may well have a different view of the consequences of a subsequent late payment by them. For the purposes of this Petition, however, it is immaterial whether the late payment was effective in retroactively exercising the purchase option, despite the lack of provision for curing a default in such exercise, or instead became a credit for royalties "immediately" due under ¶ 5(b) of the Employment Agreement. What *is* material to this Petition is that, after September 19, 1984, at worst Petitioner and Respondents had competing and inconsistent claims to ownership of the copyright and royalty interests of the LIU compositions. Petitioner, at a minimum, thus had a colorable claim to full ownership of his 50% co-author rights in the copyrights and the royalties for the LIU compositions.

¶ 5(b), no contract at all governed the LIU compositions, and the parties simply possessed the ordinary rights and reciprocal duties of co-authors under the Copyright Act.

2. In 1989 Petitioner declared Chapter 11 bankruptcy. Respondents Klein and Stanley, care of the KISS Company, were listed as creditors. In his schedule of assets, under the heading "Patents, copyrights, licenses, franchises, and other general intangibles," Petitioner included "songrights in * * * Songs written while in the band known as 'KISS.'" Respondents did not challenge that listing, did not assert any competing or conflicting interests in the asset, and ultimately raised no objection whatsoever to the "songrights" asset being included in the estate.

As part of the plan for reorganization, the songrights asset was specifically assigned back to Petitioner. The plan provided that, "[o]n confirmation, all assets of the Debtor's bankruptcy estate shall vest in Debtor," subject only to certain security interests for "Allowed" claims not relevant here. Confirmation Plan, Article 4.1(d). [ASE Tab 76, at 1497] The Plan further provided that "[a]ll executory contracts or unexpired leases of the Debtor which have not been specifically assumed by the Debtor as authorized by order of the bankruptcy Court * * * will be deemed rejected" and "Debtor is then released from all further liability and obligations" under such contracts. Article 5.1(a). [ASE Tab 76, at 1497-98] The reorganization plan did not make the songrights asset subject to any competing claims or limit it in any way by any purported rights of Respondents, and the plan did not make the rights subject to any prior agreements.

On September 17, 1990, the plan of reorganization was confirmed. The plan thus became final and binding on the Debtor and each Creditor, including Respondents, pursuant to 11 U.S.C. § 1141(a) (set forth *supra*, at 2). Petitioner thereafter emerged from bankruptcy with ownership of his songrights asset "free and clear of all claims and interests of

creditors," *id*. § 1141(c), including any claims or interests of Respondents here.

3. In July 1997, Petitioner filed suit against Respondents, seeking, *inter alia*, to recover royalties due him from the LIU compositions. Complaint. [AE Tab 1.][6] The Complaint alleged, *inter alia*, that KISS failed to make timely payment under the purchase option for the LIU compositions, that Petitioner's 50% copyright ownership and royalty rights thereby automatically reverted to him on September 19, 1984, and that a subsequent late attempt at payment represented royalties immediately due to Petitioner on account of that reverted ownership. Complaint ¶¶ 51-53. [AE Tab 1, at 16-17.] The Complaint further alleged that, following the reversion of rights in the LIU compositions, Respondents underpaid Petitioner his songwriter's share of royalties and failed to pay his reverted publisher's share of royalties at all. Complaint ¶¶ 54-55. [AE Tab 1, at 17.] Based on those and other facts, the Complaint raised a variety of claims relevant to the LIU compositions, including claims for an open book account for songwriter/publisher royalties, breach of fiduciary duty, fraud and deceit, misrepresentation, conversion, and imposition of a constructive trust. Complaint ¶¶ 180-263, 293-313, [AE Tab 1, at 37-48, 52-54.]

4. In December 1997, the district court dismissed without prejudice Petitioner's claims for royalties and other damages related to the LIU compositions and that were owed or incurred *prior* to March 21, 1989, the date Petitioner filed for bankruptcy. Pet. App. B5-B6 (Ninth Circuit description of procedural history).[7] The court held that such claims were not properly listed in the bankruptcy schedule of assets and that the "songrights" asset Petitioner did schedule was

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[6] The Complaint raised a variety of other claims and involved various songs from other albums as well. For the purposes of this Petition, however, only the claims relating to the LIU compositions are relevant.

[7] Those claims for pre-bankruptcy royalties are not at issue in this Petition.

undervalued. The court concluded that such claims and assets "would appear to belong to the estate," and hence could not be pursued by Petitioner without permission from the bankruptcy court. Pet. App. B6.

In February 1999, the district court dismissed *all* claims arising from pre-petition compositions, including the LIU compositions at issue here. Pet. App. B6. The district court held that because Petitioner's songrights asset remained the property of the bankruptcy estate, Petitioner lacked standing to assert claims based on such rights, including all claims for unpaid royalties, *accruing either pre- or post-petition*, from his pre-petition LIU compositions.

In December 1998, however, in an attempt to comply with the district court's initial suggestion that Petitioner seek permission from the bankruptcy court to pursue his claims, Petitioner filed a motion to reopen the bankruptcy proceedings. In opposing Petitioner's motion, Respondents conceded that, at the time Petitioner filed for bankruptcy in 1989, he "had a partial copyright ownership in certain musical compositions co-authored by [Petitioner] and recorded by KISS," specifically including the LIU compositions, and that at the time he filed for bankruptcy "he was aware" (as, presumably, were Respondents) "of his partial copyright ownership interest in the Pre-Bankruptcy Compositions." [ASE Tab 114, at 2029-30, 2045-46.] They offered a variety of reasons for not reopening the proceeding, however, including their inability to contest ownership of the songrights assets given the passage of time, the fading of witness memories, and the loss of documents. [ASE Tab 114, at 2043, 2051.]

In April 1999, the bankruptcy court denied Petitioner's motion to reopen, finding that because the estate was closed and the reorganization plan "fully consummated in 1993," it had no authority to allow Petitioner to amend the plan. Pet. App. B8.

In May 1999, the district court entered final judgment incorporating all of its prior dismissals and grants of summary judgment, noting that the bankruptcy court had refused to reopen Petitioner's bankruptcy. Pet. App. B8.

5. On appeal, the Ninth Circuit partially reversed the district court and reinstated Petitioner's claims as to the LIU compositions. The court started with the propositions that for Petitioner "to have standing, he, rather than the bankruptcy estate, must own the claim upon which he is suing," and that the "question of ownership turns on the validity and effect of Cusano's listing of his 'songrights' as an asset in his bankruptcy schedules." Pet. App. B9. The songrights asset was described in the bankruptcy schedule as "songrights in * * * Songs written while in the band known as 'KISS,'" a description the district court had found inadequate. The Ninth Circuit disagreed and found that description to be sufficient to put Creditors on notice:

> The "songrights" asset as described by Cusano can reasonably be interpreted to mean *copyrights and rights to royalty payments* for songs written for the band KISS pre-petition. * * * Although it would have been more helpful for Cusano to break down the description further * * *, the additional detail would not have revealed anything that was otherwise concealed by the description as it was, which provided inquiry notice to affected parties to seek further detail if they required it.

Pet. App. B12 (emphasis added).[8] The Ninth Circuit also rejected the claim that Petitioner's undervaluation of the

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[8] The relevance of such notice in the bankruptcy context, of course, is to provide Creditors an opportunity to challenge the ownership or valuation of scheduled assets or to assert competing claims to the assets prior to the bar date after which such challenges and claims will be lost. The effect of a proper listing of assets and subsequent confirmation of a plan providing for the reversion of such assets is to vest those assets in the Debtor and to bar, by *res judicata*, any competing claims by Creditors that were or could have been raised against those assets. 11 U.S.C. § 1141.

songrights provided an excuse for impairing his interest in them, absent an order of revocation after reopening the bankruptcy proceedings. *Id*.

The Ninth Circuit concluded "that Cusano sufficiently scheduled his 'songrights,'" Pet. App. B15, which, following confirmation of the reorganization plan, "vested in Cusano the rights to post-petition royalties on his pre-petition compositions and other damages accruing post-petition with respect to these pre-petition compositions," Pet. App. B13. As with the confirmation of the plan itself, the previous panel of the court of appeals never suggested that Petitioner's songrights were in any way subject to or limited by pre-petition claims or interests. Rather, the court held that because "[a]ll post-petition songright royalties are Cusano's property," he "retains standing to sue for any royalty payments coming due post-petition." Pet. App. B15-B16. The court therefore "reverse[d] the summary judgment in part and reinstate[d] Cusano's claims 1 through 5 for open book account, breach of fiduciary duty, fraud, and misrepresentation; and claims 9 and 10 for conversion and imposition of constructive trust, to the extent they seek post-petition royalties relating to pre-petition compositions, or other damages that arose post-petition." Pet. App. B15-B16.

6. On remand, despite what should have been a simple accounting of Petitioner's full post-petition royalty payments, including his concededly unpaid publisher's share, the district court once again granted summary judgment to Respondents. Ignoring the reversion of assets to Petitioner and the finality of the bankruptcy confirmation order as to competing claims on such assets, the district court instead revived the 1983 Employment Agreement as a limitation and encumbrance upon Petitioner's reverted songrights asset. Based on ¶ 5(a) of the 1983 Employment Agreement, and ignoring the failed (or at least disputed) exercise of KISS's purchase option under ¶ 5(b), the court held: that New York law governed Petitioner's claims for royalties, per a choice of law clause in

the Employment Agreement; that there was no mutual and open account between the parties under New York law; that a two-year limitation contained in the 1983 Employment Agreement barred any challenges to most past royalty statements; and that Petitioner had failed to establish damages in that there was no evidence that Respondents had not paid Petitioner his *songwriter's share* of royalties in accordance with the 1983 Employment Agreement.

As to Petitioner's conversion claim, the court held, contrary to the previous Ninth Circuit decision, that Petitioner did not *own* the copyrights or royalties and hence could not state a claim for conversion, as opposed to a simple breach of contract for the payment of royalties. Finally, on the various claims of fraud, constructive trust, and misrepresentation, the court held that because Respondents' obligations to Petitioner were defined by the pre-bankruptcy Employment Agreement they had only contractual, and not fiduciary, duties to Petitioner, and hence those claims, which depended on a fiduciary relationship, failed.

What each of those holdings had in common was the assumption that the 1983 Employment Agreement, and in particular ¶ 5(a) of that Agreement, defined and controlled the rights between the parties as to the LIU compositions, and that Petitioner had no more than a contractual right to his 25% songwriter's share of royalties, rather than his 50% copyright ownership of the LIU compositions under the Copyright Act, entitling him to 50% of the total royalties (a 25% songwriter's share *and* a 25% publisher's share).

7. Petitioner appealed to the Ninth Circuit, arguing, *inter alia*, that he owned his full 50% interest in the LIU compositions, that the bankruptcy and the previous Ninth Circuit decision confirmed his ownership as against any competing claims by Respondents, who were Creditors in that bankruptcy, and that the 1983 Employment Agreement therefore did not limit his rights. *See* Brief of Appellant, Feb. 27, 2004, at 6, 11-12, 15, 30; Reply Brief of Appellant, June

7, 2004, at 1-9, 15-16; Supplemental Brief for Plaintiff-Appellant, Apr. 6, 2005, at 2-3, 4, 6-7, 8-14, 22, 32, 41-42; Supplemental Reply Brief for Plaintiff-Appellant, June 1, 2005, at 1-7, 9-10.[9]

The Ninth Circuit affirmed in a brief unpublished opinion. Pet. App. A. Regarding the effect of the bankruptcy confirmation on Petitioner's ownership of his songrights in the LIU compositions, the court held that Petitioner "misreads our opinion in *Cusano* v. *Klein,* 264 F.3d 936 (9th Cir. 2001) (*"Cusano I"*), which held only that Cusano had standing to raise some of his claims. *Id.* at 945." Pet. App. A2. The court asserted, without analysis, that "*Cusano I* did not rule in favor of Cusano on the merits of any of his claims to royalty rights or copyrights, and did not invalidate any of the agreements between the parties." *Id*. The court then affirmed the district court's holdings as to Petitioner's claims concerning the LIU compositions, stating that the "district court was correct in applying the law of New York to Cusano's claim for an open book account," that such claim failed under New York law, and that Petitioner did not establish damages for his claims because he "had to produce evidence demonstrating inaccuracies in the accounting" but "'utterly failed' to carry this burden." Pet. App. A1-A2. The court thereafter claimed that the entire appeal was frivolous, and granted costs and attorney's fees. Pet. App. A2-A3.

8. On December 23, 2005, the Ninth Circuit denied rehearing and rehearing *en banc*. Pet. App. D. This petition for certiorari followed.

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[9] Petitioner also again noted that because KISS failed to make timely payment under the purchase option, his full 50% ownership rights automatically reverted to him in 1984, and hence the contract provisions relied upon by Respondents were of no effect in any event. *See, e.g.*, Supplemental Brief for Plaintiff-Appellant, Apr. 6, 2005, at 6. Any dispute over whether the purchase option was effectively exercised is precisely the type of claim that KISS was obliged to raise in the bankruptcy proceedings. No such claim was raised.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted because the decision below, in allowing the revival of claims by former Creditors to encumber assets that reverted to a Debtor, ignores the clear *res judicata* effects of bankruptcy proceedings and thus erroneously resolves a matter "of importance in the administration of the Bankruptcy" laws. *New York* v. *Sapper*, 336 U.S. 328, 328 (1949) (explaining a reason why certiorari was granted). Central to bankruptcy law's fundamental policy of providing Debtors a fresh start are the finality and asset-reversion provisions of 11 U.S.C. § 1141 for Chapter 11 reorganizations. Those provisions bar any future claims by Creditors that were not accepted in the bankruptcy proceedings, and ensure the reorganized Debtor possession of any remaining estate assets "free and clear" of claims by Creditors.

The fundamental and plain error of the decision below is its holding, contrary to bedrock bankruptcy law, that Petitioner's "songrights" asset regarding the LIU compositions was impaired and limited by Respondents' unreserved claims on that asset under the pre-bankruptcy 1983 Employment Agreement. But, as of the purchase-option payment date of September 19, 1984, there was at worst a *dispute* concerning Respondents' rights under that Employment Agreement, and at best an unequivocal re-vesting of all relevant songrights in Petitioner. *See supra* at 6-7. By the time of Petitioner's bankruptcy in 1989, therefore, Respondents had, at most, a *disputed claim* to Petitioner's copyrights and publisher's share of royalties, and such a disputed claim is *precisely* the type of claim or objection that Respondents were obliged to raise in the bankruptcy proceedings. Having failed to assert that existing claim in the bankruptcy proceedings, Respondents were forever barred by *res judicata* from challenging the reversion of those assets, "free and clear," 11 U.S.C. § 1141(c), to Petitioner upon confirmation of the plan of reorganization.

While the current Petition does not involve a "split" as do many of this Court's cases, it does involve a ruling that is so clearly erroneous and unsupported that the Ninth Circuit may fairly be said to have "so far departed from the accepted and usual course of judicial proceedings * * * as to call for an exercise of this Court's power of supervision." SUP. CT. R. 10.1(a). The lack of a split in this case simply reflects that the decision below is *so far in error* that not a single other decision anywhere, including in the Ninth Circuit, can be found to support it, and every relevant precedent requires an opposite result. Alternatively, rather than spend the time to review this matter on full briefing, this Court should summarily reverse such plain error. SUP. CT. R. 16.1. Such a procedure is used regularly, though admittedly not frequently, to correct plain error in the courts of appeals and in the Ninth Circuit in particular.

I. THE DECISION BELOW FLAGRANTLY IGNORES CLEAR BANKRUPTCY LAW REGARDING OWNERSHIP OF ASSETS THAT HAVE REVERTED TO A DEBTOR AND THE *RES JUDICATA* BAR TO COMPETING CLAIMS ON THOSE ASSETS BY CREDITORS.

It is black-letter bankruptcy law that, for Creditors with proper notice, claims against the assets of an estate must be raised and accepted in the bankruptcy proceedings or be forever lost. *See* 11 U.S.C. § 1141(a) (confirmed plan binds Creditors). A confirmed reorganization plan constitutes a final judgment that is *res judicata* as to any claims that were *or could have been* raised in the bankruptcy proceedings. *See, e.g.*, *In re PWS Holding Corp.*, 303 F.3d 308, 315-16 (CA3 2002) (Creditor with "opportunity to contest" Chapter 11 plan barred by confirmed plan from pursuing claims extinguished by plan; liable for costs associated with enforcing confirmation order against him), *cert. denied*, 538 U.S. 924 (2003); *Sure-Snap Corp.* v. *State Street Bank and Tr. Co.*, 948 F.2d 869, 873, 877 (CA2 1991) (citing 11 U.S.C. § 1141(a), noting

recognition by numerous courts of the "applicability of the time-honored principle of *res judicata* to confirmed, final bankruptcy hearings," and finding that prior bankruptcy order was a bar to claims "that could have been brought * * * but weren't" in the bankruptcy proceedings); *In re Chattanooga Wholesale Antiques, Inc.*, 930 F.2d 458, 463 (CA6 1991) (confirmation of plan of reorganization has "the effect of a judgment" and "res judicata principles bar relitigation of any issues raised or that could have been raised in the confirmation proceedings"); *Matter of Howe*, 913 F.2d 1138, 1143 (CA5 1990) (well-settled law that a Chapter 11 "plan is binding upon all parties once it is confirmed and all questions that could have been raised *pertaining to such plan* are res judicata") (emphasis in original); *cf. Stoll* v. *Gottlieb*, 305 U.S. 165, 170-71 (1938) (holding, regarding earlier analogous bankruptcy provisions, that "effect as *res judicata* is to be given" to an "adjudication under the reorganization provisions of the Bankruptcy Act"); *Duplessis* v. *Valenti (In re Valenti)*, 310 B.R. 138, 150 (CA9 BAP 2004) ("strong policy of finality" in analogous Chapter 13 context is the basis for "applying *res judicata* to confirmation orders").[10]

It is beyond dispute that Respondents, as Creditors in the bankruptcy proceedings, received proper notice of Petitioner's scheduling and asserted ownership, in a section specifically relating to "copyrights," of "songrights in * * * Songs written while in the band known as 'KISS.'" *See* App. B11. The 2001 Ninth Circuit decision in this case squarely

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[10] *See also In re Circle K Corp.*, 198 B.R. 784, 789 (Bankr. D. Ariz. 1996) ("Like final judgments, confirmed plans of reorganization are binding on all parties. Issues that could have been raised concerning the plan are barred by res judicata."); *In re Berryman Products, Inc.*, 183 B.R. 463, 467 (N.D. Tex. 1995) (for confirmed Chapter 11 plan, "all questions that could have been raised are foreclosed by *res judicata*"), *aff'd*, 91 F.3d 140 (CA5 1996); *In re Grimm*, 168 B.R. 102, 110 (Bankr. E.D. Va. 1994) (Chapter 11 plan confirmation is "'final judgment on the merits' for purposes of res judicata").

held that the songrights asset was adequately listed, encompassed Petitioner's unqualified interests in "copyrights and rights to royalty payments" for the LIU compositions, and Creditors were on notice and had an opportunity to investigate any claims they might have had concerning such assets. Pet. App. B12; *see also Maryland* v. *Antonelli Creditors' Liquidating Tr.*, 123 F.3d 777, 783 (CA4 1997) (bankruptcy orders binding on Creditors who received notice and opportunity to present their objections).

There likewise is no dispute that Respondents failed to challenge those assets or, indeed, to file any claims whatsoever in the bankruptcy proceedings. They never asserted ownership of Petitioner's copyrights or rights to his publisher's share of royalties from the LIU compositions, and they never raised or sought to preserve any contractual claims that would limit or encumber Petitioner's rights regarding the LIU compositions. Rather, Respondents approved the plan of reorganization without objection or reservation of any rights whatsoever.[11]

Given the lack of competing claims or reservations of rights, bankruptcy law is clear as a bell – the songrights assets

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[11] That is hardly surprising given that any competing rights or interests Respondents may have had in the LIU compositions lapsed in 1984, when Respondents failed to make timely payment to exercise their purchase option for the rights to the LIU compositions. *See supra* at 6-7. Indeed, even years later, Respondents admitted in their brief and affidavit to the bankruptcy court that Petitioner "had a partial copyright ownership" in the relevant copyrights and songrights going into bankruptcy. *See supra*, at 9. [ASE Tab 114, at 2029-30, 2045-46.] Such concession – a judicial admission that should bind Respondents, *cf. United States* v. *Bentson*, 947 F.2d 1353, 1356 (CA9 1991) (admission during oral argument), *cert. denied*, 504 U.S. 958 (1992) – is wholly at odds with any continued rights under ¶ 5(a) of the 1983 Employment Agreement that, if applicable, purports to give Respondents 100% copyright ownership. And it is likewise fatal to the conclusions below that Petitioner does not "own" the LIU copyrights and royalties due him, but merely has a *contractual* right to such royalties under the 1983 Employment Agreement. Pet. App. C11-C12.

reverted to Petitioner "free and clear" of competing claims by Creditors. 11 U.S.C. § 1141(c); *In re Regional Bldg. Systems, Inc.*, 254 F.3d 528, 531 (CA4 2001) (confirmation of Chapter 11 plan rendered property dealt with by plan "'free and clear of all claims' not expressly preserved").[12]

Absent any competing claim or agreement, the Copyright Act entitles Petitioner to an equal interest (50%) in the copyrights and associated royalty rights to the LIU compositions he co-authored, with each co-owner subject to an accounting for any profits to the other co-owner. *See Erickson* v. *Trinity Theatre, Inc.*, 13 F.3d 1061, 1068 (CA7 1994) ("In a joint work, the joint authors hold undivided interests in a work * * *. 17 U.S.C. § 201. Each author as co-owner has the right to use or to license the use of the work, subject to an accounting to the other co-owners for any profits.") (citing *Childress* v. *Taylor,* 945 F.2d 500, 505 (CA2 1991); *Weinstein* v. *University of Illinois,* 811 F.2d 1091, 1095 (CA7 1987); 1 NIMMER ON COPYRIGHT, § 6.02, at 6-7 to 6-8.).

Based on Petitioner's unadulterated rights under the Copyright Act, he was clearly entitled to bring his claims for royalties, conversion, and various flavors of fraud given that he *owned* his full 50% share of the copyrights and the royalties for the LIU compositions. And once Petitioner's full 50% ownership interest in the copyrights and the royalty stream (25% songwriter's share *and* 25% publisher's share) are established, the *merits* of his claims are a foregone con-

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[12] *In re Cumberland Farms, Inc.*, 162 B.R. 62, 69 (Bankr. D. Mass. 1993) (Chapter 11 plan confirmation vests all property of estate in reorganized debtor unless otherwise provided in plan); *In re Chisolm*, 156 B.R. 336, 338 (Bankr. M.D. Fla. 1993) ("right of the Debtors to deal with the revested assets is circumscribed only by the terms of the confirmed Plan"); *United States* v. *Redmond*, 36 B.R. 932, 934 (D. Kan. 1984) (unless plan provides otherwise, "confirmation vests all of the property of the estate in the debtor and releases it from all claims and interests of creditors") (citing 11 U.S.C. § 1141(b) & (c)).

clusion given that Respondents *concede* they never paid Petitioner his 25% publisher's share of the LIU royalties.

The arguments relied upon below in rejecting Petitioner's claims on the merits *all* assume that the pre-bankruptcy 1983 Employment Agreement continues to encumber and limit Petitioner's rights regarding the LIU compositions and give Respondents superior rights and interests in the LIU copyrights and royalties. But Respondents' claimed interests based on the 1983 Employment Agreement were not asserted, much less accepted, in the bankruptcy proceeding thus are barred by *res judicata*. *See supra*, at 15-16; *cf*. Pet. App. B14-B15 ("The only res judicata effect of [the bankruptcy court's denial of the motion to reopen the proceedings] is that the consequences of the prior closing will not be disturbed").[13] Reviving those claims now to block Petitioner's ownership of his reverted assets severely undermines the strong policy of finality that underlies the Bankruptcy Act. *Thomas* v. *RTC (In re Thomas)*, 184 B.R. 237, 240 (Bankr. M.D.N.C. 1995) (confirmation order and discharge are "critical elements of the fresh start that is afforded to debtors in the Bankruptcy Code," and it is essential that Debtors be allowed the benefit of rights and protections provided by plan); *see also Local Loan Co.* v. *Hunt*, 292 U.S. 234, 244 (1934) (one of primary purposes of Bankruptcy Act is to permit Debtor "'to start afresh free from the obligations and responsibilities consequent upon business misfortunes'") (citation omitted).

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[13] Insofar as the 1983 Employment Agreement was an executory contract in 1989, it was further barred by Article 5.1(a) of the confirmed reorganization plan, which rejects all executory contracts that "have not been specifically assumed by the Debtor as authorized by order of the Bankruptcy Court." [ASE Tab 76, at 1497-98.] At a minimum, the mutual, yet unperformed, agreement in ¶ 5(b) of the 1983 Employment Agreement to enter into a further co-publishing agreement in the event the purchase option failed is plainly an executory agreement and hence there is *no agreement at all* governing the joint-authorship rights of the parties in that situation. The rights of the parties are thus governed by the Copyright Act alone.

Notwithstanding the preclusive effect of the bankruptcy in barring Respondents' competing claims to Petitioner's songrights in the LIU compositions, both the district court and Ninth Circuit erroneously revived Respondent's competing claims based on the pre-bankruptcy Employment Agreement in order to deny Petitioner his rights in his reverted songrights asset.

The only argument by the Ninth Circuit that even remotely touches upon the effect of the prior bankruptcy proceedings is the claim that Petitioner "misreads" the standing holding in *Cusano I*, which, according to the court of appeals, "did not rule in favor of Cusano on the merits of any of his claims to royalty rights or copyrights, and did not invalidate any of the agreements between the parties." Pet. App. A2.

But it is the court below that misunderstands the inevitable consequences of its earlier holding that Petitioner had standing because ownership of the songrights asset reverted to Petitioner upon confirmation of his Chapter 11 plan. That holding, admittedly made for purposes of standing, *necessarily* determined the central question concerning the scope and ownership of the songrights and *necessarily* triggered the inevitable bankruptcy-law consequences of the reversion of assets "free and clear" and the *res judicata* bar to competing claims. The proper scheduling of assets is the threshold event for such consequences, which follow as surely and certainly as night follows day. Regardless whether the prior Ninth Circuit panel expressly discussed those consequences, neither that panel nor the subsequent panel could avoid them.

Because the listing was sufficient to include both copyrights and rights to royalties, it imposed upon Respondents the obligation to raise or else forfeit any competing claims to those assets. Having failed to do so, Respondents could no longer raise disputed claims to those assets pursuant to a prior contract. The bankruptcy confirmation thus most certainly *did* "invalidate" ¶ 5(a) of the 1983 Employment Agreement

(assuming it even applied at all) insofar as claims based on that Agreement were barred by *res judicata*.

Each of the Ninth Circuit's grounds for rejecting Petitioner's claims regarding the LIU compositions thus improperly relies upon Respondents' competing pre-bankruptcy contractual claims that could have been, but were not, raised in the bankruptcy proceedings.

For example, the holding below that Petitioner failed to establish inaccuracies in the payment of royalties, and hence could not prove damages, Pet. App. A2, *assumes* that Petitioner's right to royalties is limited to a 25% "songwriter's share" under the 1983 Employment Agreement. But Petitioner's songrights are not so limited, and include an additional 25% publisher's share and an undivided 50% copyright ownership. A correct recognition of the *scope* of Petitioner's songrights thus establishes damages on its face. Respondents have never contended that they paid Petitioner his additional 25% publisher's share of royalties, and have only maintained that they properly accounted for the 25% songwriter's share. Even assuming the accuracy of their accounting, damages are still self-evident – Petitioner has, at a minimum, been denied the additional 25% publisher's share of royalties, and Respondents do not contend otherwise.[14] While they dispute any *obligation* to pay such royalties, they certainly do not dispute that *they have not paid* such additional royalties. The central question, therefore, is whether Petitioner is entitled to *only* a 25% songwriter's share under ¶ 5(a) of the 1983 Employment Agreement, or instead to 50% of total royalties

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[14] Furthermore, there was ample evidence in the Ninth Circuit that Respondents underpaid Petitioner even on the 25% songwriter's share of royalties that they concede they must pay. *See* Appellant's Motion For Judicial Notice and for Supplementation of Record, June 9, 2005, at 4-5 & Exh. B (providing newly received royalty statements from Respondent Polygram showing that as of 2005 Petitioner was still owed songwriter royalties on the LIU compositions dating back to 1989) (motion to supplement record granted by order dated Nov. 15, 2005).

based on his 50% copyright ownership entitling him to *both* his 25% songwriter's share *and* his 25% publisher's share. That question is answered definitively by the reversion of his songrights asset, free and clear, and the *res judicata* bar to competing claims against that asset. Those rights are not a function of any prior contracts, but rather of his joint ownership of the copyrights for the co-authored LIU compositions and the rights that inhere in such ownership pursuant to the Copyright Act. Had the court of appeals properly recognized such ownership, it would have been apparent and undisputed that Petitioner had been underpaid his royalties. Damages thus would not merely have been proven, they effectively would have been conceded.

The proper resolution of the bankruptcy issue likewise resolves the district court's rejection of the various claims alleging fraud and conversion. The district court disposed of numerous claims by holding that Respondents did not owe petitioner any fiduciary duties, but rather only contractual duties, the breach of which would not support claims for fraud. *See* Pet. App. C6-C11. (The Ninth Circuit affirmed the decision of the district court without commenting on that aspect of the decision.) Of course, in the absence of the 1983 Employment Agreement – hotly disputed in connection with the failed purchase option and barred by *res judicata* in any event – the only relationship between the parties is that of joint, undivided owners of the LIU copyrights, with a fiduciary duty to account to each other for any profits earned therefrom. Similarly, the district court's rejection of Petitioner's conversion claim on the basis that he "cannot establish * * * ownership," but merely a contractual right to royalties, Pet. App. C11-C12, fails for the same reason, and flatly contradicts the holding in the Ninth Circuit's prior decision in any event. *See* Pet. App. B15 ("[a]ll post-petition songright royalties are Cusano's property").

The plain error below deprived Petitioner of the very assets that the plan of reorganization assigned to him free and

clear, and thus severely undermined the plan itself and the bankruptcy laws governing such reorganizations. And the Ninth Circuit did so without even a pretense of reconciling its decision with the clear law governing bankruptcy plans. Given Respondents' failure to preserve their competing claims and objections during the bankruptcy proceedings, there is simply no legal means for them to raise such claims now, and the Ninth Circuit committed plain error in relying upon those competing contractual claims to deny Petitioner recovery on his reverted songrights asset.

II. THIS COURT SHOULD EXERCISE ITS SUPERVISORY AUTHORITY TO EITHER TAKE THIS CASE FOR FULL REVIEW OR SUMMARILY REVERSE THE DECISION OF THE NINTH CIRCUIT.

Petitioner recognizes that this case, involving unpublished plain error arising from the non-application of otherwise clear law, is not a typical candidate for full review by this Court. But the absence in this Petition of the more usual circuit "split" does *not* mean the Petition should simply be ignored. Rather, this Court should consider the Petition in light of its other less frequent but consistent bases for granting certiorari.

For example, this Court has granted certiorari in cases of importance to the administration of bankruptcy law or other significant federal statutes, even in the apparent absence of any split. *See Callaway* v. *Benton*, 336 U.S. 132, 136 (1949) (granting cert. in part because of the "importance of the question in the administration of the Bankruptcy Act"); *Maggio* v. *Zeitz*, 333 U.S. 56, 59 (1948) (this Court taking case "in view of its supervisory authority over courts of bankruptcy" and because procedures at issue were important to successful bankruptcy administration); *see also United States* v. *Ruzicka*, 329 U.S. 287, 288 (1946) (cert. granted because case "raises questions of importance in the administration of" a large federal statute). Indeed, this Court has a history of granting even highly fact-bound cases where review was important to pre-

serving statutory rights from being undermined by the lower courts. *Wilkerson* v. *McCarthy*, 336 U.S. 53, 55 (1949) (granting cert. in an otherwise fact-bound case "because of the importance of preserving" statutory right to a jury trial under FELA).

This Court likewise occasionally grants petitions seemingly based solely on the error of the decision below, in the exercise of its supervisory function over the lower courts. *See Florida* v. *Rodriguez*, 469 U.S. 1, 7 (1984) (Stevens, J., dissenting) ("As the Court of last resort in the federal system, we have supervisory authority and therefore must occasionally perform a pure error-correcting function in federal litigation."); *United States* v. *Hale*, 422 U.S. 171, 181 (1975) (undertaking highly fact-bound review and concluding, "in the exercise of our supervisory authority over the lower federal courts, that [defendant] is entitled to a new trial"); *City of Memphis* v. *Greene*, 451 U.S. 100, 102 (1981) (resolving highly fact-bound case on grounds that "record does not support" the decision below); *Montana* v. *Kennedy*, 366 U.S. 308, 309 (1961) (granting cert. "in view of the apparent harshness of the result" below); *Southern Constr. Co.* v. *Pickard*, 371 U.S. 57, 60 (1962) (granting cert. "to consider the applicability of [FED. R. CIV. P. 13(a)] in these unusual circumstances" and reversing); *New York City Transit Authority* v. *Beazer*, 440 U.S. 568, 571 & n. 1 (1979) (granting cert. where courts below committed error in procedures used and out of "concern that the merits of these important questions had been decided erroneously"; citing Court's "power of supervision" as ground for review).

In the present case, the decision below both undermines the application of important provisions of bankruptcy law and renders a decision that is both profoundly wrong and harsh in result – effectively denying Petitioner ownership of property that reverted to him under his Chapter 11 plan. While this Petition thus indeed seeks error correction, it presents the sort of error this Court has on many occasions seen fit to correct.

Even if this Court, out of concern for its limited resources, were disinclined to consider full merits briefing and review in this case, it should nonetheless consider summary reversal in order to protect important bankruptcy law interests and to remedy a severe disservice to the administration of justice.

Supreme Court Rule 16.1 provides that this Court may resolve a petition for certiorari by issuing a "summary disposition on the merits." SUP. CT. R. 16.1. While not exactly *frequent*, summary dispositions (invariably reversals) occur quite *regularly*. During the current Term there already have been eight summary reversals (not counting a confession of error by the government).[15] Four of those eight summary reversals were of erroneous decisions of the Ninth Circuit, and four of eight also involved unpublished opinions in the courts of appeals (including two unpublished Ninth Circuit opinions). During this Court's 2004 Term there were four summary reversals, two of which were of Ninth Circuit deci-

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[15] *Gonzales* v. *Thomas*, 547 U.S. --, 126 S. Ct. 1613 (2006) (*per curiam*) (grant of cert. and summary reversal of *en banc* Ninth Circuit due to obvious error); *Ash* v. *Tyson Foods, Inc.*, No. 05-379, 546 U.S. --, 126 S. Ct. 1195 (2006) (*per curiam*) (granting cert. and vacating unpublished Eleventh Circuit decision due to error in standard applied); *Ministry of Defense and Support for Armed Forces of Islamic Republic of Iran* v. *Elahi*, 546 U.S. --, 126 S. Ct. 1193 (2006) (*per curiam*) (granting cert. and summarily vacating decision of Ninth Circuit for error in failing to consider a critical legal issue underlying its decision); *Bradshaw* v. *Richey*, 546 U.S. --, 126 S. Ct. 602 (2005) (*per curiam*) (granting cert. and vacating decision of Sixth Circuit due to error); *Kane* v. *Garcia-Espitia*, 546 U.S. --, 126 S. Ct. 407 (2005) (*per curiam*) (granting cert. and reversing unpublished Ninth Circuit decision based on error); *Eberhart* v. *United States*, 546 U.S. --, 126 S. Ct. 403 (2005) (*per curiam*) (granting cert. and reversing Seventh Circuit decision based on error); *Schriro* v. *Smith*, 546 U.S. --, 126 S. Ct. 7 (2005) (*per curiam*) (granting cert. and vacating unpublished order of Ninth Circuit based on error in ordering state court trial); *Dye* v. *Hofbauer*, 546 U.S. --, 126 S. Ct. 5 (2005) (*per curiam*) (granting cert. and reversing unpublished Sixth Circuit decision based on error).

sions.[16] And during the 2003 Term there were five summary reversals, two of which were of Ninth Circuit decisions and two of which were of unpublished court of appeals decisions.[17] Over the current and two previous Terms, therefore, summary reversals account for between 5% and 14% of this Court's published dispositions on the merits (80 opinions each in OT 2003 and OT 2004, 56 opinions to date in OT 2005). And the Ninth Circuit accounts for a disproportionate 40% to 50% of such reversals. The average from OT 2003 to date is 7.9 % (17 out of 217) of merits opinions being summary reversals with 47% (8 out of 17) of those reversals coming from the Ninth Circuit. This Court thus is quite willing to use summary reversal as a more efficient alternative to full review in appropriate cases. And the Ninth Circuit seems particularly adept at providing such appropriate cases warranting summary reversal.

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[16] *Bell* v. *Cone*, 543 U.S. 447, 459-60 (2005) (*per curiam*) (granting cert. and reversing Sixth Circuit based on error in giving insufficient deference to prior state court decision); *Brosseau* v. *Haugen*, 543 U.S. 194, 198 n. 3 (2004) (*per curiam*) (granting cert. and reversing Ninth Circuit decision "to correct a clear misapprehension of the qualified immunity standard"); *City of San Diego* v. *Roe*, 547 U.S. 77 (2004) (*per curiam*) (granting cert. and reversing Ninth Circuit decision based on fact-bound error); *Smith* v. *Texas*, 543 U.S. 37 (2004) (*per curiam*) (granting cert. and reversing Texas Court of Criminal Appeals based on error concerning jury instruction).

[17] *Holland* v. *Jackson*, 542 U.S. 649 (2004) (*per curiam*) (granting cert. and reversing unpublished Sixth Circuit decision based on error regarding fact-specific application of law); *Middleton* v. *McNeil*, 541 U.S. 433 (2004) (*per curiam*) (granting cert. and reversing Ninth Circuit decision based on error in evaluating particular jury instructions); *Illinois* v. *Fisher*, 540 U.S. 1174 (2004) (*per curiam*) (granting cert. and reversing seemingly unpublished Appellate Court of Illinois decision based on simple misapplication of law); *Mitchell* v. *Esparza*, 540 U.S. 12, 15 (2003) (*per curiam*) (granting cert. and reversing Sixth Circuit decision based on court having "failed to cite, much less apply," controlling statutory provision); *Yarborough* v. *Gentry*, 540 U.S. 1 (2003) (*per curiam*) (granting cert. and reversing Ninth Circuit decision based on fact-specific analysis of the objective adequacy of a closing argument by defense counsel).

The present case is yet another Ninth Circuit decision warranting such summary disposition by this Court. Indeed, it is the unusual one "in which the law is settled and stable, the facts are not in dispute, and the decision below is clearly in error." *Schweiker* v. *Hansen*, 450 U.S. 785, 791 (1981) (Marshall, J., dissenting) (explaining situations in which summary reversal is appropriate). The only material facts are that Respondents' competing claims to the songrights in the LIU compositions existed at the time of the bankruptcy proceedings and were subject to ample dispute by Petitioner, the songrights asset was adequately listed in the bankruptcy schedule of assets, and Respondents failed in the bankruptcy proceedings to raise any claims or objections concerning that asset. Given those facts, the law regarding *res judicata* is settled and stable and the decision below reviving barred claims is clearly erroneous. Summary reversal thus is appropriate.

Finally, the fact that the decision below is unpublished is no barrier to summary reversal. Indeed, during the three Terms analyzed above, this Court summarily reversed six unpublished decisions and, it seems, the unpublished nature of those decisions and consequent lack of precedential force may well have been a reason they were disposed of summarily, rather than after full briefing and review.

Furthermore, that the Ninth Circuit failed to publish its decision here is just another reason to be suspicious of that decision. The use of unpublished decisions lacking precedential force has been criticized as being inconsistent with the judicial function. *See Anastasoff* v. *United States*, 223 F.3d 898, 899 (CA8) (R. Arnold, J.) ("We hold that the portion of Rule 28A(i) that declares that unpublished opinions are not precedent is unconstitutional under Article III, because it purports to confer on the federal courts a power that goes beyond the judicial."), *vacated as moot*, 235 F.3d 1054 (CA8 2000) (*en banc*). But an unpublished opinion also seems often to function as an excuse for less than rigorous analysis of the issues in a case. A panel's use of an unpublished opinion al-

lows it to ignore inconvenient precedent within the circuit or elsewhere, tends to insulate a decision from review by this Court by failing to generate a true "split," and can be a means of using purportedly fact-dependant rulings to undermine legal principles with which a court may disagree but lacks the power or an adequate justification to reject. *Cf.* Richard S. Arnold, *Unpublished Opinions: A Comment,* 1 J. APP. PRAC. & PROCESS 219, 223 (1999) (use of unpublished opinions creates the "temptation" to ignore inconvenient precedent and "encourages" sweeping difficulties of a desired disposition "under the rug"). That the Ninth Circuit in *Hart* v. *Massanari*, 266 F.3d 1155 (CA9 2001), rejects Judge Arnold's views and strongly defends the use of unpublished opinions thus offers little comfort given the adverse incentives the mechanism of unpublished opinions provides.[18]

In praising a more open and candid approach by the Seventh Circuit, this Court has implicitly criticized decisions, much like this one, that "bur[y] the issue by proceeding in a summary fashion." *Eberhart* v. *United States*, 04-9949, 546 U.S. --, 126 S. Ct. 403, 407 (2005) (*per curiam*) (praising court of appeals for ruling squarely on an issue in a manner that "facilitated our review," and not "bur[ying] the issue by proceeding in a summary fashion").

In this case the court of appeals simply buried an erroneous ruling in an unpublished opinion and sought to call it a day. This Court should not reward such an approach by writ-

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[18] It is particularly ironic and unjust that the Ninth Circuit used a published precedential opinion to correctly *establish* Petitioner's ownership of the LIU copyrights and royalty streams, but then resorted to an unpublished opinion to confirm the district court's flat contradiction of that earlier holding. *Compare* Pet. App. B15 (post-petition royalties are Petitioner's "property"), *with* Pet. App. C11-12 (Petitioner cannot establish "ownership" of royalties). That treatment simply avoids having to reconcile the results of the non-precedential second decision with the precedential holding of the first decision by effectively sweeping the difficulty under the rug.

ing off the decision given its unpublished status, but instead should view the decision with greater skepticism and, in an appropriate case such as this, resolve the Petition by summary reversal. In particular, this Court should hold that *res judicata* bars Respondents from relying on pre-bankruptcy claims and interests under the 1983 Employment Agreement that they failed to raise in the bankruptcy proceedings. The decision of the Ninth Circuit thus should be summarily reversed.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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