No. 05-1492

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

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Respondents beg the *res judicata* question by asserting ownership of the LIU songrights asset re-vested in Petitioner by his confirmed Chapter 11 plan. Pet. 2-3, 17-19. That collateral attack on the confirmed plan and on the bankruptcy court's authority over the songrights asset comes 17 years too late and is now barred by *res judicata*.

Respondents' further suggestion that Petitioner waived his claim that the confirmed plan re-vested his songrights in him is absurd. Petitioner's argument was presented to and rejected on the merits by the Ninth Circuit, and Petitioner has consistently asserted his full 50% ownership rights in the LIU compositions and the re-vesting of those rights under his plan.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW FLAGRANTLY IGNORES THE BINDING EFFECT OF THE CONFIRMED PLAN ON OWNERSHIP OF THE LIU SONGRIGHTS ASSET.

Not bothering to defend the decisions below, Respondents simply repeat their clearly erroneous holdings and offer entirely new grounds for the same result. Those new grounds – their claimed ownership of the asset, lack of authority of the bankruptcy court, and waiver – are completely without merit.

At the time Petitioner *filed* for bankruptcy, ownership of the LIU songrights was, *at worst*, disputed, as even Respondents seem to concede. BIO 1, 20. After Petitioner scheduled those songrights as an asset of the bankruptcy estate, Respondents failed to raise their dispute over ownership and thereafter any such dispute was superseded by the terms of the confirmed plan, which bind Respondents and which bar their current assertions of ownership.[1]

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[1] This Court need not resolve the "dispute" over whether the 1984 purchase option was timely exercised; it need only recognize that the exercise of that option was in fact in dispute. Pet. 6, 14. The confirmation of the Chapter 11 plan itself effectively resolved that dispute in Petitioner's favor. The only issue for this Court is the legal effect of 11 U.S.C.

A. Petitioner's Ownership of the LIU Songrights, Including Copyrights, Is *Res Judicata*.

Respondents do not dispute that the listed "songrights" asset included copyrights and royalty rights for the LIU compositions. Pet. 10, 16-17; Pet. App. B12. They likewise do not dispute that the terms of the confirmed plan re-vested those rights in Petitioner. Pet. 11, 16-18; Pet. App. B13, B15-B16. Nor do they dispute that the terms of the confirmed plan are binding on all parties. Pet. 15-16, 18.[2] The confirmed plan thus resolves the ownership of the songrights "property dealt with by the plan." 11 U.S.C. § 1141(c).

Respondents instead collaterally attack the plan by raising the very arguments they could and should have raised in the bankruptcy proceeding itself. For example, they now challenge the authority of the bankruptcy court and the terms of the plan by arguing that the songrights asset was *their* property, should not have been included in the estate, and hence should not have been re-vested in Petitioner upon plan confirmation. BIO 13, 16. Regardless how that argument might have fared 17 years ago in a direct challenge to the plan, Respondents did not raise it then and the plan binds them now.[3]

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§ 1141(c) and *res judicata*. Respondents' false assertion of "undisputed" ownership in 1989, BIO 12, contradicts their own assertions of a dispute regarding exercise of the purchase option, BIO 1, 20, and their admission that *Petitioner* owned the LIU copyrights in 1989, *see* Pet. 9, 17 n. 11.

[2] *See also FDIC* v. *Lewittes (In re Friedberg)*, 192 B.R. 338, 341 (SDNY 1996) (confirmed plan extinguishes and replaces "all prior obligations and rights of the parties"); *Bonwit Teller, Inc.* v. *Jewelmasters, Inc. (In re Hooker Investments, Inc.)*, 162 B.R. 426, 433 (Bkrtcy. SDNY 1993) (confirmed plan "has full preclusive effect and is binding on all parties").

[3] Petitioner does not claim that merely *filing* for bankruptcy or scheduling an asset created or revived a property right in that asset. BIO 13, 14. Rather, the scheduling of the songrights asset *asserted* an existing property right and put Respondents on notice of that assertion. When Respondents failed to dispute Petitioner's ownership, confirmation of the plan simply ended the potential for dispute and, in effect, quieted his title.

As the Petition notes, and as established by uncontradicted authority, a confirmed plan is *res judicata* not merely as to "claims," but rather as to *all* of its terms, *all issues* concerning the plan, and *all* objections that could have been, but were not, raised regarding the plan. Pet. 16 & n. 10 (quoting cases finding *res judicata* applies to "any issues" and "all questions"); *see also Trulis* v. *Barton*, 107 F.3d 685, 691 (CA9 1995) ("all questions that could have been raised pertaining to the plan are entitled to *res judicata* effect").[4]

Indeed, the caselaw specifically applies *res judicata* to competing assertions of property interests in a scheduled bankruptcy asset, such as Respondents make here. *DiBerto* v. *The Meadows at Marbury, Inc.* (*In re DiBerto)*, for example, squarely and soundly rejected, on *res judicata* grounds, the precise argument made in the BIO, correctly holding that where a property "interest is subject to unresolved conflicting claims of ownership, the Court clearly has jurisdiction to de-

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Petitioner likewise does not rely on a claim that the 1983 Employment Agreement was an executory contract "rejected" in bankruptcy. Rather, Petitioner bases his pre-bankruptcy ownership assertion on the express *operation* of ¶ 5(b) of that very Agreement and his post-bankruptcy ownership on the *res judicata* effect of the plan eliminating the possibility for further dispute over whether ¶ 5(a) or ¶ 5(b) controls. The Petition's passing reference to executory contracts, Pet. 19 n. 13, was simply an argument in the alternative as to ¶ 5(a), and a reason why ¶ 5(b)'s mutually unperformed agreement to execute a *further* agreement could no longer be invoked. Respondents' various arguments regarding executory contracts, BIO 3, 21-22, are thus irrelevant to the question presented by the Petition.

[4] Petitioner was not obliged to file an adversary proceeding to "recover" his songrights by "avoid[ing]" their supposed transfer to Respondents. BIO 14-15. Petitioner asserted ownership and "possession" of that intangible asset by scheduling it, thus putting Respondents on notice. Pet. App. B12. There was no need to avoid a supposed transfer or recover an asset he claimed as having long-since "automatically" reverted to him *ab initio*. Pet. 5-6; *see also In re Regional Bldg. Systems*, 251 B.R. 274, 290, 292 (Bkrtcy. D. Md. 2000) (debtor need not initiate adversary proceedings to extinguish creditor's property interest; interest extinguished "simply by operation of § 1141(c)"), *subsequently aff'd*, 254 F.3d 528 (CA4 2001).

termine what is and what is not property of the estate." 171 B.R. 461, 475 (Bkrtcy. D. N.H. 1994).

> To the extent there was controversy over rights in the property, this Court, like all federal courts, had the power to determine its own subject matter jurisdiction and in the absence of a direct appeal that determination can not be upset by collateral attack. * * * [C]onfirmation of the plan necessarily involved a determination that the court had jurisdiction and power to affect the claims to the properties [dealt with by the plan]. * * * [The creditors' claim to be the] rightful owner[s] accordingly begs the question and is not material on the issue of whether the confirmed plan has *res judicata* effect * * *.

Id. This Court in *Stoll* v. *Gottlieb*, 305 U.S. 165, 171-72 (1938), also rejected a "collateral attack" on a bankruptcy court's power, holding that an order of such court "tacitly, if not expressly, determines its jurisdiction over" the subject matter, and a later "court in which the plea of *res judicata* is made has not the power to inquire again into that jurisdictional fact." [5]

Numerous other cases likewise hold that a confirmed plan is *res judicata* even as to property interests dealt with therein. *See, e.g., Universal Suppliers, Inc.* v. *Regional Bldg. Systems, Inc. (In re Regional Bldg. Systems, Inc.)*, 254 F.3d 528, 531 (CA4 2001) (lien "extinguished" by confirmed plan; "every other circuit * * * to have addressed this issue has reached the same conclusion"); *In re Southern Energy, Ltd.*, 98 B.R. 42, 43-44 (Bkrtcy. N.D. Fla. 1989) (same – possessory interest).

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[5] *See also Trulis*, 107 F.3d at 691 (for claim that plan provision is "'not within the power, even jurisdiction, of the bankruptcy court * * * only a direct attack is available and collateral attack is unavailable'") (citation omitted); *In re Ratner*, 146 B.R. 211, 214-15 (Bkrtcy. N.D. Ill. 1992) ("bankruptcy court always has jurisdiction to determine what is, or is not, property of bankruptcy estate"); *In re State of Mo.*, 7 B.R. 974, 980 (E.D. Ark.1980) (bankruptcy court "has jurisdiction to resolve competing claims to the property" and to decide whether "it is property of the estate").

Indeed, because § 1141(c) applies to the disposition of any "property dealt with by the plan," not merely "estate property," even property subject to an ownership dispute can revert to the debtor "free and clear." [6]

Given that Respondents are 17 years too late in raising their ownership challenge, the cases they cite, BIO 13-14, 16, concerning property of the estate are irrelevant. Where there is a dispute over ownership, the bankruptcy court itself is the exclusive initial forum in which to resolve that dispute for purposes of deciding whether to include an asset in the estate. Indeed, Respondents' own cases effectively make that point in that each and every one of them involves a challenge to ownership raised directly in the bankruptcy proceedings, not in a post-confirmation collateral attack such as we have here.[7]

Respondents' reliance on those cases begs the question of when that argument should have been raised and the *res judicata* effect of their having failed to raise it. However the ownership dispute might have been resolved *pre*-confirmation or on direct appeal, Respondents' cases have no application *post*-confirmation. *In re Regional Bldg. Systems*, 251 B.R. 274, 292 (D. Md. 2000) (quotes from cases involving direct appeals "are necessarily taken out of context because * * * [they do not involve] the situation to which § 1141(c) and the

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[6] *Matter of Penrod*, 50 F.3d 459, 463 (CA7 1995) ("property dealt with by the plan" under § 1141(c) is broader than "property of the estate" as defined in § 541, and claimed property rights can be extinguished regardless whether they were estate property); *cf.* 11 U.S.C. § 363(f) (allowing sale, free and clear, of property subject to *bona fide* dispute over ownership).

[7] *See Lowenschuss* v. *Selnick* (*In re Lowenschuss*), 170 F.3d 923, 927 (CA9 1999) (direct appeal); *Gendreau* v. *Gendreau (In re Gendreau)*, 122 F.3d 815, 817 (CA9 1997) (same), *cert. denied*, 523 U.S. 1005 (1998); *Bracewell* v. *Kelly (In re Bracewell)*, -- F.3d --, 2006 WL 1814367, at *1 (CA11 2006) (same); *Moody* v. *Amoco Oil Co.*, 734 F.2d 1200, 1204 (CA7 1984) (same); *Brown* v. *Dellinger (In re Brown)*, 734 F.2d 119, 120 (CA2 1984) (same); *Graziadei* v. *Graziadei (In re Graziadei)*, 32 F.3d 1408, 1410 (CA9 1994) (same).

doctrine of res judicata apply – a collateral attack on a confirmed plan, as here"). Respondents cannot now unwind the confirmed plan by merely *assuming* the disposition of an ownership dispute they failed to raise in bankruptcy.

Furthermore, Respondents' prior judicial admission and assertions that Petitioner and the estate "owned" the relevant copyrights and royalty rights precludes any consideration of their current attempt to revive a long-precluded ownership dispute. As set forth in the Petition, at 9, 17 n. 11, and unchallenged in the BIO, Respondents admitted that Petitioner in 1989 "had a partial copyright ownership in" the LIU compositions. Such a binding judicial admission renders the bulk of the BIO irrelevant. Respondents, ostrich-like, simply ignore their prior admission, making their current contradictory position frivolous.

Respondents make the related argument, BIO 18, that their disputed "property interest" in the songrights was not a "claim" or "debt" that could be discharged in bankruptcy. But the plain terms of § 1141(c) dispose of their asserted "interest" regardless whether Respondents' disputed assertion of ownership was also a claim.[8] And, as the undisputed caselaw cited in the Petition and above makes clear, *res judicata* extends to the terms of a plan and all issues, including property ownership, that could have been raised, not merely to the discharge of claims or debts. Pet. 15-16, 18; *supra* at 2-5.[9]

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[8] Respondents' citation, BIO 17, to 11 U.S.C. § 1141(d)(1) as supposedly *restricting* the effect of a plan to the discharge of "any debt" is strange beyond words. Section 1141(d) does not purport to limit § 1141(c), which independently forecloses all "claims *and interests*," not merely debts.

[9] Respondents' cases defining a claim and distinguishing debts from property interests, BIO 19-20, thus are irrelevant to the *res judicata* issue given that those cases began *within* the bankruptcy proceedings, were resolved there and on direct appeal, and hence did not involve a collateral challenge regarding "property dealt with" by a final and confirmed plan. *Brown* v. *Pitzer (In re Brown)*, 249 B.R. 303, 308-09 (S.D. Ind. 2000) (direct appeal); *Resare* v. *Resare*, 154 B.R. 399 (D.R.I. 1993) (same).

B. Petitioner Did Not Waive His Claim to Full Ownership of His Songrights.

Having failed to assert their alleged ownership in the bankruptcy proceedings, Respondents ironically suggest that *Petitioner* has failed to preserve that issue. BIO 9, 11-12, 24. That argument is wrong on multiple levels. First, Respondents concede that the issue was presented to, and rejected by, the Ninth Circuit. Pet. 12-13; BIO 24-25.[10] That the Ninth Circuit, on the merits, (incorrectly) resolved the issue presented to it thus properly places that issue before this Court.[11]

Second, the effect of the bankruptcy was resolved by *Cusano I*, and Petitioner was amply entitled to reassert that resolution in the second appeal. Pet. App. B10, B12, B15 (scheduled songrights asset encompassed unqualified interests in "copyrights and rights to royalty payments" and reverted to Petitioner, citing § 1141(b)).[12] That decision also rejected a misguided attempt by *Respondents* to invoke *res judicata* based on a later ruling, and instead held that 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." Pet. App. B14-B15.

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[10] *See, e.g.*, 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.

[11] Indeed, the issue is properly considered by this Court even had it *not* been presented below and hence it is, *a fortiori*, proper to consider the issue where it *was* raised and resolved in the court of appeals. *See Virginia Bankshares, Inc.* v. *Sandberg*, 501 U.S. 1083, 1099 n. 8 (1991) (even where issue not raised below, "[i]t suffices for our purposes that the court below passed on the issue presented"); *cf. Washington* v. *Davis*, 426 U.S. 229, 238 n. 9 (1976) (Court may notice a plain error not presented).

[12] *See also* Brief of Appellant, *Cusano I*, at 27, 34-35 (arguing that purchase option failed, publisher's share was improperly withheld, and "Chapter 11 plan and the closing of his bankruptcy case permanently vested in him[] the full interest in his songrights") (emphasis in original).

Third, the suggestion that Petitioner failed to preserve the issue by not re-litigating it on remand simply ignores the prior proceedings and the limited scope of the remand. Leading up to *Cusano I*, Petitioner routinely asserted his full 50% ownership rights in the LIU compositions and argued that such rights reverted to him under the Chapter 11 Plan. *See* Complaint ¶¶ 51-55 [AE Tab 1, at 16-17] (claiming full 50% ownership and failure of purchase option); Plaintiff's Separate Statement of Disputed Issues, Nov. 30, 1998 [AE Tab 9, at 158, 164] (asserting 50% ownership and arguing the "Bankruptcy proceedings specifically confirmed ownership of the copyright interests in Plaintiff").[13] Following remand, Petitioner simply renewed his prior position, noting that *Cusano I* held that he adequately scheduled his songrights and, "[a]ccordingly, confirmation of Plaintiff's bankruptcy reorganization plan caused all rights to post-petition royalties on Plaintiff's pre-petition compositions and other damages accruing post-petition to revert to Plaintiff." Joint Status Re-

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[13] *See also*, Opposition to Motion for Fees, July 26, 1999 [AE Tab 21, at 873, 875, 889-92, 901-03] (asserting position re 50% ownership of songrights and arguing that confirmed Chapter 11 plan reverted his full songrights back to him); *id*. at 896 (arguing that additional value paid in bankruptcy to retain songrights "was not challenged or questioned by any of the creditors which included Simmons and Stanley, and according to the final decree of the bankruptcy court these rights now belong to Cusano."); Order, July 16, 1998 [AE Tab 5, at 117] (recognizing that "Plaintiff[] [denied] the valid exercise of [the purchase] option," finding sufficient support to make that claim, and denying sanctions). Indeed, Respondents themselves recognized the scope of Petitioner's ownership claim. *See* Defendant's Motion for Summary Adjudication, Nov. 30, 1998, at 6 [Docket No. 90] ("alleged 50% ownership interest in [the LIU compositions], and the income and royalty stream generated thereby are, by necessity, based on facts, transactions and occurrences pre-dating" the bankruptcy). Respondents' principal objection was not that Petitioner did not own the songrights before, but rather that he *did* own the rights but failed to list them adequately. *Id*. at 12-13; *id*. at 22 (recognizing that claim to royalties was based on Petitioner's asserted copyright ownership); *id*. at 13 n. 7 (disputed "ownership interest and/or rights arising from the" LIU compositions should have been listed as an "asset" of the estate).

port, Dec. 28, 2001 [Appellee's SE Tab 74, at 1488]; Joint Rule 26(f) Report, Apr. 28, 2003 [AE Tab 37, at 1084] (arguing Respondents owed him a "full and complete accounting of all royalties owed"). Given his well-established position throughout the case, his reassertion of ownership of "all" rights following bankruptcy sufficiently preserved his claim.

To suggest that Petitioner was required to relitigate the very issue so recently resolved by the Ninth Circuit is simply incorrect. Rather, Petitioner adequately pressed his reverted rights, and then correctly appealed and raised the *res judicata* issue when the district court inexplicably ignored those rights and revived Respondents' claim to ownership.

Once the *res judicata* issue is properly resolved, the remainder of the decision below is clearly erroneous. Pet. 21-22. Respondents do not refute the Petition's analysis of the effect the ownership error had on the Ninth Circuit's other holdings.[14] Aside from collaterally attacking the plan, Respondents effectively concede the extensive error below.[15]

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[14] While Respondents claim that the holding in *Cusano I* was limited merely to potential "royalty claims," BIO 25-26, they ignore the express finding that the "songrights" included "copyrights" and that the royalty rights were Petitioner's "property," not merely potential "claims." Pet. App. B12-B13, B15-B16. Respondents also elide from their second quote the final words relating to "other damages," *id*. B12, and ignore the reinstatement of Petitioner's fiduciary duty, fraud, conversion, and constructive trust claims, *id*. B15, which confirms that the reverted interest was a property right, not merely a contractual right to royalty payments.

[15] Respondents make 6 ill-advised accusations of misrepresentation. BIO 22-24. Accusations 1 & 3 involve legal positions as to which Respondents are spectacularly wrong. Accusations 2 & 5 simply assert Respondents' disputed position regarding the purchase option, and Petitioner's side of that dispute has ample support in the record. *See, e.g.*, AE Tab 13, at 403-04; AE Tab 19, at 616, 620, 636-42; ASE Tab 83, at 1672-77; ASE Tab 84, at 1682; ASE Tab 88, at 1736-39; ASE Tab 99, at 1911-13. Accusation 4 itself misrepresents the criticized passage in the Petition. Pet. 11. And accusation 6 ignores Petitioner's asserted ownership via scheduling of his songrights asset and gets the burden of objection backwards.

II. THIS COURT SHOULD EXERCISE ITS SUPERVISORY AUTHORITY TO EITHER TAKE THIS CASE OR SUMMARILY REVERSE.

The Petition gives ample reason for this Court to take this case, notwithstanding the admitted lack of a split. Respondents do little more than repeat such a lack of a split, incorrectly claim that there are disputed facts precluding review, and then simply hope this Court will ignore the case and let them keep the benefit of the Ninth Circuit's egregious error.

But there are no disputed facts that this Court need resolve in order to rule on the *res judicata* issue, *see supra* at 1-2 n. 1, and there is no split only because the law is clear and the decision below is so stunningly wrong that no other court, and no panel of the Ninth Circuit, has ever even considered publishing such a disposition. Indeed, the unpublished nature of the opinion should act as a red-flag in favor of review given that, as Justice Stevens has recognized, "occasionally judges will use the unpublished opinion as a device to reach a decision that might be a little hard to justify." Cole & Bucklo, *A Life Well Lived: An Interview with Justice John Paul Stevens*, 32 NO. 3 LITIGATION 8, 67 (Spring 2006). In this case the decision is more than "a little" hard to justify; it is indefensible.

The question presented by this Petition goes to the proper administration of a bedrock aspect of the Bankruptcy Code – the finality and effect of confirmed plans – and is a proper subject for this Court's supervisory authority. While this Court may be reluctant to devote the resources of full review to such supervision, when the circumstances and the error demand it, this Court has not declined to act, often regarding errors from the Ninth Circuit. *See* Pet. 24-26. Summary reversal is an efficient and appropriate alternative in this case given the well-settled law and the clear error below.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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