Nos. 08-295 & 08-307

IN THE

Supreme Court of the United States

THE TRAVELERS INDEMNITY COMPANY, *et al.*,

Petitioners,

-and-

COMMON LAW SETTLEMENT COUNSEL,

Petitioner,

v.

PEARLIE BAILEY, *et al.*,

Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION FOR THE ASBESTOS PERSONAL INJURY RESPONDENTS

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JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) to review a case pending in a court of appeals by writ of *certiorari* before or after rendition of a judgment or decree. 28 U.S.C. § 1254(1). However, as discussed below, this Court has denied *certiorari* in the past where, as here, the circuit court below did not enter judgment but instead remanded the matter for further proceedings. *E.g.*, *Va. Military Inst. v. United States*, 508 U.S. 946, 946, 113 S. Ct. 2431, 124 L. Ed. 2d 651 (1993); *Bhd. of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R. Co.*, 389 U.S. 327, 328, 88 S. Ct. 437, 19 L. Ed. 2d 560 (1967). Denial of certiorari is likewise appropriate here.

STATEMENT OF THE CASE

A. In 1986, the Bankruptcy Court entered a Confirmation Injunction in Johns-Manville's bankruptcy case barring derivative suits against Johns-Manville's insurers.

In August of 1982, Johns-Manville, buckling under the weight of its asbestos liabilities, filed a petition for protection under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Southern District of New York, Lifland, J. (the "*Bankruptcy Court*"). *In re Johns-Manville Corp.*, 517 F.3d 52, 56 (2d Cir. 2008).

On December 22, 1986, the Bankruptcy Court confirmed Johns-Manville's plan of reorganization via its Order Confirming Debtor's Second Amended and Restated Plan of Reorganization (the "*Confirmation Order*") (SPA-4). The Confirmation Order provided for a channeling injunction/asbestos trust structure that would later be used as a template by Congress when formulating

Section 524(g) of the Bankruptcy Code. *In re Johns-Manville*, 517 F.3d at 57. The channeling injunction in the Confirmation Order (the "*Confirmation Injunction*") barred derivative claims against Johns-Manville's insurers by proscribing:

> Any and all claims, demands, allegations, duties liabilities and obligations (whether or not presently known) which have been, or could have been, or might be, asserted by any Person against any or all members of the JM Group or against any or all members of the Settling Insurer Group based upon, arising out of or relating to any or all of the Policies.

(SPA-295-96).

Predictably, the Confirmation Injunction was challenged on appeal. In 1988, the Second Circuit upheld the Confirmation Order, concluding that the Confirmation Injunction applied only to third parties who sought to collect out of the proceeds of Manville's insurance policies on the basis of Manville's own conduct. The Second Circuit concluded, therefore, that the Confirmation Injunction was jurisdictionally sound.[1] *See id.* at 68.

In 1994, Congress enacted Bankruptcy Code, Section 524(g), which provides a statutory basis for

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1. As the Second Circuit recognized:

> The application of a § 524 channeling injunction to enjoin actions against third parties is limited to situations where a third party has derivative liability for the claims against the debtor.

Johns Manville, 517 F.3d at 68. (internal quotations omitted).

injunctions that bar derivative claims against a debtor's insurer for asbestos claims arising out of the conduct of the debtor but for which the insurer is liable under its policies with the debtor. *Id.* at 67-68.

B. Sixteen years later, the Bankruptcy Court erroneously concluded for the first time that the Confirmation Injunction also barred non-derivative, third-party actions against non-debtors.

Following confirmation of Johns-Manville's Plan, a number of asbestos victims, including the Asbestos Personal Injury Plaintiffs (the "*Independent Action Plaintiffs*"), sought recovery directly from Travelers[2] for its discreet conduct perpetuating the asbestos epidemic and aggravating the damages and harms suffered by asbestos victims. *Id.* at 57. In these actions (the "*Independent Actions*"), the Independent Action Plaintiffs alleged that Travelers intentionally acted on its own to suppress information and knowledge about asbestos hazards and intentionally propagated a fraudulent "state of the art" defense to wrongfully frustrate or defeat lawful rights of asbestos victims. *Id.* at 58. The Independent Action Plaintiffs initiated litigation against Travelers, not as Johns-Manville's principal insurer, but as an independent tortfeasor. *Id.* at 63. The torts giving rise to the Independent Actions were entirely separate and independent from Manville's tort liability. The Independent Action Plaintiffs did not seek relief from Johns-Manville's

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2. "*Travelers*" refers to Petitioners, The Travelers Indemnity Company, Travelers Casualty and Surety Company and Travelers Property Casualty. Corp.

insurance proceeds, nor did they seek recovery from the asbestos trust created by Johns-Manville's confirmed bankruptcy plan to process and pay asbestos claims against Johns-Manville.[3] *Id.* These claimants sought recovery directly from Travelers' own funds. *Id.*

In response to the growing number of these Independent Actions, Travelers moved in the Bankruptcy Court, on June 19, 2002, to enjoin twenty-six Independent Actions pending in Louisiana, Massachusetts, Texas, and West Virginia state courts. *Id.* at 58. Despite the Second Circuit's 1988 opinion recognizing the limited scope of the Confirmation Injunction,[4] Travelers erroneously asserted that it was entitled to injunctive relief because the Independent Actions were barred by the Confirmation Order. *Id.* at 58-59. Many of the plaintiffs in the Independent Actions contested Travelers' overreaching attempts to enjoin their suits.

On August 1, 2002, the Bankruptcy Court referred Travelers' motion to mediation. *Id.* at 58. The mediation sessions resulted in three separate settlements. *Id.* These settlements were conditioned upon the entry of an order by the Bankruptcy Court "clarifying that the [Independent Actions] are, and have always been,

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3. Notably, the claimants could not have recovered from the Asbestos Trust for their claims against Travelers, because the trust distribution procedures governing the asbestos trust do not contemplate payment of claims against Travelers for damages caused by Traveler's independent tortious conduct.

4. *MacArthur Co. v. Johns-Manville Corp.*, 837 F.2d 89, 93 (2d Cir. 1988).

prohibited by the [Confirmation Order]." *Id.* On June 5, 2007, Travelers filed its Motion to Approve the Common Law Direct Action Settlement Agreement (the "*Settlement Motion*"), wherein it expressly requested the Bankruptcy Court to enter an order "interpreting and enforcing the injunctions" of the Confirmation Order (A-798).[5]

In considering Travelers' Settlement Motion, the Bankruptcy Court interpreted the Confirmation Injunction to bar all insurer claims falling within the Bankruptcy Court's subject matter jurisdiction. *In re Johns-Manville*, 340 B.R. 49, 60 (S.D.N.Y. 2006). At the invitation of Travelers, and over vigorous objections by counsel for the Independent Action Plaintiffs, the Bankruptcy Court then determined that the Independent Actions fell within its subject matter jurisdiction at the time it entered the Confirmation Order in 1986 (SPA-315-16).

On August 17, 2004, the Bankruptcy Court entered its Order Approving Settlement of the Statutory, Hawaii and Common Law Direct Actions and Clarifying Confirmation Order, Including Insurance Settlement Order and Channeling Injunction (the "*Clarifying Order*") (SPA-334-50). In the Clarifying Order, the Bankruptcy Court erroneously concluded that the Independent Actions fell within its subject matter jurisdiction and were, therefore, enjoined by the Confirmation Order (SPA-335-36).

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5. Petitioners also submitted a proposed order with their Settlement Motion that provided that "[t]his is an order interpreting and enforcing the Confirmation Order" (A-818).

C. The District Court erroneously upheld the Bankruptcy Court's conclusion that the Bankruptcy Court had subject matter jurisdiction to bar non-derivative, third-party, non-debtor actions.

On September 24, 2004, the Asbestos Personal Injury Plaintiffs filed an amended notice of appeal, appealing the Bankruptcy Court's Clarifying Order to the United States District Court for the Southern District of New York, Koeltl, J. (the "*District Court*") (A-1729-36). In its March 28, 2006 Opinion and Order, the District Court vacated certain provisions of the Clarifying Order not at issue here, but upheld the Bankruptcy Court's conclusion that the Independent Actions fell within the Bankruptcy Court's subject matter jurisdiction (SPA-48).[6] The Asbestos Personal Injury Plaintiffs appealed to the Second Circuit Court of Appeals seeking review of, *inter alia*, that portion of the District Court's order upholding the Bankruptcy Court's ruling concerning its subject matter jurisdiction over the Independent Actions.

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6. On March 31, 2006, the District Court entered a Judgment to the same effect as its March 28th Opinion and Order.

D. The Second Circuit correctly concluded that the Bankruptcy Court lacked subject matter jurisdiction to bar non-derivative, third-party actions against non-debtors because such actions do not affect the *res* of a debtor's bankruptcy estate.

On appeal, the Second Circuit correctly recognized that "while there is no doubt that the bankruptcy court had jurisdiction to clarify its prior orders, that clarification cannot be used as a predicate to enjoin claims over which it had no jurisdiction . . . . Thus, the bedrock jurisdictional issue in this case requires a determination as to whether the bankruptcy court had jurisdiction over the disputed [Independent Actions]" *Johns-Manville*, 517 at 60-61. Following generations of precedent, the Second Circuit concluded that "a bankruptcy court only has jurisdiction to enjoin third-party non-debtor claims that directly affect the *res* of the bankruptcy estate." *Id.* at 66. Because the Second Circuit found that the Independent Action Plaintiffs had no right to recover from Johns-Manville under the laws of the states where the Independent Actions arose, it held that the Independent Actions did not fall within the subject matter jurisdiction of the Bankruptcy Court. *Id.* at 68. The Second Circuit remanded the matter for the Bankruptcy Court to examine whether, in light of the Second Circuit's opinion, the Bankruptcy Court had jurisdiction to enjoin the Independent Actions. *Id.*

PETITIONERS' PETITIONS FOR WRIT OF *CERTIORARI* SHOULD BE DENIED BECAUSE THIS MATTER IS NOT RIPE FOR CONSIDERATION BY THE COURT.

As an initial matter, the Petitioners' ill-conceived petitions for writ of *certiorari* are premature and granting *certiorari* to review the Second Circuit's interlocutory order would be improper under these circumstances.

The Court generally awaits final judgment in the lower courts before exercising its *certiorari* jurisdiction. *Va. Military Inst. v. United States*, 508 U.S. 946, 946, 113 S. Ct. 2431, 124 L. Ed. 2d 651 (1993) ("We generally await final judgment in the lower courts before exercising our *certiorari* jurisdiction"). In the instant matter, the Second Circuit remanded the case back to the Bankruptcy Court for further proceedings as follows:

> The order of the district court is VACATED and the case REMANDED for the bankruptcy court to examine whether, in light of this opinion, it had jurisdiction to enjoin any of the instant claims.

Johns-Manville, 517 F.3d at 68. Consequently, this case is not yet ripe for review by this Court. *See Bhd. of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R. Co.*, 389 U.S. 327, 328, 88 S. Ct. 437, 19 L. Ed. 2d 560 (1967) (finding that "because the Court of Appeals remanded the case, it is not yet ripe for review by this Court").

This Court has denied *certiorari* in the past solely on the basis that the matter was not yet ripe for review. *Va. Military Inst.*, 508 U.S. at 946 (denying *certiorari* where "[t]he Court of Appeals vacated the judgment that had been entered in favor of petitioners, and remanded the case to the District Court for determination of an appropriate remedy"); *Bhd. of Locomotive Firemen & Enginemen*, 389 U.S. at 328 (denying certiorari where "[t]he Court of appeals ruled on various legal issues presented to it but remanded to the District Court to consider whether there had in fact been a contempt"). It should deny *certiorari* here as well.

PETITIONERS' PETITIONS FOR WRIT OF *CERTIORARI* SHOULD BE DENIED BECAUSE *CERTIORARI* IS NOT JUSTIFIED UNDER SUPREME COURT RULE 10.

As a general matter, the Court requires a party petitioning for *certiorari* review to demonstrate a compelling reason for review, characterized by the following:

> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals . . .
>
> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals; [or]

> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

SUP. CT. R. 10.

A. Common Law Settlement Counsel fails to provide an analysis under Supreme Court Rule 10.

Common Law Settlement Counsel's petition for writ of *certiorari* fails to state a ground upon which *certiorari* may be granted. Instead, Common Law Settlement Counsel uses its petition for writ of *certiorari* as a vehicle to make its argument on appeal—*i.e.*, that the issue before the Second Circuit was an issue of "statutory authority" and not an issue of subject matter jurisdiction. This argument is contradicted by an entire body of case law; courts consider a bankruptcy court's ability to enjoin third-party, non-debtor conduct to be a jurisdictional issue. Common Law Settlement Counsel's petition does not provide grist for a Rule 10 analysis. Pursuant to Supreme Court Rule 15.2,[7] however, the Asbestos Personal Injury Plaintiffs address Common Law Settlement Counsel's meritless argument below.

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7. Under Supreme Court Rule 15, a brief in opposition "should address any perceived misstatement of fact or law in the petition that bears on what issues properly would be before the Court if certiorari were granted." The rule goes on to provide that "[c]ounsel are admonished that they have an obligation to the Court to point out in the brief in opposition, and not later, any perceived misstatement made in the petition." Sup. Ct. R. 15.2.

B. Travelers fails to provide a compelling reason for *certiorari* review under Supreme Court Rule 10.

In its petition for writ of *certiorari*, Travelers attempts to convince this Court that the Second Circuit's opinion is somehow extraordinary and has turned the bankruptcy world on its head. Nothing could be further from the truth. In the proceedings below, the Second Circuit ruled on the discreet issue of whether a bankruptcy court has subject matter jurisdiction to enjoin a non-derivative, third-party, non-debtor action against a debtor's insurer to recover directly from the coffers of the insurer for damages arising out of the insurer's own misconduct. The Second Circuit held that a bankruptcy court has no such jurisdiction, because non-derivative, third-party, non-debtor actions have no effect on the *res* of the bankruptcy estate subject to the bankruptcy court's *in rem* jurisdiction.[8]

Far from being extraordinary or aberrational in any sense, the Second Circuit's holding preserves the traditional line that has historically marked the boundary between those matters that lie within a bankruptcy court's subject matter jurisdiction and those matters that lie outside it. In rendering its decision, the Second Circuit merely adhered to what this Court too has repeatedly recognized: "Bankruptcy jurisdiction, at its core, is *in rem*."[9] For a matter to fall within a

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8. Bankruptcy courts are courts of ***limited jurisdiction***. *Northern Pipeline Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 102 S. Ct. 2858, 73 L. Ed.2d 598 (1982).

9. *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 362, 126 S.Ct. 990, 163 L. Ed.2d 945 (2006).

bankruptcy court's subject matter jurisdiction, it must have some effect on the debtor or the *res* of the debtor's bankruptcy estate. This principle pervades not only 28 U.S.C. §§ 157 and 1334—the statutory predicates for bankruptcy jurisdiction—but the Bankruptcy Code itself, including Sections 524(g) and 105(a).

Travelers' apocalyptic ruminations that bankruptcy courts' inability to bar non-derivative, third-party, non-debtor claims against insurers based on insurers' own misconduct will "undo" Section 524(g) is unfounded. In the sixteen years preceding the Clarifying Order, neither the Bankruptcy Court nor any other court had attempted to enforce the Confirmation Order to enjoin claims such as the Independent Actions. Furthermore, in the fourteen years since the enactment of Section 524(g), no Court has held that the supplemental channeling injunction provided for in that provision may be used to enjoin claims such as the Independent Actions. In fact, no authority exists from any jurisdiction that would suggest that a bankruptcy court may bar non-derivative actions against a debtor's insurer that seek to recover directly from the insurer for the insurer's own tortious conduct. The Petitioners' "sky is falling" argument is nothing more than an ill-conceived attempt to mislead this Court into reviewing a matter that does not meet any of the criteria enunciated in Rule 10.

The Second Circuit's decision simply reined in an errant bankruptcy court that failed to recognize that "global finality is only as 'global' as the bankruptcy court's jurisdiction." *Johns-Manville*, 517 F.3d at 66. In doing so, the circuit court restored the natural order

that had been disturbed by a perverse "interpretation" of the Confirmation Order, which itself threatened the bankruptcy world. Because the Second Circuit's ruling merely re-established the *status quo ante*, this is not a matter appropriate for *certiorari* review by this Court.

PETITIONERS' REQUESTS FOR *CERTIORARI* RELY ON MISREPRESENTATIONS OF LAW AND FACT

A. Travelers' assertion that the Second Circuit's decision runs afoul of Section 524(g) is belied by the very language of the statute itself.

Travelers seeks *certiorari* based on the dubious notion that the Second Circuit's decision calls the statutory scheme of Section 524(g) into question, complaining that "[t]he Second Circuit improperly limited the reach of Section 524(g) to only those claims that are 'derivative' of a debtor's liability, or that seek the '*res*' of the debtor's estate" (Travelers Br. at p. 15).

Travelers conveniently overlooks that the third-party supplemental injunction provided for in Section 524(g) is, by the terms of Section 524(g) itself, limited to claims that are derivative of a debtor's liability.

Section 524(g)(4)(A)(ii) limits the scope of third-party, non-debtor claims to which a supplemental channeling injunction may apply to those claims that are based on the conduct of the debtor—*i.e.*, derivative claims—as follows:

> (ii) Notwithstanding the provisions of section 524(e), such an injunction may bar any action

> directed against a third party who is identifiable from the terms of such injunction (by name or as part of an identifiable group) and is alleged to be directly or indirectly liable ***for the conduct of, claims against, or demands on the debtor*** to the extent such alleged liability of such third party arises by reason of—
>
> . . .
>
> (III) the third party's provision of insurance to the debtor or a related party

11 U.S.C. § 524(g)(4)(A)(ii)(III) (emphasis added). As Travelers recognizes, when Congress wants to restrict the application of a particular provision of the Bankruptcy Code, it does so in the plain text of the provision (Travelers' Br. at p 15-16). And so it has here. Thus, Travelers' assertion that the Second Circuit's ruling improperly cabins the scope of Section 524(g) without Congress' providing for such a limitation in the statute is dispatched by the statutory language itself.

Travelers further laments that the Second Circuit's decision deprives insurance companies of the "only means available for definitively resolving asbestos-related liability" (Travelers' Br. at p. 16). This argument is inherently flawed, because it erroneously assumes that the Independent Action Plaintiffs' claims against Travelers are "asbestos-related." They are not. Travelers' liability arises out of fraud, bad faith and related malfeasance that is unrelated to asbestos, except for the purely incidental happenstance of

Travelers' insured's being an asbestos producer. Had Johns-Manville produced something besides asbestos, Traveler's liability would be unaffected. The Independent Actions are simply not the types of actions contemplated by Congress when enacting Section 524(g).

The Second Circuit's ruling does not disturb bankruptcy courts' traditional authority to fashion reorganizations under Section 524(g). Instead, it reestablishes the *status quo ante* that existed prior to the Bankruptcy Court's unprecedented and anomalous "interpretation" and "clarification" of the Confirmation Order.

B. Travelers' insistence that the Second Circuit's decision conflicts with other case law is not supportable.

Until the Clarifying Order, no bankruptcy court anywhere had ever enforced an injunction in a confirmation order in a manner that would bar a creditor from seeking to recover directly from the coffers of a debtor's insurer for the ***insurer's*** own misconduct. No court had even alluded that such an injunction would be proper. As discussed below, the authorities cited by Travelers to support its erroneous argument, to the extent that they are relevant at all, strongly imply that such an injunction would be wholly improper and would exceed a bankruptcy court's subject matter jurisdiction.

1. This Court's decision in *Central Virginia Community College v. Katz*, 546 U.S. 356 (2006) in no way provides that a bankruptcy court's jurisdiction extends to matters having no effect on the *res* of the debtor's estate.

Travelers implies that the Second Circuit's decision conflicts with the Court's decision in *Central Virginia Community College v. Katz*, 546 U.S. 356 (2006). Travelers manipulates the holding in *Katz* to support the erroneous proposition that a bankruptcy court has subject matter jurisdiction to enjoin third-party non-debtor claims that do not have any affect on the *res* of the debtor's bankruptcy estate or on the debtor itself. Such an argument, however, is belied by the Court's own language in *Katz*, which actually supports the Second Circuit's holding.

In *Katz*, the Court was asked to determine whether a State's sovereign immunity would be compromised if a bankruptcy court ordered that a preferential transfer to a State be avoided and the *res* returned to the debtor's estate. In holding that avoidance of a preferential transfer to a State does not violate the State's sovereign immunity, the Court embarked upon its analysis by recognizing that bankruptcy jurisdiction is essentially *in rem. Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 362, 126 S. Ct. 990, 163 L. Ed. 2d 945 (2006). The Court, therefore, determined that it was obliged to address the issue of whether a bankruptcy court's subject matter jurisdiction is limited merely to an adjudication of the rights in the debtor's *res*, or whether it is broad enough to also allow a bankruptcy court to enter orders enforcing those rights. *Id.* at 370

(recognizing that "courts adjudicating disputes concerning bankrupts' estates historically have had the power to issue ancillary orders enforcing their *in rem* adjudications").

In concluding that a bankruptcy court does have the jurisdiction to enforce its rulings regarding a debtor's rights to the *res* of its estate, the Court reasoned as follows:

> The interplay between *in rem* adjudications and orders ancillary thereto is evident in the case before us. Respondent first seeks a determination under 11 U.S.C. § 547 that the various transfers made by the debtor to petitioners qualify as voidable preferences. The § 547 determination, standing alone, operates as a mere declaration of avoidance. That declaration may be all that the trustee wants; for example, if the State has a claim against the bankruptcy estate, the avoidance determination operates to bar that claim until the preference is turned over. In some cases, though, the trustee, in order to marshal the entirety of the debtor's estate will need to recover the subject of the transfer pursuant to § 550(a). A court order mandating turnover of the property, although ancillary to and in furtherance of the court's *in rem* jurisdiction, might itself involve *in personam* process.

Id. at 371-72.

The analysis used by the Court in *Katz* reaffirms the principle that any ancillary jurisdiction a bankruptcy court may have is firmly rooted in and only arises out of its jurisdiction over the *res* of the bankruptcy estate. This is the same principle relied upon by the Second Circuit below when it opined that, while derivative actions against insurers may fall within bankruptcy jurisdiction because such actions seek to recover from the estate *res—viz*, insurance policy proceeds—actions such as the Independent Actions that do not affect estate *res* are outside bankruptcy courts' limited jurisdiction. The Court's analysis in *Katz* directly supports the Second Circuit's conclusion that the nexus to the *res* of a debtor's estate confers subject matter jurisdiction to enjoin derivative actions under Section 524(g) and Section 105(b); where, as here, no such nexus exists, the bankruptcy court lacks subject matter jurisdiction. The *res* of Johns-Manville's bankruptcy estate certainly does not stretch far enough to include Travelers' coffers.

2. Travelers fails to provide the Court with even a solitary example in which a lower federal court exercising bankruptcy jurisdiction has enjoined third-party, non-debtor actions that do not affect the *res* of the debtor's bankruptcy estate.

Travelers makes a half-hearted attempt to manufacture a split among the circuits by asserting that "bankruptcy courts have long issued orders that necessarily reach beyond the debtors' *res*" (Travelers Br. at 14). This assertion is a provocative misrepresentation of bankruptcy jurisprudence. The circuit courts uniformly decline to exercise power to grant releases to third-party non-debtors where such releases would not serve to prevent the depletion of the assets of the bankruptcy estate or otherwise affect the *res* of the estate.

The Third, Fourth, Fifth, Sixth and Seventh Circuits have all expressly held that a solid nexus to the *res* of the debtor's estate is required. *See In re Dow Corning Corp.*, 280 F.3d 648, 658 (6th Cir. 2002) (holding that a bankruptcy court has authority to enjoin claims against a non-debtor only where seven factors are present, including such an identity of interests between the debtor and the third party that a suit against the third party would deplete the assets of the debtor's estate); *In re Cont'l Airlines*, 203 F.3d 203, 217 (3d Cir. 2000) (finding an insufficient basis for authorizing non-debtor releases where there was no fact-intensive analysis at the bankruptcy or district court level to determine whether or not insurance proceeds that would be implicated by the releases were property of the estate); *In re Zale Corp.*, 62 F.3d 746, 756 (5th Cir. 1995) (refusing to uphold releases of third-party non-debtor insurance companies where the claims against the non-debtors did not implicate property of the estate, and thus the bankruptcy court lacked jurisdiction to enjoin them); *Matter of Specialty Equip. Cos.*, 3 F.3d 1043, 1049 (7th Cir. 1993) (refusing to overturn non-debtor releases only where there was already substantial consummation of the plan of reorganization and where appellants failed to demonstrate that the releases would adversely affect the debtor or the property of the estate); *In re A.H. Robbins Co.*, 880 F.2d 694, 702 (4th Cir. 1989) (enjoining claims against third-party, non-debtors who would have indemnification or contribution rights against debtor for any judgments).

The Ninth and Tenth Circuits have gone further and categorically forbidden releases of third-party non-debtors, reasoning that such releases are impermissible

in light of section 524(e), whether the *res* of the bankruptcy estate was implicated or not. *See Resorts Int'l, Inc. v. Lowenschuss (In re Loweschuss)*, 67 F.3d 1394, 1402 (9th Cir. 1995); *In re W. Estate Fund, Inc.*, 922 F.2d 592, 600 (10th Cir. 1990).

Those circuit courts that have not directly addressed the issue of whether a bankruptcy court may permit releases of non-debtor third-parties in the Chapter 11 context have at least acknowledged that such releases are not permissible, absent certain limited and extenuating circumstances. *See In re Munford, Inc.*, 97 F.3d 449, 455 (11th Cir. 1996) (permanently enjoining non-settling defendants in a related adversary proceeding from bringing contribution and indemnification claims against non-debtor consulting firm where the permanent injunction was found to be integral to the debtor's own settlement with the consulting firm); *Monarch Life Ins. Co. v. Ropes & Gray*, 65 F.3d 973, 985 (1st Cir. 1995) (acknowledging that a bankruptcy court may grant releases to third-party non-debtors where "an injunction allows a settlement that forms the basis of the chapter 11 plan to take effect . . . and hence the plan hinges on the parties being free from the very claims the injunction would prohibit"); *In re AOV Indus., Inc.*, 792 F.2d 1140, 1149 (D.C. Cir. 1986) (refusing to disturb the district court's finding that the plan of reorganization had been substantially implemented after a complex series of transactions, where the issue of whether or not the plan provided for releases that violated section 524(e) was effectively moot).

The cases relied upon by Travelers all comport with the Second Circuit's opinion, because the bankruptcy court orders in those cases all related to matters that directly affected the bankruptcy estate.

a. Travelers' reliance on *In re Dow Corning Corp.*, 280 F.3d 648 (6th Cir. 2002) is misplaced.

For example, Travelers' reliance on *In re Dow Corning Corp.* is misplaced, because the Sixth Circuit held that enjoining a non-consenting creditor's claim against a non-debtor is *only* appropriate where *all* of the following six factors are present:

> (1) ***There is an identity of interests between the debtor and the third party, usually an indemnity relationship, such that a suit against the non-debtor is, in essence, a suit against the debtor or will deplete the assets of the estate***; (2) The nondebtor has contributed substantial assets to the reorganization; (3) The injunction is essential to reorganization, namely the reorganization hinges on the debtor being free from indirect suits against parties who would have indemnity or contribution claims against the debtor; (4) The impacted class, or classes, has overwhelmingly voted to accept the plan; (5) The plan provides a mechanism to pay for all, or substantially all, of the class or classes affected by the injunction; (6) The plan provides an opportunity for those claimants who choose not to settle to recover in full and;

> (7) The bankruptcy court made a record of specific factual findings that support its conclusions.

In re Dow Corning Corp., 280 F.3d at 658 (emphasis added). Clearly, the *Dow Corning* court's decision cannot plausibly be construed to support Travelers' insistence that a bankruptcy court has subject matter jurisdiction to enjoin third-party non-debtor actions where there is no effect on the *res* of the debtor's estate. The Sixth Circuit specifically says that such an injunction would be appropriate only where the action enjoined could deplete the assets of the debtor's estate.

b. Travelers' reliance on *Petition of Portland Electric Power Co. (Delzell v. Flagg)*, 97 F.Supp. 877 (D. Or. 1943) is misplaced.

Travelers' reliance on *Portland Electric Power Co.*, is similarly misplaced. In *Portland Electric*, Portland Electric Power Company, the debtor, sought an injunction barring the Public Utilities Commissioner of Oregon from reducing the existing rate schedules of Portland General Electric Company, a wholly-owned subsidiary of the debtor. The commissioner argued that the bankruptcy court lacked subject matter jurisdiction to enjoin him from reducing the rates charged by Portland General Electric Company, a non-debtor. The court couched the issue as follows:

> The argument then proceeds that this property is not within the jurisdiction of the court, because the Portland General Electric

> Company is a separate entity, is solvent and has never been brought within the scope of the bankruptcy proceedings.

Pet. of Portland Elec. Power Co. (Delzell v. Flagg), 97 F.Supp. 877, 880 (D. Or. 1943).

The Court first recognized that "if property is subject to the jurisdiction of the court, any person who threatens interference therewith is liable to restraint." *Id.* The court then went on to find that Portland General Electric Company was a wholly-owned subsidiary of the debtor and that its stock was the principle asset to be dealt with in the debtor's reorganization proceedings. Thus, "[a]ny circumstance which affects the value of this stock will affect the reorganization proceeding and if the value thereof be decreased, the reorganization proceeding may fail entirely of its purpose." *Id.* The court concluded that it had subject matter jurisdiction to bar the commissioner from lowering the rates charged by the subsidiary of the debtor because such a lowering of rates would affect the value of the debtor's bankruptcy estate. *Id.*

Clearly, *Portland Electric* does not support the proposition that a bankruptcy court has subject matter jurisdiction to enjoin third-party non-debtor actions that do not involve the debtor or the *res* of the debtor's bankruptcy estate. The district court concluded that it had jurisdiction to enjoin the commissioner only because the commissioner's actions threatened to affect the estate *res* by reducing its value. Whereas, here, the Independent Actions threaten only Travelers' own funds.

c. Travelers' reliance on *United States v. Energy Resources*, 495 U.S. 545 (1990) is misplaced.

In *United States v. Energy Resources*, the bankruptcy court confirmed a reorganization plan that created a special trust which, *inter alia*, was to pay the debtor's federal tax debt of approximately $1 million over roughly five years. Later, the trustee of the special trust sent approximately $385,000 in payment to the IRS. The trustee asked the IRS to apply the money to the debtor's trust fund tax debt. The IRS refused to do so, asserting that it could apply the money instead to non-trust fund tax debt that was not guaranteed. This Court held that "a bankruptcy court has the authority to order the IRS to apply the payments to trust fund liabilities if the bankruptcy court determines that this designation is necessary to the success of a reorganization." *United States v. Energy Res. Co., Inc.*, 495 U.S. 545, 549, 110 S. Ct. 2139, 109 L. Ed. 2d 580 (1990).

Energy Resources thus implicated a bankruptcy court's broad authority to modify creditor-debtor relationships. *Id.* The issue of jurisdiction was not raised, because the bankruptcy court's order directly affected the resolution of a creditor's claim in the debtor's bankruptcy case. *Energy Resources* merely stands for the proposition that a bankruptcy court may determine how a debtor is allowed to satisfy a creditor's claim in its bankruptcy. The case does not discuss a bankruptcy court's subject matter jurisdiction to enjoin third-party, non-debtor actions and it assuredly does not hold that a bankruptcy court has subject matter jurisdiction to enjoin such actions when they do not affect the debtor or involve the *res* of the debtor's bankruptcy estate.

d. Travelers' reliance on both *In re A.H. Robins Co.*, 880 F.2d 694 (4th Cir. 1989) and *In re Drexel Burnham Lambert Group, Inc.*, 130 B.R. 910 (Bankr. S.D.N.Y. 1991) is misplaced.

Travelers' reliance on *A.H. Robins Co.* and *Drexel* is similarly contrived. In neither case did the court purport to enjoin third-party claims against non-debtors having no effect on the debtor's estate. Instead, the respective courts merely confirmed plans that enjoined claimants from asserting claims against non-debtors that "would affect the bankruptcy reorganization in one way or another such as by way of indemnity or contribution." *See e.g.*, *In re A.H. Robins Co.*, 880 F.2d 694, 701 (4th Cir. 1989). In *A.H. Robins*, the debtor's plan enjoined certain claimants who opted out of a plan settlement from pursuing their causes of action against the debtor's directors and law firms who represented the debtor. The Fourth Circuit held that "where the entire reorganization hinges on the debtor being free from indirect claims such as suits against parties who would have indemnity or contribution claims against the debtor, we do not construe § 524(e) so that it limits the equitable power of the bankruptcy court to enjoin the questioned suits." *Id.* at 702. Similarly, in *Drexel* the bankruptcy court merely confirmed a plan that barred claims against officers and directors of the debtor to which the debtor could owe indemnification obligations. *See In re Drexel Burnham Lambert Group, Inc.*, 130 B.R. 910 (Bankr. S.D.N.Y. 1991). Neither *A.H. Robins Co.* nor *Drexel* stands for the proposition that a bankruptcy court has jurisdiction unrelated to the *res* of the bankruptcy estate.

C. Travelers' extravagant assertion that the Second Circuit's decision runs afoul of the Supremacy Clause relies on a misrepresentation of the Second Circuit's holding and analysis.

Travelers misleadingly asserts that the Second Circuit "erroneously held that state law, not a federal confirmation order, determined whether these claims could proceed against Petitioners outside of the express provisions of the confirmation order" (Travelers Br. at 17). Traveler's assertion brazenly distorts the Second Circuit's analysis and holding.

In 2004, Travelers presented the Bankruptcy Court with the broad language used in the Confirmation Injunction and asked the Court to determine if the Independent Actions were barred by the provision. The Bankruptcy Court interpreted the Confirmation Injunction to bar any and all claims against Johns-Manville insurers falling within the Bankruptcy Court's subject matter jurisdiction. In holding that the Independent Actions were barred under the Confirmation Order, the Bankruptcy Court necessarily concluded that the claims fell within its limited jurisdiction.[10] In the Second Circuit's review, the threshold issue was whether the Bankruptcy Court's conclusion with regard to its subject matter jurisdiction was in error.

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10. Indeed, as discussed more fully below, the Bankruptcy Court and the parties considered subject matter jurisdiction to be a major issue in the bankruptcy proceedings (SPA-315-16).

The Second Circuit correctly recognized that, under established precedent, the Independent Actions did not fall within the Bankruptcy Court's subject matter jurisdiction if they did not affect the *res* of Johns-Manville's bankruptcy estate. The Second Circuit, therefore, conducted an analysis to determine whether the Independent Actions could have any such effect. The Second Circuit reasoned that if, under the state laws applicable to the claims, the claimants would not be entitled to recover from Johns-Manville or its bankruptcy estate, then, absent another nexus to the *res* of the bankruptcy estate, the claims did not fall within the Bankruptcy Court's subject matter jurisdiction.

It was entirely appropriate for the Second Circuit to look to state law to determine the Independent Action Plaintiffs' rights against Johns-Manville. It is a settled principle that "[c]reditors' entitlements in bankruptcy arise in the first instance from the underlying substantive law creating the debtor's obligation, subject to any qualifying or contrary provisions of the Bankruptcy Code." *Raleigh v. Ill. Dept. of Revenue*, 530 U.S. 15, 20, 120 S. Ct. 1951, 147 L. Ed. 2d 13 (2000). Indeed, the Court has long recognized that the basic federal rule in bankruptcy is that state law governs the substance of claims, Congress having generally left the determination of property rights in the assets of a bankrupt's estate to state law. *Travelers Cas. & Sur. Co. of Am. v. Pac. Gas & Elec.*, 549 U.S. 443, 127 S. Ct. 1199, 1205, 167 L. Ed. 2d 178 (2007). Accordingly, when the Bankruptcy Code uses the word "claim", it is usually referring to a right to payment recognized under state law. *Id.* As this Court stated in *Butner v. United States*: "Property interests are created and defined by state

law" and "[u]nless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding." *Butner v. United States*, 440 U.S. 48, 55, 99 S. Ct. 914, 59 L. Ed. 2d 136 (1979).

Thus, the Second Circuit correctly looked to state law for the limited purpose of determining whether the claimants would be entitled to recover from Johns-Manville's bankruptcy estate or if they were limited to recovering solely from the insurer tortfeasors. In doing so, the Second Circuit found that, despite the Bankruptcy Court's repeated statements that the claims "arise out of" Johns-Manville's insurance policies, claimants would not be entitled to recover from Johns-Manville or under Johns-Manville's insurance policies under applicable state law. *Johns-Manville*, 517 F.3d at 64. ("Thus, it is evident that Plaintiffs' Direct Action claims constitute independent tort actions").[11]

Because the Second Circuit found that the Independent Actions cannot affect Johns-Manville's bankruptcy estate, it concluded that they never fell within the Bankruptcy Court's subject matter

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11. The Second Circuit ultimately held that:

> Plaintiffs aim to pursue the assets of Travelers. They raise no claim against Manville's insurance coverage. They make no claim against an asset of the bankruptcy estate, nor do their actions affect the estate. The bankruptcy court had no jurisdiction to enjoin the Direct Action claims against Travelers.

Johns-Manville, 517 F.3d at 65.

jurisdiction. The Second Circuit's decision presents no Supremacy Clause issue because there is no conflict between a legitimate confirmation order—properly premised on valid subject-matter jurisdiction—and the independent tort liability of Travelers to be litigated in the Independent Actions.

D. Judicial finality and repose are not compromised by a circuit court's reviewing on direct appeal a bankruptcy court's determination of its subject matter jurisdiction.

Travelers makes the spectacularly erroneous argument that "[t]he court of appeal's decision to revisit the propriety and scope of the confirmation order nearly a quarter century after the fact 'dishonor[s] the historic wisdom in the value of repose'" (Travelers' Br. at p. 20). This argument ignores the procedural history of this matter and Travelers' part in raising the issue of subject matter jurisdiction.

Travelers raised the issue of the Bankruptcy Court's subject matter jurisdiction in 2004, when it requested in its Settlement Motion that the Confirmation Order be "interpreted" to enjoin the Independent Actions. The Bankruptcy Court interpreted the Confirmation Injunction to bar all claims against insurers falling within the Bankruptcy Court's subject matter jurisdiction. Thus, the Bankruptcy Court was obliged to determine whether the Independent Actions fell within its subject matter jurisdiction. All the parties, and the Bankruptcy Court itself, recognized that subject matter jurisdiction was a threshold issue that Travelers' request demanded the Bankruptcy Court to determine (SPA-313-17).

Travelers' implication that the Clarifying Order merely decided the pedestrian issue of whether the Independent Actions "arise out of" or "relate to" Johns-Manville's insurance policies in the vernacular sense misses the point entirely. The issue decided by the Bankruptcy Court was whether the claims "arose out of" or "related to" the insurance policies as these phrases are understood in the bankruptcy realm and as Congress understood them when enacting 28 U.S.C. §§ 157 and 1334—*i.e.*, whether the claims fell within the Bankruptcy Court's subject matter jurisdiction. The Second Circuit reviewed the Bankruptcy Court's conclusions on direct appeal.

Furthermore, Travelers' assertion that "[t]he inequity of altering bankruptcy court protections—ex post and without compensation—is the very reason why settled authority prohibits collateral attacks on Chapter 11 reorganizations"[12] rings hollow, where, as here, Travelers was the party that sought an alteration of the Confirmation Order. It was Travelers—not the Independent Action Plaintiffs—that asked the Bankruptcy Court to "interpret" the Confirmation Order in a way that broadened the scope of the order far beyond the limits of the Bankruptcy Court's subject matter jurisdiction. Travelers invited the Bankruptcy Court to extend its subject matter jurisdiction beyond the realm ever conceived by Congress when enacting 28 U.S.C. §§ 157 and 1334. In entering its Clarifying Order, the Bankruptcy Court erroneously acquiesced. The Second Circuit reviewed the Clarifying Order on direct appeal. In doing so, the Second Circuit correctly

12. (Travelers' Br. at p. 21).

concluded that "[t]he fact that our case involves a clarification of the bankruptcy court's prior order does not alter the jurisdictional predicate necessary to enjoin third-party non-debtor claims." *In re Johns-Manville*, 517 F.3d at 65. For Travelers to seek and obtain an unwarranted and illegitimate extension of the Bankruptcy Court's subject matter jurisdiction some two decades after the entry of the Confirmation Order and then shriek "finality" when challenged is risible. Travelers placed jurisdiction in issue and should not be heard to complain when the Second Circuit ruled against it.

E. Common Law Settlement Counsel's assertion that the issues at bar are not jurisdictional is directly contradicted by case law.

Common Law Settlement Counsel takes a different tack than Travelers. Cognizant that the Bankruptcy Court lacked jurisdiction to bar the Independent Actions, Common Law Settlement Counsel inadvisably attempts to undermine the Second Circuit's decision *via* a hyper-technical argument, which is remarkable only for its absurdity. In short, Common Law Settlement Counsel asserts that:

> [o]nce a bankruptcy court's jurisdiction to confirm a plan of reorganization is determined, the focus shifts to whether the Bankruptcy Code authorizes such bankruptcy court to approve particular provisions within the proposed plan

(Common Law Settlement Counsel Br. at p. 10). The assertion that, if a bankruptcy court has jurisdiction to

enter a confirmation order, the court then has *carte blanche* to put any provision it wishes in the order without exceeding its subject matter jurisdiction is simply preposterous. A bankruptcy court's authority to enjoin non-debtor third party actions is an issue of subject matter jurisdiction, plain and simple. *See, e.g. In re Cont'l Airlines*, 203 F.3d 203, 214 n.12 (3d Cir. 2000) (noting that a bankruptcy court cannot simply presume it has jurisdiction to permanently enjoin third-party actions against non-debtors); *In re Zale Corp.*, 62 F.3d 746, 755 (5th Cir. 1995) (holding that a bankruptcy court may only consider enjoining third party actions after jurisdiction has been established) *MacArthur Co. v. Johns-Manville Corp.*, 837 F.2d 89, 91-92 (2d Cir. 1988). As the Fifth Circuit in *Zale* opined:

> We must establish independently that a dispute is part of a bankruptcy case; the existence of power within the bankruptcy case does not imply an expansion of jurisdiction beyond it. To the contrary, it suggests that courts must be particularly careful in ascertaining the source of their power, lest bankruptcy courts displace state court for large categories of disputes in which someone . . . may be bankrupt. Accordingly a bankruptcy court may potentially include an injunction as part of a settlement only once jurisdiction is established.

In re Zale Corp., 62 F.3d at 755 (internal quotations and citations omitted). Common Law Settlement Counsel provides absolutely no authority stating otherwise.

The Clarifying Order purports to provide Travelers an unprecedented and improper discharge of any and all liability Travelers may have that is even remotely and incidentally related to asbestos—even those outside of any claims related to Johns-Manville. There is no conceivable scenario under which a bankruptcy court would have subject matter jurisdiction to issue an injunction so wide in scope for the benefit of a *non-debtor*. Common Law Settlement Counsel indulges in pure sophistry. To the extent that Common Law Settlement Counsel's erroneous legal principle is accepted at face value, a bankruptcy court could deal with any property or take any action with regard to the property of third parties, without the availability of jurisdictional challenge. Such broad jurisdiction was never contemplated by Congress for bankruptcy courts. A bankruptcy court presiding over Johns-Manville's bankruptcy can only assert jurisdiction over the *res* of the debtor's estate and not independent tort claims against Travelers.

CONCLUSION

For the reasons set out above, there is no basis for granting *certiorari* in this case and the Petitioners' respective petitions for writ *certiorari* should be denied.

Respectfully submitted,

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