No. 09-1023

IN THE

Supreme Court of the United States

APEX OIL COMPANY, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

BRIEF *AMICUS CURIAE* OF ATLANTIC RICHFIELD CORPORATION, EQUILON ENTERPRISES LLC D/B/A SHELL OIL PRODUCTS US, THE PREMCOR REFINING GROUP INC., AND SINCLAIR OIL CORPORATION IN SUPPORT OF RESPONDENT

MICHAEL E. RIGNEY
MARK W. PAGE
KELLEY DRYE & WARREN LLP
333 West Wacker Drive
Suite 2600
Chicago, IL 60606
(312) 857-7070

ERIC R. WILSON
KELLEY DRYE & WARREN LLP
101 Park Avenue
New York, NY 10178
(212) 808-7800

JOHN L. WITTENBORN
Counsel of Record
KELLEY DRYE & WARREN LLP
Washington Harbour
Suite 400
3050 K Street, NW
Washington, D.C. 20007
(202) 342-8400
jwittenborn@kelleydrye.com

Counsel for Amicus Curiae

March 29, 2010

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

Whether an injunction issued under section 7003 of the Resource Conservation and Recovery Act, 42 U.S.C. § 6973, ordering cleanup of contaminated property, gives rise to a "right to payment" within the meaning of the Bankruptcy Code's definition of "claim," 11 U.S.C. § 101(5), such that a debtor's obligation under the injunction is a claim that can be discharged in bankruptcy.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
INTEREST OF *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	3
ARGUMENT	5
I. The Seventh Circuit's Holding Is Fully Consistent With *Ohio v. Kovacs* And In Accord With How Every Other Circuit Has Construed The Holding Of *Kovacs*, Including The Sixth Circuit	5
A. The Seventh Circuit's Decision Does Not Conflict With *Ohio v. Kovacs*	5
B. The Seventh Circuit's Decision Is In Accord With How Every Other Circuit Has Construed The Holding Of *Kovacs*, Including The Sixth Circuit	8
II. Any Conflict Between The Decision Below And The Sixth Circuit Is Insignificant And Does Not Warrant Review	12
A. There Is No Three-Way Conflict Among The Circuits	12
B. The Sixth Circuit's Decision In *Whizco* Is Not Significant, And Any Conflict Between It And The Decision Below Does Not Require This Court To Intervene	13
CONCLUSION	17

TABLE OF AUTHORITIES

CASES Page

AM Int'l, Inc. v. Datacard Corp., 106 F.3d 1342 (7th Cir. 1997) 15
Cournoyer v. Town of Lincoln, 790 F.2d 971 (1st Cir. 1986)..... 9
In re Ben Franklin Hotel Assocs., 186 F.3d 301 (3d Cir. 1999)..... 10
In re Chateaugay Corp., 112 B.R. 513 (S.D.N.Y. 1990), *aff'd*, 944 F.2d 997 (2d Cir. 1991)..... 14
In re Chateaugay Corp., 944 F.2d 997 (2d Cir. 1991).....10, 12, 13, 15
In re CMC Heartland Partners, 966 F.2d 1143 (7th Cir. 1992)..... 15
In re Combustion Equip. Assocs., 838 F.2d 35 (2d Cir. 1988) 10
In re Continental Airlines, 125 F.3d 120 (3d Cir. 1997) 10
In re Daniels, 130 B.R. 239 (E.D. Ky. 1991) 14
In re Dant & Russell, Inc., 853 F.2d 700 (9th Cir. 1988)..... 9
In re Kaiser Steel Corp., 87 B.R. 662 (Bankr. D. Colo. 1988) 14
In re Lyondell Chemical Co. et al., No. 09-10023 (Bankr. S.D.N.Y. filed Jan. 6, 2009), *available at* http://www.epiq11.com/..... 16
In re May, 141 B.R. 940 (Bankr. S.D. Ohio 1992)..... 14
In re Torwico Electronics, Inc., 8 F.3d 146 (3d Cir. 1993), *cert. denied*, 511 U.S. 1046 (1994)..... 10, 12-13, 15
In re Udell, 18 F.3d 403 (7th Cir. 1994) 8

TABLE OF AUTHORITIES—Continued

Page

Kennedy v. Medicap Pharmacies, Inc., 267 F.3d 493 (6th Cir. 2001) 9, 14
Meghrig v. KFC Western Inc., 516 U.S. 479 (1996) 3, 4
Ohio v. Kovacs, 469 U.S. 274 (1985) .....*passim*
Torwico Elecs., Inc. v. New Jersey Dep't of Envtl Prot. & Energy, 511 U.S. 1046 (1994) (No. 93-1187) 12
United States v. Apex Oil Co., 579 F.3d 734 (7th Cir. 2009) .....*passim*
United States v. Hubler, 117 B.R. 160 (W.D. Pa. 1990), *aff'd mem.*, 928 F.2d 1131 (3d Cir. 1991) 14
United States v. Whizco, Inc., 841 F.2d 147 (6th Cir. 1988) .....*passim*

STATUTES

11 U.S.C. § 101(5) 3
11 U.S.C. § 105(B) 14
11 U.S.C. § 362 9
11 U.S.C. § 362(b)(4) 14
11 U.S.C. § 362(b)(5) 14
11 U.S.C. § 503 9
11 U.S.C. § 523(a)(6) 14
11 U.S.C. § 1141(d) 3

Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA),

§ 106, 42 U.S.C. § 6906 13
§ 107, 42 U.S.C. § 6907 13

TABLE OF AUTHORITIES—Continued

	Page
Resource Conservation and Recovery Act (RCRA)	
§ 7002, 42 U.S.C. § 6972	15
§ 7002(a), 42 U.S.C. § 6972(a)	3
§ 7003, 42 U.S.C. § 6973	2
§ 7003(a), 42 U.S.C. § 6973(a)	3, 4
OTHER AUTHORITIES	
Third Amended Disclosure Statement Accompanying Third Amended Joint Chapter 11 Plan of Reorganization for the Lyondell Basell Debtors, dated March 15, 2010 (Docket No. 3988)	16
Third Amended Joint Chapter 11 Plan of Reorganization for the Lyondell Basell Debtors, dated March 15, 2010 (Docket No. 3990)	16

IN THE

Supreme Court of the United States

APEX OIL COMPANY, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

BRIEF *AMICUS CURIAE* OF ATLANTIC RICHFIELD CORPORATION, EQUILON ENTERPRISES LLC D/B/A SHELL OIL PRODUCTS US, THE PREMCOR REFINING GROUP INC., AND SINCLAIR OIL CORPORATION IN SUPPORT OF RESPONDENT

INTEREST OF *AMICI CURIAE* [1]

Pursuant to Supreme Court Rule 37.2, Atlantic Richfield Corporation, Equilon Enterprises LLC d/b/a Shell Oil Products US, The Premcor Refining Group

[1] Pursuant to Rule 37.6, *amici curiae* certify that this brief was not written in whole or in part by counsel for any party, and that no person or entity other than *amici curiae* and their counsel has made a monetary contribution to the preparation and submission of this brief. Letters from the parties consenting to the filing of this brief have been filed with the Clerk pursuant to Rule 37.2. Counsel of record for all parties received timely notice of *amici curiae's* intent to file the brief at least ten days prior to its due date.

Inc., and Sinclair Oil Corporation (collectively, the "Cooperating Parties"), as *amici curiae*, respectfully submit this brief in support of respondent United States of America. Pursuant to Supreme Court Rule 37.2, this *amici curiae* brief is filed with the consent of all parties.

Both the Cooperating Parties and petitioner Apex Oil Company ("Apex") are former owner/operators of petroleum refineries and refinery-related pipelines in or near Hartford, Illinois. The Environmental Protection Agency ("EPA") and the Cooperating Parties have entered into an Administrative Order on Consent ("AOC") to address alleged petroleum contamination in the soil and groundwater in and under Hartford, Illinois (the "Site"). Pursuant to the AOC, the Cooperating Parties are currently conducting environmental remediation work at the Site. After Apex declined to participate in this work, the United States District Court for the Southern District of Illinois issued an injunction in favor of the United States under section 7003 of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6973, directing Apex to clean up contamination at the Site. Apex refused and appealed. On appeal, the Seventh Circuit held that the RCRA injunction does not give rise to a right to payment of the United States and therefore is not a bankruptcy claim that could have been discharged in Apex's bankruptcy.[2] *United States v. Apex Oil Co.*, 579 F.3d 734, 737 (7th Cir. 2009).

The Cooperating Parties submit this brief not because they believe the decision below is of great interest or wide importance, but because they have a

[2] The Seventh Circuit also held that the terms of the injunction were not impermissibly vague. 579 F.3d at 740. Apex does not seek review of that holding.

direct and immediate interest in the finality of this matter and Apex's participation in remediation efforts at the Site. In addition, their actual experience in bankruptcy cases throughout the country involving environmental issues is quite different from Apex's speculations about the possible impact of the decision below. The reality is that, despite Apex's dire prediction, the bankruptcy process will continue to work just as it always has to foster settlements, allowing otherwise viable and responsible businesses to reorganize, notwithstanding their environmental issues.

SUMMARY OF ARGUMENT

The petition for a writ of certiorari should be denied. The Seventh Circuit's decision is not only correct but, more to the point, is unremarkable and not in need of review by this Court. In the decision below, the Seventh Circuit held that the United States' right to a RCRA injunction was not discharged as a "claim" in Apex's bankruptcy. As a general rule, a discharge in bankruptcy relieves a debtor from any liability on a claim that arose before the date of the discharge. 11 U.S.C. § 1141(d). The Bankruptcy Code defines a "claim" as not only a simple "right to payment," but also as a "right to an equitable remedy for breach of performance if such breach gives rise to a right to payment." 11 U.S.C. § 101(5). The Seventh Circuit held that RCRA section 7003(a), the statutory basis for the United States' injunction, does not authorize any monetary relief.[3] Therefore, an injunction issued

[3] In reaching its holding, the Seventh Circuit relied on this Court's decision in *Meghrig v. KFC Western Inc.*, 516 U.S. 479 (1996). *Meghrig* held that RCRA section 7002(a), the citizen suit provision of RCRA, provides a private citizen a right to pursue only injunctive relief and does not provide a right to monetary

under that statute does not give rise to a right to payment and, consequently, is not a claim that can be discharged in bankruptcy. *Apex*, 579 F.3d at 736-37.

Review of the Seventh Circuit's decision is not necessary for either of the reasons asserted by Apex—that the decision departs from this Court's decision in *Ohio v. Kovacs*, 469 U.S. 274 (1985), or that it creates a meaningful circuit split with the Sixth Circuit's holding in *United States v. Whizco, Inc.*, 841 F.2d 147 (6th Cir. 1988). The Seventh Circuit's decision is fully consistent with *Kovacs* and in accord with every other circuit's treatment of *Kovacs*, including that of the Sixth Circuit. *Kovacs* held that the State of Ohio converted its cleanup order into a dischargeable monetary obligation when it: 1) obtained the appointment of a receiver who dispossessed the debtor of his assets and disabled him from performing the required cleanup, and 2) sought only payment of money from the debtor—not performance of the cleanup order. 469 U.S. at 282-83. Neither of those circumstances is present with respect to Apex. The United States has taken no action to dispossess or disable Apex. Nor has it sought to obtain payment from Apex. In sharp contrast to the State in *Kovacs*, the United States seeks to enforce its RCRA injunction by requiring Apex actually to participate in the remedial activities at the Site.

Apex maintains that *Kovacs* holds that a cleanup injunction is dischargeable whenever the debtor must pay money to comply with it. That reading has no basis in *Kovacs* and no circuit court has so inter-

---

relief. *Id*. at 488. The Seventh Circuit concluded that the reasoning in *Meghrig* applies equally to the nearly identical operative provisions of RCRA section 7003(a), the statutory basis for the United States' injunction. 579 F.3d at 736-37.

preted *Kovacs*. All of the circuit courts, including the Sixth, recognize that *Kovacs* turned on the State's conduct—dispossessing and disabling the debtor from performing the cleanup and thereafter seeking only payment from him to defray the cleanup costs but not his performance of the cleanup.

Any conflict between the Seventh Circuit's decision and the Sixth Circuit's *Whizco* decision is insignificant. *Whizco* held that a 63-year old individual debtor's mine reclamation obligations had been discharged in his bankruptcy. The case was decided in 1988 and was the first circuit court decision to construe the holding in *Kovacs*. The court acknowledged its ruling was not compelled by *Kovacs*, and since then, the holding in *Whizco* has essentially been ignored. Since the *Whizco* decision, only three circuit courts, including the Seventh Circuit in the decision below, have been called on to decide whether a government cleanup injunction is a dischargeable claim. Contrary to the Sixth Circuit, each of those three circuit courts has ruled that a cleanup injunction is not a dischargeable claim. Under these circumstances, there is no need for this Court to address any circuit conflict.

ARGUMENT

I. The Seventh Circuit's Holding Is Fully Consistent With *Ohio v. Kovacs* And In Accord With How Every Other Circuit Has Construed The Holding Of *Kovacs*, Including The Sixth Circuit.

A. The Seventh Circuit's Decision Does Not Conflict With *Ohio v. Kovacs*.

Apex maintains that the decision below is irreconcilable with this Court's decision in *Ohio v.*

Kovacs, 469 U.S. 274 (1985). In support, Apex attempts to cast *Kovacs* as holding that an injunction is a dischargeable claim any time the party enjoined must pay money to comply with the injunction. Apex's argument, however, has no basis in the holding in *Kovacs*.

In *Kovacs*, this Court held that, on the facts before it, the State of Ohio's "cleanup order had been converted into an obligation to pay money, an obligation that was dischargeable in bankruptcy." *Id.* at 283. This Court based its holding on two essential facts: 1) that the State, through securing appointment of a receiver for Kovacs, had dispossessed Kovacs of his assets and disabled him from performing the required cleanup, and 2) that, after appointment of the receiver, the State and the receiver wanted only money from Kovacs, not his performance of an environmental cleanup. *Id.* at 282-83. Both of these facts were emphasized in this Court's opinion:

- First, when the debtor, Kovacs, failed to comply with the State's cleanup order, "rather than prosecute Kovacs under the environmental laws or bring civil or criminal contempt proceedings, the State secured the appointment of a receiver, who was ordered to take possession of all of Kovacs' nonexempt assets as well as the assets of the corporate defendants and to comply with the injunction entered against Kovacs. As wise as this course may have been, it dispossessed Kovacs, removed his authority over the site, and divested him of assets that might have been used by him to clean up the property." *Id.*

- Second, "[w]hat the receiver wanted from Kovacs after bankruptcy was the money to defray cleanup costs. At oral argument in this Court, the State's counsel conceded that after the receiver was appointed, the only performance sought from Kovacs was the payment of money." *Id*. at 283.

The Seventh Circuit's *Apex* decision is not in conflict with *Kovacs*. Unlike the State's actions in *Kovacs*, the United States has done nothing to convert its injunctive relief right into an obligation to pay money. It has not sought the appointment of a receiver for Apex or possession of Apex's assets, or otherwise done anything to hinder Apex from doing the required cleanup. Nor has the United States sought the payment of money from Apex. Instead, the United States sought and obtained a RCRA injunction that requires Apex to clean up the Site and now seeks to have Apex conduct the cleanup. Apex makes much of the fact that it is not in possession of the Site and never has been. This is not an unusual occurrence in remediation activities. In fact, none of the Cooperating Parties, all of whom are currently engaged in the same kinds of activities at the Site that Apex has been ordered to perform, is or ever has been in possession of the Site. The Cooperating Parties have only the limited access provided for the remediation work itself. Apex will have no trouble gaining necessary access to the Site to do the agreed work.

The Seventh Circuit correctly distinguished *Kovacs*. It explained that Kovacs "had failed to comply with the injunction and a receiver had been appointed to take possession of his assets and obtain from them the money needed to pay for the clean up." 579 F.3d at 737. Because the receiver "was seeking money

rather than an order that the debtor clean up the contaminated site," the State had "a claim to a 'right to payment.'" *Id.*; *accord In re Udell*, 18 F.3d 403, 406, 408 (7th Cir. 1994) (same). The court then easily distinguished this case from *Kovacs* on the grounds that the government "is not seeking a payment of money and the injunction it has obtained does not entitle it to payment." *Id.*

B. The Seventh Circuit's Decision Is In Accord With How Every Other Circuit Has Construed The Holding Of *Kovacs*, Including The Sixth Circuit.

In determining whether an equitable remedy is a claim, every other circuit court that has construed the holding in *Kovacs* has done so consistently with the Seventh Circuit. Even the Sixth Circuit, in *United States v. Whizco, Inc.*, 841 F.2d 147 (6th Cir. 1988), a decision that Apex maintains is in conflict with the Seventh Circuit's decision (Pet. at 29-36), referred to both its and this Court's decisions in *Kovacs* as turning on the fact that the State sought payment from Kovacs. First, in discussing its own *Kovacs* decision, the Sixth Circuit in *Whizco* explained:

> The Sixth Circuit [in its *Kovacs* decision] agreed, holding that the petitioner essentially sought from the respondent only a monetary payment and that such a required payment was a liability on a claim that was dischargeable under the Bankruptcy Code. *In re Kovacs*, 717 F.2d 984 (6th Cir. 1983). The opinion stressed that *the petitioner was seeking the payment of money from the respondent* to the petitioner . . . .

841 F.2d at 149 (emphasis added). The Sixth Circuit then addressed this Court's *Kovacs* decision:

> The Supreme Court affirmed [the Sixth Circuit], finding that the respondent's breach of the petitioner's injunction gave rise to a right to payment within the meaning of 11 U.S.C. § 101(4)(B). 469 U.S. at 282-83. In so holding, the Court stressed that *what the petitioner wanted from the respondent* after bankruptcy "was the money to defray cleanup costs." *Id.* at 283. Since the clean up order had been converted into an obligation to pay money, it gave rise to a "right to payment" and thus was a debt dischargeable under the Bankruptcy Code. *Id.*

Whizco, 841 F.2d at 149-50 (emphasis added); *accord Kennedy v. Medicap Pharmacies, Inc.*, 267 F.3d 493, 496 (6th Cir. 2001) (construing both Sixth Circuit and Supreme Court *Kovacs* decisions in same way).

Only two other circuit courts have construed the holding in *Kovacs* in determining whether an equitable remedy is a claim. Each is in complete accord with the Sixth and Seventh Circuits on the scope of *Kovacs*' holding.[4]

---

[4] This Court has not construed its holding in *Kovacs*. A few other circuits have construed *Kovacs* in determining issues other than whether an injunction or other equitable remedy is a bankruptcy claim. *See. e.g.*, *In re Dant & Russell, Inc.*, 853 F.2d 700, 708 (9th Cir. 1988) (holding debtor's lessor was not entitled to administrative expense priority under section 503 of Bankruptcy Code for amounts incurred as cleanup costs at leased property and in support citing *Kovacs* for proposition that injunction that is claim is "no more that general unsecured claim"); *Cournoyer v. Town of Lincoln*, 790 F.2d 971, 975-76 (1st Cir. 1986) (holding automatic stay of section 362 of Bankruptcy Code did not apply to township's enforcement of zoning ordin-

- The Second Circuit emphasized in *In re Chateaugay Corp.*, 944 F.2d 997 (2d Cir. 1991), that "[w]hat seems to have been decisive was the fact that Ohio obtained the appointment of a receiver, precluded Kovacs from taking any steps to comply with the injunction, and was seeking from Kovacs only the payment of money." *Id.* at 1008. "[B]y virtue of Ohio's actions, 'the cleanup order had been converted into an obligation to pay money.'" *Id.* at 1009 (quoting *Kovacs*, 469 U.S. at 283); *see also In re Combustion Equip. Assocs.*, 838 F.2d 35, 39 (2d Cir. 1988) ("[T]he appointment of a receiver prevented Kovacs from performing personally, thereby converting the cleanup obligation into an obligation to pay money.").

- The Third Circuit construed *Kovacs* the same way in *In re Torwico Electronics, Inc.*, 8 F.3d 146, 148 (3d Cir. 1993), *cert. denied*, 511 U.S. 1046 (1994) : "[The Court] noted that Kovacs no longer had possession of the site nor control over the cleanup; all the state sought from Kovacs was money to fund the cleanup. In essence, the Court found that Kovacs' obligation had been reduced to a monetary claim." *Accord In re Ben Franklin Hotel Assocs.*, 186 F.3d 301, 304 (3d Cir. 1999) (same); *see also In re Continental Airlines*, 125 F.3d 120, 132 (3d Cir. 1997) (quoting *Kovacs*, 469 U.S. at 283, to same effect).

---

ances against debtor and distinguishing case from *Kovacs* because debtor "ha[d] not been dispossessed from his property" and government "[was] not seeking money from [debtor] to clean up the site").

No circuit court has construed *Kovacs* to hold that a cleanup order is a dischargeable claim any time the debtor must pay money to comply. Notably, even the Sixth Circuit in *Whizco*, which reached that result on the unusual facts before it, acknowledged that its ruling was an extension of *Kovacs*: "The distinction between *Kovacs* and the case before this Court is that in the present case the plaintiff is not seeking an order that defendant Lueking pay money to the plaintiff in order to defray cleanup costs." 841 F.2d at 150. Recognizing the distinction, the Sixth Circuit "acknowledge[d] the limited character of the *Kovacs* holding" and that its holding was not compelled by *Kovacs*. *Id.*

Apex's construction of this Court's holding in *Kovacs* is inconsistent with the Court's analysis in that decision. Under Apex's position, this Court would have had no need to examine the State's and the receiver's conduct to see if, in the words of the Court, "the cleanup order had been *converted* into an obligation to pay money." 469 U.S. at 283 (emphasis added). Instead, had this Court held, as Apex would have it, that an injunction is a claim if the debtor must pay money in order to comply, it would have had to consider only whether Kovacs could have complied without paying money to anybody—whether the State, a receiver, a contractor, vendors, employees, etc. [5]

[5] Apex's position is untenable. If an equitable remedy is discharged whenever the debtor would have to pay money in order to comply, virtually all mandatory injunctions would be discharged, and many prohibitory injunctions would be, as well. For example, an injunction to cease polluting often requires a party to invest in equipment to stop newly created pollution from occurring or being released into the environment.

This is not the first time a petitioner has argued that a circuit court decision is in conflict with *Kovacs*. In petitioning for a writ of certiorari in *Torwico*, the debtor argued that the Third Circuit's *Torwico* decision, which held that a cleanup order could not be discharged in bankruptcy, was in conflict with *Kovacs*. In support, the debtor construed *Kovacs* as does Apex—arguing that any environmental obligation is dischargeable if the debtor cannot comply with the obligation without paying money—and urged that the Third Circuit had misconstrued *Kovacs*' holding. Petition for a Writ of Certiorari at 12-18, *Torwico Elecs., Inc. v. New Jersey Dep't of Envtl Prot. & Energy*, 511 U.S. 1046 (1994) (No. 93-1187). This Court denied certiorari without dissent. *Torwico*, 511 U.S. 1046.

Apex's position that *Kovacs* turns on the fact that the debtor would have to pay money to comply with the cleanup order is contrary to every circuit's reading of that decision, including the Sixth Circuit.

II. Any Conflict Between The Decision Below And The Sixth Circuit Is Insignificant And Does Not Warrant Review.

A. There Is No Three-Way Conflict Among The Circuits.

Contrary to Apex's argument (Pet. at 29-36), the Seventh Circuit's decision in *Apex* does not conflict with the rulings of the Second Circuit in *In re Chateaugay Corp.*, 944 F.2d 997 (2d Cir. 1991), and the Third Circuit in *In re Torwico Electronics, Inc.*,

---

Under Apex's reading of *Kovacs*, the debtor's obligations under such an injunction could be discharged in bankruptcy.

8 F.3d 146 (3d Cir. 1993). Like the Seventh Circuit, both the Second and the Third Circuits held that the government's cleanup order was not a dischargeable claim. Granted, the approaches each circuit took to the analysis of that question differed in some respects. The courts were analyzing different statutes under different facts, but all reached the same result.[6] Accordingly, no conflict exists between the Second, Third, and Seventh Circuits that requires this Court's intervention.

B. The Sixth Circuit's Decision In *Whizco* Is Not Significant, And Any Conflict Between It And The Decision Below Does Not Require This Court To Intervene.

The Sixth Circuit's decision in *United States v. Whizco, Inc.*, 841 F.2d 147 (6th Cir. 1988), decided in 1988, was the first circuit court decision to construe *Ohio v. Kovacs*. All of the circuit courts since then have construed *Kovacs* the same way and have held that cleanup orders are not claims.

Whizco was decided on peculiar facts involving a 63-year old individual debtor who, unlike Apex,

---

[6] *See Chateaugay*, 944 F.2d at 1008 (holding that government's cleanup order issued under CERCLA § 106 was not a dischargeable claim, notwithstanding government's option under CERCLA § 107 of doing cleanup itself and then seeking reimbursement of its costs from responsible parties); *Torwico*, 8 F.3d at 151 & n.6 (holding that government's cleanup order issued under statutory sections of unidentified state and federal statutes that did not authorize government to do cleanup itself and then sue for reimbursement of its costs, was not a dischargeable claim); *Apex*, 579 F.3d at 736-37 (holding that RCRA authorized no monetary relief and therefore government's injunction issued under RCRA was not a dischargeable claim).

lacked the physical and financial ability to comply with his mine reclamation obligations. The court held that those obligations had been discharged in his bankruptcy. *Id.* at 149, 150. In the past twenty-two years, *Whizco* has rarely been cited, and even less so approvingly. It has been cited only twelve times. Three of those times it was criticized.[7] No circuit court has actually followed its holding. [8] In fact, the

---

[7] *Whizco* was criticized by the Seventh Circuit in the decision below, the district court in the *Chateauga*y case, and a district court from the Third Circuit. *See Apex*, 579 F.3d at 738 (criticizing *Whizco* as inconsistent with decisions holding that cost incurred is not equivalent to "right to payment" under 11 U.S.C. § 105(B) and setting forth no limiting principle to distinguish equitable remedies that are claims from those that are not); *In re Chateaugay Corp.*, 112 B.R. 513, 524 n.19 (S.D.N.Y. 1990) (declining to follow *Whizco* because *Kovacs* does not support contention that injunction can be discharged merely because debtor may have to spend money to comply with it), *aff'd*, 944 F.2d 997 (2d Cir. 1991); *United States v. Hubler*, 117 B.R. 160, 164 & n.1 (W.D. Pa. 1990) (declining to follow *Whizco* because it is contrary to rationale of *Kovacs*, which limited its holding to instances where monetary payment is only relief sought from debtor), *aff'd mem.*, 928 F.2d 1131 (3d Cir. 1991).

[8] Only three lower courts have followed *Whizco*'s holding, *In re May*, 141 B.R. 940 (Bankr. S.D. Ohio 1992); *In re Daniels*, 130 B.R. 239, 240 (E.D. Ky. 1991), and *In re Kaiser Steel Corp.*, 87 B.R. 662, 665 (Bankr. D. Colo. 1988)—and in not one of them was it dispositive of the matter before the court. *See May*, 141 B.R. at 945 (denying debtor summary judgment that covenant not to compete was dischargeable claim); *Daniels*, 130 B.R. at 242-43 (ultimately holding the debtor's reclamation obligations were non-dischargeable under exception to discharge set forth in 11 U.S.C. § 523(a)(6)); *Kaiser Steel*, 87 B.R. at 666-67 (holding that Utah's enforcement of its environmental laws was excepted from automatic stay under police and regulatory powers exception of 11 U.S.C. §§ 362(b)(4), (5)). In *Kennedy v. Medicap Pharmacies, Inc.*, 267 F.3d 493, 496, 497-98 (6th Cir. 2001), the Sixth Circuit reiterated its prior holding in *Whizco*, but held

Second and Third Circuits did not even cite it in discussing the dischargeability of cleanup orders in their respective *Chateaugay* and *Torwico* decisions.

As shown above, the circuit courts, including the Sixth, agree on the meaning of *Kovacs*, and there is great weight in all the circuit courts since *Whizco* unequivocally agreeing that a government cleanup order is not a claim that can be discharged in bankruptcy.[9] Moreover, this is not an issue that the circuit courts are called on to resolve with any regularity. In fact, the circuit courts have done so on only five occasions in the twenty-five years since *Kovacs*. The Sixth Circuit has not had an opportunity to revisit its holding on this issue in light of the more recent unanimous circuit court decisions in disagreement.

The *Apex* decision does not depart from *Kovacs*, was decided correctly, and creates no meaningful circuit split. In addition, in the experience of the Cooperating Parties, environmental issues rarely preclude an otherwise viable business from reorganizing under the Bankruptcy Code. State and federal environmental regulators have proven to be sophisticated participants in the bankruptcy process.

---

that a covenant not to compete was not a claim and therefore could not be discharged.

[9] *See Apex*, 579 F.3d 734 (7th Cir. 2009); *Torwico*, 8 F.3d 146 (3d Cir. 1993), *cert. denied*, 511 U.S. 1046 (1994); *In re CMC Heartland Partners*, 966 F.2d 1143, 1146-47 (7th Cir. 1992); *Chateaugay*, 944 F.2d 997 (2d Cir. 1991); *cf. AM Int'l, Inc. v. Datacard Corp.*, 106 F.3d 1342, 1348 (7th Cir. 1997) (RCRA injunction issued in favor of private citizen plaintiff under RCRA § 7002, 42 U.S.C. § 6972, was not discharged as "claim" in defendant's previous bankruptcy).

They recognize that forcing the liquidation of debtors is usually not in the public's interest. Accordingly, they have shown great flexibility and creativity in arriving at settlements with debtors that are acceptable to creditors and allow a debtor to emerge from bankruptcy as a going concern while bearing a negotiated portion of its environmental liabilities. For example, Apex highlights the recent bankruptcy cases of Lyondell Chemical Company and certain of its affiliates, now pending in the United States Bankruptcy Court for the Southern District of New York, as exemplifying the need for this Court's intervention (Pet. at 36 n. 2). There, the debtors recently filed a Chapter 11 plan of reorganization and disclosure statement for the plan indicating that the debtors, the EPA, and state environmental agencies had reached, in principle, a global settlement of all outstanding environmental issues.[10]

[10] *See* Third Amended Disclosure Statement Accompanying Third Amended Joint Chapter 11 Plan of Reorganization for the Lyondell Basell Debtors, dated March 15, 2010, at 60-61, 100-03 (Docket No. 3988), and Third Amended Joint Chapter 11 Plan of Reorganization for the Lyondell Basell Debtors, dated March 15, 2010, at 54-56 (Docket No. 3990), *In re Lyondell Chemical Co. et al.*, No. 09-10023 (Bankr. S.D.N.Y. filed Jan. 6, 2009), *available at* http://www.epiq11.com/ (follow "Lyondell Chemical Company" hyperlink; then follow "Docket" hyperlink; then search for Docket Nos. 3988 (Disclosure Statement) and 3990 (Plan)).

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

MICHAEL E. RIGNEY
MARK W. PAGE
KELLEY DRYE & WARREN LLP
333 West Wacker Drive
Suite 2600
Chicago, IL 60606
(312) 857-7070

ERIC R. WILSON
KELLEY DRYE & WARREN LLP
101 Park Avenue
New York, NY 10178
(212) 808-7800

JOHN L. WITTENBORN
Counsel of Record
KELLEY DRYE & WARREN LLP
Washington Harbour
Suite 400
3050 K Street, NW
Washington, D.C. 20007
(202) 342-8400
jwittenborn@kelleydrye.com

Counsel for Amicus Curiae

March 29, 2010