NO. 18-_____

In the Supreme Court of the United States

CURTLAND H. CAFFEY,
S. BREWSTER RANDALL, II, and ROBERT C. SANDERS,

Petitioners,

v.

BRENDA K. BOWERS,
CHAPTER 7 TRUSTEE OF THE BANKRUPTCY ESTATE
OF NICOLE GAS PRODUCTION, LTD.,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a state RICO action for injuries to a Chapter 7 debtor that arises five years after the filing of the Chapter 7 petition is property of the bankruptcy estate?

2. Whether a reasonable good faith belief that a cause of action is not property of a bankruptcy estate is a defense for violation of the automatic stay 11 U.S.C. § 362(a).

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PETITION FOR WRIT OF CERTIORARI

Curtland H. Caffey and S. Brewster Randall, II, as trustees for the probate estate of Freddie L. Fulson, and Robert C. Sanders, as litigation counsel to Nicole Gas Production, Ltd. ("NGP"), petition for review of the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The Sixth Circuit opinion affirming the Sixth Circuit Bankruptcy Appellate Panel opinion is reported as *Lowe v. Bowers*, 916 F.3d 566 (6th Cir., Feb. 22, 2019) (App.1a-24a). The Sixth Circuit Bankruptcy Appellate Panel opinion affirming the opinion of the United States Bankruptcy Court for the Southern District of Ohio is reported as *Lowe v. Ransier*, 581 B.R. 843 (B.A.P. 6th Cir. Mar. 13, 2018) (App.25a-48a). The opinions of the United States Bankruptcy Court for the Southern District of Ohio are reported as *In re Nicole Gas Production, Ltd.*, 519 B.R. 723 (Bankr. S.D. Ohio, September 26, 2014) (contempt order) (App.114a-180a) and *In re Nicole Gas Production, Ltd.*, 542 B.R. 204 (Bankr. S.D. Ohio, Dec. 10, 2015) (monetary sanctions) (App.49a-113a).

JURISDICTION

The Sixth Circuit opinion was filed on February 22, 2019. This Court has jurisdiction under 28 U.S.C. § 1254(1) and Supreme Court Rule 13.

RELEVANT STATUTORY PROVISIONS

- **11 U.S.C. § 362(a) provides:**

  Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of—****(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate; . . . .

- **11 U.S.C. § 105(a) provides:**

  The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, *sua sponte*, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

STATEMENT OF THE CASE

INTRODUCTION

This case arises from a 2013 civil action filed in Ohio state court by Freddie L. Fulson under the Ohio Corrupt Practices Act, Ohio Rev. Code § 2923.31, *et seq.* ("OCPA"), against four affiliated natural gas pipeline companies—Columbia Gas Transmission, L.L.C. ("Transmission Company" or "TCO"), which owns and operates an interstate natural gas pipeline system serving the Appalachian region, and three of TCO's affiliated local distribution companies ("LDCs"), Columbia Gas of Ohio, Inc., Columbia Gas of Pennsylvania, Inc., and Columbia Gas of Kentucky, Inc. (collectively, "the Columbia Companies").

Fulson, now deceased and succeeded by his probate estate, alleged in his OCPA complaint that the Columbia Companies perpetrated wire fraud, mail fraud and other illegal acts to drive his two companies out of business and tortuously block their ability to recover their damages in civil litigation.

One of Fulson's companies, Nicole Gas Production, Ltd. ("NGP"), is a debtor in chapter 7 bankruptcy. The United States Bankruptcy Court for the Southern District of Ohio ruled that the claims in the OCPA action pertaining to injuries sustained by NGP were the exclusive property of the Chapter 7 bankruptcy estate and that the filing of the action violated the automatic stay in 11 U.S.C. § 362(a). The bankruptcy court entered a contempt order and monetary sanctions under 11 U.S.C. § 105 against Fulson's probate

estate and his attorneys, James A. Lowe and Robert C. Sanders (collectively, "the Fulson parties").

Fulson made two principal arguments in the bankruptcy court and on appeal as to why the contempt order and sanctions were improper. First, he argued that he had independent standing to bring a private cause of action under the OCPA because the OCPA, unlike for the federal Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961, *et seq.* ("RICO") and the RICO statutes in other states, provides standing to persons who are "indirectly injured." Second, he argued that the OCPA claims did not exist when the involuntary bankruptcy petition was filed and therefore were not property of the NGP bankruptcy estate subject to the automatic stay.

On the first argument, the bankruptcy court and the two reviewing courts ruled that the "indirectly injured" language of the OCPA does not override the common law rule that only a corporation can sue for injuries to the corporation. Although petitioners believe that the Ohio legislature intended such an override by expanding standing to any person "indirectly injured," petitioners do not seek review of the Sixth Circuit's holding to the contrary. Whether the OCPA abrogates aspects of common law presents no inter-circuit conflict or any other basis for granting *certiorari*.

This Court should review, however, the Sixth Circuit's holding that the OCPA claims are the property of the NGP bankruptcy estate. Under *In re Van Dresser Corp.*, 128 F.3d 945, 947 (6th Cir. 1997), property of a bankruptcy estate is limited to claims that the debtor could have raised at the commencement of the bankruptcy case. The Sixth Circuit's holding that the OCPA

claims are property of the NGP bankruptcy estate directly conflicts with *First Nationwide Bank v. Gelt Funding Corp.,* 27 F.3d 763, 768-769 (2d Cir. 1994), which holds that "a cause of action does not accrue under RICO until the amount of the damages becomes clear and definite." In the instant case, not only were the OCPA damages not "clear and definite" when the bankruptcy petition was filed, *there were no damages at all*. The OCPA claims only arose five years later due to events that might never have occurred. Since there were no damages at the time of the petition and there was the distinct possible that there might never be damages, no OCPA action existed when the petition was filed. As a result, the OCPA claims were not property of the bankruptcy estate and were not subject to the automatic stay.

This Court should also grant *certiorari* because the Sixth Circuit ruled that there is no good faith defense to sanctions in bankruptcy court. This ruling conflicts with *Lorenzen v. Taggart*, 888 F.3d 438 (9th Cir. 2018), which holds that good faith is a defense to violation of a discharge order. *Lorenzen* is presently before this Court as *Taggart v. Lorenzen*, Case No. 18-489. Oral argument was heard on April 24, 2019. While predicting the outcome of a case from oral argument is dicey at best, the questioning of the Court suggests that it will affirm the Ninth Circuit's holding that good faith is a defense to sanctions in bankruptcy court.

FACTUAL BACKGROUND

The facts of this case reveal egregious corporate malfeasance by the Columbia Companies. Petitioners summarize the key facts here.

A. The Fulson Companies

Natural gas is transported from the well to the end-user customer through three successive pipeline systems: gathering lines connecting the wells to the interstate pipeline system, the interstate pipeline system which delivers the gas to local distribution systems owned by local distribution companies ("LDCs"), and the LDC systems that deliver the gas to the end-user customer.

In the mid-1990s, the federal government deregulated interstate natural gas pipelines to promote greater competition in the marketing and sale of natural gas. Interstate pipeline companies were prohibited from owning the gas shipped through their pipelines. Instead, they were limited to providing gas storage and transportation services to independent marketers at federally approved rates on an equal access basis. State regulators allowed LDCs to continue to own gas shipped through their systems, but required them to share their systems with independent marketers. The effect of the deregulation of the industry was that the monopoly held by interstate pipelines and LDCs over their systems was broken, opening up robust competition from independent gas marketers able to compete with the LDCs on equal footing.

To take advantage of the marketing opportunities created by the deregulation of industry, Freddie L. Fulson formed NGP, a natural gas production company, and Nicole Energy Services, Inc. ("NES"), a natural gas marketing company. Both companies were owned by Nicole Gas Marketing, Inc., which was in turn owned by Fulson.

In 1999, NGP purchased 138 gas-producing wells. NGP sold this gas to NES, which marketed the gas to its customers in Ohio, Pennsylvania and Kentucky. To deliver the gas to these customers, NES entered into transportation agreements with four affiliated pipeline companies: Columbia Gas Transmission, L.L.C. ("Transmission Company" or "TCO"), which owns and operates an interstate natural gas pipeline system, and three of TCO's affiliated LDCs, Columbia Gas of Ohio, Inc., Columbia Gas of Pennsylvania, Inc., and Columbia Gas of Kentucky, Inc. (collectively, "the Columbia Companies").

Fulson's business model proved successful for three reasons. First, NGP owned its own wells and therefore did not have to buy gas at market prices. Second, NES was able to inexpensively deliver the gas it purchased from NGP to its customers using the TCO and Columbia LDC pipeline systems. Finally, Fulson, an African American, was able to expand the NES customer base with government contracts under federal and state minority set aside programs. These included a lucrative contract to supply gas to Ohio State University, a contract previously held by Columbia Gas of Ohio.

B. The Fraudulent Under-Crediting of the Gas Produced By NGP

Alarmed at Fulson's inroads into the market share of the Columbia LDCs, the Columbia Companies engaged in a tortious scheme to eliminate NGP and NES as competitors and block their civil remedies. Under the scheme, TCO fraudulently understated the actual amount of gas delivered from the NGP wells into the TCO interstate transmission system. Rather

than measure the gas with meters, as required by federal law, TCO falsified production reports to credit NES with *less than one-third* of the gas actually delivered by NES into the TCO system. TCO and its affiliated LDCs then used this fraudulent production data to terminate NES's transportation contracts on the false ground that NES had a "negative gas imbalances" on their systems, *i.e.*, had delivered more gas out of the systems than was delivered into the systems. Because NES was unable to deliver gas directly to its customers, it was effectively driven out of business and ceased operations.

After NES' demise, NGP began to market its gas on its own behalf. To do so, it entered into transportation agreements with TCO and the Columbia LDCs. TCO continued to mis-measure and under-credit the gas produced from NGP wells and even seized gas placed on the TCO pipeline by NGP. Due to TCO's mis-measurement and under-crediting of NGP's gas, and its seizure of gas delivered by NGP into the TCO system, NGP eventually was forced to sell the remainder of its wells and go out of business. TCO's brazen seizure of NGP's gas was later ruled to be illegal by the state court, which ordered the gas released. By then, however, TCO had achieved its objective of driving NGP out of business, eliminating it as a competitor and regaining the market share previously lost to NES.

C. The State Court Contract Litigation

In June 2001, before NES was driven out of business, the parties' dispute boiled into litigation. The Columbia LDCs fired the opening salvo with a state court breach of contract action in which they alleged

that NES had negative gas imbalances on their systems. NES impleaded TCO, alleging that TCO had breached its service agreements with NES by failing to measure NES's gas with meters and by failing to credit NES with the full amount of gas it delivered into the TCO system.

On September 5, 2003, the state court entered a declaratory order that TCO's service agreement with NES required TCO to install meters to measure the gas delivered by NES into the TCO pipeline system. Confronted with having to proceed to a jury trial on the losing end of this declaratory order, the Columbia Companies filed an involuntary bankruptcy petition against NES *the day before jury selection* and removed the contract dispute to bankruptcy court, all with the aim of settling NES's contract claims against TCO with a Trustee for less than would be awarded by the jury.

D. TCO's Settlement of the NES and NGP Claims

The NES bankruptcy trustee hired Sanders as special counsel to prosecute NES's contract claim against TCO and the case was remanded to state court. The state court entered partial summary judgment as to liability against TCO, holding that TCO had breached its service contract with NES by failing to use meters to measure the gas delivered into the TCO pipeline system. Then, in March 2006, NES's experts opined that TCO's fraudulent mis-measuring of gas had caused NES more than $36.6 million in damages. The NES bankruptcy trustee then compromised NES's $36.6 million claim against TCO by selling it to TCO for approximately $3 million.

Having successfully used an involuntary Chapter 7 bankruptcy petition to block the litigation of NES's claims, the Columbia Companies employed the same tactic to block the litigation of NGP's claims. They solicited four purported creditors of NGP and guided them in filing an involuntary petition against NGP. The petition was filed on March 23, 2009. On October 5, 2012, the NGP trustee (a different trustee than the NES trustee) filed a motion to approve a settlement of NGP's claims against TCO for $250,000. The bankruptcy court approved the settlement on September 26, 2014.

E. The OCPA Action

In 2013, Fulson, through his attorneys, Lowe and Sanders, filed the OCPA action in the Court of Common Pleas for Franklin County, Ohio, against the four Columbia Companies. As damages, Fulson sought to recover the difference between the settlements paid by TCO and the amounts the Fulson companies would have recovered in civil litigation.

The OCPA Complaint details the acts or wire fraud, mail fraud and common theft employed by the Columbia Companies to eliminate NGP and NES as competitors and block their redress in court. The OCPA violations included the fraudulent mismeasurement and under-crediting of the gas that formed the basis of NES's third-party complaint in the contract action, as well as additional predicate acts that followed, including the seizure of NES's gas, which seizure the state court had ruled was illegal, and the tortious obstruction of NES's and NGP's civil remedies. [OCPA Complaint, B.R. Dkt. 161-1; 161-3]

Fulson's OCPA damages arise from the difference between the legal standard applied by bankruptcy courts in approving compromises of claims held by a debtor (whether the compromise falls anywhere within the range of a reasonable compromise) and the standard applied in finding damages in civil litigation (proof by the preponderance of the evidence). The OCPA damages did not accrue until the bankruptcy court approved the $250,000 settlement on September 26, 2014, five years after the involuntary petition was filed on March 23, 2009.

No OCPA damages would have accrued if the NES and NGP bankruptcy trustees had either litigated the NES and NGP claims to verdict or settled the claims at amounts equal to or greater than the amounts the companies would have recovered in litigation. In either of these situations the OCPA violations would have caused no damage. Thus, at the time of the NGP bankruptcy petition, there were no OCPA claims and there was the distinct possibility none would accrue. The claims only accrued when NGP released the Columbia Companies of all liability and no longer owned a property interest in any claim against them. The OCPA damages are not duplicative of the $250,000 settlement because they are net the settlement. The OCPA damages are not property of the bankruptcy estate because they accrued after the bankruptcy petition and at a time when NGP no longer had a property interest in any claim against the Columbia Companies.

F. The Contempt Proceedings

If the Columbia Companies believed that the OCPA action violated the automatic stay, they could have efficiently resolved that question by filing a motion to

dismiss the OCPA action on the ground that Fulson lacked standing. Instead, the NGP trustee stayed the OCPA action and filed a motion in bankruptcy court for sanctions against Fulson and his counsel, Lowe and Sanders. He did this without communicating to the Fulson parties his concerns or requesting that they cure the stay violation he believed had occurred, even though he would later testify that this is his standard practice.

On receipt of the sanctions motion, the Fulson parties tried to resolve the trustee's concerns. Although they did not believe (and still do not believe) that the OCPA complaint violated the automatic stay, they filed an amended OCPA complaint that sought to recover damages only for harm on NES, not NGP. Unknown to the Fulson parties, the NGP trustee had already obtained a stay of the OCPA action from the state court judge on the trustee's representation that the OCPA action violated the automatic stay.

The Fulson parties argued in bankruptcy court that there was no violation of the automatic stay because Fulson had indirect injury standing under the OCPA and because the OCPA claims did not arise until five years after the bankruptcy petition was filed. On the second argument, the Fulson parties relied on *In re Van Dresser Corp.*, 128 F.3d 945, 947 (6th Cir. 1997) (property of a bankruptcy estate is limited to claims that the debtor could have raised at the commencement of the bankruptcy case) and *First Nationwide Bank v. Gelt Funding Corp.,* 27 F.3d 763, 768-769 (2d Cir. 1994) ("a cause of action does not accrue under RICO until the amount of the damages becomes clear and definite.").

The Fulson parties argued in their briefing in the contempt proceedings:

> As a person with an ownership interest in NGP, Fulson would be indirectly damaged if the Trustee settles NGP's claims against TCO for less than NGP would have recovered in a civil action. The damages—the difference between the settlement and the recovery in a civil action—*arise only after there is a settlement and release*.

[B.R. Dkt. 132 at 2] (emphasis added).

Lowe argued in his brief:

> In this case, however, Fulson cannot possibly recover twice. Instead, the last predicate act which would allow Fulson's damages to accrue and become ascertainable is the settlement and recovery by the Trustee. Thus, a double recovery is impossible since Fulson is only seeking recovery to the extent that the Trustee does not recover full damages on behalf of NGP estate.

[B.R. Dkt. 183 at 11] (emphasis in original).

Sanders likewise argued in his brief in the bankruptcy court that Fulson's OCPA damages "will be reduced to the extent that the Trustee recovers from TCO." [B.R. Dkt. 182 at 15].

The Co-Administrators of the Fulson probate estate argued in their brief in the bankruptcy court:

> We believe it is quite apparent that the Ohio RICO complaint was intended to seek as damages only the difference between what

> NGP would have recovered in the civil litigation and the $250,000 compromise subsequently approved by this Court.

[B.R. Dkt. 248 at 1].

At the hearing on the contempt motion, the Trustee's counsel acknowledged that the damages sought by Fulson in the OCPA action were net the $250,000 settlement. She stated: "Within the responses that have been filed it has also been made quite clear by the Fulson parties that any damages would necessarily be the net amount of the compromise[.]" [Hearing Tr., B.R. Dkt 175 at 9:11-14] (emphasis added).

Sanders testified at the contempt hearing that Fulson's claims do not materialize until "the trustee surrenders all claims that the Debtor has against [the Columbia Gas entities]," and that "[i]t's therefore conceptionally impossible for Mr. Fulson to be invading or putting his hand into assets of the Debtor's estate because at that instant the Debtor's estate no longer has any property interest in those claims." [Hearing Tr., B.R. Dkt. 175 at 79:4-7; 18-23]. Sanders testified further that the OCPA action "in no way did or even could be an effort to get property of the estate." *Id.* at 90:7-10.

Lowe's counsel argued at the contempt hearing that the harm to Fulson was "a settlement for less than the entire amount that should have been owed under the claim" and that with his claim, Fulson was only "asking for the difference." [Hearing Tr., B.R. Dkt. 175 at 16:12-16]. Lowe's counsel stated further "there's no possible chance of double recovery because the trustee would have to settle their claim before the

proximate cause even results to the client in this case." *Id.* at 21:23-22:2.

Despite these arguments, the bankruptcy court found the OCPA claims were property of the bankruptcy estate, entered its contempt order and imposed $95,386.25 in sanctions. [B.R. Dkt. 194; 254]. The bankruptcy court rejected petitioners' argument that the damages were not clear and definite when the bankruptcy petition was filed. It reasoned that because the claims are derivative claims the damages must have clear and definite when the bankruptcy petition was filed:

> [T]he argument made by Sanders and Lowe—that Fulson's damages will become clear and definite only after Ransier settles NGP's claims against the Columbia Gas Entities for less than Fulson believed the claims were worth—ignores the derivative nature of Fulson's claims.

App.173a-174a. This reasoning incorrectly assumes that because the claims were derivative the damages must have been clear and definite when the petition was filed. This is a *non sequitur*. It does not follow that because the claims were derivative the damages must have been clear and definite when the petition was filed.

In its contempt order, the court also ruled that good faith is not a defense to a finding of civil contempt. The court stated:

> [E]ven if he [Sanders], as well as the other Fulson parties, acted in good faith, a good faith belief is not a defense in civil contempt proceedings.

App.178a. (quotations and citations omitted)

G. The Appeal to the BAP

The Fulson parties appealed the contempt order and sanctions order to the Sixth Circuit BAP. The BAP affirmed the orders without ever reaching petitioners' argument that Fulson's OCPA damages were net the settlement, incorrectly stating that the argument had not be raised in bankruptcy court:

> Appellants argued during this appeal that Fulson's unique damages were the difference between the settlement value and what Appellants believed was full value for the Columbia Gas claims. However, neither Fulson nor the other Appellants made such a claim before this appeal.

App.39a. As the Fulson parties argued in their subsequent appeal to the Sixth Circuit, the BAP was simply wrong that this argument had not been made to the bankruptcy court. They cited in their Sixth Circuit brief the numerous instances quoted above in which the "netting" argument was made to the bankruptcy court. [Sixth Cir. Dkt. 24 at 28-30].

By not recognizing the argument that Fulson's OCPA damages would be net the $250,000 settlement, the BAP stated that "[e]very dollar Fulson would have recovered would represent a dollar the estate could not recover." App.41a. This is incorrect. Because Fulson's OCPA damages would be net the estate's settlement—and would only arise after the estate had settled and released all claims against the Columbia Companies—any post-settlement recovery by Fulson

on his OCPA claims could not possibly diminish the amount paid to the estate.

H. The Appeal to the Sixth Circuit

The Fulson parties argued on appeal that "the OCPA claims could not have been property of the NGP bankruptcy estate because the claims did not accrue until September 26, 2014—long after NGP's involuntary bankruptcy was filed on March 23, 2009." [Sixth Cir. Dkt. 24 at 14]. The OCPA claims, they argued, "only accrued when the Bankruptcy Court approved the $250,000 settlement on September 26, 2014, well after the date when any pre-petition claims became property of the bankruptcy estate." *Id.* at 15. Expanding on these points, the Fulson parties argued:

> It is settled law that a bankruptcy estate only owns claims that existed when the bankruptcy petition was filed. As this Court has explained, "if the debtor could have raised a state claim *at the commencement of the bankruptcy case*, then that claim is the exclusive property of the bankruptcy estate and cannot be asserted by a creditor." *Van Dresser Corp.*, 128 F.3d at 947 (emphasis added). *See also Bondi v. Bank of Am. Corp.* (*In re Parmalat Sec. Litig.*), 383 F.Supp.2d 587, 594 (S.D.N.Y. 2005) (a trustee "stands in the shoes of the defunct corporation and may assert only claims that the debtor could have asserted at the moment before it entered bankruptcy."). In this case. The Trustee could not possibly have asserted Fulson's OCPA claims pre-petition because "a cause of action *does not accrue* under RICO until the amount

of the damages becomes clear and definite." *First Nationwide Bank v. Gelt Funding Corp.,* 27 F.3d 763, 768-769 (2d Cir. 1994) (emphasis added). Fulson's claim only accrued when the Bankruptcy Court approved the $250,000 settlement on September 26, 2014. *See Bankers Trust Co. v. Rhoades*, 859 F.2d 1096, 1106 (2d Cir. 1988), *cert. denied,* 490 U.S. 1007 (1989) (creditor asserting RICO claim against debtor's principals must await bankruptcy court's disposition of trustee's claim based on same wrongful conduct *before the creditor's claim will accrue*); *Gelt Funding Corp.,* 27 F.3d at 768-769 ("[A] cause of action *does not accrue* under RICO until the amount of the damages becomes clear and definite.") (Emphasis added). Fulson's OCPA claims did not accrue and his OCPA damages did not become "clear and definite" until after the Debtor had released TCO and no longer had claims of its own.

[* * * *]

The involuntary Chapter 7 petition in this case was filed on March 23, 2009. Fulson's individual damages were not clear and definite until September 26, 2014, when the Bankruptcy Court approved the $250,000 settlement between the estate and TCO. Fulson could not calculate his OCPA damages (the difference between the settlement amount and the amount the NGP would have recovered in litigation) until the settlement was approved. Thus, the Fulson OCPA claims

> did not exist when the involuntary petition was filed, and as a result, were never property of the bankruptcy estate.

[Sixth Cir. Dkt. 24 at 37-38; 41].

> Petitioners argued further:
>
> There is no danger of duplicative recovery in this case because Fulson seeks recovery only to the extent that the Trustee's $250,000 settlement with TCO did not make NGP whole. The recovery by Fulson, in other words, would be reduced by $250,000. As Fulson is not seeking to recover the amount that NGP has already recovered through the Trustee, his claims are not duplicative of NGP's claim and Fulson was not seeking to recover property of the bankruptcy estate.

[Sixth Cir. Dkt. 24 at 27 (citations omitted)].

> The Sixth Circuit rejected these arguments, stating:
>
> If Fulson was considering pursuing claims belonging to the corporation he owned, then upon the moment of the bankruptcy filing, those claims belonged to the corporation's bankruptcy estate. *In re Van Dresser Corp.*, 128 F.3d at 947 ("[I]f the debtor could have raised a state claim at the commencement of the bankruptcy case, then that claim is the exclusive property of the bankruptcy estate . . . "). The Fulson Parties argue that Fulson's individual Corrupt Practices Act claims were not the property of the bankruptcy estate because the claims had not accrued at the

> time of the petition. They further assert that it was only when the claims were valued at $250,000 by the Trustee that those claims accrued. This is nonsense. Fulson never had any independent claims to assert.

App.20a.

As set forth more fully below, this reasoning is flawed. The fact that Fulson could not assert the claims does not mean that the claims are necessarily property of the estate. They could only be property of the estate if they could have been asserted at the time of the bankruptcy petition, and the claims did not exist at that time.

As to good faith, the Sixth Circuit ruled that "Fulson may have believed he personally had a viable claim to assert against Columbia Gas," but that the sanctions were appropriate against he and his counsel "regardless of their good faith or lack thereof." App.23a.

REASONS FOR GRANTING THE PETITION

I. THE SIXTH CIRCUIT'S OPINION CONFLICTS WITH THE SECOND CIRCUIT OPINION IN *GELT FUNDING*

This Court should grant this petition because the Sixth Circuit's affirmance of the contempt and sanctions orders directly conflicts with *First Nationwide Bank v. Gelt Funding Corp.,* 27 F.3d 763, 768-769 (2d Cir. 1994), which holds that "a cause of action does not

accrue under RICO until the amount of the damages becomes clear and definite."

The parties agree that a bankruptcy estate only owns claims that existed when the bankruptcy petition was filed. As the Sixth Circuit held in *In re Van Dresser Corp.*, 128 F.3d 945 (6th Cir. 1997), "if the debtor could have raised a state claim *at the commencement of the bankruptcy case*, then that claim is the exclusive property of the bankruptcy estate and cannot be asserted by a creditor." *Id.* at 947 (emphasis added). *See also Bondi v. Bank of Am. Corp.* (*In re Parmalat Sec. Litig.*), 383 F.Supp.2d 587, 594 (S.D.N.Y. 2005) (a trustee "stands in the shoes of the defunct corporation and may assert only claims that the debtor could have asserted *at the moment before it entered bankruptcy*."). (emphasis added).

As set forth above, petitioners argued that the OCPA claims did not exist when the bankruptcy petition was filed. The Sixth Circuit rejected this argument on the basis that "Fulson never had any independent claims to assert." App.20a. The fact that Fulson does not have standing to assert the OCPA claims does not mean that the claims are necessarily property of the bankruptcy estate, however. A claim could both not belong to Fulson and also not belong to the estate*, i.e.*, be a derivative claim to be prosecuted as a civil action by the debtor after the conclusion of the bankruptcy.

For a claim to be owned by the estate, it must be one that could be asserted at the time the bankruptcy petition was filed. The OCPA claims did not exist at the time of the petition, and never would have existed if the claims had been litigated to a verdict or settled for an amount equal to or greater than would have

recovered had the claims be litigated to a verdict. Thus, there were no OCPA claims to assert when the bankruptcy petition was filed. There were certainly no damages that were "clear and definite," as required for a racketeering claim to accrue under *Gelt*.

This Court should grant this petition to resolve the split between the Sixth Circuit in this case that the OCPA claims existed when the bankruptcy petition was filed and the Second Circuit holding in *Gelt* that "a cause of action does not accrue under RICO until the amount of the damages becomes clear and definite."

II. THE SIXTH CIRCUIT'S OPINION CONFLICTS WITH THE NINTH CIRCUIT RULING IN *LORENZEN V. TAGGART*, 888 F.3D 438 (9TH CIR. 2018)

Fulson and his counsel reasonably believed that the OCPA claims were not property of the bankruptcy estate, both because the OCPA provided Fulson with an independent cause of action as a person "indirectly injured" and because the claims did not accrue until five years after the filing of the bankruptcy petition.

The Sixth Circuit acknowledged that Fulson may have had the good faith belief that he had standing to bring the OCPA claims, but ruled that sanctions against Fulson and his attorneys were appropriate regardless because there is no good faith defense to sanctions in bankruptcy court. The court stated that "Fulson may have believed he personally had a viable claim to assert against Columbia Gas," but that the sanctions were appropriate against he and his counsel "regardless of their good faith or lack thereof." App.23a (emphasis added). This ruling conflicts with *Lorenzen v. Taggart*, 888 F.3d 438 (9th Cir. 2018), in which the

Ninth Circuit held that sanctions for violating a bankruptcy court discharge injunction are inappropriate where there is a good faith belief that the debt had not been discharged. *Lorenzen*, which is before this Court's on the merits in *Taggart v. Lorenzen*, Case No. 18-489.

The bankruptcy court scoured the record in this lengthy dispute in search of apparent inconsistencies in the positions taken by petitioners. Finding several instances of what it believes are inconsistencies, it questions whether petitioners actually believed that Fulson had standing to assert the OCPA claims or that they actually believed that the claims did not exist when the bankruptcy petition was filed. Yet when this litigation is viewed globally, petitioners have been very consistent on their central positions that the OCPA vested Fulson with indirect injury standing and that the claims were not subject to the automatic stay estate because they did not exist when the bankruptcy petition was filed.

Petitioners' belief that the OCPA vested Fulson with standing to bring the OCPA claims is not unreasonable given the legislative history of the statute and the case law construing it. The Ohio legislature patterned the OCPA after the federal Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961, et *seq*. ("RICO"). However, the OCPA was not a mere restatement of the federal RICO statute, like most state RICO statutes. It was designed to be "'the toughest and most comprehensive [RICO] Act in the nation.'" *State v. Schlosser*, 79 Ohio St. 3d 329, 333, 681 N.E.2d 911 (1997) (quoting 57 Ohio Report No. 117, Gongwer News Serv. (June 18, 1985)). Most notably, the OCPA provides a private right of action not only

to persons directly injured by acts of wire and mail fraud, but also to "any person" who is "indirectly injured," without any qualifying or limiting language. *See* OCPA. at § 2923.34(E). The "In choosing to broaden standing to bring RICO actions under state law, the Ohio General Assembly decided to widen the right to bring an action." *Iron Workers Local Union No. 17 Ins. Fund v. Philip Morris Inc.*, 23 F.Supp.2d 771, 778 (N.D. Ohio 1998).

Petitioners reasonably construed the OCPA's standing provision to mean what the words say, that is, vest "any person" who is "indirectly injured" with standing. "When analyzing a statute, our primary goal is to apply the legislative intent manifested in the words of the statute." *Proctor v. Kardassilaris*, 115 Ohio St. 3d 71, 2007-Ohio-4838, 873 N.E.2d 872, ¶ 12. "The starting point in discerning congressional intent is the existing statutory text . . . and not the predecessor statutes." *Lamie v. U.S. Tr.*, 540 U.S. 526, 534, 124 S.Ct. 1023, 1030, 157 L.Ed.2d 1024 (2004) (internal citation omitted). "Statutes that are plain and unambiguous must be applied as written without further interpretation." *Kardassilaris*. 115 Ohio St. 3d at 71. A court must presume that the legislature "says what it means and means what it says," *Norfolk S. Ry. Co. v. Perez*, 778 F.3d 507, 512 (6th Cir. 2015), and "[w]hen the language of a statute is plain and unambiguous and conveys a clear and definite meaning, there is no need for this court to apply rules of statutory interpretation." *State v. Kreischer*, 109 Ohio St. 3d 391, 2006-Ohio-2706, 848 N.E.2d 496, ¶ 12. "It is well established that when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to

enforce it according to its terms." *Lamie*, 540 U.S. at 534 (internal quotation omitted). Under these canons of statutory construction, petitioners reasonably believed when they filed the OCPA complaint, and continue to believe, that Fulson had standing to bring the OCPA action as a person "indirectly injured" by the conduct challenged. The fact that the bankruptcy court and the reviewing courts disagreed does not mean there is no good faith basis to read the standing provision to vest Fulson with standing to bring the OCPA claims.

Indeed, the bankruptcy court itself acknowledged that "it is not entirely clear" what "indirectly injured" means in the context of the OCPA. [B.R. Dkt. 137 at 9]. The BAP was uncertain enough to certify the following question to the Ohio Supreme Court in this case:

> Whether a shareholder of a corporation has standing to bring a claim individually (as opposed to merely derivatively) under the Ohio Corrupt Practice Act, R.C. 2923, *et seq.*, which provides standing to any person "directly or indirectly injured," based on an injury to the value of the shareholder's interest in the corporation?

[B.R. Dkt 20-2]. Although the Ohio Supreme Court declined to accept the question, the fact that the BAP certified the question reveals that one could reasonably read the broad standing language of the OCPA to allow Fulson to bring the claims he asserted in the OCPA action.

Petitioners' belief that the OCPA claims had not accrued as of the date of the involuntary bankruptcy is also reasonable. Even the NGP trustee recognized that Fulson's OCPA damages "would necessarily be the

net amount of the compromise." [Hearing Tr., B.R. Dkt 175 at 9:11-14]. Since there could be no netting until the settlement was approved, the OCPA claims did not exist when the bankruptcy petition was filed.

In considering whether to file this petition, petitioners were faced with a Hobson's choice. Do they not file the petition and pay the sanctions, despite their continued good faith belief that the OCPA claims were not property of the bankruptcy estate because the claims accrued post petition? Or do they seek *certiorari*, exposing themselves to an even greater fee award, on the hope that this Court will grant *certiorari* and rule that the OCPA claims did not exist when the bankruptcy petition was filed and/or that reasonable good faith is a defense to sanctions in bankruptcy court. Believing they are correct on the merits of the two questions presented and that those questions warrant *certiorari* to resolve inter-circuit splits on each question, petitioners respectfully submit this petition.

CONCLUSION

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

Respectfully submitted,

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