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OPINION OF THE COURT OF APPEALS FOR THE SIXTH CIRCUIT (FEBRUARY 22, 2019)

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NICOLE GAS PRODUCTION, LTD.,

Debtor.

JAMES A. LOWE; CURTLAND H. CAFFEY;
S. BREWSTER RANDALL, II;
ROBERT C. SANDERS,

Appellants,

v.

BRENDA K. BOWERS, Chapter 7 Trustee of the Bankruptcy Estate of Nicole Gas Production, Ltd.,

Appellee.

No. 18-3301

On Appeal from the Bankruptcy Appellate Panel of the Sixth Circuit. Nos. 15-8053/8055— Paulette J. Delk, Marian F. Harrison, and Daniel S. Opperman, Bankruptcy Appellate Panel Judges.

United States Bankruptcy Court for the Southern District of Ohio at Columbus. No. 2:09-bk-52887— John E. Hoffman, Judge.

Argued: October 18, 2018
Decided and Filed: February 22, 2019

Before: MERRITT, COOK, and LARSEN, Circuit Judges.

MERRITT, Circuit Judge. This is a bankruptcy contempt dispute. Normally a party's conduct is contemptuous or it is not. But in this unusual case, whether the defendants are in contempt depends on statutory construction. The question presented is whether the Ohio RICO statute gives the sole shareholder of a bankrupt corporation standing to circumvent the automatic stay and individually sue a competitor. The issue is a complex intersection of three areas of law: the principle of the derivative suit in corporate law, the function of the automatic stay in bankruptcy, and the extent and construction of a specific state's RICO laws. In this appeal, we must consider how these precepts work together where the RICO statute offers no explicit guidance on how the claim should operate in the corporate and bankruptcy contexts. But for all the legal overlays here, ultimately the Appellants are in contempt or they are not.

The basic facts. Appellant Freddie Fulson[1] owned a company called Nicole Gas that entered bankruptcy proceedings. During the bankruptcy, Fulson became dissatisfied with the Trustee's handling of claims that Nicole Gas held against its competitors. With the help of two lawyers, Appellants Robert Sanders, Esq. and James A. Lowe, Esq., Fulson sought relief

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[1] Fulson died during the pendency of the bankruptcy, and his estate was substituted in the proceedings below and here.

in state court under the Ohio Corrupt Practices Act (Ohio civil RICO) against the competitors that allegedly put his business into bankruptcy. Because Fulson alleged damages incurred only by the debtor-business, the Trustee alleged that he had appropriated claims that the Trustee owned. By filing this action during the bankruptcy, the Trustee alleged that Fulson, Sanders, and Lowe violated the automatic stay. The Bankruptcy Court agreed and held the three in contempt and entered a judgment for roughly $91,000. The contempt finding and fee order are the subjects of the instant appeal.

Back to legal principles. Derivative liability is a cardinal tenet of corporate common law. When an artificial entity (a corporation) is injured, shareholders cannot necessarily redress that injury themselves. *See* 19 Am. Jur. 2d *Corporations* § 1935 (1998) ("[W]here the injury is to the corporation, and only indirectly harms the shareholder, the claim must be pursued as a derivative claim."); *see also* James D. Cox & Thomas Lee Hazen, 3 Treatise on the Law of Corporations § 15:2 (3d ed. 2010) ("An almost necessary consequence of a wrong to a corporation is some impairment of the value of each shareholder's stock interest. As a general rule, however, shareholders are considered to have no direct individual right of action for corporation wrongs that impair the value of their investment.").

As to the bankruptcy gloss on this dispute, the Bankruptcy Code imposes a powerful stay on parties attempting to gain control over the property of the debtor's estate. *See* 11 U.S.C. § 362(a)(3) ("[A] petition . . . operates as a stay, applicable to all entities, of . . . 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"). The policy imperative behind the automatic stay is to "give[] the debtor a breathing spell from creditors and stop[] foreclosure actions, collection efforts, and creditor harassment." 2 Norton Bankr. L. & Prac. 3d § 43:4 (2019).

The precise language of the Ohio Corrupt Practices Act is the complicating factor here. The Appellants claim that the wording of the statute converts a derivative shareholder action to an individual claim because it provides a private right of action for "any person directly or indirectly injured by conduct" violating the Act. Ohio Rev. Code § 2923.34. As the sole shareholder of Nicole Gas, normally Fulson would have to seek relief from Nicole Gas's competitors via the traditional route of derivative liability. But, his successors argue, the Corrupt Practices Act means both (a) that he did not have to pursue a derivative claim at all, and (b) that thus, the bankruptcy Trustee did not have the right to exercise control over the claim. If Fulson's successors are right, and the claim against Nicole Gas's competitors can be alleged outside of corporate law and via the Corrupt Practices Act, then they did not violate the automatic stay. Thus, the basis for the Contempt and Fee Orders would disappear. We shall see in due course that they are wrong. In agreement with the persuasively reasoned decisions below, both in the Bankruptcy Court and the Bankruptcy Appellate Panel, we AFFIRM.

I. FACTUAL AND PROCEDURAL BACKGROUND

In the late 1990s, Freddie Fulson formed several corporate entities to produce and market natural gas

in the Midwest. One of these entities is the debtor in the bankruptcy case, Nicole Gas Production, Ltd. The bottom line is that Fulson was the indirect equity owner of Nicole Gas and was calling the shots. To market and move the gas, Fulson's entities contracted with a larger company, Columbia Gas Transmission, and its affiliates. Eventually, relations between Columbia Gas and Fulson's entities soured and in the early 2000s a decade of litigation in state and federal court began. For his part, Fulson believed that Columbia Gas had conspired with other entities, including Nicole Gas's creditors, to put him out of business. Columbia Gas did this, he alleged, by mismeasuring the amount of natural gas produced by Fulson's wells, misappropriating gas that the entities delivered into Columbia Gas's transmission system, and improperly soliciting his creditors to force Nicole Gas into bankruptcy proceedings. This bankruptcy proceeding began in 2009 and has continued since then, but it is only the tip of the iceberg of the disputes between these entities.

In 2013, while Nicole Gas was in bankruptcy proceedings, the corporation's bankruptcy Trustee, Frederick Ransier, proposed settling all of Nicole Gas's claims against Columbia Gas for $250,000. Back in 2001, one of Nicole Gas's affiliates, Nicole Energy Services, Inc., had asserted claims against Columbia Gas for $36 million. Likely miffed that the Trustee was trying to settle similar claims for less than a million dollars, Fulson objected to that settlement in October of 2012. But objecting in the proper and usual course was not enough for him. Sometime after objecting to the settlement, Fulson began working with Robert C. Sanders, Esq., a Maryland attorney

who had represented one of Fulson's other gas companies in state court. Fulson filed a new complaint in Ohio state court against Columbia Gas seeking roughly $34 million in damages. Fulson, Sanders, and Lowe wanted to try the claims to a jury in state court because, according to Sanders, jurors "don't like utility companies." 519 B.R. at 740 n.18.

The state court complaint recited the history between the companies and alleged that Columbia Gas had violated the Ohio Corrupt Practices Act, Ohio Rev. Code § 2923.31 *et seq.*, which provides that no person shall engage in a pattern of corrupt activity, defined as engaging in racketeering, theft, telecommunications fraud, and the like. *Id.* § 2923.32. This is Ohio's Racketeer Influenced and Corrupt Organizations ("RICO") statute. The Act includes a private right of action in § 2923.34 which allows for treble damages for "*any* person directly or *indirectly* injured by conduct" violating the Act (emphasis added). The Act presented an attractive avenue for relief because it carries treble damages and confers broad standing on litigants. Fulson and Sanders then hired James A. Lowe, Esq., of Cleveland as local counsel, and the three of them together filed the complaint (with Fulson as the sole plaintiff) in the Court of Common Pleas for Franklin County, Ohio, in January 2013. Because Nicole Gas was a domestic limited liability company, it counted as a "person" in Ohio and could have asserted these claims against Columbia Gas.

There was one big problem with the complaint: Fulson couched his damages as directly resulting from his status as the sole shareholder of Nicole Gas' parent corporation. He alleged no damages that related to him personally; he only pled that he had been harmed

because of his indirect ownership of Nicole Gas. In multiple paragraphs of the complaint, Fulson's attorneys recited the damages to Fulson *as sustained by* the corporation he owned.[2] Usually, when a corporation is damaged, shareholders seek relief through a derivative suit. Fulson, Sanders, and Lowe, however, believed that the language of the Corrupt Practices Act would allow them to circumvent both the automatic stay and the principle that the bankruptcy trustee has the sole right to assert a debtor's causes of actions. *See Stevenson v. J.C. Bradford & Co.* (*In re Cannon*), 277 F.3d 838, 853 (6th Cir. 2002); *Bauer v. Commerce Union Bank*, 859 F.2d 438, 441 (6th Cir. 1988).

Because Nicole Gas was in bankruptcy proceedings, filing a derivative suit (based on the Corrupt Practices Act or some other statute) would have meant seeking relief from the automatic stay, *see* 11 U.S.C. § 362(d); Fed. R. Bankr. P. 4001(a), or convincing the bankruptcy trustee to either bring the claims himself or abandon them, *see Maloof v. Level Propane, Inc.*, 429 F. App'x 462, 468 (6th Cir. 2011). Keep in mind that in a Chapter 7 bankruptcy, the role of the Trustee is to close the estate as expeditiously as

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[2] For instance, Paragraph 120 of the state court complaint reads, "The Plaintiff has standing to bring a civil action against the Defendants under Section 2923.34(E) of the Act because, as the owner of NES, he is a person who was 'directly or indirectly injured' by the Defendants' violations . . . " (emphasis added). Paragraph 126 continues this grammatical pattern: "The amount of the damages caused to the Plaintiff by the Defendant's violations of the Act are (1) the net damages of $36,654,305.94 sustained by NES . . . and (2) the damages sustained by NGP . . . " (emphasis added). By its very terms, then, the state court complaint pled damages that were incurred by the corporation.

possible. *See* 11 U.S.C. § 704(a); *see also In re Modern Plastics Corp.*, 732 F. App'x. 379, 384 (6th Cir. 2018) (discussing trustee duties). Fulson and his lawyers did not consult Ransier, who discovered the complaint when an employee conducted a routine state court docket check. At that time, Ransier was in the process of negotiating and finalizing a settlement agreement with Columbia Gas that would take care of "any and all" claims Nicole Gas might hold against Columbia. Ransier believed that the Corrupt Practices Act claim fell under this settlement umbrella, and he filed a Motion for Contempt before the Bankruptcy Court. The Corrupt Practices action in state court was stayed.

The Bankruptcy Court held a hearing and heard testimony from Fulson's two attorneys and Ransier. In a 56-page order (the "Contempt Order"), reported as *In re Nicole Gas Prod., Ltd.*, 519 B.R. 723 (Bankr. S.D. Ohio 2014), the Court found that Fulson, Lowe, and Sanders (collectively, "the Fulson Parties") had willfully violated the automatic stay, 11 U.S.C. § 362 (a)(3), by filing the Corrupt Practices Act complaint. In this order, the Bankruptcy Court analyzed the Ohio Corrupt Practices Act in detail and concluded that Fulson had no independent standing to raise claims that belonged to Nicole Gas. After soliciting additional briefing and holding a separate hearing, the Court issued a second 51-page order (the "Fee Order"), reported as *In re Nicole Gas Prod., Ltd.*, 542 B.R. 204 (Bankr. S.D. Ohio 2015), detailing the amount of damage that the Fulson Parties had done to Nicole Gas's estate and directing them to pay $91,068.00 to Ransier. The Fulson Parties–Fulson's attorneys in the Corrupt Practices Act case (James A. Lowe, Esq. and

Robert C. Sanders, Esq.), and the administrators of Fulson's estate–appealed the Contempt and Fee Orders to the Bankruptcy Appellate Panel for the Sixth Circuit.

The Bankruptcy Appellate Panel proceeded in two stages. In August 2016, the Panel certified a question of law to the Ohio Supreme Court. The Panel asked the Ohio Supreme Court whether an injured shareholder was entitled to individual standing under the Ohio Corrupt Practices Act. In October 2016, the Ohio Supreme Court declined to answer the certified question and dismissed the cause. In March of 2018, the Bankruptcy Appellate Panel issued a decision addressing the merits of the Fulson Parties' claims. The Panel affirmed the Bankruptcy Court in all respects (the "Bankruptcy Appellate Panel Opinion"), reported as *In re Nicole Gas Prod., Ltd.*, 581 B.R. 843 (B.A.P. 6th Cir. 2018), and concluded that an individual shareholder could not use the Ohio Corrupt Practices Act to convert a corporate law claim into an individual one. Thus, the claim was the property of the bankruptcy estate, and the Fulson Parties had violated the automatic stay by misappropriating that claim. The Fulson Parties appealed again to the Sixth Circuit. Ransier was eventually replaced by Brenda K. Bowers, the Successor Trustee of the bankruptcy estate of Nicole Gas Production, Ltd.

II. ANALYSIS

We have jurisdiction to review orders of the Bankruptcy Appellate Panel under 28 U.S.C. § 158(d)(1). Review of the Bankruptcy Court's decision is independent of the Bankruptcy Appellate Panel's review. *In re Curry*, 509 F.3d 735 (6th Cir. 2007). The

Sixth Circuit uses the "clear error" standard for factual findings and reviews conclusions of law de novo. *In re Century Boat Co.*, 986 F.2d 154, 156 (6th Cir. 1993). Generally, bankruptcy court determinations of contempt are examined under an abuse of discretion standard. *In re Wingerter*, 594 F.3d 931, 936 (6th Cir. 2010).

Filing a bankruptcy petition creates a bankruptcy estate, which includes "all legal or equitable interests of the debtor in property as of the commencement of the case," 11 U.S.C. § 541(a)(1), including causes of action, *In re Parker*, 499 F.3d 616, 624 (6th Cir. 2007). "The nature and extent of property rights in bankruptcy are determined by the 'underlying substantive law'"—Ohio law, in this case. *Tyler v. DH Capital Mgmt., Inc.*, 736 F.3d 455, 461 (6th Cir. 2013); *In re Underhill*, 579 F. App'x 480. 482 (6th Cir. 2014) ("State substantive law determines the 'nature and extent' of causes of action . . . "). "[O]nce that determination is made, federal bankruptcy law dictates to what extent that interest is property of the estate for the purposes of § 541." *DH Capital Mgmt.*, 736 F.3d at 461 (quoting *Bavely v. United States* (*In re Terwilliger's Catering Plus, Inc.*), 911 F.2d 1168, 1172 (6th Cir. 1990)).

If a shareholder has sole right to assert a cause of action, the cause of action is not part of the bankruptcy estate. Whether a shareholder "has sole right to a cause of action is determined in accordance with state law." *Honigman v. Comerica Bank* (*In re Van Dresser Corp.*), 128 F.3d 945, 947 (6th Cir. 1997) (citing *Oakland Gin Co. v. Marlow* (*In re The Julien Co.*), 44 F.3d 426, 429 (6th Cir. 1995). Under *Van Dresser*, whether "shared" causes of action belong to

the bankruptcy estate comes down to two questions: (1) whether both the shareholder and the corporation-debtor could *state* claims for the damages; and, if so, (2) whether the shareholder and corporation-debtor could both *recover* full damages. *Van Dresser*, 128 F.3d at 947–48. If either's recovery can "preclude[] the other from a subsequent recovery, then the claims are not truly independent." *Id.* Absent being "truly independent," the claims belong to the bankruptcy estate in toto.

A. The Ohio Corrupt Practices Act

The most important question raised by the Fulson Parties is substantively a question of Ohio state law. There is no case or statute explicitly suggesting that the Ohio Corrupt Practices Act does or does not confer standing upon an individual shareholder to seek redress for damages visited upon a corporation. But applying principles of construction announced by the Ohio Supreme Court, we can triangulate a clear answer. The relevant section of the Corrupt Practices Act reads:

> (E) In a civil proceeding under division (A) of this section, *any person* directly *or indirectly* injured by conduct in violation of section 2923.32 of the Revised Code or a conspiracy to violate that section, other than a violator of that section or a conspirator to violate that section, in addition to relief under division (B) of this section, shall have a cause of action for triple the actual damages the person sustained. To recover triple damages, the plaintiff shall prove the violation or conspiracy to violate that section and actual

> damages by clear and convincing evidence. Damages under this division may include, but are not limited to, competitive injury and injury distinct from the injury inflicted by corrupt activity.

Ohio Rev. Code § 2923.34(E) (emphasis added).[3] On its face, this is a broadly written statute allowing for a wide set of claims. It employs the words "any" and "indirectly" to expand the scope of civil RICO claims contemplated in the federal case law. *See Iron Workers Local Union No. 17 Ins. Fund v. Philip Morris Inc.*, 23 F. Supp. 2d 771, 788 (N.D. Ohio 1998) (hereinafter *Iron Workers I*) ("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."). But it is not clear in this context that by using "indirectly injured" the statute allows shareholders to seek recovery under the Corrupt Practice Act for an entity's injury. Indeed, the conclusion that "indirect" injuries under the Corrupt Practices Act *do* include a shareholder's derivative injuries is as plausible as the conclusion that they *do not*. The statu-

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[3] The rest of the Ohio Corrupt Practices Act contains few explicit references to corporate law. First, Ohio Rev. Code § 2923.34(B)(5) allows a court to dissolve a corporation on a finding that the corporation violated the Act. Second, the Act's Definitions section, § 2923.31(A)(3), excludes stockholders from the definition of "beneficial interest." But as the Act currently stands, "beneficial interests" are only referenced in § 2923.36, which discusses the filing of corrupt activity liens. In other words, one may not file a corrupt activity lien against the interest of a stockholder. Aside from these passing references, corporate law and rights thereunder go unmentioned in the Act. The statute is simply not written as specifically addressing claims relating to the corporate form.

tory language is thus ambiguous. *See Jacobson v. Kaforey*, 75 N.E.3d 203 (Ohio 2016) ("Ambiguity, in the sense used in our opinions on statutory interpretation, means that a statutory opinion is capable of bearing more than one meaning." (quotation marks omitted)); *Hughes v. White*, 388 F. Supp. 2d 805, 818 (S.D. Ohio 2005) ("A statute is ambiguous 'if the language is susceptible [to] more than one reasonable interpretation." (quoting *State v. Jordan*, 733 N.E.2d 601, 605 (Ohio 2000))).

Because the language is ambiguous, we therefore look to additional principles of statutory interpretation. *State v. Thomas*, 70 N.E.3d 496, 498 (Ohio 2016). We must, for example, presume that the Ohio General Assembly passed the Corrupt Practices Act with knowledge of the existing common law of derivative suits. In Ohio, shareholders may not pursue claims based on injuries to a corporation in which the shareholder holds an interest; the proper path for remedy is the derivative suit. *See generally* 12 Ohio Jur. 3d *Business Relationships* § 899 (2018) ("A plaintiff-shareholder does not have an independent cause of action where there is no showing of individual injury in any capacity other than in common with all other shareholders as a consequence of the wrongful actions of a third party directed toward the corporation."). The seminal Ohio case is *Adair v. Wozniak*, 492 N.E.2d 426 (Ohio 1986). In *Adair*, the Ohio Supreme Court wrote:

> Where the defendant's wrongdoing has caused direct damage to corporate worth, the cause of action accrues to the corporation, not to the shareholders, even though in an economic sense real harm may well be sustained by

> the shareholders as a result of reduced earnings, diminution in the value of ownership, or accumulation of personal debt and liabilities from the company's financial decline. *The personal loss and liability sustained by the shareholder is both duplicative and indirect to the corporation's right of action*. . . . Although this is a case of first impression, we accept and follow the widely recognized rule that a plaintiff-shareholder does not have an independent cause of action where there is no showing that he has been injured in any capacity other than in common with all other shareholders as a consequence of the wrongful actions of a third party directed towards the corporation.

Id. at 429 (internal citations omitted) (emphasis added). In short: a shareholder cannot "enter the fray" for injuries sustained by a corporation that have lowered the value of his or her interest in that corporation. Interpreting *Adair*, the Bankruptcy Court below wrote that the Corrupt Practices Act may have removed "indirectness" as a bar to recovery but could not remove the bar erected by corporate law. 519 B.R. at 746. We agree.

The Fulson Parties, however, seize upon the language in *Adair*, and argue that the Ohio Supreme Court's use of the word "indirect" in the above-quoted passage means that the claim for indirect damages under the Act is viable. Because *Adair* says that a shareholder is "indirectly" injured when the corporation is injured, they contend, the Corrupt Practices Act's use of the word "indirect" affords an injured shareholder standing for civil RICO. The argument is that the

Corrupt Practices Act gives the Fulson Parties an "out" with regard to complying with the rules of derivative shareholder suits.

This reading is strained to say the least. Why? Because the two documents are not talking about the same thing. *Adair* employed the word "indirect" to characterize shareholder claims against a corporate antagonist as secondary and duplicative in a pejorative sense. If shareholders of Apple could pursue claims against Samsung and bypass the derivative suit, it would render the corporate form superfluous. The very holding of *Adair* is that shareholders cannot strike out on their own to right wrongs visited on the corporation. Allowing indirectly injured parties to sue does not mean that the Act allows *anyone* to sue in all situations. The use of the word "indirect" in both *Adair* and the Act is a coincidence, not a confluence. The Fulson Parties' attempts to cast the occurrence of the word "indirect" in two places as somehow deliberate or instructive cannot overcome the presumption that the Act did not intend to restructure corporate law absent a clear statement of the intent to do so. *See, e.g.*, *Mann v. Northgate Invs., L.L.C.*, 5 N.E.3d 594, 598–99 (Ohio 2014). The Bankruptcy Court correctly deemed the Fulson Parties' argument "the sophist's game." 519 B.R. at 746.

Ohio corporate law supplies further support for our conclusion. The analogous right to sue for injuries to Nicole Gas never belonged to Fulson in the first place. *See Boedeker v. Rogers*, 746 N.E.2d 625, 632–33 (Ohio Ct. App. 2000) (citing *Adair* for the proposition that "[w]here the basis of the action is a wrong to the corporation, redress must be sought in a derivative action"). As the Bankruptcy Appellate Panel noted,

the state court complaint did not allege any injuries *specific to* Fulson outside of his role as owner. 581 B.R. at 851 ("Appellants have conceded at least three times–in the state court complaint, before the Bankruptcy Court, and in their initial appellate brief–that Fulson sought recovery which would make the *Debtor* whole.") (emphasis in original). If, for instance, a shareholder of Corporation A slipped and fell on the floor of the premises of Corporation B (Corporation A's rival), then that shareholder would have an independent basis to pursue a claim against Corporation B. 519 B.R. at 739 (citing *Honigman v. Comerica Bank (In re Van Dresser Corp.)*, 128 F.3d 945, 947 (6th Cir. 1997)). That is not the case here; there is no independent basis for liability.

Corporate law cabins the claims that a shareholder may raise *when the entity in which she owns stock is injured*, and the value of her shares had decreased accordingly. "Stated another way, a shareholder brings a derivative action on behalf of the corporation for injuries sustained by or wrongs done to the corporation, and a shareholder brings a direct action where the shareholder is injured in a way that is separate and distinct from the injury to the corporation." *HER, Inc. v. Parenteau*, 770 N.E.2d 105, 109 (Ohio Ct. App. 2002); *see also Crosby v. Beam*, 548 N.E.2d 217, 219 (Ohio 1989) ("[I]f the complaining shareholder is injured in a way that is separate and distinct from an injury to the corporation, then the complaining shareholder has a direct action."). A derivative suit is a shareholder's single path through which she may recover losses the corporation sustained in the rough and tumble of the marketplace.

The Corrupt Practices Act says nothing about this process; allowing indirectly injured plaintiffs to sue is not the same as constructing an explicit statutory mechanism to bypass corporate law. Although the text of the Ohio RICO statute indicates that it grants broader standing than federal RICO, we see no clear indication that, by using the term "indirect," the Ohio General Assembly supplanted an entire area of the common law. Instructively, shareholders cannot pursue claims individually against competitors under the federal RICO statutes. *See Warren v. Mfrs. Nat'l Bank of Detroit*, 759 F.2d 542 (6th Cir. 1985) (holding that a sole shareholder could not individually allege federal RICO claims that a bank put his steel company out of business); *State v. Franklin*, Nos. 24011 & 24012, 2011 WL 6920727, at *16 (Ohio Ct. App. Dec. 30, 2011) (noting that Ohio courts still look to federal RICO case law for guidance in applying Ohio RICO). There is no basis for expanding Ohio RICO to the extent the Fulson Parties assert.

The legislature is perfectly capable of adding a *tool* (broad civil RICO) to potential plaintiffs' toolboxes without simultaneously throwing a different tool*box* (corporate derivative suits) out the window. The Fulson Parties argue otherwise, and point to *Clark v. Scarpelli*, 744 N.E.2d 719, 726 (Ohio 2001), which held that "[i]t is presumed that the General Assembly is fully aware of any prior judicial interpretation of an existing statute when enacting an amendment." In other words, the Fulson Parties say, the Ohio legislature is presumed to have known about derivative liability and the key words of that corpus; so its choice of words in expanding civil RICO is the final say. But the legislature's presumed omniscience does not mean that the enactors of

the Corrupt Practices Act intended to destroy a whole area of corporate law without so much as mentioning it. As the Bankruptcy Appellate Panel correctly noted, "the Legislature can 'mean what it said' when it granted standing to those who suffer indirect injury without intending to turn on its head a century of law governing shareholder litigation. Shareholder derivative suits involve one discreet corner of corporate jurisprudence." 581 B.R. at 850.

What little Ohio case law addresses these issues supports our conclusions.[4] And although Ohio has not seen a case directly considering derivative civil RICO in the bankruptcy context, another state in our Circuit, Michigan, has. *See Kelley v. Thompson-McCully Co., LLC*, No. 236229, 2004 WL 1676760 (Mich. Ct. App. July 27, 2004). And–no surprises–the Michigan Court of Appeals concluded that a shareholder's derivative claim belonged to the bankruptcy trustee.[5] The Michigan case also teaches that the

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[4] Ohio's civil RICO jurisprudence contains several examples of "derivative" or "indirect" claims, although none in the corporate context. *See Iron Workers I*, 23 F. Supp. 2d at 791; *Cleveland v. JP Morgan Chase Bank, N.A.*, No. 98656, 2013 WL 1183332 (Ohio Ct. App. Mar. 21, 2013). These cases are not wholly dispositive, but we may simply look to them for the proposition that the Corrupt Practices Act does not allow plaintiffs to merge distinct claims belonging to different parties.

[5] In *Kelley*, the plaintiff was a shareholder and corporate officer in a company called West Shore Construction that entered bankruptcy proceedings. The suit concerned a failed corporate buyout, and the plaintiff alleged that the defendants had conspired to ruin West Shore. *Kelley*, 2004 WL 1676760, at *1. One of the claims was styled under the Michigan Antitrust Reform Act, Mich. Comp. Laws § 445.778(2), which allows "any other person . . . injured directly or indirectly . . . " to sue under the statute for antitrust claims. The Michigan Court of Appeals

Fulson Parties should have petitioned the Bankruptcy Court for guidance about their planned suit. *Id.* at *3 ("[T]he shareholder must make a demand on the trustee."). Courts outside of our Circuit have held similarly when these problems have arisen.[6]

In sum: Fulson and his lawyers may have believed that the claims against Columbia Gas were worth more than the Trustee was settling them for. If they thought that Fulson had a shot at suing Columbia Gas via the Corrupt Practices Act, the proper course would have been to seek the Trustee's cooperation or abandonment, or to seek relief from the automatic stay. But, as the Bankruptcy Court noted, "filing the Complaint without providing Ransier notice and without requesting the Court grant relief from the automatic stay appears to have been a calculated risk by one who believed it more expedient to ask for forgiveness rather than for permission." 519 B.R. at 736. It is clear that the Fulson Parties, by filing and continuing the state court lawsuit, "act[ed] to obtain possession of the property of the estate . . . or to exercise control over property of the estate." 11 U.S.C. § 362(a)(3).

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held that because the injured party was the corporation, West Shore, the derivative nature of the suit meant that the claim belonged to the bankruptcy trustee. *Kelley*, 2004 WL 1676760, at *3.

[6] The Oregon Court of Appeals has concluded that shareholders may not assert derivative claims under the Oregon RICO statutes. *See Loewen v. Galligan*, 882 P.2d 104, 113 (Or. Ct. App. 1994) ("[T]he only injury that plaintiffs' [Oregon RICO] claims allege is a diminution in share value that affected all shareholders. Because that injury is derivative, we conclude that plaintiffs do not have standing to bring their [Oregon RICO] claims.") (internal citations omitted). *See also Harris v. Orange S.A.*, 636 F. App'x 476, 483 (11th Cir. 2015) (analyzing Georgia RICO).

B. The Automatic Stay and the Fee Award

Because Nicole Gas was in bankruptcy, the Trustee was in charge of any claims the debtor-business might hold. *Cf. Griffin v. Bonapfel* (*In re All Am. of Ashburn, Inc.*), 805 F.2d 1515 (11th Cir. 1986) (similar dispute with shareholder suit). 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. The Bankruptcy Court fully and correctly addressed these arguments in the Contempt Order. To this, Appellants retort, if Fulson had no standing under the Corrupt Practices Act, then he could not have violated the stay by asserting "claims that do not exist." This is, to borrow the Bankruptcy Court's term, sophistry. To the contrary, because the Corrupt Practices Act claims were property of the estate, filing the state court complaint was an impermissible "act to obtain possession of the property of the estate . . . or to exercise control over property of the estate." 11 U.S.C. § 362(a)(3). Here is the bottom line: whatever corporate wrongs had been visited upon Nicole Gas, the right to *redress* those claims

belonged to Nicole Gas itself. Upon the filing of the bankruptcy petition, those claims passed into the hands of Ransier, who was trying to settle "any and all" claims with Columbia Gas. Any Corrupt Practices Act claim that Nicole Gas could have asserted fell into that box. Before bankruptcy and after, Fulson did not have the power to sue individually on those claims. But he did, and thus violated the automatic stay.

The automatic stay is one of the most important and powerful features of the bankruptcy system. *Cf. Easley v. Pettibone Mich. Corp.*, 990 F.2d 905, 911 (6th Cir. 1993) ("[A]ctions taken in violation of the stay are invalid and voidable and shall be voided absent limited equitable circumstances."). Violating the automatic stay constitutes civil contempt. *See In re Crabtree*, 767 F.2d 919, 1985 WL 13441 (6th Cir. 1985) (table). The Bankruptcy Court below did not simply conclude that the Fulson Parties had fumbled their way into violating the automatic stay–it deemed their actions willful and called their credibility into question. 519 B.R. at 736. Further, as highlighted by the Bankruptcy Appellate Panel, if Fulson had secured a judgment on his Corrupt Practices Act claims in state court, the bankruptcy estate would have been prejudiced. 581 B.R. at 853. The Bankruptcy Court made detailed findings in this regard, and it acted diligently and thoughtfully to protect its own procedures and the Bankruptcy Code.

With regard to the Fee Order, the Fulson Parties argue that *Baker Botts, L.L.P. v. ASARCO, L.L.C.*, 135 S. Ct. 2158 (2015), precludes the Bankruptcy Court from awarding fees to the trustee. The *Baker Botts* case simply held that, "Because § 330(a)(1) does not explicitly override the American Rule with respect to

fee-defense litigation, it does not permit bankruptcy courts to award compensation for such litigation." *Id.* at 2169. But, as recited by the Bankruptcy Appellate Panel, Section 330, which governs compensation for certain professionals, is irrelevant here. 581 B.R. at 854–55. The Bankruptcy Court here relied on 11 U.S.C. § 105(a) to hold Sanders, Lowe, and Fulson in contempt. 519 B.R. at 736–37. Section 105(a) states that "The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." The sole authority the Fulson Parties cite as to their *Baker Botts* argument, *City of Philadelphia v. Walker*, No. CV-15-01685, 2015 WL 7428501 (E.D. Pa. Nov. 23, 2015), contains no references to contempt or 11 U.S.C. § 105.

Whatever limits apply to the Bankruptcy Court's contempt powers, *see generally In re John Richards Homes Bldg. Co.*, 552 F. App'x 401, 414 (6th Cir. 2013) ("Those powers are circumscribed and have most often been limited to compensatory punitive awards of attorney's fees after findings of bad faith or contempt."), they do not apply on these facts. *See Liberis v. Craig*, 845 F.2d 326, 1988 WL 37450 at *8 (6th Cir. 1988) (table) ("In the instant case, there is no question that the bankruptcy court had the authority to award attorneys' fees against the plaintiffs to compensate the trustee for bringing plaintiffs' contempt to the court's attention."). In an opinion written with "painstaking detail," 581 B.R. at 855, the Bankruptcy Court found that Fulson, Sanders, and Lowe were aware of the automatic stay, and had intentionally taken actions that violated it, regardless of their good faith or lack thereof. 519 B.R. at 729–30, 754–55. A contempt finding and accompanying sanctions were appropriate.

III. CONCLUSION

Assuming best intentions, Fulson may have believed he personally had a viable claim to assert against Columbia Gas. But by the time he filed the Corrupt Practices Act complaint, it was far too late to make such claims without seeking relief from the stay or the trustee's cooperation. Fulson, Sanders, and Lowe were all aware of the automatic stay, and took action that, we agree, violated it. One of the unfortunate results in this case is that it is unclear precisely how much Fulson's claims against Columbia Gas were worth. The Trustee tried to settle them for $250,000, but Fulson obviously believed them to be worth millions more. If Fulson or his attorneys had communicated their theory to the Trustee, perhaps the Ohio courts could have confronted head-on the question of indirect pursuit of civil RICO claims under Ohio law. And as a policy matter, there may be situations in which shareholders possess viable civil RICO claims against a company that destroyed the shareholder's business. But instead, we are left to assess the question collaterally in the contempt context, with sanctions against the Fulson Parties riding on our interpretation. These legal ambiguities could have been addressed with a simple collaborative phone call. Instead, the Bankruptcy Court was forced to expend valuable judicial resources assessing whether the conduct was in fact contemptuous.

This is a case where the Bankruptcy Court did its job and did it well. These issues have been extensively briefed thrice, once at the Bankruptcy Court, once at the Bankruptcy Appellate Panel, and again here in the Circuit. The one complex issue in this case–whether the Ohio Corrupt Practices Act

allows shareholders to pursue claims individually–was convincingly handled by the Bankruptcy Court; the Bankruptcy Appellate Panel agreed and so do we. We conclude that the Corrupt Practices Act did not grant Fulson any independent cause of action to pursue his derivative damages without violating the automatic stay. And *Baker Botts* does not apply to the Bankruptcy Court's fee award here, which was a contempt sanction. Fulson and his attorneys should have sought either the trustee's cooperation or relief from the automatic stay in order to file the complaint. For all of the foregoing reasons, and for the reasons articulated by the Bankruptcy Court and the Bankruptcy Appellate Panel below, we AFFIRM.

OPINION OF THE BANKRUPTCY APPELLATE PANEL OF THE SIXTH CIRCUIT (MARCH 13, 2018)

BANKRUPTCY APPELLATE PANEL
OF THE SIXTH CIRCUIT

In re: NICOLE GAS PRODUCTION, LTD.,

Debtor.

JAMES A. LOWE (15-8053);
CURTLAND H. CAFFEY, S. BREWSTER RANDALL II, and ROBERT C. SANDERS (15-8055),

Appellants,

v.

FREDERICK L. RANSIER, Trustee,

Appellee.

Nos. 15-8053/8055

On Appeal from the United States Bankruptcy Court for the Southern District of Ohio at Columbus.
No. 09-52887—John E. Hoffman, Judge.

Argued: May 9, 2017
Decided and Filed: March 13, 2018

Before: DELK, HARRISON, and OPPERMAN, Bankruptcy Appellate Panel Judges.

DANIEL S. OPPERMAN, Chief Bankruptcy Appellate Panel Judge. The Bankruptcy Court in the underlying case held Appellants in contempt for conduct that it found constituted an impermissible exercise of control over property of the bankruptcy estate. A Fee Order followed the Contempt Order and awarded Appellee fees and expenses of $91,068.00 as a sanction for Appellants' conduct. Appellants appealed the Contempt Order and the opinion regarding same and the Fee Order and opinion regarding same. For the reasons stated below, the Panel AFFIRMS those orders and opinions.

ISSUES ON APPEAL

1. Whether the Bankruptcy Court erred in entering the Contempt Order based on its determination that the claims Appellants pursued under the OCPA were property of Debtor's estate.

2. Whether the Court erred when it awarded Appellee fees and expenses totaling $91,068.00 as a sanction for Appellants' contempt.

JURISDICTION AND STANDARD OF REVIEW

Under 28 U.S.C. § 158(a)(1), this Panel has jurisdiction to hear appeals "from final judgments, orders, and decrees" issued by the bankruptcy court. For purposes of appeal, an order is final if it "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 798, 109 S. Ct. 1494, 1497 (1989) (quotation marks and citation omitted). The orders at issue in this appeal are final and none of the parties to this appeal challenge the Panel's jurisdiction to hear it.

1. Standard and Method of Review Regarding the Contempt Order

Reviewing the Contempt Order and opinion accompanying it requires a three-step analysis. The first step is to determine whether Freddie Fulson, the indirect equity owner of the Debtor, had an individual claim under the OCPA. The Bankruptcy Court held that Fulson did not have his own claim, under the OCPA, for damage to the value of his interest in Debtor. That decision involves interpretation of a statute and the Panel reviews it *de novo*. *TranSouth Fin. Corp. v. Sharon* (*In re Sharon*), 234 B.R. 676, 679 (B.A.P. 6th Cir. 1999).

The second step is to determine whether the claims against the Columbia Gas Entities belonged to Debtor's estate. According to the Bankruptcy Court, Debtor had the exclusive right to prosecute those claims and those claims became estate property when Debtor filed bankruptcy. Thus, the Court held that Fulson violated the automatic stay by appropriating estate property when he pursued the claims in state court. The determination of whether property belongs to the estate is reviewed *de novo*. *Kitchen v. Boyd* (*In re Newpower*), 233 F.3d 922, 927 (6th Cir. 2000). The determination of whether conduct violates the automatic stay also is reviewed *de novo*. *Slabicki v. Gleason* (*In re Slabicki*), 466 B.R. 572, 577 (B.A.P. 1st Cir. 2012).

The third step is to determine whether the Bankruptcy Court's holding of contempt was appropriate. The Panel reviews that decision for abuse of discretion. *Long Term Care Mgmt. Inc. v. VI/XII Collateral Trust* (*In re Nat'l Century Fin. Enters., Inc.*), No. 05-8048, 2006 WL 620643, *1 (B.A.P. 6th Cir. Mar. 14, 2006).

2. Standard and Method of Review Regarding the Fee Order

The Panel also must determine whether the Bankruptcy Court's fee award was appropriate. An appellate court reviews a fee award for abuse of discretion. *Adell v. John Richards Homes Bldg. Co., LLC* (*In re John Richards Homes Bldg. Co., LLC*), 475 B.R. 585, 592 (E.D. Mich. 2012). A trial court abuses its discretion when it commits a clear error of judgment; if reasonable people could differ on the issue, there is no abuse. *Id.*

FACTS

Nicole Gas Productions, Ltd. ("Debtor") is the Chapter 7 debtor in the matter before the Panel. Freddie L. Fulson, now deceased[1], was the indirect equity owner of Debtor. Fulson's equity interest in Debtor resulted from his owning a company known as Nicole Gas Marketing, which company was the sole owner of Debtor. Before filing bankruptcy, Debtor had business relationships with various branches of Columbia Gas. Those relationships soured, resulting in litigation between Debtor and numerous Columbia Gas entities. Eventually, Debtor filed bankruptcy and the bankruptcy estate obtained its causes of actions against the Columbia Gas entities. Appellee Frederick L. Ransier is the Chapter 7 Trustee of Debtor.

While Debtor's bankruptcy was pending Fulson, represented by Appellant James A. Lowe, filed a state court complaint (and subsequently an amended com-

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[1] S. Brewster Randall III and Curtland H. Caffey, the Co-Administrators of Fulson's probate estate, are Appellants in this matter, along with Fulson's former counsel James A. Lowe.

plaint) against the Columbia Gas entities. Both complaints sought relief under the Ohio Corrupt Practices Act ("OCPA" or the "Act"). The relevant portion of that Act is Ohio Revised Code Section 2923.34(E), which states:

> [A]ny person directly or indirectly injured by conduct in violation of section 2923.32 of the Revised Code or a conspiracy to violate that section, other than a violator of that section or a conspirator to violate that section, in addition to relief under division (B) of this section, shall have a cause of action for triple the amount of actual damages the person sustained.

O.R.C. § 2923.34(E).

Fulson's state court complaints alleged that the Columbia Gas entities caused him indirect injury by harming Debtor, a company in which he owned an indirect equity interest. However, the only damages Fulson pled were those Debtor suffered—he did not claim any unique individual damages. Appellants conceded as much in their initial appellate brief, recognizing that Fulson only sought damages necessary "to make [Debtor] whole." *Joint Brief of Appellants*, p.20. Ransier, as Trustee, eventually settled the Columbia Gas claims on behalf of Debtor's estate. The Appellants believed the settlement did not return full value for the claims and objected to it. The Bankruptcy Court denied their objections.

As a result of Fulson's ongoing state court efforts, Ransier moved for contempt against Appellants in the Bankruptcy Court. Ransier argued that Fulson had merely a derivative claim based entirely on Debtor's

injury and for damages that duplicated Debtor's damages. According to Ransier, then, the claims Fulson brought in state court were causes of action that Debtor owned originally and that became property of Debtor's bankruptcy estate. Thus, Ransier argued, the bankruptcy estate had the exclusive right to prosecute those causes of action. Ransier concluded that by filing a state court complaint, Appellants violated Debtor's automatic stay by appropriating estate property without the Bankruptcy Court's permission.

Fulson, through Lowe, responded that his state court action pled his own individual claims, not any causes of action that Debtor or Debtor's bankruptcy estate owned. Fulson took the position that his claim was one for "indirect" injury that fell within the OCPA, although he recognized confusion regarding what the word "indirect" means for OCPA purposes. In an effort to clear up that confusion, Fulson requested the Bankruptcy Court seek the Ohio Supreme Court's input regarding the meaning of the word "indirect" in the OCPA.

The Bankruptcy Court denied Fulson's request. According to the Bankruptcy Court, the "directly or indirectly injured" language of the OCPA did not abrogate the common law principle that an injured shareholder has only a derivative claim deriving from the corporation and not an individual claim separate from the corporation. The Bankruptcy Court agreed with Ransier that the causes of action against the Columbia entities were the exclusive property of Debtor's estate. It followed, then, that Fulson violated the automatic stay by wrongfully appropriating estate property when he pursued those claims in state court.

As a result, the Bankruptcy Court held Appellants in contempt for violating 11 U.S.C. § 362(a)(3).

As part of the Contempt Order, the Bankruptcy Court established a procedure for determining the amount of damages Debtor's estate sustained due to the contemptuous conduct. In compliance, Ransier prepared and filed a detailed fee statement, to which Appellants objected. The Bankruptcy Court held a hearing regarding the fee statement and objections, with Ransier testifying. At the conclusion of that hearing, the Bankruptcy Court directed Ransier to supplement his fee statement with additional fees and expenses incurred in complying with the Contempt Order and addressing Appellants' ongoing contemptuous conduct. Ransier sought $95,386.25 and the Bankruptcy Court awarded him $91,068.00, which Appellants argue included fees and expenses connected with the fee hearing itself. The Appellants appealed the Contempt Order as well as the portion of the Bankruptcy Court's Fee Order that Appellants claim awarded Ransier fees incurred defending his fee request.

After filing this appeal, Appellants requested the Panel certify to the Ohio Supreme Court a question similar, though not identical, to the one they requested the Bankruptcy Court certify. The Panel agreed and certified the following question to the Ohio Supreme Court:

> Whether a shareholder of a corporation has standing to bring a claim individually (as opposed to merely derivatively) under the Ohio Corrupt Practices 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?

Opinion Re: Motions to Certify Question of State Law at 4, Aug. 19, 2016, BAP Nos. 15-8053 & 15-8055 ECF No. 19.

The Ohio Supreme Court declined to answer the certified question, leaving the Panel to do so. The answer to that question remains dispositive. If a corporate shareholder has standing to bring an individual claim under the OCPA, that claim is his personal property and does not belong to the corporation. Thus, if Fulson had an individual claim, that claim was not Debtor's property and did not become part of Debtor's bankruptcy estate. However, if Fulson had merely a derivative claim based solely on Debtor's injury and damages, his state court efforts appropriated estate property, subjecting him to contempt.

DISCUSSION OF THE CONTEMPT ORDER

1. The OCPA Does Not Allow an Equity Owner of a Corporation to Pursue an Individual Claim Based on Damage to the Value of His Interest in That Corporation

The first issue before the Panel is whether the OCPA gave Fulson an individual claim against the Columbia Gas entities that was separate and distinct from Debtor's claims. The Panel finds the Act did not create such an individual claim.

The plain language of the OCPA grants standing to anyone injured "directly or indirectly" by conduct that violates that Act. O.R.C. § 2923.34(E). While the OCPA was modeled after federal RICO statutes, it

broadens the standing of those federal statutes by allowing a party to recover when "indirectly" injured. *CSAHA/UHHS-Canton, Inc. v. Aultman Health Found.*, No. 2010CA00303, 2012 WL 750972, at *18 (Ohio App. 5th Dist. Mar. 5, 2012). Thus, Appellants correctly note that the Ohio Legislature intended the OCPA to offer standing to a broader class of plaintiffs than federal RICO statutes. *See Iron Workers Local Union No. 17 Ins. Fund v. Philip Morris, Inc.*, 23 F. Supp. 2d 771, 787 (N.D. Ohio 1998) (hereinafter *Iron Workers I*).

What is not clear from the statute's plain language, however, is whether the Ohio Legislature intended the Act to create standing for individual shareholders when their company suffers damage. Doing so would have abrogated a century of common law regarding the legal relationship between shareholders and their corporations. Applying relevant canons of statutory interpretation leads the Panel to conclude the Legislature did not intend the overhaul of corporate jurisprudence that would result from Appellants' reading of the OCPA.

Principles of statutory interpretation require a court construe a statute such that no clause, sentence, or word is rendered superfluous. *Duncan v. Walker*, 533 U.S. 167, 174, 121 S. Ct. 2120 (2001) (citing *Williams v. Taylor*, 529 U.S. 362, 404, 120 S. Ct. 1495 (2000)). Additionally, a court must presume that a "legislature says what it means and means what it says." *Norfolk S. Ry. Co. v. Perez*, 778 F.3d 507, 512 (6th Cir. 2015). Appellants note these principles while arguing that to preclude a shareholder or equity owner from bringing an individual claim under the OCPA would render the statute's "indirectly injured" language superfluous. While the Panel recognized that

theoretical risk in its Certification Opinion, after full review of this matter and oral argument of the parties, the Panel concludes that this theoretical risk was not realized in this case.

Disallowing individual shareholder claims under the OCPA does not render the Act's language superfluous. Likewise, the Legislature can "mean what it said" when it granted standing to those who suffer indirect injury without intending to turn on its head a century of law governing shareholder litigation. Shareholder derivative suits involve one discreet corner of corporate jurisprudence. There remain plenty of other circumstances where the OCPA's broadened standing provision opens the courthouse doors to new plaintiffs without overturning Ohio's well-settled law governing shareholder litigation.

Application of other relevant guidelines for statutory interpretation supports this conclusion. A court construing a statute should not presume that a legislature intended to repeal settled rules of common law unless the statutory language clearly expresses or imports such intention. *Mann v. Northgate Investors, L.L.C.,* 5 N.E.3d 594, 598-99 (Ohio 2014) (citing *State ex rel. Morris v. Sullivan*, 90 N.E. 146 (Ohio 1909)). Instead, "statutes are presumed to embrace the common law extant at their enactment." *Mann*, 5 N.E. 3d at 599. Under the longstanding Ohio law extant when the OCPA was enacted, a shareholder has no right to bring an individual claim based on injury to a corporation in which he owns an interest. *Warren Tel. Co. v. Staton*, 189 N.E. 660, 663 (Ohio Ct. App. 1933); *Bloom & Co. v. Ray*, 1923 WL 1781, at *1 (Ohio Ct. App. Mar. 16, 1923). Instead, a shareholder may bring such a claim, if at all, only on behalf of the corporation through a

shareholder derivative suit. *Polikoff v. Adam*, 616 N.E.2d 213, 218 (Ohio 1993).

The seminal Ohio case on this issue is *Adair v. Wozniak*, 492 N.E.2d 426 (Ohio 1986). In *Adair*, the Ohio Supreme Court reiterated the common law principle that a corporation, not its shareholders, has a claim for injury sustained by or wrong done to the corporation. *Id.* at 428. The Ohio Supreme Court further noted that "wrongful action by third parties impairing the capital position of the corporation gives no right of action to the shareholders as individuals for damages [.]" *Id.* at 429.

> On that issue, the Bankruptcy Court wrote in its opinion regarding the Contempt Order:
>
> One of those principles is the previously discussed "well-settled [rule] that only a corporation and not its shareholders can complain of injury sustained by, or wrong done to, the corporation." *Adair*, 492 N.E.2d at 428. This principle is grounded not only on the fact that injuries shareholders incur as a result of harm to the company are indirect, but also on the fact that the claims on account of those injuries are "duplicative [of] the corporation's right of action." *Id.* at 429. There is no reason to believe that a plaintiff may bring an indirect claim under the OCPA if there is a bar to bringing the claim—such as its duplicative nature— other than the claim's indirectness. To the extent indirectness is a bar to recovery, the OCPA may remove it, but it does nothing to remove the bar erected by the principle that shareholders have no right of recovery on claims

> that are derivative and duplicative of claims held by the corporation.

In re Nicole Gas Production, Ltd., 519 B.R. 723, 746 (Bankr. S.D. Ohio 2014).

Adair did not involve a claim under OCPA and, therefore, did not directly address the instant situation. But it does reflect the applicable common law that was in place when Ohio enacted the OCPA, and the Bankruptcy Court was correct to rely on it. Despite being free to do so, the Ohio Legislature did not express in the OCPA a clear intent to repeal that well-settled common law. Instead, the Bankruptcy Court and the Panel must presume that contrary to abrogating that common law, the OCPA actually embraces it. *See Mann, supra*. Embracing the relevant law requires the Panel to conclude the Bankruptcy Court was correct in its Contempt Order—the OCPA may have removed indirectness as a bar to recovery, but it did not remove the bar that exists due to Ohio common law applicable to this matter. Thus, the OCPA did not provide Fulson an individual claim against the Columbia Gas entities.

2. The Claims Against the Columbia Gas Entities Were Estate Property

Fulson did not have an individual claim against the Columbia entities. He was positioned as any other shareholder or equity owner of an injured corporation, possessing only a right to pursue relief on the corporation's behalf. A shareholder's only injury is the loss in value of his share, which is nothing more than the corporation's lost value reduced in proportion to the shareholder's interest. Thus, when a shareholder's injury consists merely of lost value to his corporate

interest, that injury derives from and is the same as the corporation's injury. *Crosby v. Beam*, 548 N.E.2d 217, 219 (Ohio 1989). Accordingly, it is the corporation that has suffered a distinct injury and the corporation's recovery provides redress for the shareholder's injury.

The Panel recognizes that there may be situations in which a shareholder suffers injury that is separate and distinct from the corporation's injury. In *Crosby,* for example, the court allowed minority shareholders to bring claims for breach of fiduciary duty against the majority shareholders, as those claims were not derivative of any claims held by the corporation. But that is not what happened here. Appellants have conceded at least three times—in the state court complaint, before the Bankruptcy Court, and in their initial appellate brief—that Fulson sought recovery which would make *Debtor* whole. At all stages leading up to this appeal, Appellants were unable to identify any damages Fulson suffered separate and independent from Debtor's damages. That is because Fulson's only alleged damages are the result of harm the Debtor suffered, and he had no unique, individual right to recover those damages. Instead, Fulson was merely asserting the recovery rights of a third party.

As the Panel previously noted, the OCPA may remove indirectness as a bar to recovery, but that does not remove the bar erected by the principle that shareholders have no right to recover on "claims that are derivative and duplicative of claims held by the corporation." *Nicole Gas*, 519 B.R. at 746; *See also Cleveland v. JP Morgan Chase Bank, N.A.*, No. 98656, 2013 WL 1183332 (Ohio Ct. App. Mar. 21, 2013) in

which an Ohio Appellate Court affirmed a trial court's decision dismissing an OCPA claim because the complaining party's cause of action was based on derivative injury. The language of the OCPA reinforces this conclusion. In the OCPA the word "indirectly" modifies "injury" and should be read in the context of proximate cause, not individual damages. The Panel does not read that language as abrogating the requirement that someone suffer individual damages before having a right to relief. For these reasons, the Panel finds that the Bankruptcy Court correctly determined that Debtor, not Fulson, had the right to seek recovery from the Columbia Gas entities.

If a debtor has the right to raise a state claim at the beginning of a bankruptcy case, that claim becomes the exclusive property of the bankruptcy estate. *Honigman v. Comerica Bank (In re Van Dresser Corp.),* 128 F.3d 945, 947 (6th Cir. 1997). Because Debtor owned the causes of action against the Columbia Gas entities, Debtor had the right to bring state court claims against those entities at the time its bankruptcy began. Accordingly, when Debtor's bankruptcy began, those claims became exclusive property of Debtor's bankruptcy estate.

Appellants argue that the duplicative nature of the claims did not preclude Fulson from pursuing his own individual claims against the Columbia entities. According to Appellants, duplication of the claims is not an issue because Fulson's damages would be offset by the settlement Debtor's estate received from the Columbia Gas entities. That argument misses the point. A duplicative claim, by definition, is identical to and derives from another claim. The duplicative nature of Fulson's alleged injury stops the analysis before it

becomes necessary to discuss offsetting damages. To the extent Fulson had any claims, they were derivative of the corporation's claim, relied entirely on the corporation's harm, and were redressed by the corporation's recovery.

Put more plainly, there is no need to ever discuss offsetting in a situation like this because it is impossible for someone in Fulson's position to demonstrate separate and distinct damages in the first place. Once the corporation is made whole, there is no longer a need for a shareholder or other equity owner to advocate on its behalf. Thus, when a corporation recovers for its injury (as Debtor did via the settlement Ransier obtained) the equity owner's derivative claim is extinguished. The consequence of the corporation settling its claims underscores the harsh reality that a shareholder simply has no individual claim through which he can recover damages that would need to be offset.

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. Appellants previously sought to recover the full value of *Debtor's* damages, not Fulson's damages, and only offered the "difference in value" argument after failing in the lower court. Barring extraordinary circumstances, a reviewing court does not consider new arguments first raised on appeal. *Khan v. Bankowski* (*In re Khan*), 375 B.R. 5, 13-14 (B.A.P. 1st Cir. 2007); *Drewes v. Vote* (*In re Vote*), 261 B.R. 439, 441 (B.A.P. 8th Cir. 2001). The Panel finds

that no extraordinary circumstances exist here to justify considering Appellants' new argument.

Finally, Fulson's response to the proposed settlement, in the Bankruptcy Court, contradicts the position Appellants now take before the Panel. Appellants claim the settlement was the last "predicate act" giving rise to Fulson's claim and that the settlement fixed the value of Fulson's damages. But Fulson objected to the settlement in the Bankruptcy Court. Accepting Appellants' current arguments would require the Panel to conclude that objecting to the settlement was, at best, counter-productive. Rather than objecting, they should have done everything possible to facilitate the settlement, without which Fulson could not seek the individual relief he claims he deserves. Their conduct regarding the settlement, combined with the reasoning above, lead the Panel to conclude that Appellants' arguments are not persuasive. Fulson had no individual claim, either before or after the settlement. The claims against the Columbia Gas entities belonged to the Debtor. Once Debtor filed bankruptcy, those claims became the exclusive property of Debtor's bankruptcy estate.

3. Fulson Violated the Automatic Stay and Contempt Was Appropriate

According to 11 U.S.C. § 362(a)(3), a party violates the automatic stay by obtaining possession of or exercising control over property of a bankruptcy estate. This broad prohibition extends to "virtually all formal and informal actions" against estate property. *Smith v. First America Bank, N.A.* (*In re Smith*), 876 F.2d 524, 525-26 (6th Cir. 1989). In this case, the claims against the Columbia Gas entities were the property

of Debtor and, after Debtor filed bankruptcy, Debtor's estate. Thus, Fulson's efforts to recover for the damages Debtor suffered constituted an act to exercise control over estate property.

Additionally, the greater the impact a party's actions will have on the estate, the greater likelihood that those actions constitute an impermissible exercise of control over estate property. *Harchar v. United States* (*In re Harchar*), 393 B.R. 160, 177 (Bankr. N.D. Ohio 2008). Appellants cannot avoid the detrimental impact Fulson recovering for his alleged individual claim would have worked on the bankruptcy estate. If Fulson had been successful in his state court litigation, his recovery would have substantially and negatively impacted the estate. Every dollar Fulson would have recovered would represent a dollar the estate could not recover. Any payment to Fulson would have reduced the resources available to the estate to pay Debtor's creditors, resulting in an exercise of control over estate property.

Furthermore, allowing Fulson to pursue individual claims probably would have scuttled Ransier's settlement efforts on the estate's behalf. It is unlikely the Columbia Gas entities would have agreed to settle if they had to fear ongoing litigation from anyone with a tangential connection to the damages alleged. These practical implications of Fulson pursuing claims against or recovering from the Columbia Gas entities support the conclusion he was exercising control over estate property when he filed his state court claims. Exercising control over estate property without court permission violates Section 362(a). Therefore, the Bankruptcy Court did not abuse its discretion when

it held Appellants in contempt for pursuing the state court actions at issue.

4. The Case Law Appellants Cite Does Not Support Their Position

Appellants rely extensively on a series of cases that are factually distinct from the instant situation. They cite a line of cases known as *Iron Workers*. This line includes *Iron Workers I*; *Iron Workers Local Union No. 17 Ins. Fund v. Phillip Morris, Inc.,* 29 F. Supp. 2d 801 (N.D. Ohio 1998) (hereinafter *Iron Workers II*); and *Iron Workers Local Union No. 17 Ins. Fund v. Phillip Morris, Inc.*, 29 F. Supp. 2d 825 (N.D. Ohio 1998) (hereinafter *Iron Workers III*). In those cases, union health insurance trusts brought OCPA claims for smoking-related medical expenses that the trust paid on behalf of insured members. The defendants moved to dismiss, arguing that the insurance trusts suffered no direct injury and could not bring a direct action. *Iron Workers I*, 23 F. Supp. 2d at 786. The district court denied the motion because compensating smokers for their personal injuries did not compensate the trusts for the medical bills they paid on the smokers' behalf. *Id.* at 791. Because the trusts' claims were not duplicative of the smokers' claims, each set of plaintiffs could pursue their own relief. In this case, Fulson suffered no injury distinct from Debtor's injury. His claim is entirely duplicative of Debtor's claim.

Appellants also rely heavily on *Bankers Trust Co. v. Rhoades*, 859 F.2d 1096 (2d Cir. 1988), which is another distinguishable case. *Rhoades* involved litigation between a bankrupt corporation and one of its general creditors; it did not involve an equity holder

of the debtor company. *Id.* at 1097. And like *Iron Workers*, the plaintiff in *Rhoades* sought to recover for its own direct damages, not those the corporation suffered. *Id.* at 1101. In fact, *Rhoades* reiterated the common law principle that is fatal to Fulson's claims, stating:

> This conclusion is not contrary to our decision in *Rand v. Anaconda-Ericsson, Inc.*, 794 F.2d 843 (2d Cir.), *cert. denied*, 479 U.S. 987, 107 S. Ct. 579, 93 L.Ed.2d 582 (1986), where we held that the shareholder of an injured corporation did not have individual standing to bring a claim under civil RICO. In so holding, we merely recognized a standing requirement applicable throughout corporate law: "An 'action to redress injuries to a corporation cannot be maintained by a shareholder in his own name but must be brought in the name of the corporation'" through a derivative action. *Id.* at 849 (*quoting Warren v. Manufacturers National Bank*, 759 F.2d 542, 544 (6th Cir. 1985)).

Rhoades, 859 F.2d at 1101.

Thus, in addition to being factually distinct from this case, *Bankers* actually reinforces the legal reality that a shareholder in Fulson's position has no individual claim for injury suffered by the corporation in which he owns an interest. For the reasons stated, the Panel finds Appellants' arguments lack merit.

DISCUSSION OF THE FEE ORDER

In addition to attacking the Contempt Order, Appellants also argue the Bankruptcy Court erred by

awarding Ransier certain fees he incurred in defending his fee application. They support their argument, initially, by citing *Baker Botts, L.L.P. v. ASARCO, L.L.C.*, 135 S. Ct. 2158 (2015), which involved a fee application under 11 U.S.C. § 330, which governs compensation for certain professionals in a bankruptcy case. However, the Bankruptcy Court in this case did not base its award on Section 330. In its opinion supporting the Fee Order, the Bankruptcy Court noted the basis for the award:

> A "[trial] court ha[s] broad discretion to fashion an appropriate remedy for . . . contempt," and "[i]n a civil contempt proceeding, judicial sanctions can be used not only to coerce compliance, but also to compensate the complainant." *Williamson v. Recovery Ltd. P'ship*, 467 F. App'x 382, 396 (6th Cir. 2012) (internal quotation marks omitted). In order to recover fees and expenses as compensation for contemptuous conduct, a party must demonstrate that the fees and expenses were incurred as a result of the contempt. *See Ross v. Meyers*, 883 F.2d 486, 491 (6th Cir. 1989) . . . ; *Liberis v. Craig*, No. 87-5321, 1988 WL 37450, at *8 (6th Cir. Apr. 25, 1988) . . . As the Court found above, fees in the amount of $89,011.25 and expenses in the amount of $2,056.75 were incurred by Ransier as a result of the Fulson Parties' contempt.

In re Nicole Gas Production, Ltd., 542 B.R. 204, 218 (Bankr. S.D. Ohio 2015).

Thus, the Bankruptcy Court did not rely on Section 330 when awarding Ransier fees. Instead, the Court's

fee award fell squarely within both its authority under the Bankruptcy Code and its inherent authority as an Article III court. Under Section 105(a), a bankruptcy court may issue "any order, process, or judgment that is necessary or appropriate to carry out the provisions" of the Bankruptcy Code. The power granted in Section 105(a) carries with it the authority to "award attorney fees as a sanction for misconduct." *In re Mehlhose*, 469 B.R. 694 711 (Bankr. E.D. Mich. 2012). Additionally, even apart from the Bankruptcy Code, bankruptcy courts enjoy the same inherent authority invested in all Article III courts to sanction parties for improper conduct. *Mapother & Mapother, P.S.C. v. Cooper* (*In re Downs*), 103 F.3d 472, 477 (6th Cir. 1996). In this case, the sanctions the Bankruptcy Court imposed find their basis in both Section 105 and the Court's inherent authority. Accordingly, neither Section 330 nor *Baker Botts* apply.

Appellants also reference the "American Rule" and argue that fees should not have been allowed because fee-shifting statutes generally provide that only a "prevailing party" or "successful litigant" can receive an award of fees. This is misguided as well. Initially, the American Rule does not apply to this situation. An exception to the American Rule exists when a court imposes sanctions by virtue of its inherent power. *Liberis v. Craig*, No. 87-5321, 1988 WL 37450, at *5 (6th Cir. Apr. 25, 1988). That is what happened here. The Bankruptcy Court did not award Ransier fees and expenses because it deemed him a prevailing party. It made that award to sanction Appellants for their conduct.

Moreover, Appellants' claim that Ransier was not a "prevailing party" with regard to his fee request is

not persuasive. Even assuming, *arguendo*, some form of the American Rule applied requiring Ransier to "prevail" in this matter, the facts would compel the Panel to find that he did so. Ransier sought a total of $95,386.25 in fees. The Bankruptcy Court awarded him $91,068.00, which is more than 95% of what he requested. That does not reflect an unsuccessful effort by Ransier. Thus, the Panel is left to consider whether the Bankruptcy Court abused its discretion by awarding Ransier fees totaling $91,068.00. The Panel finds no such abuse.

Regarding the fees, the Bankruptcy Court conducted an initial hearing at which Ransier presented a detailed fee statement, an affidavit, and his own testimony. The Bankruptcy Court then directed Ransier to supplement his affidavit with additional detail regarding his firm's billing policies and to provide an updated statement with the fees and expenses incurred since the first statement. Additionally, another attorney at Ransier's firm submitted an affidavit in support of his efforts.

The Bankruptcy Court then entered the Fee Order, which is more than 50 pages long, to explain its decision. In that Order the Court discussed in painstaking detail the support for its award. The Court noted its duty to review the fee statements and reduce them if any fees sought did not result from the Appellants' contemptible conduct. As a result, it denied Ransier's request for fees associated with objecting to proofs of claim and dealing with hearings unrelated to the contempt issue. It also denied fees for research Ransier did to determine if he could charge the Appellants for conducting other research.

> After making these reductions, the Bankruptcy Court stated:
>
> [I]n sum, as a result of its independent review, the Court is reducing Ransier's fees by $2,039.25. As explained in Section V.B below, the Court is reducing the fees by an additional $398 as a result of the objections. . . . Based on Ransier's testimony and a line-by-line review of the Fee Statements, the Court concludes that the remainder of the fees sought by Ransier were reasonably and necessarily incurred as a result of the Fulson Parties' persistent attempts to exercise control over property of NGP's bankruptcy estate.

In re Nicole Gas Production, Ltd., 542 B.R. 204, 213-14 (Bankr. S.D. Ohio 2015).

The Court referred to Appellants' "persistent attempts to exercise control," connecting the fees it awarded to the behavior for which it held Appellants in contempt in the first place. The court then proceeded to spend more than 30 pages justifying its award, explaining in detail how the fees included were related to Appellants' contempt. The fee award in this case finds solid footing both in law and the facts before the Panel, and the Bankruptcy Court did not abuse its discretion by ordering it.

CONCLUSION

The Panel affirms the Bankruptcy Court's Contempt Order and affirms the Bankruptcy Court's Fee Order. Regarding the Contempt Order, Fulson did not have an individual claim under the OCPA. Instead, he and his counsel exercised control over

estate property by pursuing claims that were the exclusive property of Debtor's estate. Those actions violated the automatic stay and the Bankruptcy Court acted properly by holding Appellants in contempt as a result.

As to the Fee Order, the Bankruptcy Court properly exercised its inherent authority to impose sanctions for contempt. The Fee Order explains clearly and in detail how the fees awarded derived from Appellants' contempt. The Order does not reflect an abuse of the Bankruptcy Court's discretion.

MEMORANDUM OPINION AND ORDER AWARDING FREDERICK RANSIER ATTORNEYS' FEES AND EXPENSES INCURRED AS A RESULT OF CIVIL CONTEMPT (DECEMBER 10, 2015)

UNITED STATES BANKRUPTCY COURT,
S.D. OHIO, EASTERN DIVISION, AT COLUMBUS

In re: NICOLE GAS PRODUCTION, LTD.,

Debtor.

Case No. 09-52887

Before: John E. HOFFMAN Jr.,
Unites States Bankruptcy Judge.

I. Introduction

The Court previously held three individuals in civil contempt for commencing and continuing a state court action asserting claims belonging to the bankruptcy estate of Nicole Gas Production, Ltd. ("NGP"). Frederick L. Ransier, III ("Ransier"), the Chapter 7 trustee of NGP's estate, requests an award of the reasonable attorneys' fees and expenses he has incurred to date as a result of the contemptuous conduct. For the reasons explained below, the Court awards Ransier fees and expenses in the amount of $91,068.

II. Jurisdiction and Constitutional Authority

The Court has jurisdiction to hear and determine this contested matter under 28 U.S.C. §§ 157 and 1334 and the general order of reference entered in this district. This is a core proceeding. *See* 28 U.S.C. § 157 (b)(2)(A) and (O).

The Court also has the constitutional authority to enter a final order awarding professional fees and costs incurred as a result of contemptuous conduct. *See In re Brown,* 511 B.R. 843, 848 (Bankr. S.D. Tex. 2014) (holding that bankruptcy courts have the constitutional authority to impose sanctions for contempt after *Stern v. Marshall*, ___ U.S. ___, 131 S. Ct. 2594, 180 L.Ed.2d 475 (2011)); *In re Green,* No. 12-13410, 2014 WL 1089843, at *1 (Bankr. N.D. Ohio Mar. 19, 2014) (same); *Schermerhorn v. Centurytel, Inc.* (*In re Skyport Global Commc'ns*), No. 08-36737-H4-11, 2013 WL 4046397, at *41 (Bankr. S.D. Tex. Aug. 7, 2013) (same).

III. Procedural Background

Earlier in this case, Ransier filed a motion requesting that the Court enter an order directing Freddie Fulson ("Fulson") and the attorneys who represented him in the state court action—Robert Sanders ("Sanders") and James Lowe ("Lowe" and, together with Sanders and Fulson, the "Fulson Parties")—to appear and show cause why they should not be held in civil contempt (the "Contempt Motion") (Doc. 119). The Court held an evidentiary hearing on the issue of whether the Fulson Parties should be held in civil contempt (the "Contempt Hearing"). Following the Contempt Hearing, Fulson passed away, and his probate estate was substituted as the plaintiff

in the state court case, effectively substituting his estate (the "Fulson Estate") as a party in interest in this contested matter. *See* Docs. 188 & 190. The co-administrators of the Fulson Estate are Curtland H. Caffey and S. Brewster Randall, II, Esq. (the "Co-administrators").

Based on the evidence presented at the Contempt Hearing, the Court entered an opinion and order (the "*Contempt Opinion*") holding that the Fulson Parties "violated the automatic stay and were in contempt of Court when they commenced and continued the state court action." *In re Nicole Gas Prod., Ltd.,* 519 B.R. 723, 725 (Bankr. S.D. Ohio 2014). The Contempt Opinion also established a procedure for the Court to determine the amount of damages the NGP estate sustained as a result of the Fulson Parties' contemptuous conduct. In accordance with this procedure, Ransier filed a statement of the time and expenses incurred by professionals from his law firm, Vorys, Sater, Seymour and Pease LLP ("Vorys"), as of the date the statement was filed (the "First Fee Statement"), together with a supporting affidavit (the "Ransier Affidavit") (Doc. 200).[1] Lowe filed an objection to the First Fee Statement (the "Lowe Objection") (Doc. 201), and Sanders filed an objection as well (the

[1] Ransier previously had filed an application pursuant to § 327 of the Bankruptcy Code seeking an order approving his retention of Vorys to represent NGP's estate. Doc. 24. Under the Bankruptcy Code, the "court may authorize the trustee to act as attorney or accountant for the estate if such authorization is in the best interest of the estate." 11 U.S.C. § 327(d). Finding that Ransier and Vorys "are qualified to act as attorneys . . . and that it is in the best interests of the estate that [Ransier] be authorized to retain said law firm, with Frederick L. Ransier as case attorney," the Court entered an order approving the retention. Doc. 26.

"Sanders Objection") (Doc. 202). Ransier then filed a combined reply to the Lowe Objection and the Sanders Objection (the "Ransier Reply") (Doc. 206).

Although the Court provided Sanders, Lowe and the Co-administrators with notice of the entry of the Contempt Opinion, Docs. 196 & 199, Ransier gave notice of the filing of the First Fee Statement to Sanders and Lowe, but not to the Co-administrators. After the Court made Ransier aware of the need to provide the Co-administrators with notice of the First Fee Statement, he served it on them under the terms of an agreed order among the Co-administrators, Sanders and Lowe (the "Agreed Order") (Doc. 246). The Agreed Order established a schedule under which the Co-administrators filed an objection to the First Fee Statement (the "Co-administrators Objection") (Doc. 248) and Ransier filed a reply to their objection (Doc. 250). The Court will refer to Lowe, Sanders and the Co-administrators collectively as the "Objectors."

The Court held a hearing to consider the amount of fees and expenses that should be awarded to Ransier (the "Fee Hearing"). At the Fee Hearing, Ransier testified in support of the fees and expenses charged by the Vorys professionals who rendered the legal services he asserted were necessary to respond to the Fulson Parties' contemptuous conduct. During the Fee Hearing, the Court admitted the following documents into evidence without objection: (1) Ransier's Exhibit 1 (the First Fee Statement), Exhibit 1A (the Ransier Affidavit) and Exhibit 2 (a document setting forth Ransier's expenses); and (2) Lowe's Exhibit A (a version of the First Fee Statement annotated with paragraph numbers 1 through 303).

At the conclusion of the Fee Hearing, the Court asked Ransier to file (1) an affidavit explaining Vorys's billing policy with respect to computerized legal research and (2) a supplemental statement of the fees and expenses incurred since the First Fee Statement was filed. On October 6, 2015, Vorys attorney Brenda Bowers filed an affidavit (the "Bowers Affidavit") in support of a statement of the time and expenses incurred since the filing of the First Fee Statement (the "Second Fee Statement") (Doc. 252). On November 6, 2015, at the Court's request, the parties filed a Notice of Submission of Reviewed and Numbered Supplemental Fee Statement Pursuant to Contempt Order (Doc. 253), attaching a copy of the Second Fee Statement annotated with paragraph numbers 304 through 444).[2]

The Court will assume that the Objectors oppose Ransier's recovery of the fees and expenses set forth in the Second Fee Statement on the same grounds that they objected to the First Fee Statement. Accordingly, the Court will deem the Sanders, Lowe and Co-administrators' Objections to be objections to both the First and Second Fee Statements.

IV. Findings of Fact

In this opinion, the Court uses defined terms contained in the Contempt Opinion and incorporates by reference the findings of fact set forth in the Contempt Opinion. Based on the evidence introduced

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[2] The annotated Second Fee Statement included two entries numbered 326 and no entry numbered 435. Nonetheless, in order to avoid confusion, the Court will use the numbers from the annotated version submitted by the parties.

during the Contempt Hearing and the Fee Hearing, including the documentary evidence and the testimony presented, and having found Ransier to be a highly credible witness, the Court makes the following additional findings of fact.

A. The Total Amount of Fees and Expenses Requested

In the First Fee Statement, Ransier attributed a total of $68,476.50 of fees and $3,788.48 of expenses to the Fulson Parties' contempt. According to the Bowers Affidavit and the Second Fee Statement, after Ransier filed the First Fee Statement, he incurred additional fees of $22,972 and additional expenses of $149.27. Thus, the amount of fees Ransier seeks to recover is $91,448.50, and the amount of expenses is $3,937.75, for a total award of fees and expenses in the amount of $95,386.25. Bowers Aff. ¶ 8.

B. Fees

Because Ransier is the Chapter 7 trustee of NGP's bankruptcy estate as well as an attorney for the estate, the Court "may allow compensation for [his] services as such attorney . . . only to the extent that [he] performed services as attorney . . . for the estate and not for performance of any of [his] duties that are generally performed by a trustee without the assistance of an attorney . . . for the estate."

11 U.S.C. § 328(b). Litigating a contested matter such as this contempt proceeding certainly requires an attorney's professional skills. *See, e.g., Gordon v. Walton* (*In re Hambrick*), No. 08-66265, 2012 WL 10739279, at *5 (Bankr. N.D. Ga. Apr. 10, 2012). Ransier testified that he was careful to separate the

work that he performed as Chapter 7 trustee of the NGP estate—and work that other professionals at his firm performed on his behalf in his capacity as Chapter 7 trustee—from the services that he and others provided as counsel in this contested matter. The Court finds that Ransier and the other Vorys attorneys billed only for time spent representing the estate as counsel, not as the Chapter 7 trustee. That said, Ransier may recover the fees set forth in the First and Second Fee Statements (collectively, the "Fee Statements") only to the extent that (1) the hourly rates of the professionals who represented NGP's estate in this matter were reasonable and (2) the time spent was both reasonable and expended as a result of the Fulson Parties' contempt.

1. Hourly Rates

The Fee Statements identify the professionals who represented NGP's estate in this contempt matter together with their hourly rates. Ransier testified that the rates charged by the Vorys professionals in this matter reflect the firm's rates in 2009 (the year the NGP case was commenced) rather than the rates in place at the time the services were performed from 2013 through 2015. The parties stipulated in the Agreed Order that the "hourly rates of the attorneys and paralegals within the [First Fee Statement] are reasonable, standard and customary for similarly situated attorneys and paralegals in bankruptcy litigation throughout Ohio and the Midwest for similar bankruptcy litigation matters" and that "[t]here shall be no expert witnesses required as to the reasonableness of the hourly rates." Agreed Order ¶ B.

Ransier has been licensed to practice law since 1974 and has been a panel Chapter 7 trustee in the Southern District of Ohio since 1988. In his capacity as a Chapter 7 trustee, Ransier has extensive experience in reviewing fee requests made in a variety of different contexts, including fee requests made in connection with motions for contempt. He also serves on the management committee of Vorys and in that role annually reviews billing rates of attorneys at firms comparable to Vorys. Based on this experience, he testified that the rates charged by the Vorys professionals in this contempt matter are reasonable and customary for similarly situated professionals in bankruptcy litigation in the Columbus area. Relying on the parties' stipulation, Ransier's testimony, and its own knowledge and experience, the Court concludes that the hourly rates set forth in the Fee Statements are consistent with the "prevailing market rate," that is, the rate that professionals of "comparable skill and experience can reasonably expect to command" in this Court.[3]

2. Time Spent

The Court has an independent duty to review the Fee Statements and to reduce them if any of the fees sought were not incurred as a result of the Fulson Parties' contempt. This independent duty applies even to time not specifically challenged by the Objectors. *See Smith v. Serv. Master Corp.,* 592 Fed. Appx. 363, 367 (6th Cir. 2014).

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[3] *Waldo v. Consumers Energy Co.,* 726 F.3d 802, 821 (6th Cir. 2013) (internal quotation marks omitted).

During the Fee Hearing, Lowe objected to a few time entries relating to Ransier's request to continue the hearings scheduled on his objections to the proofs of claim filed by Fulson and Sanders against the NGP estate. The Court then brought to the parties' attention the fact that the First Fee Statement included several other entries relating to the objections to the proofs of claim. None of this time was incurred as a result of the Fulson Parties' contempt. Ransier testified that he did not intend to include those entries in the First Fee Statement and conceded that such time should not be part of the contempt sanction. The Second Fee Statement also includes onetime entry relating to the proofs of claim.

The following chart sets forth the reductions the Court is making to the Fee Statements based on the inadvertent inclusion of time spent with respect to claim objections:

No.[4]	Date	Time-keeper	Time Description and Hours Billed	Reduction in Time and (Fees)[5]
115	9/27/13	Bowers	Reviewed orders from Court regarding hearings on motion to show cause and	.25 × $285 = ($71.25)

[4] The number used to designate each entry is taken from the version of the First Fee Statement submitted as Lowe's Exhibit A and the version of the Second Fee Statement submitted by the parties as docket number 253.

[5] Several time entries contain both compensable and non-compensable time. As explained in Section V.B.12 below, the Court is permitted to estimate the non-compensable time and reduce the Fee Statements accordingly.

			objections to claims. Reviewed hearing dates with Mr. Ransier–.50	
116	9/28/13	Bowers	Reviewed orders from Court on: Hearing Notice of Motion to Compromise; Order to Show Cause and Setting Hearing on Fulson, Lowe, and Sanders; Order on objection to Sanders' Proof of Claim and Setting Hearing on the Same; and Order on Objection to Fulson's Proof of Claim and Setting Hearing on the Same–1.0	.50 × $285 = ($142.50)
117	9/30/13	Bowers	Reviewed orders on sanctions/show cause, proof of claim and motion to compromise and docketed dates–.30	.10 × $285 = ($28.50)
119	10/1/13	Bowers	Drafted memo to Ms. Fromme and Mr. Ransier regarding documents filed related to Fulson and Sanders proofs claim, motion to compromise, and motions to show cause–.30	.10 × $285 = ($28.50)
120	10/3/13	Ransier	Attention to e-mail concerning Orders	.30 × $380

			entered setting hearings relative to show cause motions and claims objections. Draft e-mail to Ms. Bowers concerning same–.50	=($114)
121	10/3/13	Fromme	Review Show Cause Order as to Claim Objections and Show Cause Order as to the Contempt Motion and authorities in support thereof. Prepare summary and analysis for Messrs. Ransier and Bowers regarding the same–2.20	1.10 × 230 = ($253)
124	10/7/13	Ransier	Review show cause order on Trustee objection to Sanders claim–.20	.20 × $380 = ($76)
144	11/5/13	Ransier	Conference with Ms. Bowers concerning hearing request by Mr. Fulson. Consideration as to whether request complies with Order–.30	.30 × $380 = ($114)
145	11/05/13	Bowers	Conference with Mr. Ransier regarding continuance for hearings scheduled on December 9 and 10, 2013 and rescheduling hearing on Motion to Show	.10 × $285 = ($28.50)

			Cause–.20	
150	11/14/13	Bowers	Reviewed e-mail regarding potential continuance rescheduling date(s) for hearings on objection to show cause, objection to proof of claim, and second motion to compromise–.20	.10 × $285 = ($28.50)
155	11/26/13	Bowers	Telephone conferences with Court regarding dates available for continuance dates for hearings on claim objection, second motion to compromise and motion to show cause–.20	.10 × $285 = ($28.50)
156	11/26/13	Bowers	Drafted e-mails to and telephone conferences with counsel regarding potential dates for continuances of hearings on motion to show cause, objection to proof of claim, and second motion to compromise–.40	.20 × $285 = ($57)
157	11/27/13	Bowers	Drafted orders continuing hearings on proof of claim objection, show cause hearing, and second motion for	.20 × $285 = ($57)

			compromise–.60	
158	12/2/13	Bowers	Updated orders on continuance and prepared for uploading with court on motion to show cause, objection to claim, and second motion to compromise–.20	.10 × $285 = ($28.50)
165	1/11/14	Bowers	Reviewed Fulson's Response to Second Order to Show Cause Why Trustee's Objection to Fulson's Proof of Claim Should Not Be Sustained. Drafted memo to Ms. Fromme and Mr. Ransier regarding the same–.40	.40 × $285 = ($114)
345	1/28/15	Tobin	Finalize and file objections to claim–.80	.80 × $125 = ($100)
				Subtotal: $1,269.75

Certain of the fees that the Court is reducing relate to services performed with respect to a request for a continuance of a hearing scheduled on Ransier's objection to the proofs of claim of Fulson and Sanders. During the Fee Hearing, counsel for Lowe argued that fees resulting from Ransier's request to continue the hearing on the Contempt Motion also should not be charged to the Fulson Parties, because the reason for the request was Ransier's unavailability on the date scheduled by the Court. Ransier, however, would not have needed to file the Contempt Motion—and thus

would not have needed to file a motion to continue the hearing scheduled by the Court—were it not for the Fulson Parties' contempt. The Court accordingly declines to reduces the fees requested by Ransier for time spent requesting a continuance of the Contempt Hearing.

The following chart sets forth the reductions the Court is making to the Fee Statements based on the inclusion of time—in addition to the time spent objecting to Fulson's and Sanders' proofs of claim — that does not appear to have been incurred as a result of the Fulson Parties contempt:

No.	Date	Time-keeper	Time Description and Hours Billed	Reduction in Time and (Fees)
386	6/5/15	Bowers	Reviewed Kendig decision regarding trustee files .30	.30 × $285 = ($85.50)
432	9/20/15	Bowers	Reviewed IRS voucher/notice for 2013. Drafted memo to Mr. Ransier regard-ing receipt of said notice–.20	($85.50) .20 × $285 = ($57)
				Subtotal: $142.50

In the Second Fee Statement, Ransier requests that the Fulson Parties pay the fees he incurred analyzing the issue of whether he may charge them for on-line legal research expenses. But, as explained in Section IV.C below, the Court cannot award Ransier the expenses he requests for on-line legal research, because those expenses were not incurred as a result

of the Fulson Parties' contempt. It would not be consistent or appropriate to award Ransier the fees he incurred analyzing the issue of whether he may charge the Fulson Parties the expenses incurred for on-line legal research given the Court's determination that such expenses are not recoverable. The Court accordingly must make the following reductions to the Fee Statements:

No.	Date	Time-keeper	Time Description and Hours Billed	Reduction in Time and (Fees)
438	9/22/15	Giberson	Reviewed Kendig decision regarding trustee files .30	.30 × $285 = ($85.50)
442	9/22/15	Bowers	Reviewed IRS voucher/notice for 2013. Drafted memo to Mr. Ransier regarding receipt of said notice–.20	
443	9/23/15	Bowers	Reviewed statement of fees as related to legal research and drafted memo to Ms. Hanrahan regarding the same–.70	.70 × $285 = ($199.50)
				Subtotal: $627

In sum, as a result of its independent review, the Court is reducing Ransier's fees by $2,039.25. As explained in Section V.B below, the Court is reducing

the fees by an additional $398 as a result of the objections. *See* Sections V.B.12 (reduction of $159.50) & V.B.14 (reduction of $238.50). This results in a total fee reduction of $2,437.25.

Based on Ransier's testimony and a line-by-line review of the Fee Statements, the Court concludes that the remainder of the fees sought by Ransier were reasonably and necessarily incurred as a result of the Fulson Parties' persistent attempts to exercise control over property of NGP's bankruptcy estate. As the Court explained in the Contempt Opinion, Fulson commenced the 2013 State Court Case against Columbia Gas Transmission, LLC ("TCO") and the other Columbia Gas Entities, and the Complaint commencing the lawsuit, as well as the Amended Complaint, identified Sanders and Lowe as Fulson's counsel. The "Fulson Parties violated the automatic stay and were in contempt of Court when they commenced and continued the 2013 State Court Case." *Contempt Op.,* 519 B.R. at 755. As a result of the Fulson Parties' contemptuous conduct, the Vorys professionals spent time analyzing the Complaint and the Amended Complaint. They also assessed the implications of those pleadings for the settlement that Ransier had reached with the Columbia Gas Entities, a settlement under which NGP's estate would receive a $250,000 cash payment in exchange for a release of any claims NGP had or may have against the Columbia Gas Entities.

After conducting this assessment, Ransier or his counsel prepared and filed the Stay Notice with the State Court. Lowe specifically objects to 11 time entries related to the preparation of the Stay Notice, contending that the amount of time spent was excessive. Lowe Objection at 9. But it was the Fulson Parties'

contempt that necessitated the preparation of the Stay Notice. And all but one of those 11 entries includes time incurred for other services performed as a result of the Fulson Parties' contempt. After reviewing the 11 entries, the Court finds that the total amount of time spent on the Stay Notice itself was, as Lowe suggests it should have been, relatively minimal, and therefore reasonable.

As a result of the Fulson Parties' contempt, the Vorys professionals also expended time preparing the Contempt Motion; researching and reviewing legal and factual issues related to the Contempt Motion; preparing scheduling orders and a brief in support of the Contempt Motion; reviewing and evaluating the Fulson Parties' response to the Contempt Motion and numerous other documents the Fulson Parties filed with the Court, including motions for reconsideration of the Show Cause Order entered on the Contempt Motion and a request for certification of an issue to the Supreme Court of Ohio; drafting Ransier's reply in support of the Contempt Motion; reviewing the reopening of the bankruptcy case of Nicole Energy Services, Inc. ("NES"), which occurred as a result of the filing of the 2013 State Court Case; preparing argument, witnesses and exhibits for the Contempt Hearing; analyzing briefs filed by the Fulson Parties after the Contempt Hearing and preparing a reply to those briefs; reviewing the authority cited in the notice issued by the Court (the "Injunction Notice") regarding its intent to permanently enjoin all entities from pursuing claims that are property of NGP's estate, including, without limitation, claims that are derivative of those belonging to NGP's estate (the "Injunction"); researching authority in support of the Injunction

and preparing a supporting brief; analyzing Lowe's and Sanders's response filed in opposition to the Injunction Notice and preparing a reply to the response; reviewing and responding to the concerns that TCO expressed about the Settlement Motion as a result of the filing of the Complaint and the Amended Complaint and negotiating with TCO regarding the settlement; addressing Sanders's and Fulson's objections to the Settlement Motion; and reviewing and analyzing the impact of Fulson's death and the substitution of there presentative of the Fulson Estate in the 2013 State Court Case.

All of the time spent on these matters was reasonable and was expended as a result of the Fulson Parties' contempt. But for their contemptuous conduct, it would have been unnecessary for the Vorys professionals to incur this time. The finding that the time was reasonable and that it was incurred as a result of the contempt includes those fees to which Lowe and Sanders specifically object—those relating to the Injunction (discussed in Section V.B.6 below), those incurred researching and otherwise addressing the effect of Fulson's death (discussed in Section V.B.7) and those related to monitoring the NES bankruptcy case (discussed in Section V.B.8). The Court's findings of fact include any findings set forth in Section V.

Neither Lowe nor Sanders expressly objected to the fees relating to the Settlement Motion. In an exercise of its independent duty to review the Fee Statements, however, the Court will make more detailed findings with respect to the fees relating to

the Settlement Motion.[6] As the Court previously explained, Ransier requested in the Settlement Motion that the Court authorize him to accept a cash payment of $250,000 in exchange for complete releases of any and all claims that NGP's bankruptcy estate had or might have against the Columbia Gas Entities. *Contempt Op.,* 519 B.R. at 729. The Court entered an opinion and order granting the Settlement Motion and issuing the Injunction (the "*Settlement and Injunction Order*") contemporaneously with the Contempt Opinion. *See In re Nicole Gas Prod., Ltd.,* 518 B.R. 429 (Bankr. S.D. Ohio 2014).[7]

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[6] "The Settlement Motion actually was the second motion Ransier filed for approval of a compromise of claims between NGP and the Columbia Gas Entities." *Contempt Op.,* 519 B.R. at 729. The Court denied the first settlement motion, and no fees related to that motion are included in the Fee Statements. Nor are any fees related to the mere preparation and filing of the Settlement Motion included in the Fee Statements. Rather, the requested fees relate to Sanders's and Fulson's objections to the Settlement Motion.

[7] The Settlement and Injunction Order appears to have been a final order for two reasons. First, it approved a settlement. *See Vickers v. IRS* (*In re Fortier*), 161 Fed. Appx. 514, 517 (6th Cir. 2005) ("In this case, the bankruptcy court's sale order was final. . . . It gave effect to a settlement among the parties regarding the proceeds from the sale of . . . property. The order specified that the property would be sold according to the terms of that settlement, and it specified the exact distribution of the sale proceeds."). Second, the Settlement and Injunction Order "*permanently* [enjoined] all entities from pursuing the NGP Ohio RICO Claims as well as all other claims that are property of NGP's estate. . . . " *Settlement & Inj. Order,* 518 B.R. at 445 (emphasis added). "An order granting a permanent injunction is a final order." *Golden Gate Hotel Ass'n v. City & Cnty. of S.F.,* 18 F.3d 1482, 1483 (9th Cir. 1994) (citing *Mayor & Aldermen of Vicksburg v. Henson,* 231 U.S. 259, 267, 34 S. Ct. 95, 58 L.Ed.

Ransier's intent in settling with the Columbia Gas Entities and filing the Settlement Motion was to compromise any and all claims that NGP's bankruptcy estate had or might have against the Columbia Gas Entities. *Contempt Op.,* 519 B.R. at 732-33. Yet in the 2013 State Court Case Fulson asserted claims against the Columbia Gas Entities that were property of NGP's estate. In addition to filing the 2013 State Court Case, Fulson and Sanders also filed objections to the Settlement Motion. *Id.* at 729. During the Contempt Hearing, Ransier testified about his belief as to why Fulson and Sanders filed their objections to the Settlement Motion:

> THE COURT: Mr. Ransier, assuming the Court will grant the relief requested and impose sanctions for violating the automatic stay, is it your intention to seek to recover only those fees and expenses relating to responding to the [NGP Ohio RICO Claims], or would the fees and expenses that your law firm will seek to recover also include fees and expenses incurred in response to the objections to the motion to compromise the claims against Columbia Gas Transmission?
>
> A: The problem we're having here, we have some inconsistent things going on. We have an objection to the amount of our compromise filed in the bankruptcy court and then we have another cause of action asserting damages for Mr. Fulson arising out of those

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209 (1913)); *see also, e.g., Di Pierro v. Taddeo* (*In re Taddeo*), 685 F.2d 24, 26 n. 4 (2d Cir. 1982)). No party appealed the Settlement and Injunction Order.

> same claims. On the one hand I don't understand why he would be objecting in the bankruptcy court because if his theory were to prevail he would get more if the settlement was less. So I don't know that I can untie the fact that we're dealing with—and, in fact, I believe the objections are pretty much the same as the allegations that are in the complaint. It's kind of hard for me to tear them apart. But it would not be my intent to, in the ordinary course of a bankruptcy case, it would not have been my intent to seek sanctions on a compromise motion that ended up in some dispute. In this case there's a relationship, I believe there's a direct relationship, between the objections made in the case—I'm sorry, in the bankruptcy case—to the compromise and the claims that were being asserted in the state court.. . . . They're inextricably tied. In the ordinary bankruptcy case there could be objections filed to a proposed compromise; I would not be seeking attorney fees. In this case the objection found itself into the [Complaint filed in the State Court].

Hr'g Tr. (Doc. 175) at 55-58.

In short, Ransier determined that he could not separate his work on the Contempt Motion from his work defending the Settlement Motion against challenges that were essentially part and parcel of the contempt. It therefore makes sense for Ransier to seek reimbursement for fees incurred and equitable and that the Court should issue the Injunction:

> Once the [Settlement Motion] was filed . . . the conclusion that the proposed settlement was fair and equitable and within the range of reasonableness should have been as clear to Sanders as it was to Ransier.. . . . It should have been equally clear to [Sanders] that requiring Ransier to continue to defend the [Settlement Motion] would, rather than increasing the [value of the settlement], only increase the expenses the estate had already incurred, thereby decreasing the funds available for distribution to creditors, including Sanders himself. Assuming that it was not his intent to spend his time and other resources engaging in efforts that would only reduce his own recovery from the NGP estate along with other creditors' recoveries, it is difficult to see what Sanders hoped to accomplish. The only motivation the Court can fathom is that Sanders did not wish to be in the position of having to explain to the finder of fact in the 2013 State Court Case—perhaps the jury that he believed would share his negative view of the Columbia Gas Entities—why he had not objected to the [Settlement Motion] if he believed that the claims on which Fulson was seeking to recover were worth millions more than the amount for which Ransier was settling.

Settlement & Inj. Order, 518 B.R. at 442, 444. Again, the Settlement and Injunction Order is a final order from which no party appealed.

In light of the foregoing, other than the time represented by the $2,437.25 amount by which the

Court is reducing Ransier's fees, the Court finds that all of the fees set forth in the Fee Statements were incurred as a result of the Fulson Parties' contempt and are compensable. In sum, fees in the amount of $89,011.25 (the $91,448.50 requested in the Fee Statements minus $2,437.25) are reasonable and necessary and were incurred as a result of the Fulson Parties' contempt.

C. Expenses

In the First Fee Statement, Ransier seeks to recover expenses in the amount of $3,788.48 and in the Second Fee Statement additional expenses of $149.27, for total expenses of $3,937.75. Of this amount, $1,860.38 is for on-line legal research ($1,837.88 in the First Fee Statement and $22.50 in the Second Fee Statement). In the affidavit regarding Vorys's billing practices with respect to computerized legal research that the Court requested during the Fee Hearing, Bowers stated:

> The Vorys firm has a flat fee arrangement for computer legal research such as Lexis/Nexis. In order to recoup the flat fee arrangement for each search, Lexis/Nexis gives to the Vorys firm a report showing a retail charge based upon the search/searches done. Vorys charges its clients 25% of that retail charge in order to recoup the flat fee costs and expenses. The Lexis/Nexis computer research charges shown on the statement of fees related to this matter were calculated as stated herein.

Bowers Aff. ¶ 9.

Based on the Bowers Affidavit, the Court concludes that Vorys would have incurred the flat fee owed to Lexis/Nexis for electronic legal research regardless of the Fulson Parties' contempt. *See Serv. Master Corp.,* 592 Fed.Appx. at 368 ("If the lawyer or firm pays a blanket access fee, rather than per search, there is no reason to distinguish the on-line research cost from the cost of the books that at one time lined the walls of legal offices, which was treated as overhead."). Ransier therefore did not incur the expenses for on-line legal research as a result of the contempt. Thus, although the Objectors did not raise the point, the Court's independent duty to review the Fee Statements prevents the Court from awarding Ransier the $1,860.38 he requests for online legal research.

That leaves $2,113.37 of expenses for photocopies, postage and long-distance calls. During the Fee Hearing, Ransier stated that all of those expenses related to the contempt proceeding, not to services performed in connection with the NGP Chapter 7 case in general. But, as noted above, Vorys inadvertently included in the Fee Statements fees that were not incurred as a result of the Fulson Parties' contempt. And Ransier was unable to tie the expenses included in the Fee Statements to any particular services set forth in the Fee Statements. Thus, the Court will assume that the expenses relate to all the fees for which Vorys billed in the Fee Statements, including those that were incurred as a result of the contempt and those that were not.

Given this, counsel for Lowe argued that Ransier's expenses should be reduced in the same proportion that the Court reduces his fees. The entire $1,860.38 expense amount for on-line legal research is already

being disallowed. The Court has not been provided the information that would allow it to determine which of the expenses for photocopies, postage and long-distance calls relate to the reimbursable fees and what part of those expenses relate to non-reimbursable fees. The Court therefore will reduce the remaining $2,113.75 of expenses for photocopies, postage and long-distance calls using the same percentage by which it is reducing Ransier's fees (approximately 2.7%), or by $57. Thus, the Court finds that the amount of expenses incurred as a result of the Fulson Parties' contempt was $2,056.75. In sum, other than the on-line legal research costs and the expenses allocated to non-reimbursable services, the expenses sought by Ransier were incurred as a result of the Fulson Parties' contempt and are reasonable and customary.

V. Legal Analysis

A. Fees and Expenses as Sanctions for Contemptuous Conduct

A "[trial] court ha[s] broad discretion to fashion an appropriate remedy for . . . contempt," and "[i]n a civil contempt proceeding, judicial sanctions can be used not only to coerce compliance, but also to compensate the complainant." *Williamson v. Recovery Ltd. P'ship,* 467 Fed. Appx. 382, 396 (6th Cir. 2012) (internal quotation marks omitted). In order to recover fees and expenses as compensation for contemptuous conduct, a party must demonstrate that the fees and expenses were incurred as a result of the contempt. *See Ross v. Meyers,* 883 F.2d 486, 491 (6th Cir. 1989) ("A compensatory sanction [for contempt of court] must be based upon . . . actual losses sustained as a result of the contumacy.") (Internal quotation marks

omitted); *Liberis v. Craig,* No. 87-5321, 1988 WL 37450, at *8 (6th Cir. Apr. 25, 1988) ("[T]he costs associated with these appeals were a direct result of the plaintiffs' initial contumacious conduct. . . . Therefore, we find that the bankruptcy judge did not abuse his discretion by awarding attorneys' fees and expenses incurred by the trustees as a result of the plaintiffs' unsuccessful appeals of the orders holding them in contempt."). As the Court found above, fees in the amount of $89,011.25 and expenses in the amount of $2,056.75 were incurred by Ransier as a result of the Fulson Parties' contempt.

There is a split of authority on the issue of whether courts must use the lodestar method—which calculates the permissible fee based on "the number of hours reasonably expended multiplied by a reasonable hourly rate"—when evaluating a request for fees in the civil contempt context. *Walman Optical Co. v. Quest Optical, Inc.,* No. 11-CV-0096, 2012 WL 3248150, at *11 (D.Minn. Aug. 9, 2012) (citing cases on both sides of the issue while following the lodestar method).

The Bankruptcy Appellate Panel of the Sixth Circuit (the "BAP") declined to require the use of the lodestar method in *In re Nicole Energy Services, Inc.,* No. 06-8028, 2007 WL 328608, at *5 (6th Cir. BAP Feb. 1, 2007), but the BAP did not prohibit its use. And the United States District Court for the Southern District of Ohio (the "District Court") has used the lodestar method in the context of a civil contempt sanction. *See Dominic's Rest. of Dayton, Inc. v. Mantia,* No. 09-131, 2009 WL 4680223, at *6 (S.D. Ohio Dec. 3, 2009); *Williamson v. Recovery Ltd. P'ship,* No. 06-292, 2013 WL 3222428, at *9 (S.D. Ohio June 25, 2013).

Thus, the Court has employed the lodestar method in making its findings of fact.

Under this method, the party seeking fees "bears the burden of proving that the number of hours expended was reasonable," *Williamson,* 2013 WL 3222428, at *9 (citations omitted) (quoting *Gunasekera v. Irwin,* 774 F. Supp. 2d 882, 887 (S.D. Ohio 2011)). Ransier carried this burden with respect to fees in the amount of $89,011.25. In fact, "[t]he documentation offered in support of the hours charged [is] of sufficient detail and probative value to enable the [Court] to determine with a high degree of certainty that such hours were actually and reasonably expended[.]" *Imwalle v. Reliance Med. Prods., Inc.,* 515 F.3d 531, 552-53 (6th Cir. 2008) (quoting *United Slate, Tile & Composition Roofers, Damp & Waterproof Workers Ass'n, Local 307 v. G & M Roofing & Sheet Metal Co.,* 732 F.2d 495, 502 n. 2 (6th Cir. 1984)). "Once a party has established that the number of hours and the rate claimed are reasonable, the lodestar amount is presumed to be the reasonable fee to which counsel is entitled." *Williamson,* 2013 WL 3222428, at *9 (quoting *Gunasekera,* 774 F. Supp. 2d at 887). The lodestar accordingly is $89,011.25 plus expenses in the amount of $2,056.75, for a total of $91,068.

B. The Objections

"Where a party raises specific objections to a fee award, a [trial] court should state why it is rejecting them." *Serv. Master Corp.,* 592 Fed. Appx. at 367 (quoting *Wooldridge v. Marlene Indus. Corp.,* 898 F.2d 1169, 1176 (6th Cir. 1990)). The Court will do so here. In addition to the objections discussed above with respect to the time spent on the Stay Notice and

Ransier's request to continue the hearing on the Contempt Motion, Lowe's objections to the Fee Statements—which Sanders and the Co-administrators adopt—fall into 14 categories. The Court will address each of those objections, as well as the additional objections made by Sanders and the Co-administrators. As explained below, while the Objectors take a scattershot approach in the apparent hope that some of the objections will hit the mark, only two do so, and those objections result only in minimal reductions to the requested fees. Most of the objections, including the first 11 discussed below, are completely meritless.

1. The Lack of Discovery

Lowe begins by noting that Ransier "did not issue a single interrogatory, request for production, or request for admission. . . . [n]or did [he] take or defend a single deposition." Lowe Objection at 2. But so what? Having reviewed and analyzed the Complaint and the Amended Complaint, there was no need for Ransier to conduct discovery in order for him to determine that the Fulson Parties were in civil contempt. Thus, far from providing a reason to reduce Ransier's fees, this objection instead underscores the point that Ransier exercised appropriate judgment in not asking his counsel to perform unnecessary tasks. The possibility that the amount of the Fee Statements might have been higher if discovery had been necessary provides no reason to reduce the fees that Ransier actually requested. The Court thus will not reduce Ransier's fees based on this objection.

2. The Clarity of the Law Governing the Court's Finding of Contempt

Lowe continues by noting that this Court previously held that "the law is neither novel nor in flux, and there is nothing ambiguous about the applicable provisions of the Bankruptcy Code or the language of the OCPA as applied to the NGP Ohio RICO Claims [,]" *Contempt Op.,* 519 B.R. at 754—his suggestion being that it therefore was unreasonable for the Vorys professionals to spend the amount of time they expended combating efforts by the Fulson Parties to assert the NGP Ohio RICO Claims. Lowe Objection at 2. But the passage from the Contempt Opinion that Lowe quotes was directed at the Fulson Parties, not at Fulson. The point the Court was making was that, under the governing law, the Fulson Parties clearly violated the automatic stay and were in contempt when they commenced and continued the 2013 State Court Case. Yet they persisted in their contempt, requiring Ransier to incur more fees. As the Court repeatedly made clear in the Contempt Opinion, it was the Fulson Parties who were being unreasonable, not Ransier. While the Objectors now attempt to twist the Court's statement in the Contempt Opinion and use it against Ransier, their argument is utterly unpersuasive. No reduction of Ransier's fees will be made based on this objection.

3. The Amount of Fees Compared to the Settlement Amount

According to Lowe, "by the time all the appeals are exhausted, the parties' attorneys' fees connected with this contempt may exceed the value of [Ransier's] settlement with the Columbia Gas Entities—the asset

this contempt proceeding was ostensibly prosecuted to protect." Lowe Objection at 2. First of all, this statement may well turn out to be false. After all, Ransier's fees and expenses to date approximate only $90,000, while the value of the settlement with TCO was $250,000. But even if the statement proves to be true, it would provide no reason for Ransier to have made a passing attempt to stop the Fulson Parties from engaging in contemptuous conduct and to have then given up when they refused to cease and desist. *See Liberis,* 1988 WL 37450, at *8 ("The trustee was forced to incur these costs to defend the contempt order on appeal, regardless of whether or not the actual contumacious conduct which had given rise to the contempt order had ceased. Therefore, we find that the bankruptcy judge did not abuse his discretion by awarding attorneys' fees and expenses incurred by the trustees as a result of the plaintiffs' unsuccessful appeals of the orders holding them in contempt."). Citing *In re Russell,* 441 B.R. 859 (Bankr. N.D. Ohio 2010) and *Harris v. Memorial Hospital* (*In re Harris*), 374 B.R. 611 (Bankr. N.D. Ohio 2011), Lowe posits that "the attorney fees requested should bear a reasonable relationship to the amount in controversy and *significant awards of attorney fees are rarely appropriate where the debtor has no other damages besides the attorney fees"* Lowe Objection at 4 (internal quotation marks omitted). While this proposition is true, it is entirely inapplicable here. In both *Russell* and *Harris,* the party alleging damages from the stay violation was a debtor who had not been significantly harmed by the violation, and it therefore made sense that the debtor's attorney should not be permitted to incur significant fees litigating the stay violation. In *Russell,* the debtor's wages had been garnished, but

the creditor fully reimbursed the debtor for the garnishments without the debtor's attorney needing to incur substantial fees. *Harris* involved a similar fact pattern. There, the creditor sent two dunning notices, which the court found were transmitted by mistake, and the creditor agreed to refrain from sending more notices even before it was sued by the debtor. By contrast, in awarding over $40,000 of sanctions for ongoing violations of the automatic stay, another bankruptcy court distinguished *Harris,* noting that "[t]he Defendants' actions prior to and during this litigation lead this Court to believe that any attempt to resolve the violations outside of litigation would have been pointless." *In re Henderson,* No. 095114, 2011 WL 1838777, at *7 (Bankr. E.D. Ky. May 13, 2011).

Just so here. Because the Fulson Parties persisted in their violation of the stay, Ransier needed to spend considerable time addressing the stay violations in order to protect the settlement with TCO, which will be the source of funds for the distribution to creditors. *See Contempt Op.,* 519 B.R. at 735 ("Because the NGP Ohio RICO Claims were property of NGP's estate and Ransier was settling them, he could not stand idly by once the Fulson Parties filed the 2013 State Court Case."). The Fulson Parties "have caused Ransier to incur expenses that, if not reimbursed, will reduce the distributions to other creditors." *Id.* at 754. Indeed, the Fulson Parties' contempt already has harmed creditors by delaying their distributions. *See In re Royal Manor Mgmt., Inc.,* 525 B.R. 338, 383 (6th Cir. BAP 2015) ("[The bankruptcy court] noted that Grossman's appeals diminished the distribution to holders of allowed claims because the Trustee incurred greater

attorney fees and distributions were delayed."). For all these reasons, the Court will not reduce Ransier's fees based on this objection.

4. Ransier's Testimony During the Contempt Hearing

Lowe alleges that Ransier "admitted [during the Contempt Hearing that] he could not separate his fees for responding to the contempt from his other fees for administering NGP's estate." Lowe Objection at 3. But this statement grossly mischaracterizes Ransier's testimony during the Contempt Hearing. As discussed above, Ransier explained that he was unable to separate the time spent on the Contempt Motion from services performed defending the Settlement Motion against challenges that were essentially part and parcel of the contempt—an explanation the Court credited in approving the fees Ransier seeks for defending the Settlement Motion against the objections of Sanders and Fulson. Contrary to Lowe's suggestion, Ransier never testified that he was unable to separate his work on the Contempt Motion from any of his other work administering NGP's estate. In fact, Ransier has for the most part separated his case-administration services from those performed as a result of the Fulson Parties' contempt.[8] This objection is seriously misleading, and no reduction of Ransier's fees will be made based on it.

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[8] The Court has detailed above in Section IV.B.2 the reductions it has made in Ransier's fees due to his inadvertent inclusion of time spent on matters unrelated to the Fulson Parties' contemptuous conduct.

5. Services Performed After the Court Issued the Show Cause Order

Lowe contends that the only fees for which Ransier should be compensated after the Court issued the Show Cause Order are the fees incurred to "prepare for and attend the show cause hearing; and . . . file post-hearing memoranda." Lowe Objection at 4. The asserted rationale for this contention is that, once the Show Cause Order was issued, Ransier knew that "there was a high probability of 'reimbursability'" of his fees. *Id.* at 5 (citing *In re Gen. Motors Corp.,* 110 F.3d 1003, 1017-18 (4th Cir. 1997)). Apparently, the suggestion is that Ransier did more than he needed to do in order to address the Fulson Parties' contempt. But this argument simply will not wash. As already discussed, Ransier declined to conduct any discovery in this case because it was unnecessary for him to do so in order to establish the Fulson Parties' contempt. Ransier's prudence in this regard belies an intent to run up the bill unnecessarily. To the contrary, as discussed below, the services to which Lowe specifically objects were all performed as a result of the Fulson Parties' contempt and as part of a reasonable attempt by Ransier to keep the Fulson Parties from engaging in ongoing contemptuous conduct.[9] Thus, no reduction of Ransier's fees will be made based on this objection.

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[9] In *General Motors,* the United States Court of Appeals for the Fourth Circuit adopted a district court judge's report and recommendation to the effect that attorneys' fees incurred by General Motors in an amount exceeding $165,000 were reasonable. The Fourth Circuit did so even though "the Fourth Circuit [had already] stated that GM would recover its attorneys' fees, [so that] there [was] a greater risk of bill inflation as the 'reimburs ability' [was] known before most of the work [was] performed

The first category of post-Show Cause Order services to which Lowe objects are those related to the Injunction. Lowe Objection at 5. During the hearing on the Settlement Motion, counsel for TCO stated that TCO would pay the $250,000 settlement amount only upon the satisfaction of two conditions: (1) the Court's approval of the settlement; and (2) the Court's issuance of an injunction enjoining any entity from pursuing derivative claims and/or other claims that are property of NGP's bankruptcy estate. The Court entered the Injunction Notice and later issued the Injunction. *See Settlement & Inj. Order,* 518 B.R. at 443-44. The portion of the Settlement and Injunction Order entitled "The Need for the Injunction" contains, among others, the following findings:

> [T]he Complaint asserted derivative claims against the Columbia Gas Entities that are property of NGP's estate. . . . Although it ostensibly asserted claims only for damages sustained by NES in Fulson's purported capacity as the owner of NES, the Amended Complaint seems deliberately designed to say enough to permit a later amendment (once the NGP case is closed) in order for Fulson to re-assert a claim for damages on account of injuries allegedly sustained by NGP. . . . In the Injunction Notice, the Court stated its intent to enjoin the NGP Ohio RICO Claims if they were judicially deter-

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and billed." *Gen. Motors Corp.,* 110 F.3d at 1017. While *General Motors* supports the Court's close scrutiny of Ransier's fees, the decision does not provide a basis for reducing them. Instead, the decision's award of over $165,000 in fees, if anything, provides support for Ransier's fee request.

> mined to be derivative of claims of NGP or otherwise to be property of NGP's bankruptcy estate. *See* Injunction Notice at 2. As noted above, in the companion opinion also issued today, the Court holds that the NGP Ohio RICO Claims are derivative of NGP's claims against the Columbia Gas Entities and are property of NGP's bankruptcy estate. Thus, the prerequisite for enjoining the NGP Ohio RICO Claims has been satisfied.

Id. at 440-41.

The Court held in the Settlement and Injunction Order that "Fulson had no right to bring the claims asserted in the 2013 State Court Case—the NES Ohio RICO Claims because they had been sold to TCO and the NGP Ohio RICO Claims because they are property of NGP's estate and are being settled by Ransier"—and that "it is appropriate to enjoin the NGP Ohio RICO Claims and other claims that are property of NGP's estate." *Id.* at 444.

> Lowe makes five arguments with respect to the fees related to the Injunction, none of which is meritorious:
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> a. "Even before the [issuance of the Injunction Notice], [Ransier] and his firm had billed 7 hours on matters related to the Injunction. At a minimum, this time should be disallowed." Lowe Objection at 5 n.6. The fact that Vorys performed services related to the Injunction before the Court issued the Injunction Notice shows only that, as a result of the Fulson Parties' contempt, Ransier and TCO were discussing the need

for an injunction even before the Court issued the Injunction Notice. Lowe does not explain why this means that the pre-Injunction Notice fees should be disallowed, and the Court cannot fathom how there could be a tenable basis for doing so based on Lowe's argument.

b. Lowe argues that "[t]he Injunction was requested by the Columbia Gas Entities, and the Injunction primarily benefited the Columbia Gas Entities, so the cost for obtaining the Injunction should have been borne by the Columbia Gas Entities." Lowe Objection at 5 (footnote omitted). This argument is contrary to the findings the Court made in issuing the Injunction. In that opinion, the Court found that "the failure to enjoin the NGP Ohio RICO Claims would adversely affect NGP's estate by permitting entities other than Ransier to assert those claims, scuttling the settlement he struck with TCO, to the detriment of NGP's creditors." *Settlement & Inj. Order,* 518 B.R. at 443. Further, as noted above, TCO made the entry of the Injunction a prerequisite to payment pursuant to the settlement. It was Ransier who was seeking approval of the settlement, so it makes sense that Ransier would file a brief in support of the Injunction.

c. According to Lowe, "[t]hough [Ransier] expressed concern that the Columbia Gas Entities might back out of the settlement without the Injunction, the Columbia Gas

Entities had no basis, under the terms of the settlement, for doing so." Lowe Objection at 5 n.7. As the Court noted in addressing this argument once before, "Sanders and Lowe [previously] argue[d] that TCO did not have the right to impose th[e] condition [of the entry of the Injunction] after having already reached an agreement with Ransier." *Settlement & Inj. Order,* 518 B.R. at 443. But as the Court has already found, "Ransier did not see it that way; he has agreed to the injunction as a condition of the settlement." *Id.*" If he had not [agreed to the Injunction], then the Court would be faced with having to decide whether the settlement should be enforced against TCO absent the injunction." *Id.* Yet as things stood at the time of the hearing on the proposed settlement, "Ransier ha[d] agreed to the injunction, the settlement with the injunction [was] the only deal on the table, and the Court ha[d] provided adequate notice of the proposed injunction." *Id.* In other words, Lowe's argument is contrary to the Court's prior findings in the portion of the Settlement and Injunction Order approving the Injunction.

d. Lowe contends that "if the scope of the OCPA is clear, as the Court determined, the Columbia Gas Entities could have filed a brief motion to dismiss in the State Court Action for a few thousand dollars, rather than backing out of a $250,000 settlement." Lowe Objection at 5 n.7. But in any such motion to dismiss TCO would have pointed

out that Fulson asserted claims in the 2013 State Court Case that are property of NGP's bankruptcy estate, and the State Court likely would have declined to adjudicate the issue of whether the claims were property of the estate. In fact, as the Settlement and Injunction Order pointed out, on February 13, 2013, Ransier filed [the Stay Notice]. In response to the Stay Notice, the State Court entered an order (Stay Order) providing that [i]t appearing that this case has been stayed by the U.S. Bankruptcy Court . . . this case is designated inactive pending further order of the Bankruptcy Court, or by motion of a party herein to proceed in a manner not stayed by that Court. Stay Order at 1. This Court did not and has not issued any order lifting the automatic stay, and Fulson never filed a motion 'to proceed in a manner that is not stayed. . . . ' Instead, despite the Stay Order, Fulson filed [the Amended Complaint]. *Settlement & Inj. Order,* 518 B.R. at 440. This argument is yet another nonstarter.

e. Lowe argues that "[t]he Injunction was not issued to correct the contemptuous conduct; in fact, the Injunction was only necessary because the Columbia Gas Entities were concerned that the Objectors would engage in *non-contemptuous* conduct (litigating the State Court Action after the close of the case) in the future." Lowe Objection at 5. Lowe's argument boils down to this: the automatic stay will expire upon the closing of the NGP case; the Fulson Parties

> would not have been in contempt once the NGP case closed if Ransier had not obtained the Injunction; and Ransier therefore cannot be compensated for obtaining the Injunction. But the conclusion does not follow from the premises. As the Court previously found, the Fulson Parties were engaging in contemptuous conduct when they sought to exercise control over property of NGP's bankruptcy estate by asserting the NGP Ohio RICO Claims. Ransier sought and obtained the Injunction in order to protect the estate's interests in the NGP Ohio RICO Claims, and he did so as a result of the Fulson Parties' contemptuous assertion of the NGP Ohio RICO Claims in the 2013 State Court Case. No reduction of Ransier's fees will be made based on the objections related to the Injunction.

6. The Effect of Fulson's Death

Lowe argues that he should not be held liable for the fees Ransier incurred analyzing the impact of Fulson's death on the contempt proceedings because those fees were "not a foreseeable consequence of the contempt." Lowe Objection at 6. Whether fees must be foreseeable before they may be awarded as a sanction for contempt is open to debate.[10] But assuming

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[10] *See Flagler v. Hous. Auth. of Sanford, Fla.,* No. 90-878, 2008 WL 785937, at *4 (M.D.Fla. Mar. 20, 2008) ("While the public policy underlying tort law may favor a tradeoff between compensation and reasonable limits on liability, the policy underlying the use of remedial contempt sanctions is skewed in favor of the injured party. Accordingly, the measure of the court's power in

for the sake of argument that foreseeability is a prerequisite to reimbursability, Lowe's objection nonetheless is unavailing for the simple reason that the need to analyze the effect of Fulson's death on the contempt proceeding was a foreseeable result of the Fulson Parties' contempt.

As the Court previously held, "the Fulson Parties violated the automatic stay and were in contempt of Court when they commenced *and continued* the 2013 State Court Case." *Contempt Op.,* 519 B.R. at 755 (emphasis added). In other words, the substitution of the Fulson Estate as the plaintiff in the 2013 State Court Case in and of itself was contemptuous, and at that point a quite foreseeable consequence of that contempt was that Ransier would need to analyze the ramifications of Fulson's death and the substitution of the Fulson Estate. In his reply, Ransier provides more detail than he did in the time entries as to the nature of the research conducted in this regard. The Vorys professionals undertook "efforts to ascertain and verify: (a) the identity of Mr. Fulson's legal successor-in-interest, (b) the nature and extent of the interest succeeded to, (c) the authority of and means of exercise of authority by the individual or entity succeeding to Mr. Fulson's interest, and (d) if a contempt order were issued, the proper means and timing for filing a claim against the Fulson estate." Ransier Reply at 3. At the time Fulson died, an agreed order effectuating Fulson's withdrawal of his proof of claim had already been entered, Doc. 165, and no matter other than the Contempt Motion was pending at that time that would have been affected by Fulson's

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civil contempt proceedings is determined by the requirements of full remedial relief.").

passing. Thus, when Ransier spent time analyzing the effect of Fulson's death, it was the effect on the Contempt Motion that he would have been analyzing. So no reduction of Ransier's fees is warranted based on this objection.

7. The Need to Monitor the NES Case

Lowe further argues that Ransier should not be able to bill "for keeping abreast of the developments in the NES case." Lowe Objection at 4; *see also id.* at 6. But the need to monitor the NES case after it was reopened in response to the filing of the 2013 State Court Case arose as a result of the Fulson Parties' contempt. As Ransier stated in his reply, the only entries included in the Fee Statements related to NES "are those entries specifically tied to arguments raised by the Fulson Parties *in both the NES and NGP proceedings*." Ransier Reply at 3. Ransier "was required to monitor the NES proceeding to address any potential concerns regarding issue preclusion, contrary positions taken by the Fulson Parties, or judicial estoppel." *Id.* Accordingly, this objection does not provide a tenable basis for a reduction of Ransier's fees.

8. Lowe's Purported Settlement Efforts

Lowe represents to the Court that "in October 2013, counsel for Lowe attempted to resolve this matter by offering to pay [Ransier's] attorneys' fees and had requested information pertaining to the amount accrued through that date[,]" Lowe Objection at 7, but that because Ransier "fail[ed] to provide information relating to outstanding fees after such a settlement request was made, thereby allowing the parties to engage in settlement discussions, he should be precluded from

recovering fees after that offer." *Id.* In his reply, Ransier states:

> [T]he offer presented consisted solely of a soft-inquiry inviting the Trustee to negotiate with counsel for Lowe with respect solely to fees incurred by the Trustee through October 2013—this offer did nothing to address the very real and substantive contempt issues fully addressed in the ultimate Contempt [Opinion]. No reasonable offer, and indeed no offer on behalf of all of the Fulson Parties, was ever presented to the Trustee so as to support an argument that the Trustee failed to mitigate his damages.

Ransier Reply at 4.

Ransier's testimony during the Fee Hearing was consistent with this statement. As Ransier testified, no settlement was possible unless the Fulson Parties agreed that Fulson had no right to continue to pursue the 2013 State Court Case, an agreement they were unwilling to make. No reduction of Ransier's fees will be made based on this objection.

9. Ransier's Delegation

Lowe also contends that the Fee Statements should be reduced because Ransier did not properly delegate. Lowe Objection at 10 ("In this case, 166.2 hours were performed by attorneys that are partners or are of-counsel (Mr. Ransier, Mr. Swift, and Ms. Bowers), while only 77.8 hours were billed by attorneys that are associates (Ms. Giberson and Ms. Fromme)."). To be clear, Ransier billed only 27.30 hours in the First Fee Statement and 5.10 hours in the Second Fee

Statement; Swift billed just one hour, for time related to analyzing the effect of Fulson's death and the substitution of the Fulson Estate. The objection therefore essentially relates to the time spent by Bowers, who billed 137.90 hours in the First Fee Statement and 49.10 hours in the Second Fee Statement.

According to the Objectors, rather than Bowers researching and writing at $285 per hour, the work instead should have been done by one of the associates, including Fromme at $210 or $230 per hour (depending on Fromme's rate at the time). This might be a winning argument in those instances where partners have performed work that junior associates could have handled. *See Shannon v. Fireman's Fund Ins. Co.,* 156 F. Supp. 2d 279, 301-02 (S.D.N.Y. 2001) (35% reduction based on, among other things, a senior partner with 40 years' experience billing $315 for legal research and writing that associates could have done at a rate of $180-200 per hour). But the argument holds no water where, as here, the objection is that an associate should have done the work rather than of counsel who is only billing $55 to $70 more per hour than one of the associates and the same as the rate charged for one of the other associates, Giberson. There simply is no issue with Bowers performing services rather than a senior associate when Bowers was billing at the same rate as the associate. *See Adusumelli v. Steiner,* 2013 WL 1285260, at *4 (S.D.N.Y Mar. 28, 2013) ("Defendants seek to reduce the fee request because Jeffrey A. Wadsworth, currently a Partner at Harter Secrest, conducted a significant amount of legal research. . . . [W]hen Wadsworth himself conducted most of the research in this case, he was an associate,

not a partner. . . . Thus, the Court declines to reduce the fee request on this basis.").

In addition, Ransier pointed out during the Fee Hearing that it would have made little sense for him to rely heavily on a junior associate such as Fromme when the Fulson Parties were well-represented by several seasoned attorneys. As Ransier says in his reply:

> Mr. Lowe inexplicably concludes that Ms. Bowers' designation as of counsel makes her a top-heavy biller, notwithstanding the fact that Ms. Bowers' rate is identical to associate Ms. Giberson's rate and nearly $100 less than partner billing rates. Mr. Lowe concedes that work is to be performed by the person with the lowest billing rate who is competent to perform such services, then argues that more of Ms. Bowers' work should have been delegated to Ms. Giberson (an associate with the exact same billing rate as Ms. Bowers) or Ms. Fromme (a significantly junior associate). . . . Not only does Ms. Bowers' specialized bankruptcy litigation experience weigh heavily against concluding that more of Ms. Bowers' work was required to be delegated to Ms. Giberson or Ms. Fromme, Mr. Lowe glosses over the fact that delegation of work to associate Ms. Giberson (billable rate of $285) from of-counsel Ms. Bowers (billable rate of $285) would have resulted in precisely the same Fee Statement.

Ransier Reply at 7. Ransier's testimony during the Fee Hearing was consistent with this statement. At

the risk of sounding like a broken record, no reduction of Ransier's fees will be made based on this meritless objection.

10. Ransier's Billing Judgment

Although Lowe questions Ransier's billing judgment, Lowe Objection at 12, Ransier in fact exercised commendable billing judgment. In fact, the Court "is surprised that [Ransier's] fees were not higher given the conduct of the [Fulson Parties]." *Rockland Credit Fin., LLC v. Ceda Mills, Inc* (*In re Ceda Mills, Inc.),* No. 04-24452JAD, 2009 WL 8556804, at *7 (Bankr. W.D. Pa. Feb. 11, 2009). The Objectors' conduct, which is described in detail in the Contempt Opinion, and the scattershot quality of their objections to the Fee Statements, demonstrate that it is the Objectors who have failed to exercise proper judgment. The Court thus will not reduce Ransier's fees based on this objection.

11. Block Billing

Turning to the manner in which the Vorys professionals kept time, Lowe objects to their use of block billing, which Lowe describes as "the practice by which a timekeeper aggregates all the timekeeper's separate tasks for a single day into one entry." Lowe Objection at 8. Indeed, "[b]lock billing is the practice of lumping multiple tasks into a single entry of time such that the billing entry does not delineate how hours were allotted to specific tasks." *Boardwalk Apartments, L.C. v. State Auto Prop. & Cas. Ins. Co.,* No. 11-2714-JAR, 2015 WL 866902, at *15 (D.Kan. Mar. 2, 2015) (internal quotation marks omitted), *appeal*

docketed, No. 15-3070, ___ Fed. Appx. ___, 2015 WL 6685302 (10th Cir. Apr. 1, 2015).

Lowe contends that Vorys's use of block billing prevents the Court from properly assessing the reasonableness of the request for fees and requires a 20% across-the-board reduction in the requested fees. Lowe Objection at 8-10. Lowe's counsel, Rick Ashton ("Ashton"), vigorously pursued this objection during the Fee Hearing, stating that "[w]hen we were reviewing [the First Fee Statement] we would try to determine, okay, how much is or should be compensable? Because if I could come here to you, Judge, saying we think this is an appropriate amount, we would have. The block billing in this case made it impossible." And Ashton confirmed that he was advocating for a 20% across-the-board reduction of Ransier's fees based on the block billing.

Block billing is not the optimal method for billing time.[11] But an across-the-board reduction is not called for here; reducing the fees by 20% (or approximately $18,000) would be using an ax when a scalpel is required. Instead, as explained below, a reduction of the Fee Statements by only $159.50 is warranted based on block billing. As counsel for Lowe conceded during the Fee Hearing, block billing "in and of itself is not

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[11] The Guidelines for Reviewing Applications for Compensation and Reimbursement of Expenses Filed Under 11 U.S.C. 330, adopted by the Executive Office for United States Trustees, provide that services set forth in time entries "should be noted in detail and not combined or 'lumped' together, with each service showing a separate time entry; however, tasks performed in a project which total a de minimis amount of time can be combined or lumped together if they do not exceed .5 hours on a daily aggregate." 28 C.F.R. pt. 58, App. A ¶ (b)(4)(v).

improper in the attorney fee context." *Williamson,* 2013 WL 3222428, at *11.[12] And the manner in which Ransier billed time for multiple tasks on a single day is consistent with the method of billing that counsel for trustees and debtors in possession have used in many other cases in this District.[13] The practice does

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[12] *See also Serv. Master Corp,* 592 Fed. Appx. at 371 ("Regarding block-billing, this court has held that so long as the description of the work performed is adequate, block-billing can be sufficient."); *Armstrong v. Receivables Performance Mgmt., LLC,* 2:11-CV-0387, 2012 WL 404893, at *3 (S.D. Ohio Feb. 8, 2012) ("Block-billed entries are not improper in the attorney fee context."); *United States ex rel. MacKay v. Touchstone Research Labs.,*No. 1:04cv327, 2009 WL 3150385, at *4 (S.D. Ohio Sept. 30, 2009) ("Counsel has identified the general subject matter of each entry and included the time expended, and information to identify which attorney or other staff member billed the time. The information is sufficient, even if the billing descriptions are not explicitly detailed. Consequently, the Court declines Defendant's invitation to adjust downward the hours claimed based on vague entries and/or block billing." (citations omitted)).

[13] In fact, as the Court pointed out during the Fee Hearing, Ashton is a member of a law firm that consistently employed the practice of block billing in invoices it submitted to the Court in another bankruptcy case. On April 15, 2015—while Lowe's objection to Ransier's fee request was already pending—Ashton's firm submitted invoices in support of a final application for approval of nearly $800,000 of fees incurred in a Chapter 11 case in which the firm represented the debtor in possession. No objections were lodged to the fee application, and the Court approved it after fulfilling its independent duty to review the application. But if the Court had applied to his firm's fee application the 20% across-the-board reduction for which Ashton is advocating here based on block billing, the Court would have reduced his firm's fees by approximately $160,000. When the Court inquired about this, Ashton stated that he was "ill-prepared to discuss what's happening in another case at [his] law firm that [he was] not working on." As it turns out, Ashton himself billed 70.30 hours of time in the case to which the Court was referring. And

not warrant a downward adjustment where, as here, the Court is able to "review[] the[][fee] statements. . . [and] counsels' declarations and testimony, and is able to ascertain the compensable work within the block billing." *Williamson,* 2013 WL 3222428, at *11.

Here, the Court is able to ascertain the compensable work within the block billing for two reasons. First, the vast majority of entries that include block-billed time are entries for which all of the time is compensable. This includes entries to which Lowe objects, such as number 21, that include time for reviewing and revising services lists. Although the actual preparation of a service list should not require attorney time, it is an appropriate use of attorney time to review and revise the service list, especially in light of the importance of proper service and the fact that an attorney signs the certificate of service. The remainder of the time billed in entry number 21 is for reviewing and revising the Contempt Motion, making the entirety of it compensable, which again is true of most entries that include block-billed time.[14]

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when performing multiple tasks on the same day in that case, Ashton regularly utilized the practice of block billing. For example, he billed his client 1.50 hours for "Continued drafting Rule 30(b)(6) notice of deposition; conference with Attorney Pfefferle; review of pertinent documents relating to subject matter of 30(b)(6)" and 7.40 hours in a single day using the following description: "Conducted research regarding possible tax implications with respect to client bankruptcy proceedings; conference with Attorney Stovall and Attorney Allen [two other partners in the firm]."

[14] The Court interprets time entries stating that a document was prepared "for service and filing" to mean preparing a document that needs to be filed and served, not performing clerical-type work that needs to be done as a precursor to filing and service,

And in the few instances where this is not true, the Court is permitted to estimate the compensable and the non-compensable time. *See Armstrong,* 2012 WL 404893, at *3. In *Armstrong,* the District Court found that "out of an entry totaling 0.50 hours for "Prepared Summons, Civil Cover Sheet, and initiating documents; filed Complaint and initiating documents with the Court,' 0.10 hours (or six minutes) is a logical portion of that time spent on filing the complaint and initiating documents with the Court." *Id.* Making those estimates, the Court sets forth below the reductions related to block billing:

No.	Date	Time-keeper	Time Description and Hours Billed	Reduction in Time and (Fees)
33	2/14/13	Tobin	Draft, file, and Serve Supplement-al 21 Day Notice to Show Cause–.80	.20 × $170[15] = ($34)
99	6/28/13	Bowers	Reviewed motions filed by Columbia Gas and updated file–.70	.20 × $285 = ($57)
248	2/15/14	Bowers	Reviewed brief in support of in-junctive relief filed by Columbia Gas	.10 × $285 = ($28.50)

making the fees incurred for those services compensable. Thus, Lowe's objections to Entries 55, 111, 261 and other similar entries are overruled.

[15] The rate stated for Tobin in the Second Fee Statement was $125 rather than the $170 rate listed in the First Fee Statement. As noted above, the parties stipulated that the rates used in the First Fee Statement are reasonable, standard and customary.

			as related to compromise and updated pleadings index with the same– .40	
319	10/10/14	Tobin	Preparation of Exhibits in Support of Fee Statement, finalize and file fee statement– .50	.10 × $125 = ($12.50)
397	6/11/15	Tobin	Finalize and file agreed order following telephone status conference– .20	.10 × $125 = ($12.50)
420	7/14/15	Walkuski	Finalize and file Reply in Support of Chapter 7 Trustee's Statement of Damages Pursuant to Contempt Order–.50	.10 × $150 = ($15)
				Subtotal: $159.50[16]

12. Intra-office Conferences

According to Lowe, Ransier billed for excessive conference time, warranting an across-the-board reduction in the Fee Statements of 5%. Lowe Objection at 10. As Lowe concedes, "[t]here is no per se prohibition

[16] The reduction in the time for entries 33, 319, 398 and 421 is for filing the documents and effectuating service; the reduction in time for entry 99 is for updating the file; and the reduction in time for entry 248 is for updating the pleadings index.

against awarding compensation for intra-office conferences." *In re Moss*, 320 B.R. 143, 158 (Bankr. E.D. Mich. 2005). Fees for intra-office conferences generally are allowed if: (1) "the fee application contains sufficient information to permit the court to evaluate the necessity of the service provided, the reasonableness of the time spent on the service, and the reasonableness of the fee charged for the service—including the need for a conference;" and (2) "the court finds that such conferences were necessary and benefited the estate." *Id.* (internal quotation marks omitted). In *Moss,* the bankruptcy court found that "the time entries relating to intra-office conferences do contain sufficient detail for the Court to determine that they were necessary and beneficial to the administration of the bankruptcy case" where "[t]hey contain the names of the attorney[s] involved in the conference . . . and the specific issue(s) discussed in the conferences." *Id.* The *Moss* court also noted that "the time spent in each conference was minimal." *Id.*

Applying the standards used in *Moss,* the Court finds that, although there are instances in which two or more attorneys billed for the same conference with one another, the time billed for such conferences is relatively minimal and appropriate. One Vorys attorney would sometimes bill for a conference with a second attorney, but the second attorney did not bill for the time; the Court did not count that time as being subject to Lowe's objection—after all, Lowe specifically stated that he lodged this objection "[b]ecause [Ransier] consistently billed the time of multiple attorneys in conferences without justifying this duplication. . . . " Lowe Objection at 11. Again, while some of the time that includes conference time is lumped with other

time, the Court is permitted to estimate the time spent on particular matters, including the intra-office conferences.

The Court's estimate of the time billed by two or more attorneys for intra-office conferences in the First Fee Statement is approximately 10 hours out of 251.60 total hours billed, and the Court's estimate of the time billed by two or more attorneys for intra-office conferences in the Second Fee Statement is approximately 6.50 hours out of 81 total hours billed. That adds up to approximately 16.50 hours out of 332.60 hours, or approximately 5% of the total time billed. It is difficult to understand, then, how Lowe can contend in good faith that "a substantial portion of the fee request is for conference time[.]" Lowe Objection at 11. Because the time billed by more than one attorney for the same intra-office conference is not inordinate, no reduction of Ransier's fees will be made based on this objection.

13. Clerical Time

Lowe asserts that the Fee Statements must be reduced by fees billed for clerical time. *See* Lowe Objection at 12 & n.9 ("The Billing Records reflect that Mr. Tobin, a paralegal, spent approximately 4.6 hours finalizing and filing documents with the Court. Entries 28, 57, 112, 208, 247, 263. [Ransier] cannot recover fees for clerical services, even if those clerical services are performed by paralegal. . . . Mr. Tobin also appears to have billed twice for finalizing, filing, and serving the motion to show cause and suggestion of stay. Entries 25 & 28." (footnote omitted)).

The entries about which Lowe complains are reproduced below. First, Lowe objects to entry number 25:

No.	Date	Time-keeper	Time Description and Hours Billed	Reduction in Time and (Fees)
25	2/12/13	Tobin	Finalize Exhibits to file along with Motion to Show Cause. Finalize and file Motion to Show Cause and Notice of Bankruptcy and Suggestion of Stay– 1.70	$0

None of this entry could have been for the filing, because the Contempt Motion was not filed until February 13, 2013. The six exhibits to the Contempt Motion totaled approximately 216 pages. The exhibits were documents that had already been prepared (*e.g.*, the state court Complaint and the Stay Notice), so finalizing them would only have entailed ensuring they were the right documents and that they were in the proper order. But the time billed by Tobin also includes work on the Contempt Motion itself. Accordingly, the Court concludes that the entire 1.70 hours was necessary and appropriate.

As set forth below, however, Tobin did bill for time spent finalizing and filing documents. Lowe relies on three cases from the District Court holding that time spent filing documents cannot be billed. *See Armstrong,* 2012 WL 404893, at *3 ("Filing documents with the Court and mailing documents are not activities

sufficiently complex to require the professional training of a paralegal."); *Abernathy v. Corinthian Colleges, Inc.,* No. 2:10-CV-131, 2014 WL 4272723, at *16 (S.D. Ohio Aug. 29, 2014); *Ohio Right To Life Soc., Inc. v. Ohio Elections Comm'n,* No. 2:08-CV-492, 2013 WL 5728255, at *21 (S.D. Ohio Oct. 22, 2013).[17] Again, the Court may estimate the compensable and the non-compensable time.

As the Ransier Reply states, finalizing a document for filing includes "non-clerical work required to finalize a document in accordance with local court rules and procedures to ensure proper service." Ransier Reply at 8. And as Ransier pointed out in his testimony, "filing is probably the least of the task." This view is consistent with case law from the District Court. *See*

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[17] There is contrary authority. *See Peavler v. Law Firm of Krisor & Assocs.,* 49 F. Supp. 3d 535, 541 (S.D.Ind.2014) ("Travel to the post office to mail documents, like travel to and from court for the purpose of filing a complaint, is traditionally counted as part of a law firm's administrative clerical work—and will be considered so in this case. However, time spent filing a complaint is unlike administrative clerical work. . . . "); *Williams v. Z.D. Masonry, Corp.,* No. 07-C-6207, 2009 WL 383614, at *5 (N.D.Ill. Feb. 17, 2009) ("In light of the problems that can result from a botched electronic filing, the court will not second-guess the firm's decision that such filing must be overseen by a paralegal."); *Annuity, Pension, Welfare & Training Funds of Int'l Union of Operating Eng'rs, Local 14-14B, N. Am. Iron Works, Inc.,* No. 07-CV-2257, 2008 WL 4724507, at *4 (E.D.N.Y. Oct. 24, 2008) (finding $285 per hour for an attorney's substantive legal work and $70 per hour for that attorney's administrative work—including electronic filing, mailing papers to opposing counsel and scheduling meetings—was reasonable); *McCullough v. Astrue,* 565 F. Supp. 2d 1327, 1332 (M.D.Fla.2008) ("Paralegal services for Plaintiff's case involved electronic filing, work that is neither clerical nor secretarial in nature.").

Armstrong, 2012 WL 404893, at *3 ("The Court finds that out of an entry totaling 0.50 hours for 'Prepared Summons, Civil Cover Sheet, and initiating documents; filed Complaint and initiating documents with the Court,' 0.10 hours (or six minutes) is a logical portion of that time spent on filing the complaint and initiating documents with the Court."). In light of *Armstrong* and the other District Court decisions cited above, the Court will reduce the Fee Statements on account of the filing of documents as follows:

No.	Date	Time-keeper	Time Description and Hours Billed	Reduction in Time and (Fees)
28	2/13/13	Tobin	Finalize, file and serve Motion to Show Cause and Notice of Sugges-tion of Stay–2.10	.10 × $170 = ($17)
57	3/04/13	Tobin	Finalize and file Chapter 7 Trustee's Reply in Further Support of Order to Show Cause–.50	.10 × $170 = ($17)
112	9/24/13	Tobin	Finalize and File Trustee's Request for Hearing and or Joint Scheduling Related to Motion to Show Cause–.90	.10 × $170 = ($17)
208	1/30/14	Tobin	Finalize and upload proposed order to show cause–.20	.10 × $170 = ($17)

247	2/13/14	Tobin	File Trustee's Final Trial Brief/Closing Argument and Brief in Support of Issuance of Injunction–.40	.40 × $170 = ($68)
263	3/06/14	Tobin	Finalize and file Reply Brief in Support of Issuance of Injunction; Reply Brief/Closing Argument–.50	.10 × $170 = ($17)
				Subtotal: $153

In addition, the Court will reduce the fees billed in the Second Fee Statement for clerical time as follows:

No.	**Date**	**Timekeeper**	**Time Description and Hours Billed**	**Reduction in Time and (Fees)**
352	2/24/15	Bowers	Nicole Services appeal and certification reviewed, and updated file–.40	.10 × $285 = ($28.50)
399	6/22/15	Bowers	Updated file with supplemental certificate of service for statement of fee–.10	.10 × $285 = ($28.50)
405	7/01/15	Bowers	Updated pleadings index with co-executors objection to statement of fee–.10	.10 × $285 = ($28.50)
				Subtotal: $85.50

In sum, based on this objection, the Court reduces as clerical time .10 hours from each of entry numbers 28, 57, 112, 208, 263 and 352, plus the entirety of entries 247, 399 and 405, for a total reduction for clerical time of $238.50.

14. The Additional Objections by Sanders and the Co-administrators

For the reasons explained below, no reduction of Ransier's fees will be made based on the additional objections to the Fee Statements asserted by Sanders and the Co-administrators. Sanders begins by citing decisions in which approximately $1,000 or less was awarded for violations of the automatic stay and then argues that "[t]he reason that [Ransier's] damage request is so out of line with the mainstream is shown in the objections filed by James A. Lowe." Sanders Objection at 1; *see also* Co-administrators Objection at 3 ("We do not see any application or award even remotely close to what [Ransier] seeks. Time and again the awards are only several hundred or, at most, several thousand dollars."). Each of the decisions on which Sanders and the Co-administrators rely involved improper collection or repossession activity that did not significantly injure the debtor and that was addressed without protracted litigation. But the only thing those decisions have in common with this case is that they involved a violation of the automatic stay. As explained above, rather than involving a violation of the stay that was resolvable without significant litigation, the NGP case involves an unremitting attempt by recalcitrant parties attempting to exercise control over property of the estate for their own gain and to the detriment of unsecured creditors of the estate.

While the authorities cited by Sanders are wholly inapposite, decisions rendered in cases that more closely resemble the fact pattern here support the reasonableness of the five-figure compensatory sanction the Court is awarding Ransier. *See Henderson,* 2011 WL 1838777, at *7 (awarding over $40,000 for repeated violations of the automatic stay that were still ongoing because "[t]he Defendants' actions prior to and during this litigation lead this Court to believe that any attempt to resolve the violations outside of litigation would have been pointless"); *In re Sayeh,* 445 B.R. 19, 30 (Bankr. D. Mass. 2011) (awarding more than $51,000 of fees and expenses in favor of Chapter 11 trustee and against debtor on account of debtor's exercising control over property of the estate in violation of the automatic stay); *Henkel v. Lickman* (*In re Lickman*), 297 B.R. 162 (Bankr. M.D. Fla. 2003) (awarding more than $78,000 in legal fees and costs that Chapter 7 estate incurred in addressing defendants' attempts to exercise control over property of the estate).

Sanders takes the position that Ransier's attorneys' fees and expenses should be "limited to the 'amount that would have been incurred if the matter had been resolved in a nonlitigious manner.'" Sanders Objection at 4 (quoting *In re Price,* 179 B.R. 70, 71 (Bankr. S.D. Ohio 1995)); *see also* Co-administrators Objection at 2. Given the intransigence of the Fulson Parties (and now the Fulson Estate), the matter was not susceptible to resolution in a nonlitigious manner; in fact, the

Objectors are continuing to litigate, warranting higher attorneys' fees than the cases on which they rely.[18]

Sanders contends that "[i]f this Court determines that the fees incurred in obtaining the [I]njunction are proper, it should assess only those fees as damages. The [I]njunction made any other action unnecessary." Sanders Objection at 10 n.3. This contention simply is flatly wrong, and Sanders does not even make a passing attempt to explain why he believes it to be true. Sanders makes several additional arguments that the Court has already rejected. He argues that the

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[18] Sanders and Lowe both sound the theme of Ransier's purported litigiousness in their objections. They maintain that if Ransier had taken a more conciliatory approach in responding to the contemptuous conduct of the Fulson Parties, the total amount of attorneys' fees and expenses he incurred would have been much lower. But this argument rings hollow given that Ransier was forced to counter the Fulson Parties' continuous and unrelenting effort to assert control over claims that belonged to the bankruptcy estate of NGP. And the contention that Ransier should have addressed the violation of the automatic stay in a less vigorous manner is vexing given that Lowe and Sanders—without any apparent sense of irony—objected to the Fee Statements on more than two dozen grounds. Their position is particularly irksome considering that only two of their objections had any merit whatsoever and that those two objections resulted in a mere $398 reduction of the fees requested in the Fee Statements (a reduction of less than one-half of one percent of the total fees Ransier requested). "This scattershot approach is the antithesis of sound advocacy." *Max M. v. New Trier High Sch. Dist.,* 859 F.2d 1297, 1300 (7th Cir. 1988). *See also Black Radio Network, Inc. v. Nynex Corp.,* 44 F. Supp. 2d 565, 588 (S.D.N.Y.1999) (decrying "kitchen-sink approach to litigation"); *Chavis Van & Storage of Myrtle Beach, Inc. v. United Van Lines, LLC*, No. 4:11CV1299 RWS, 2014 WL 793732, at *1 n. 2 (E.D. Mo. Feb. 27, 2014) (criticizing litigant's "'throw everything against the wall and see what sticks' approach to litigation").

Court could have approved the Settlement Motion without also entering the Injunction, an argument that, as discussed above, the Court has previously found to be meritless.

Sanders maintains that "[t]here was no need for [Ransier] to resort to litigation" because "[w]hen the Fulson Parties learned that [Ransier] believed the OCPA action violated the automatic stay they promptly filed an amended OCPA complaint in state court. . . show[ing] the willingness of the Fulson Parties to cure the alleged violation, notwithstanding their belief that none had occurred." Sanders Objection at 4. Yet this is contrary to both of the Court's earlier decisions—the Contempt Opinion and the Settlement and Injunction Order. *See Contempt Op.,* 519 B.R. at 734 ("[T]he Court's review of the Amended Complaint validates Ransier's view that it appears deliberately designed to say enough to permit (once the NGP case is closed) a further amendment that seeks damages based on harm allegedly suffered by NGP. And it appears that this was the Fulson Parties' intent."); *Settlement & Inj. Order,* 518 B.R. at 444 ("[T]he Amended Complaint seems deliberately designed to say just enough to permit a later amendment—once the NGP case is closed—in order to re-allege damages to Fulson based on injuries purportedly suffered by NGP. And it appears that such an amendment was the intent, as evidenced by the Injunction Response. . . . [E]ven after Fulson filed the Stay Notice, and after the State Court entered the Stay Order and this Court entered [the Show Cause Order,] Sanders and Lowe have persisted, going so far as to oppose the injunction that is a prerequisite to TCO's willingness to consummate the settlement with Ransier and then, just

recently, substituting Fulson's probate estate as the plaintiff in the 2013 State Court Case.").

Sanders further contends that the NGP Ohio RICO Claims were no longer property of NGP's bankruptcy estate once the Court approved Ransier's compromise with TCO. Sanders Objection at 4-5 & n. 1. Ransier, however, did not sell the NGP Ohio RICO Claims to TCO—he settled them. The Court's approval of the settlement resulted in Ransier's release of NGP's claims against the Columbia Gas Entities, but did not render the claims property of any entity other than NGP's bankruptcy estate. Put differently, if Ransier attempted to sue the Columbia Gas Entities at this point, the appropriate response would be that the settlement approved by the Court prohibited him from pursuing the claims on behalf of NGP's bankruptcy estate—not that the claims were no longer property of the estate. Furthermore, in addition to constituting a violation of the automatic stay, the continuation of the 2013 State Court Case would violate the Settlement and Injunction Order—which, as noted above, the Fulson Parties did not appeal despite its status as a final order.

Sanders also argues that the Fee Statements should be reduced because

[i]n considering the amount of damages that should be awarded for a stay violation, a bankruptcy court should consider (1) whether the injury caused, and the damage incurred, other than attorney fees, only amount to the cost of appearing in court to litigate the contempt motion; (2) whether the burden of requiring Debtor's attorney to notify the Creditor of the violations is insignificant; and (3) whether the offending creditor acted in bad faith.

Sanders Objection at 2 (quoting *In re Price,* 179 B.R. 70, 71 (S.D. Ohio 1995)). This argument is not well-taken. As to the first *Price* factor, the injury in the NGP case amounts to more than "the cost of appearing in court to litigate the contempt motion"—as already explained, it also includes the delay creditors have experienced in receiving their distributions, as well as a reduction in those distributions if Ransier's attorneys' fees are not paid by the Objectors. Nor does the second *Price* factor support Sanders's position. While the burden of requiring Ransier to notify the Fulson Parties of the violation of the stay would have been relatively "insignificant," as already discussed, doing so would have been completely unavailing. *See Contempt Op.,* 519 B.R. at 754 ("While it is true that parties seeking to redress violations of the automatic stay should do so without incurring any more expense than is necessary . . . the telephone calls suggested by Sanders and Lowe clearly would have been ineffectual here."). The third factor also weighs against Sanders. The question of whether the stay violator "acted in bad faith" is definitively answered in the affirmative when the stay violator refuses to stop engaging in the stay violation—as the Fulson Parties did here. Further, as explained in the Ransier Reply, Sanders has the burden of proving that he was not acting in bad faith under *Price,* and he has simply not done so.

The Court questioned Sanders's good faith in the Contempt Opinion and in the Settlement and Injunction Order. And the arguments asserted by Sanders in his current objection have done nothing but underscore the Court's doubts about his credibility. In the Contempt Opinion, the Court stated as follows:

> During his testimony, Sanders suggested that he was aware of and relied upon Adair v. Wozniak . . . while he was in the process of deciding whether filing the Complaint would violate the automatic stay. Tr. at 74-75. He left this impression even though he mentioned Adair for the first time in the Sanders Motion, having failed to cite it in the first three documents he filed in this matter, the Fulson Parties Response, their Surreply and the document containing supplemental case law authority. This also calls his credibility into question.

Contempt Op., 519 B.R. at 735.

Sanders attempts to rehabilitate his credibility on this point, stating that:

> There was no reason for the Fulson Parties to cite Adair in opposing the Trustee's show cause motion. Adair applied the common law rule that only a corporation (not its equity holder) has standing to sue for injuries the corporation. The common law rule in Adair has no application to standing under the OCPA. . . . Sanders cited Adair in his Final Trial Brief and Closing Argument [Doc. 182] because, on rereading Adair, he found language suggesting that the common law rule discussed in it does not apply in cases of indirect injury. The fact that Sanders did not discuss Adair in the pre-hearing briefs does not support a finding that Sanders believed the OCPA action would violate the automatic stay.

Sanders Objection at 7 (citation omitted).

This explanation makes no sense in light of Sanders's testimony during the Contempt Hearing, at which he was asked whether there was "a particular Ohio Supreme Court case that [he] used to help make [his] determination as to this indirect injury[.]" Hr'g Tr. at 74. The context of the question was Sanders's decision to file the 2013 State Court Case based on his purported belief that doing so would not violate the automatic stay. Answering the question, Sanders said that he was aware of *Adair*'s description of "the nature of the injury to the shareholder as an indirect injury." Hr'g Tr. at 75. In other words, during the Contempt Hearing, Sanders suggested that he was aware of the passage in *Adair* regarding indirect injury when he was deciding whether to file the 2013 State Court Case. But then, in the Sanders Objection, he represents that he was not aware of that aspect of the case until long after he filed the 2013 State Court Case—that he did not, in fact, become aware of it until after this litigation in the bankruptcy court ensued. The Court thus cannot conclude that Sanders was acting in good faith when he commenced and continued the 2013 State Court Case.

In addition to adopting the other Objectors' arguments, the Co-administrators make several of their own. First, they argue that the $250,000 that TCO paid to Ransier to settle any claims that NGP had against the Columbia Gas Entities (including the NGP Ohio RICO Claims) was property of NGP's bankruptcy estate, but that the NGP Ohio RICO Claims themselves were not property of the estate. Co-administrators Objection at 1-3. The Court has already considered and rejected this argument. *See Contempt Op.,* 519

B.R. at 741-54. Second, the Co-administrators contend that "the ownership of the [NGP Ohio RICO Claims] is something on which there can be honest disagreement." Co-administrators Objection at 3. To the contrary, as the Court previously held, the contention that Fulson owned the NGP Ohio RICO Claims defies logic, common sense and applicable case law. *See Contempt Op.,* 519 B.R. at 745-54. The Court likewise rejects the Co-administrators' attempt to characterize their contemptuous conduct as an "honest, good faith assertion of claims." Co-administrators Objection at 3. And even if the Objectors had been operating in good faith, "a [g]ood faith [belief] is not a defense in civil contempt proceedings." *Contempt Op.,* 519 B.R. at 754 (internal quotation marks omitted).

Finally, the Co-administrators argue that Ransier will be unable to recover on any claim he has against the Fulson Estate because Ransier did not timely assert the claim in the probate proceeding. *See* Co-administrators Objection at 3. But the timeliness of Ransier's claim is an issue for the probate court. Furthermore, the possibility that Ransier might be unable to recover on the claim provides no reason for this Court to decline to enter an order against the Fulson Estate.

VI. Conclusion

To compensate the NGP bankruptcy estate for the damages it sustained as a result of the contempt of the Fulson Parties, the Court hereby enters judgment in favor of Ransier and against Sanders, Lowe and the Fulson Estate, jointly and severally, in the amount of $91,068.

IT IS SO ORDERED.

ORDER OF THE BANKRUPTCY COURT OF SOUTHERN DISTRICT OF OHIO (OCTOBER 24, 2014)

UNITED STATES BANKRUPTCY COURT,
S.D. OHIO, EASTERN DIVISION

In re: NICOLE GAS PRODUCTION, LTD.,

Debtor.

Case No. 09-52887

Before: John E. HOFFMAN Jr.,
Unites States Bankruptcy Judge.

I. Introduction

About a year before his death, Freddie Fulson sued Columbia Gas Transmission, LLC and three of its affiliates in state court for alleged violations of the Ohio Corrupt Practices Act. His attorneys, Robert Sanders and James Lowe, filed the complaint commencing the lawsuit, seeking damages based on injuries the purportedly corrupt activities allegedly caused two companies Fulson had founded, including Nicole Gas Production, Ltd., or NGP, which is the debtor in this Chapter 7 case. Sanders and Lowe filed the lawsuit even though Frederick Ransier, the trustee of NGP's bankruptcy estate, was seeking authority from this Court to settle all of NGP's claims against the Columbia Gas entities.

Ransier contends that the lawsuit asserts claims that are property of NGP's bankruptcy estate and that, by commencing and pursuing the suit, Fulson, Sanders and Lowe violated the automatic stay. In their defense, Sanders and Lowe argue—as did Fulson before his death—that the claims belonged to Fulson personally, not to NGP's bankruptcy estate.

For the reasons explained below, the Court concludes that the claims belong to NGP's estate and that Fulson, Sanders and Lowe violated the automatic stay and were in contempt of Court when they commenced and continued the state court action. Having determined that Fulson, Sanders and Lowe engaged in contemptuous conduct, the Court also establishes procedures for determining the amount of damages Ransier may recover on behalf of NGP's estate.

II. Jurisdiction and Constitutional Authority

The Court has jurisdiction to hear and determine this contested matter pursuant to 28 U.S.C. §§ 157 and 1334 and the general order of reference entered in this district. This is a core proceeding. *See* 28 U.S.C. § 157(b)(2)(A) and (O).

The Court also must evaluate whether it has the constitutional authority to enter a final order in this contested matter after *Stern v. Marshall*, —U.S.—, 131 S. Ct. 2594, 180 L.Ed.2d 475 (2011). By this opinion and order, the Court finds that Fulson, Sanders and Lowe ("Fulson Parties") violated the automatic stay. "There is no question that bankruptcy court[s] continue[] to have the authority to enter judgment on [trustees'] claims for violation of the automatic stay[,]" post-*Stern*, because "the automatic stay is fundamental to the bankruptcy system enacted by Congress."

Loveridge v. Hall (*In re Renewable Energy Dev. Corp.*), 500 B.R. 77, 93(D. Utah 2013); *see also Tow v. Henley* (*In re Henley*), 480 B.R. 708, 765 (Bankr. S.D. Tex. 2012) ("[T]he requested relief—that the . . . Carooms be found in violation of the automatic stay —is unique to the Code. Such relief is not possible to obtain under state law. As a result, this Court concludes that *Stern* is inapposite, and this Court is constitutionally authorized to enter a final judgment regarding the disputes at bar."). In order to determine whether the Fulson Parties violated the automatic stay, the Court must determine whether the claims Fulson asserted in the state court case are property of NGP's bankruptcy estate. The Court has the authority to determine whether the claims are property of the estate even if, as here, "making that determination require[s] the bankruptcy court to apply state law" because "[t]his is an essential part of administration of the bankruptcy estate and stems from the bankruptcy itself." *Velo Holdings Inc. v. Paymentech, LLC* (*In re Velo Holdings Inc.*), 475 B.R. 367, 387 (Bankr. S.D.N.Y. 2012).

The Court also has the constitutional authority to enter a final order holding the Fulson Parties in contempt and awarding sanctions to Ransier to compensate NGP's estate for damages caused by that contempt. *See In re Brown,* 511 B.R. 843, 848 (Bankr. S.D. Tex. 2014) (holding that bankruptcy courts have the constitutional authority to impose sanctions for contempt after *Stern*); *In re Green,* No. 12–13410, 2014 WL 1089843, at *1 (Bankr. N.D. Ohio Mar. 19, 2014) (same); *Schermerhorn v. Century Tel, Inc.* (*In re Skyport Global Commc'ns*), No. 08–36737–H4–11,

2013 WL 4046397, at *41 (Bankr. S.D. Tex. Aug. 7, 2013) (same).

By this opinion and order the Court holds the Fulson Parties in contempt but, rather than awarding sanctions, establishes procedures for determining the amount of sanctions. Thus, this order is not yet a final order. *See Wicheff v. Baumgart* (*In re Wicheff*), 215 B.R. 839, 843 (6th Cir. BAP 1998) ("A civil contempt order is not final unless: (1) a finding of contempt is issued, *and* (2) a sanction is imposed.").

III. Procedural Background

In January 2013, Fulson commenced a lawsuit ("2013 State Court Case") against Columbia Gas Transmission, LLC ("TCO"); Columbia Gas of Ohio, Inc.; Columbia Gas of Pennsylvania, Inc. and Columbia Gas of Kentucky, Inc. (collectively, "Columbia Gas Entities"). The complaint commencing the lawsuit ("Complaint") was filed in the Court of Common Pleas of Franklin County, Ohio ("State Court") and identified Sanders and Lowe as Fulson's counsel.

This matter is before the Court on Ransier's motion ("Motion") (Doc. 119) requesting that the Court enter an order directing the Fulson Parties to "appear and show cause as to why each should not be held in civil contempt and sanctioned for violating the automatic stay" by filing the Complaint and an amended complaint ("Amended Complaint"). Mot. at 10. The Fulson Parties filed a response to the Motion ("Fulson Parties Response") (Doc. 122, with Exhibit 1 filed as Doc. 124). The Fulson Parties Response acknowledged that "Mr. Lowe, with Mr. Sanders of counsel, filed" the Complaint on behalf of Fulson. Fulson Parties Resp. at 1. They also stated that they had

"carefully considered whether the filing of the [Complaint] would violate the automatic stay in this case and concluded, in good faith, that it would not[,]" *id.,* but did not cite any statutory or case law authority supporting this conclusion.

A copy of the Complaint is attached as Exhibit 1 to the Motion. A copy of the Amended Complaint is located at Doc. 124.

Ransier filed a reply ("Ransier Reply") (Doc. 125) and, in accordance with an order the Court entered granting their motion to file a further reply, the Fulson Parties filed a surreply in which they continued to assert that filing the Complaint did not violate the automatic stay ("Surreply") (Doc. 132). The only authority they cited was portions of sections 2923.31 –2923.36 of the Ohio Revised Code, the Ohio Corrupt Practices Act ("OCPA").

After those documents were filed, the Court entered an order directing the Fulson Parties to appear and show cause why they should not be held in civil contempt and sanctioned for violating the automatic stay ("Show Cause Order") (Doc. 137). The Fulson Parties then filed a document containing a single case as supplemental authority (Doc. 146), *Iron Workers Local Union No. 17 Ins. Fund v. Philip Morris Inc.,* 23 F. Supp. 2d 771 (N.D. Ohio 1998), which is discussed below. The only authority *Iron Workers* was supplemental to was the OCPA, as *Iron Workers* was the sole case the Fulson Parties had cited at that point.

The issuance of a show cause order does not shift the burden of proof from the movant, but instead "acts as notice to the relevant party by informing the

party what conduct is alleged to be sanctionable, and allows the party an opportunity to respond[.]" *Cook v. Am. S.S. Co.,* 134 F.3d 771, 776 (6th Cir. 1998). "[B]y presenting evidence and arguments why sanctions should not be imposed, the party has the opportunity to 'persuade' the court that sanctions are not warranted." *Id.*

Sanders filed a motion for reconsideration of the Show Cause Order ("Sanders Motion") (Doc. 161). Lowe also filed a motion for reconsideration or, alternatively, certification of an issue to the Supreme Court of Ohio ("Lowe Motion") (Doc. 164). The Court entered an order (Doc. 166) denying the Sanders Motion and the Lowe Motion.

During the hearing on the Motion and the Show Cause Order, the Court, without objection by any party, admitted into evidence the Complaint and the Amended Complaint, a suggestion of stay filed by Ransier in the State Court, the response to the suggestion of stay filed by Fulson and the State Court's order designating the 2013 State Court Case as inactive. The Court also heard the testimony of Ransier, Sanders and Lowe. Fulson attended the hearing but did not testify.

At the conclusion of the hearing, the Court requested post-hearing briefs. In accordance with an order establishing a post-hearing briefing schedule, Ransier filed a brief in support of the Motion (Doc. 178), and Sanders filed a brief in opposition ("Sanders Brief") (Doc. 182), as did Lowe ("Lowe Brief") (Doc. 183) and Fulson ("Fulson Brief") (Doc. 185). Ransier filed a reply brief (Doc. 187). A document was later filed advising the Court and parties in interest that Fulson had died (Doc. 188). On August 6, 2014, Lowe

filed a notice (Doc. 190) stating that Fulson's estate had been substituted as the plaintiff in the 2013 State Court Case, effectively substituting it as the party in interest in this contested matter.

IV. Findings of Fact

Based on the evidence adduced at the hearing, including the documentary evidence and the testimony presented, and having considered the demeanor and credibility of the witnesses, the Court makes the findings of fact set forth below.

A. Events Leading to the Filing of the Complaint

The Complaint provides much of the factual background necessary to understand the disputes that led to its filing. TCO owns and operates an interstate natural gas pipeline system in multiple states, and the other Columbia Gas Entities own and operate local distribution systems in certain of those states. Compl. ¶¶ 2–5. In the mid–1990s, the federal government and various states took steps that provided independent gas companies access to the interstate gas pipeline system and local gas distribution systems of companies such as the Columbia Gas Entities. Compl. ¶¶ 12–22. In order to take advantage of the opportunities afforded by this access, Fulson formed NGP and Nicole Energy Services, Inc. ("NES"). Compl. ¶¶ 23–24. Fulson was the president and sole owner of another company he formed, Nicole Gas Marketing, Inc. ("NGM"), which according to the Complaint was the sole owner of both NGP and NES. Compl. ¶ 1. In 1999, NGP purchased 138 gas-producing wells in Pennsylvania and West Virginia and began selling the gas produced from those wells to NES. Compl. ¶¶ 26–28. Unable to transport

and distribute the gas itself, NES entered into agreements with the Columbia Gas Entities to transport NES's natural gas over the Columbia Gas system and to distribute the gas to NES's customers. Compl. ¶¶ 29–30.

While the Complaint identified NGM as the sole owner of NGP, the schedules that Fulson prepared for filing in NGP's case (Doc. 28) identified a different entity, Nicole Energy Marketing, Inc. ("NEM"), as the sole owner of NGP.

In mid–2001, the Columbia Gas Entities commenced a lawsuit in the State Court alleging that they had delivered more gas to NES's customers than NES had placed into the system ("2001 State Court Case"). Compl. ¶¶ 51–52. In response, NES filed a third-party complaint alleging that the Columbia Gas Entities had failed to credit NES with the amount of gas it had injected into the system. Compl. ¶ 53. NES lost most of its wells after it was unable to service the debt it incurred to purchase them, Compl. ¶ 95, and ceased operations in 2002. Compl. ¶ 50. Fulson contended that it was "TCO's mis-measurement and under-crediting of the gas produced by the NGP wells [that] had caused NGP to lose most of its 138 wells. . . . " Compl. ¶ 95. Afterward, NGP continued to sell natural gas to its customers from its remaining wells pursuant to a contract with TCO that permitted NGP to use the transportation capabilities of TCO ("NGP Agreement"). Compl. ¶¶ 93–95. As went NES, so went NGP, which sold the remaining wells and went out of business in 2004. Compl. ¶ ¶ 96–101.

In time, both NES and NGP entered bankruptcy. NES was first. Following the Columbia Gas Entities' filing of an involuntary Chapter 7 petition against

NES one business day before the trial of the 2001 State Court Case was to begin, Compl. ¶ 57, and after several months of legal wrangling (including a dispute over the removal of the 2001 State Court Case to this Court), NES filed a voluntary Chapter 11 petition and became a voluntary Chapter 11 debtor in 2004. Compl. ¶¶ 61, 69, 74–76. The Columbia Gas Entities then filed a motion for the appointment of a Chapter 11 trustee, and the Court ultimately ordered the appointment of a trustee. Compl. ¶¶ 78–79. The Complaint attempts to paint the appointment of a Chapter 11 trustee as part of a scheme on the part of the Columbia Gas Entities, but fails to point out that NES agreed to the appointment of a Chapter 11 trustee. *See* Agreed Order to Appoint Chapter 11 Trustee, Doc. 155 in Case No. 03–67484.

The United States Trustee appointed Larry J. McClatchey as the Chapter 11 trustee of NES's estate, and the Court approved McClatchey's appointment. *See* Order Approving Appointment of Chapter 11 Trustee, Doc. 162 in Case No. 03–67484. McClatchey filed an application to employ Sanders as special counsel to prosecute NES's third-party complaint for breach of contract in the 2001 State Court Case, which was granted by the Court. Thus, as he had done before NES's bankruptcy, Sanders continued to represent the company in the 2001 State Court Case. Compl. ¶ 80.

In 2005, McClatchey filed a motion to remand NES's third-party complaint back to the State Court, a motion the Court granted. Compl. ¶¶ 81–82. In the 2001 State Court Case, NES asserted that "TCO's mismeasurement and under-crediting of the gas from the NGP wells caused NES net damages" in excess of $36

million. Compl. ¶ 85. McClatchey and TCO eventually entered into a multimillion dollar settlement of any claims NES had against the Columbia Gas Entities. In particular, McClatchey and TCO "entered into a settlement of NES's third-party claim against TCO in the form of an Asset Purchase Agreement ('APA') [under which] TCO agreed to purchase NES's $36.6 million breach of contract claim against TCO, and all other claims that NES had asserted or could assert against TCO [and its affiliates], for $2.7 million, plus the payment of . . . certain administrative expenses." Compl. ¶¶ 87–88. McClatchey filed a motion for approval of the APA, which the Court granted in 2008 over Fulson's objection following a multi-day hearing. Compl. ¶¶ 89–90. In 2012, the Court granted McClatchey's motion for a final decree closing the NES Chapter 11 case. Compl. ¶¶ 91–92.

As discussed in the opinion that the Court is contemporaneously issuing on Ransier's motion for approval of a settlement of NGP's claims against the Columbia Gas Entities, the estimated value of the NES settlement was $4.33 million.

NGP's bankruptcy case was initiated by the filing of an involuntary Chapter 7 petition on March 23, 2009 ("Petition Date"). Compl. ¶ 105. In May 2009, the Court entered an order for relief, making NGP a Chapter 7 debtor, and Ransier was appointed the Chapter 7 trustee of NGP's estate that same month. Compl. ¶ 106.

Ransier eventually filed a motion under Rule 9019(a) of the Federal Rules of Bankruptcy Procedure ("Settlement Motion") (Doc. 104) requesting that the Court authorize him to accept a cash payment of $250,000 in exchange for complete releases of any

and all claims of NGP against the Columbia Gas Entities. Compl. ¶ 107; Settlement Mot. ¶ 34. The Settlement Motion actually was the second motion Ransier filed for approval of a compromise of claims between NGP and the Columbia Gas Entities. The first motion was denied by the Court, in part because it did not "identify or describe the claims to be released, nor . . . explain why the amounts to be paid to the estate[] of [NGP] are substantially less than the amount TCO paid to the estate of NES." Order, Doc. 87 at 13. Ransier then filed the Settlement Motion and, to support his assertion that the $250,000 sum offered by TCO constituted a fair settlement cited, among other things, the fewer number of wells at issue in the NGP case than were involved in the NES case. Settlement Mot. at 19. The $250,000 amount would fund a distribution to NGP's creditors (including McClatchey on behalf of the creditors of NES) of far less than 100% of their claims, meaning that no funds would be available to pay Fulson anything on account of any indirect ownership interest he asserted in NGP. Settlement Mot. at 15–20. Fulson filed an objection to the Settlement Motion (Doc. 111), as did Sanders (Doc. 112). Tr. at 47.

A hearing on the approval of the Settlement Motion was held the day following the hearing on the Motion; an opinion and order granting the Settlement Motion is being entered contemporaneously with this opinion and order.

At some point, Fulson and Sanders decided to commence the 2013 State Court Case. The Complaint was prepared in which Fulson asserts claims under the OCPA, a statute Sanders has referred to as "the Ohio version of the federal RICO statute." Hearing

Transcript ("Tr."), at 72. Sanders was the sole drafter of the Complaint. Tr. at 77. After drafting it, he contacted Lowe to ask whether he would be willing to serve as local counsel. Tr. at 97. Lowe reviewed the Complaint and agreed to serve as local counsel, signing the Complaint on behalf of Fulson. Tr. at 98–99; Compl. at 1, 28–29. The Complaint, which identified Sanders as of counsel, was filed on January 24, 2013.

B. The Fulson Parties' Awareness of the Automatic Stay

The Fulson Parties were aware of the pendency of NGP's bankruptcy case and the automatic stay when they filed the Complaint. Tr. at 34, 86–89, 100, 105. Sanders conceded that he knew the automatic stay was in place at that time and that the stay "d[id] not permit any actions to seek property of the estate." Tr. at 90; *see also* Tr. at 105. Sanders made Lowe aware of the automatic stay, Tr. at 86, and Lowe acknowledged that he had knowledge of the NGP bankruptcy and the automatic stay at the time he reviewed the Complaint. Tr. at 98, 100. Fulson relied on Sanders's representation that filing the Complaint would not violate the automatic stay, Tr. at 87, which means that Fulson also was aware that the automatic stay was in effect in NGP's case.

Despite their knowledge of the automatic stay, the Fulson Parties did not provide Ransier with notice of the filing of the Complaint. Tr. at 32–33. Nor did they seek relief from the automatic stay before filing it. Tr. at 89. Sanders testified that this was because he believed that the 2013 State Court Case "in no way did or even could be an effort to get property of the estate." Tr. at 90:7–10. Likewise, Lowe testified

that he believed that this was "not a case in which Mr. Fulson is seeking anything from [NGP] or for [NGP];" that "since it seeks nothing from the estate or for the estate of the bankrupt, that it's permissible, and it is not a violation of the stay," Tr. at 98; and that "under Ohio law Mr. Fulson has an independent claim that has nothing to do with NGP." Tr. at 102. Because the Fulson Parties failed to notify him that the Complaint had been filed, Ransier learned of the 2013 State Court Case only after a member of his office staff who regularly reviews state court dockets brought it to his attention. Tr. at 51.

C. The Complaint

Upon reading the Complaint, Ransier saw that, in addition to recounting the background facts summarized above, it alleged that those facts evidenced an "illegal scheme to eliminate the Nicole companies [NGP and NES] as competitors and unlawfully block them from redress in court." Compl. ¶ 34. According to the Complaint, the purported scheme was unlawful because the Columbia Gas Entities allegedly had violated the OCPA, Compl. ¶ 6, and Fulson was entitled to damages because the OCPA provides that "'any person directly or indirectly injured'" by certain conduct shall have "'a cause of action for triple the actual damages the person sustained.'" Compl. ¶ 110 (quoting section 2923.34(E) of the Ohio Revised Code).

Fulson asserted claims under the OCPA ("Ohio RICO Claims") for damages "in his capacity as the 100% owner of NES and NGP." Compl. ¶ 125. According to the Complaint, the Ohio RICO Claims were based on 13 predicate acts. Given that NGP ceased operating five years before it entered bankruptcy, it is unsur-

prising that those predicate acts all occurred before the Petition Date of March 23, 2009. The acts alleged to have occurred included using interstate mail and wire communications for fraudulent purposes from December 1, 1999 to September 2002, Compl. ¶ 124 (1)–(4), dates that preceded the Petition Date.

The Complaint also alleges other acts that occurred before the Petition Date—"fraudulently forc[ing] NES into involuntary bankruptcy on November 14, 2003 [,]" Compl. ¶ 124(5); "unlawfully solicit[ing] third-parties to join as bankruptcy petitioners from November 2003 through January 2004[,]" Compl. ¶ 124(6); "fraudulently maintain[ing] the NES involuntary bankruptcy from November 14, 2003 to November 5, 2012[,]" Compl. ¶ 124(7); "seek[ing] the appointment of a Chapter 11 Trustee in the NES bankruptcy[,]" Compl. ¶ 124(8); "from October 2006 through April 2008. . . unlawfully block[ing] NES from redress for [other] predicate acts . . . by purchasing NES's damage claims against TCO," Compl. ¶ 124(9); "from September 1, 2002 through April 7, 2004 . . . fraudulently credit-[ing] NGP with only one-third of the gas delivered by NGP into the TCO system," Compl. ¶ 124(10); "using interstate mail and wire communications from September 1, 2002 through April 7, 2004 to fraudulently misappropriate two-thirds of the gas delivered by NGP into the TCO system," Compl. ¶ 124(11); "using interstate mail and wire communications from September 1, 2002 to the present to fraudulently seize and 'escrow' gas delivered by NES into the TCO system[,]" Compl. ¶ 124(12); and "using interstate and mail and wire communications in February and March of 2009 to unlawfully solicit third-parties to

file a Chapter 7 involuntary bankruptcy petition against NGP. . . . " Compl. ¶ 124(13).

Two of these alleged predicate acts warrant further discussion because they are framed in such a way to suggest that they occurred after the Petition Date even though they did not. The predicate act of allegedly "fraudulently maintaining" the NES involuntary bankruptcy case through November 5, 2012 occurred before the Petition Date in the NGP case (even though the Petition Date was March 23, 2009). The Columbia Gas Entities were petitioning creditors in the NES involuntary bankruptcy, but the case became a voluntary Chapter 11 case, and an agreed order with NES regarding the appointment of a trustee was entered, in 2004. *See* Case No. 03–67484, Doc. 155. The appointment of McClatchey also was approved by an order entered in 2004. *See* Case No. 03–67484, Doc. 162. Even if it could be argued that the Columbia Gas Entities were "maintaining" the NES bankruptcy before the appointment of a trustee, no basis exists for alleging that the Columbia Gas Entities were doing so after the appointment of McClatchey as the trustee of NES's estate, which occurred several years before the Petition Date in the NGP case.

Similarly, the predicate act of "using interstate mail and wire communications from September 1, 2002 *to the present* to fraudulently seize and 'escrow' gas delivered by NES into the TCO system[,]" Compl. ¶ 124(12) (emphasis added), did not truly relate to events occurring after the Petition Date, because the Complaint itself states that NES "ceased operations in September of 2002 [,]" Compl. ¶ 50, and that NGP "went out of business" in April 2004. Compl. ¶ 101.

Accordingly, no gas was or could have been seized from NES or NGP after April 2004.

In response to the Show Cause Order—in which the Court laid out the reasons why the predicate acts all occurred prior to the Petition Date—Sanders responded that the Court's conclusion that the fraudulent escrowing of gas occurred before the Petition Date "ignores that the escrowing of the gas has not ceased and continues to inflict harm on both NES and NGP, notwithstanding that neither is presently operating." Sanders Mot. at 11 n. 3. If the Columbia Gas Entities fraudulently seized and escrowed gas prior to April 2004, then perhaps it owed NES or NGP compensation. But to the extent the Columbia Gas Entities owed NES or NGP compensation for any seizure and escrowing of gas, McClatchey settled any such claim for compensation on behalf of NES by way of the APA, and Ransier is in the process of doing so on NGP's behalf.

Further, the argument that the claim did not arise *before* the Petition Date because the allegedly fraudulent escrowing continued *after* the Petition Date defies logic. Under Sanders's reasoning, NGP would have a claim based on the allegedly fraudulent escrowing only after it stopped. But that makes no sense. As explained in more detail below, § 541(a)(1) of the Bankruptcy Code provides that interests of the debtor in property existing as of the commencement of the bankruptcy case, including causes of action, are property of the estate. As of the Petition Date, NGP could have brought the claim for any fraudulent escrowing that began before the Petition Date even if it continued after the Petition Date. In sum, the Ohio RICO Claims arose entirely prior to the Petition Date.

To the extent the Ohio RICO Claims are based on damages sustained by NGP ("NGP Ohio RICO Claims"), and to the extent they had any validity, NGP would have had the right to assert them as of the Petition Date.

NGP was an Ohio domestic limited liability company. *See* Ohio Secretary of State, http://www.sos.state.oh.us (last visited Sept. 26, 2014). As such, NGP is a person with the capacity to have a cause of action under the OCPA. *See* Ohio Rev. Code Ann. § 2923.31(G) (West 2014) (defining person for purposes of the OCPA to include "any person, as defined in section 1.59 of the Revised Code "); Ohio Rev. Code Ann. § 1.59 ("'Person' includes an individual, corporation, business trust, estate, trust, partnership, and association."); *Dexxon Digital Storage, Inc. v. Haenszel,* 161 Ohio App.3d 747, 832 N.E.2d 62, 69 (2005) (holding that a limited liability company is a person within the meaning of Ohio Rev. Code § 1.59).

Fulson alleged that the purported violations of the OCPA caused him damages in his capacity as the sole owner of NES and NGP. Compl. ¶ 126. According to the Complaint, there were two components to the damages: (1) "the net damages of $36,654,305.94 sustained by NES as of March 31, 2006" minus "the $2,700,000 paid by TCO to the NES Chapter 11 estate;" and (2) "the damages sustained by NGP from December 1, 1999 to the present in the form of lost profits and the loss of oil and gas rights to 20,000 acres in the Appalachian Marcellus Shale Gas play[.]" Compl. ¶ 126. Unlike the damages sought by Fulson for harm allegedly sustained by NES—which he netted against the NES settlement—the Complaint referenced no netting on account of the proposed settlement between Ransier

and TCO. Importantly, Fulson did not allege that he was damaged in any way other than "in his capacity as the 100% owner of NES and NGP." Compl. ¶ 125.

Ransier noted the "similarities [between] the allegations in th[e] [C]omplaint [and] the matters that were pending in our compromise motion" and also noted that the "allegations in [the] third-party complaint[] [filed in the 2001 State Court Case] are "fairly similar, and in some cases identical" to the matters that are the subject of the proposed compromise. Tr. at 35. His intent in settling with TCO and filing the Settlement Motion was to settle "all claims [of NGP's estate] that existed against Columbia Gas[,]" Tr. at 36, and yet the Complaint asserted claims against the Columbia Gas Entities, claims that Ransier believes are property of NGP's estate. Tr. at 38, 42, 48.

Exhibit 5 to the Motion "highlights all of the portions of the Fulson Complaint which have been copied word-for-word from Sanders' Objection to the Settlement Motion." Mot. at 7.

D. The Motion and the Amended Complaint

Based on his review and analysis, Ransier concluded that the filing of the Complaint violated the automatic stay. Tr. at 35. He thus filed the Motion on February 13, 2013, requesting that the Court enter an order directing the Fulson Parties to appear and show cause why they should not be held in civil contempt and sanctioned for seeking to exercise control over property of the estate in violation of the automatic stay.

On February 13, 2013, Ransier also filed a Notice of Bankruptcy and Suggestion of Stay with the State

Court ("Stay Notice"). In response, the State Court entered an order ("Stay Order") providing that "[i]t appearing that this case has been stayed by the U.S. Bankruptcy Court . . . this case is designated inactive pending further order of the Bankruptcy Court, or by motion of a party herein to proceed in a manner not stayed by that Court." Stay Order at 1. This Court has not issued any order lifting the stay, and Fulson never filed a motion "to proceed in a manner that is not stayed. . . . " Instead, despite the Stay Order, Fulson filed the Amended Complaint. Tr. at 36–37, 53.

A copy of the Stay Notice is attached as Exhibit 6 to the Motion.

A copy of the Stay Order is attached as Exhibit 1 to the Ransier Reply.

Fulson also filed a response to the Stay Notice, a copy of which is attached as Exhibit 2 to the Ransier Reply.

Because the Amended Complaint was filed in violation of the State Court's own Stay Order, it is not clear that the Amended Complaint operated as an effective amendment of the Complaint. Furthermore, the Amended Complaint alleged that the Columbia Gas Entities engaged in an "illegal scheme to eliminate the Nicole companies as competitors and unlawfully block them from redress in court [,]" Am. Compl. ¶ 34, and by "Nicole companies," the Amended Complaint meant both NGP and NES. Am. Compl. ¶ 24 (defining "Nicole companies" to mean both NGP and NES). Once again, the Amended Complaint alleged that the purported scheme was unlawful because the Columbia Gas Entities had violated the OCPA. Am. Compl. ¶ 6. In the Amended Complaint, Fulson asserted claims for

damages "in his capacity as the 100% owner of NES." Am. Compl. ¶ 108. Lowe signed the Amended Complaint as counsel to Fulson and Sanders was identified as of counsel. Am. Compl. at 22–23.

According to the Amended Complaint, the Ohio RICO Claims were based on nine of the predicate acts already discussed above, including "using interstate mail and wire communications to fraudulently force NES into involuntary bankruptcy on November 14, 2003 based on fraudulent creditor claims and for the purpose of fraudulently blocking . . . NGP from legal redress for predicate acts (1)-(4), in violation of 18 U.S.C. 1341 (mail fraud), 18 U.S.C. 1343 (wire fraud) and Ohio Rev. Code 2913.05 (telecommunications fraud). . . . " Am. Compl. ¶ 107(5). Those predicate acts all occurred before the Petition Date. Fulson alleged that the purported violations of the OCPA caused him "net damages of $36,654,305.94 sustained by NES as of March 31, 2006" minus "the $2,700,000 paid by TCO to the NES Chapter 11 estate." Am. Compl. ¶ 109.

Sanders and Lowe contend that, by seeking damages only for the alleged harm to NES, the Amended Complaint cured any violation of the automatic stay as to NGP. Ransier, though, did not see it that way. Tr. at 37. According to Ransier, "it seemed pretty clear within the [Amended Complaint] the belief that there was a claim to be made at some point in the future by Mr. Fulson [on account of damages allegedly sustained by NGP], essentially under the same facts and issues that we were trying to resolve in our compromise." Tr. at 37. As already noted, the Amended Complaint alleges an illegal scheme as to both NGP and NES and includes a reference to NGP

in one of its predicate acts. Thus, the Court's review of the Amended Complaint validates Ransier's view that it appears deliberately designed to say enough to permit (once the NGP case is closed) a further amendment that seeks damages based on harm allegedly suffered by NGP. And it appears that this was the Fulson Parties' intent.

After the hearings on the Motion and the Settlement Motion, the Court entered an Order (A) Providing Notice of Proposed Injunction and (B) Establishing Briefing Schedule on the Issue of the Appropriateness of the Injunction ("Injunction Notice") (Doc. 169). The Injunction Notice stated that during the hearing on the Settlement Motion "counsel for TCO stated that TCO would pay the settlement amount only upon the satisfaction of two conditions: (1) the Court's approval of the compromise; and (2) the Court's issuance of an injunction enjoining any entity from pursuing derivative claims and/or other claims that are property of NGP's bankruptcy estate." Injunction Notice at 1. The Injunction Notice provided notice of the Court's intent to issue such an injunction if it approved the Settlement Motion:

> [T]he Court intends—if it approves the Motion —to permanently enjoin all entities from pursuing claims that are property of NGP's estate, including, without limitation, claims that are derivative of those belonging to NGP's estate. The claims enjoined would include the claims asserted in the pending lawsuit against TCO and affiliated entities filed by Freddie Fulson (through his attorneys Robert Sanders and James Lowe) in the Court of Common Pleas of Franklin

> County, Ohio, Case No. 13CVH–972, to the extent that the claims asserted in that lawsuit are determined to be derivative of claims of NGP or are otherwise determined to be property of NGP's bankruptcy estate, as well as any such claims that might be asserted in the future.

Injunction Notice at 2.

Ransier filed a brief in support of the injunction (Doc. 177), but Sanders and Lowe opposed it. *See* Response of James A. Lowe and Robert C. Sanders to Chapter 7 Trustee's Brief in Support of the Issuance of an Injunction Upon Approval of the Compromise Motion ("Injunction Response") (Doc. 184). In the Injunction Response, Lowe and Sanders contend that the Amended Complaint "seeks no *damages* from harm on [sic] NGP" and that "[s]ince the operative complaint clearly does not assert a claim of the Estate, there is no need for an injunction." Injunction Resp. at 16. To the contrary, the Injunction Response demonstrates the need for the proposed injunction. There would have been no point in Lowe's and Sanders's opposing the proposed injunction if they had not intended to amend the Amended Complaint to reassert damages on account of injury to NGP. Further, given that the Amended Complaint was filed in violation of the State Court's own Stay Order, the filing of the Amended Complaint arguably was ineffective, leaving the Complaint as the operative pleading.

Because the NGP Ohio RICO Claims were property of NGP's estate and Ransier was settling them, he could not stand idly by once the Fulson Parties filed the 2013 State Court Case. Ransier requested addi-

tional sums from TCO to cover the costs that NGP's estate would incur as a result of actions he needed to take in order to address the 2013 State Court Case in the State Court and here. Tr. at 61. This request did not lead to any additional consideration from TCO, but Ransier's conversations with a representative of TCO confirmed that the settlement covered—just as the Settlement Motion and the original motion to compromise made clear—any and all claims of NGP against TCO and its affiliated entities, without any carve-out for claims such as those asserted in the 2013 State Court Case. Tr. at 61–63.

E. Sanders's Lack of Good Faith

Good faith is not a defense to a finding of civil contempt, but it may in certain circumstances serve to mitigate the sanctions imposed for the contempt. The Fulson Parties contend that they filed the Complaint in good faith. There is evidence to the contrary, especially as to Sanders. During his testimony, Sanders suggested that NGP and NES had their own claims under the OCPA. Tr. at 79:6–7. If one assumes that NGP had viable claims under the OCPA, then it also would be reasonable to assume that it had claims under RICO and that NES likewise had claims under both the OCPA and RICO. And during the hearing on the Motion, Sanders testified that he was familiar with RICO and had "done RICO work[.]" Tr. at 71. Yet nothing in the record indicates that he ever brought those claims to the attention of Ransier or, for that matter, McClatchey—even though Sanders had been employed by McClatchey as special counsel to represent the NES estate and even though Sanders received approximately $1 million from the NES estate

as a contingency fee on account of his retention as special counsel. This calls his credibility into question.

See In re Nicole Energy Servs., Inc., 385 B.R. 201, 217 n. 10 (Bankr. S.D. Ohio 2008).

During his testimony, Sanders suggested that he was aware of and relied upon *Adair v. Wozniak,* 23 Ohio St.3d 174, 492 N.E.2d 426 (1986) while he was in the process of deciding whether filing the Complaint would violate the automatic stay. Tr. at 74–75. He left this impression even though he mentioned *Adair* for the first time in the Sanders Motion, having failed to cite it in the first three documents he filed in this matter, the Fulson Parties Response, their Surreply and the document containing supplemental case law authority. This also calls his credibility into question.

As discussed in the next section, *Adair* applied the common law rule under which a company, not its equity holders, have the right to sue for injuries the company sustains. *Adair,* 492 N.E.2d at 428. Despite this, Sanders and Lowe cite it for the proposition that Fulson had the right to bring claims on his own behalf based on damages allegedly sustained by NGP.

In assessing whether Sanders truly believed that the Fulson Parties were free to file the Complaint despite the pendency of NGP's bankruptcy case and the automatic stay, other testimony of his also bears noting. "I don't fault Mr. Ransier or, for that matter, Mr. McClatchey in either of these two related Nicole cases[,]" he testified. "I have no quarrel with them nor does Mr. Fulson have any quarrel with their function as a trustee." Tr. at 80. At the time Sanders provided that testimony, objections to the Settlement Motion by both Fulson and Sanders were pending. Far

from evidencing "no quarrel" with Ransier and McClatchey, Fulson, in his objection to the Settlement Motion (Doc. 111), described Ransier as a "fraud and a liar" and McClatchey as a "liar [,]" expressing opprobrium consistent with his conduct throughout the NES case. *See Nicole Energy Servs.,* 385 B.R. at 217, 219 & n. 13. And Sanders, rather than supporting Ransier's approach as trustee, argued in his objection to the Settlement Motion (Doc. 112) that "the proposed settlement should not be approved because it is not a reasonable compromise of NGP's claims against TCO." Doc. 112 at 1. He made that same argument during the hearing on the Settlement Motion, which took place the day after the hearing on the Motion. In other words, Sanders's representation on the witness stand that neither he nor Fulson had any "quarrel" with Ransier and McClatchey was diametrically opposed to the positions they took in this case and the NES case. Sanders's capacity to make such plainly contradictory statements with no apparent sense of irony again calls his credibility into question. In short, on several occasions Sanders has exhibited a lack of forthrightness that is inconsistent with his contention that he was proceeding in good faith.

In light of these credibility issues, the Court questions whether Sanders had a good faith belief that filing the Complaint would not violate the automatic stay. In addition, as explained below, the conclusion that filing the Complaint would not violate the automatic stay is contrary to logic, common sense and case law. For all these reasons, filing the Complaint without providing Ransier notice and without requesting the Court grant relief from the automatic stay appears to have been a calculated risk by one who

believed it more expedient to ask for forgiveness rather than for permission.

V. Legal Analysis

A. The Automatic Stay and Civil Contempt

The filing of a bankruptcy petition triggers an automatic stay that puts a halt to all creditor collection efforts and safeguards property of the bankruptcy estate. *See* 11 U.S.C. § 362(a). "There is no question that violation of the automatic stay is a civil contempt of court." *In re Crabtree,* No. 84–5842, 1985 WL 13441, at *3 (6th Cir. June 7, 1985).

Parties who take actions in violation of the stay may face sanctions. In seeking the imposition of sanctions here, Ransier relies on § 105(a) of the Bankruptcy Code, which provides that bankruptcy courts may "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a). *See* Mot. at 1; Ransier Reply at 5–6. "[I]t is firmly established that [t]he power to punish for contempts is inherent in all courts." *Chambers v. NASCO, Inc.,* 501 U.S. 32, 44, 111 S. Ct. 2123, 115 L.Ed.2d 27 (1991) (internal quotation marks omitted). Like other courts, bankruptcy courts have the authority to award damages in order to compensate injured parties for the civil contempt of another party. *See, e.g., Liberis v. Craig,* No. 87–5321, 1988 WL 37450, at *8 (6th Cir. Apr. 25, 1988) ("[T]here is no question that the bankruptcy court had the authority to award attorneys' fees against the plaintiffs to compensate the trustee for bringing plaintiffs' contempt to the court's attention."). Under § 105(a), the Court has the authority to use its civil

contempt powers to compensate trustees for damages incurred as a result of violations of the automatic stay. *See Havelock v. Taxel* (*In re Pace*), 67 F.3d 187, 193 (9th Cir. 1995). Sanders and Lowe concede that § 105(a) provides the Court with this authority. *See* Sanders Mot. at 5 ("The Court . . . does have the authority to issue sanctions for civil contempt under § 105 when a party violates an automatic stay.") and 12 ("[T]his Court . . . has the authority to issue sanctions for civil contempt under § 105."); Lowe Mot. at 2 (incorporating the Sanders Motion).

Section 362(k)(1) of the Bankruptcy Code provides that "an *individual* injured by any willful violation of a stay provided by this section shall recover actual damages including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages." 11 U.S.C. § 362(k)(1) (emphasis added). A split of authority exists on the issue of whether a trustee is an "individual" for purposes of § 362(k)(1), *see In re Nicole Gas Prod., Ltd.,* 502 B.R. 508, 510 (Bankr. S.D. Ohio 2013) (citing cases), but the Court need not decide that issue here.

In order to obtain an order of civil contempt, the movant must carry the "burden of proving by clear and convincing evidence that the respondent violated a definite and specific order of the court requiring him to perform or refrain from performing a particular act or acts with knowledge of the court's order." *Liberte Capital Grp., LLC v. Capwill,* 462 F.3d 543, 550–51 (6th Cir. 2006) (internal quotation marks omitted). The order must be "clear and unambiguous[,]" with "[a]mbiguities . . . resolved in favor of the party charged with contempt." *Id.* (citations and internal quotation marks omitted). "[T]he automatic stay is

exactly the kind of definite and specific order of the court contemplated by the Sixth Circuit." *Elder–Beerman Stores Corp. v. Thomasville Furniture Indus., Inc.* (*In re Elder–Beerman Stores Corp.*), 197 B.R. 629, 633 (Bankr. S.D. Ohio 1996) (internal quotation marks omitted). To support a finding of contempt in the context of the automatic stay, "[t]he party alleging contempt must show that the defendant had knowledge that the [automatic] stay was in effect and nonetheless took an action in violation of the stay." *TLB Equip., LLC v. Quality Car & Truck Leasing, Inc.* (*In re TLB Equip., LLC*), 479 B.R. 464, 480(Bankr. S.D. Ohio 2012).

B. The Fulson Parties Willfully Violated the Automatic Stay

1. Overview

The evidence shows that the Fulson Parties knew that the automatic stay was in effect in NGP's bankruptcy case when they filed the Complaint and the Amended Complaint, and they do not contend otherwise. Despite this knowledge, the Fulson Parties violated the automatic stay. This conclusion follows from a straightforward application of two provisions of the Bankruptcy Code as well as a fundamental principle of Ohio law. Section 362(a)(3) of the Bankruptcy Code automatically stays attempts to exercise control over property of the estate, and under § 541-(a)(1) claims belonging to the debtor as of the commencement of the bankruptcy case are property of the estate. Because the NGP Ohio RICO Claims sought damages solely in Fulson's capacity as the equity owner of the equity owner of NGP on account of injuries sustained by NGP, under Ohio law it was

NGP alone—not Fulson in his capacity as an indirect owner of NGP—that had the right to assert those claims before the Petition Date. The NGP Ohio RICO Claims thus became property of NGP's bankruptcy estate by operation of § 541(a)(1) on the Petition Date and, as a result, only Ransier had the right to assert and settle the claims in order to monetize them on behalf of all creditors. The Fulson Parties thus violated the automatic stay when they asserted the NGP Ohio RICO Claims on behalf of Fulson personally. And because the Bankruptcy Code and Ohio law are definite and specific as applied here, the Fulson Parties' violation of the stay subjects them to liability for civil contempt.

2. The Automatic Stay and Property of the Estate

The automatic stay prohibits, among other things, the "exercise [of] control over property of the estate[.]" 11 U.S.C. § 362(a)(3). Section 362(a)(3)'s reference to "property of the estate" includes "interests of the debtor in property" as of the commencement of the bankruptcy case. 11 U.S.C. § 541(a)(1). As the Sixth Circuit has recognized, "it is well established that 'interests of the debtor in property' include 'causes of action[,]'" *Bauer v. Commerce Union Bank,* 859 F.2d 438, 441 (6th Cir. 1988), making causes of action existing as of the commencement of the bankruptcy case property of the estate under § 541(a)(1). *See Parker v. Goodman* (*In re Parker*), 499 F.3d 616, 624 (6th Cir. 2007). And as the Sixth Circuit also has pointed out, "[i]t is well settled that the right to pursue causes of action formerly belonging to the debtor—a form of property 'under the Bankruptcy Code'—vests in the trustee for the benefit of the estate." *Bauer,* 859 F.2d

at 441 (internal quotation marks omitted). The trustee has the exclusive right to assert those causes of action, *see Stevenson v. J.C. Bradford & Co.* (*In re Cannon*), 277 F.3d 838, 853 (6th Cir. 2002), and any person other than the trustee who asserts them violates the stay. *See Maloof v. Level Propane, Inc.,* 429 Fed. Appx. 462, 468 (6th Cir. 2011) (holding that debtors' shareholder and former CEO violated the automatic stay by asserting a cause of action that belonged to the estate). In short, § 362(a)(3) establishes a clear line that parties may not cross.

See also United States ex rel. Spicer v. Westbrook, 751 F.3d 354, 362 (5th Cir. 2014) ("In the bankruptcy context, the bankruptcy trustee is the real party in interest with respect to claims falling within the bankruptcy estate. The bankruptcy trustee therefore has exclusive standing to assert undisclosed claims that fall within the bankruptcy estate.") (citation omitted).

See also Sec. Investor Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC (*In re Madoff*), 429 B.R. 423, 430 (Bankr. S.D.N.Y. 2010) (holding that a party "violate[s] the stay by usurping causes of action belonging to the estate under sections 362(a)(3) and 541 of the Code"), *aff'd sub nom. Fox v. Picard* (*In re Madoff*), 848 F. Supp. 2d 469 (S.D.N.Y. 2012), *aff'd sub nom. Marshall v. Picard* (*In re Bernard L. Madoff Inv. Sec. LLC*), 740 F.3d 81 (2d Cir. 2014).

3. Application of § 362(a)(3) in Light of Ohio Law

The Fulson Parties crossed the line established by § 362(a)(3) when they filed the 2013 State Court Case. As the Complaint shows, to the extent they had

any validity at all, the NGP Ohio RICO Claims—including those in which Fulson alleged a fraudulent scheme that led to NGP's bankruptcy—arose before the Petition Date, and NGP had the sole right to assert them. *See Warren v. Mfrs. Nat'l Bank of Detroit,* 759 F.2d 542, 545 (6th Cir. 1985) ("Where a corporation is defrauded bringing about ultimate bankruptcy, a cause of action exists on the part of the corporation against the wrongdoer."). As a result, the rule that "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" applies to the NGP Ohio RICO Claims. *Honigman v. Comerica Bank* (*In re Van Dresser Corp.*), 128 F.3d 945, 947 (6th Cir. 1997). *Van Dresser* is particularly instructive here. There, Daniel Honigman, a shareholder and creditor of Van Dresser Corp., filed a state court lawsuit alleging that the defendants caused him over a million dollars in damages by draining funds from two subsidiaries of Van Dresser—Renaissance Manufacturing Company and Van Dresser Corporation/Westland—leading to their own bankruptcies as well as Van Dresser's. *Id.* at 946. The lawsuit was removed to the bankruptcy court presiding over the cases of Van Dresser and its subsidiaries, and the bankruptcy court granted a motion to dismiss Honigman's complaint. *See id.* at 947. "The district court affirmed, holding that Honigman's claim was derivative, that it was the exclusive property of the debtors' estates, and that therefore, he had no standing to sue." *Id.* In affirming as to Honigman's loss, the Sixth Circuit began its analysis with the same principles discussed above—that "the interests of the debtor in property include causes of action" and that "[a] debtor's appointed trustee has the

exclusive right to assert the debtor's claim." *Id.* (internal quotation marks omitted). "[I]f Honigman had slipped and fallen on a negligently maintained floor at [the] offices [of one of the defendants], he could recover irrespective of his status as [a] Van Dresser shareholder." *Id.* at 948. Obviously, such a slip-and-fall claim is not one that Van Dresser would have brought. But "if Honigman's state claims could have been brought by Van Dresser or its subsidiaries on [the date they commenced their bankruptcy cases], then the plaintiff is barred from [pursuing] them now." *Id.* at 947. The Sixth Circuit concluded that Honigman's lawsuit was barred. *See id.* at 947, 949.

So too was Fulson. The Complaint made clear that Fulson brought the NGP Ohio RICO Claims solely in his capacity as the purported owner of NGP based on actions the Columbia Gas Entities allegedly took to misappropriate NGP's assets and to eliminate NGP as a competitor, and the Surreply confirmed that Fulson believed the settlement with TCO would cause him harm "[a]s a person with an ownership interest in NGP[.]" Surreply at 2. Applicable state law governs the extent of a debtor's interest in property when the Bankruptcy Code does not. *See Drown v. JPMorgan Chase Bank, N.A.* (*In re Barnhart*), 447 B.R. 551, 555(Bankr. S.D. Ohio 2011). Under longstanding Ohio common law, shareholders have no right to bring claims based on direct injury to the corporation on their own behalf. *See Warren Tel. Co. v. Staton,* 46 Ohio App. 505, 189 N.E. 660, 663 (1933); *Bloom & Co. v. Ray,* 1923 WL 1781, at *1 (Ohio Ct. App. Mar. 16, 1923). Instead, shareholders may bring such claims, if at all, only on behalf of the corporation through shareholder derivative suits, which "originated [at common law]

more than one hundred years ago as actions in equity." *Polikoff v. Adam,* 67 Ohio St.3d 100, 616 N.E.2d 213, 218 (1993).

In *Adair,* the Ohio Supreme Court reiterated the "well-settled [principle] that only a corporation and not its shareholders can complain of an injury sustained by, or a wrong done to, the corporation." *Adair,* 492 N.E.2d at 428. The court then applied this principle in a case where, as here, the company had filed for bankruptcy as a result of the alleged misconduct of the defendants, and the company's shareholders had brought a lawsuit on their own behalf instead of attempting to bring a derivative suit. *See id.* at 427–28. The Ohio Supreme Court held that "wrongful actions by third parties impairing the capital position of the corporation give no right of action to the shareholders as individuals for damages where there is no violation of duty owed directly to the shareholders." *Id.* at 429. True, impairing the capital position of a company visits "real harm" on the company's equity holders in the form of a "diminution in the value of [their] ownership." *Id.* at 429. But any amount the company itself recovers through litigation or settlement results in a corresponding increase in the value of the shareholders' equity. So the injuries that shareholders suffer as a result of harm to the company are not only indirect, claims on account of those injuries also are duplicative of the company's claims. *See id.* at 429 ("The personal loss and liability sustained by the shareholder is both duplicative and indirect to the corporation's right of action.").

See also Boedeker v. Rogers, 140 Ohio App.3d 11, 746 N.E.2d 625, 632–33 (2000) (citing *Adair* for the

proposition that "[w]here the basis of the action is a wrong to the corporation, redress must be sought in a derivative action"); *Henkel v. Aschinger,* 167 Ohio Misc.2d 4, 962 N.E.2d 395, 402, 403 (Ohio Ct. Common Pleas 2012) (citing *Adair* and stating that "[w]here a corporation is harmed by alleged wrongdoing and the shareholders are indirectly injured, the claim is derivative in nature").

That is, in addition to being indirect, the duplicative nature of the shareholder's claim is a reason the claim must be brought as a derivative action. Because the company's recovery redresses the equity holders' indirect injuries, the equity holders may pursue claims for the damages sustained by the company only derivatively, and only if the company does not assert or settle the claims. Yet bringing an action against the Columbia Gas Entities on his own behalf for damages allegedly sustained by NGP is precisely what Fulson did when he brought the NGP Ohio RICO Claims.

Under Ohio law, then, the NGP Ohio RICO Claims belonged to NGP, and any claims Fulson had were derivative of NGP's claims against the Columbia Gas Entities. "[R]ights derivative from the debtor's causes of action constitute an interest in property that the estate acquires." *Parker,* 499 F.3d at 624. Thus, like the claims asserted by the shareholder in *Van Dresser,* the NGP Ohio RICO Claims asserted by Fulson were property of NGP's estate. *See City Sanitation v. Allied Waste Servs. of Mass., LLC* (*In re Am. Cartage, Inc.*), 656 F.3d 82, 90 (1st Cir. 2011) ("[T]he harm was to the debtor, and these claims must be considered part of the debtor's estate. This point is reinforced by an examination of the state court complaint, which only

describes harm inflicted upon the debtor, its customers, and its assets. As to City, the harm alleged is derivative and indirect."). Fulson accordingly was barred—and his probate estate is barred—from pursuing the NGP Ohio RICO Claims.

Sanders and Lowe—and before his death, Fulson—clearly wanted to try the NGP Ohio RICO Claims before a jury in the State Court. *See* Surreply at 2–3 ("[T]he RICO claims arise . . . from the different standards applied by bankruptcy courts in approving compromises and by the finder of fact in a civil action."). But even if Ransier had not attempted to stop them when he did by filing the Stay Notice, applicable Ohio law would have required the State Court—before the matter reached a jury—to conclude that the NGP Ohio RICO Claims were property of NGP's estate and that only Ransier could assert or settle them. In a case where a shareholder of bankruptcy debtor Columbus Microfilm brought a breach of contract action in her capacity as shareholder, the Ohio court of appeals affirmed the summary judgment granted against her by the State Court on the basis that "only a corporation and not its shareholders can complain of an injury sustained by, or wrong done to, the corporation." *Granata v. Stamatakos,* No. 13AP–424, 2013 WL 6708412, at *4 (Ohio Ct. App. Dec. 17, 2013). The Ohio court of appeals held that the trustee in the Columbus Microfilm bankruptcy was the real party in interest and that the plaintiff thus lacked standing to bring the claim on its behalf. *Id.* Likewise, in *Huntington National Bank v. Weldon F. Stump & Co.,* No. L–06–1398, 2008 WL 1921742 (Ohio Ct. App. May 2, 2008), the court of appeals held that the sole shareholder of the debtor "had no standing to bring an action against [the

defendant] for losses he has or may sustain [,]" and that "[a]ny cause of action . . . now lies exclusively with the trustee in bankruptcy[,]" *Id.* at *4. The same is true in the NGP case, and there is no reason to believe that the State Court would hold otherwise.

During the hearing on approval of the APA between McClatchey and the Columbia Gas Entities, Sanders testified that "[j]uries don't like utility companies" and that when "I can stand before a jury of ordinary people and say you've got this big corporation that gave this man no credit, zero, for two years, then I think I get a jury verdict." *Nicole Energy Servs.,* 385 B.R. at 251–52.

The court of appeals held that the "existence of a single shareholder" (Fulson is the sole shareholder of NGM and NEM, one of which was the sole owner of the equity in NGP) does not change the general rule that the claim belongs only to the corporation. *Id.* at *4.

The general rule under which only the corporation can assert a claim does not apply if "the complaining shareholder is injured in a way that is separate and distinct from [the] injury to the corporation." *Crosby v. Beam,* 47 Ohio St.3d 105, 548 N.E.2d 217, 219 (1989); *see also Van Dresser,* 128 F.3d at 948. During the hearing on the Motion, therefore, the Court asked Lowe's counsel if he could identify anything in the Complaint or the Amended Complaint "that alleges injury to Mr. Fulson that's not derivative of injury to the corporation[,]" or "that alleges injury to Mr. Fulson that's separate and independent from injury to NGP[.]" Tr. at 14–15. Lowe's counsel was not able to identify any separate injuries, nor was anyone else on behalf of the Fulson Parties. The reason for this is

simple—the NGP Ohio RICO Claims are based on no injury that Fulson experienced separate and independent of the alleged injury to NGP. This leaves no doubt that the filing of the Complaint and the Amended Complaint was an attempt to exercise control over property of NGP's estate.

4. Ransier's Settlement with TCO Does Not Permit Fulson to Assert the NGP Ohio RICO Claims

The fact that Ransier is settling the NGP Ohio RICO Claims for less than the amount the Fulson Parties assert they are worth rather than litigating with the Columbia Gas Entities does not change the conclusion that Fulson had no right to assert the claims. As established above, Ransier has the exclusive right to attempt to monetize the NGP Ohio RICO Claims. "Only if [Ransier] truly abandon[ed] the[] claims . . . may [Fulson pursue] them in state court." *Van Dresser,* 128 F.3d at 949. And Ransier has not abandoned the bankruptcy estate's claims against the Columbia Gas Entities, but instead is settling them, converting them to $250,000 in cash for distribution to creditors. In *Van Dresser,* the bankruptcy court approved a settlement between one of the defendants and the bankruptcy trustees for Van Dresser's subsidiaries. *See id.* at 947. Rather than holding that the shareholder could sue the defendant after the settlement was approved, the Sixth Circuit held that the shareholder, who was also a creditor, "must recoup whatever portion he can of [his damages] from the bankrupt estates." *Id.* at 949.

Given that Fulson withdrew his claim against NGP, *see* Agreed Order (Doc. 165), he is not entitled

to a distribution from NGP's bankruptcy estate. Nonetheless, he had no right to assert—nor does his probate estate—the claims that Ransier is settling any more than did the shareholder in *Van Dresser,* where the Sixth Circuit held that "[t]he [bankruptcy] estates' recovery takes precedence over [the shareholder's]." *Van Dresser,* 128 F.3d at 949. This is because derivative claims of shareholders belong "exclusively to the [debtor's bankruptcy] Estate and [are] extinguished by its settlement of those claims." *Sobchack v. Am. Nat'l Bank & Trust Co. of Chi.* (*In re Ionosphere Clubs, Inc.*), 17 F.3d 600, 604 (2d Cir. 1994).

This is not a rule without a reason. If derivative shareholder claims were not extinguished by the trustee's settlement of the estate's claims, then a defendant facing a claim for injuries to a corporate entity that indirectly harmed shareholders and creditors would always face the possibility of either settling with each and every one of them or, failing that, paying the full amount for which the stakeholders collectively assert the defendant is liable. Not infrequently, direct harm to a company leads to indirect injury to the company's stakeholders: equity holders' investments decline in value, creditors go unpaid, and employees lose their jobs. "Allowing every shareholder, employee and creditor a cause of action for injuries derivative of those suffered directly by a corporation" would not only "create[] a potential avalanche of suits that previously could not have been brought *at all [,]" Warren,* 759 F.2d at 545, it likewise would make it impracticable (if not impossible) for companies—and trustees of the estates of the companies once they enter bankruptcy—to settle claims against third parties.

Trustees would find third parties unwilling to settle due to the possibility that employees, creditors and shareholders might disagree with the settlement terms and seek to bring their own lawsuits. For that reason, orders approving settlements often contain injunctions against the pursuit of claims that are derivative of claims of the debtor.

Sec. Investor Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC, Case No. 08–1789, 2011 WL 10549389 (Bankr. S.D.N.Y. Jan. 13, 2011), *aff'd sub nom. Fox v. Picard* (*In re Madoff*), 848 F. Supp. 2d 469 (S.D.N.Y. 2012), *aff'd sub nom. Marshall v. Picard* (*In re Bernard L. Madoff Inv. Sec. LLC*), 740 F.3d 81 (2d Cir. 2014); *Griffin v. Bonapfel* (*In re All Am. of Ashburn, Inc.*), 805 F.2d 1515, 1518 (11th Cir. 1986). TCO insists on such an injunction here. As noted above, after TCO became aware of the 2013 State Court Case, it agreed to pay the settlement amount of $250,000 only if the Court not only approved the Settlement Motion, but also enjoined any entity from pursuing derivative claims and other claims that are property of NGP's bankruptcy estate. This approach facilitates settlement, an important goal in light of the fact that "[f]ully litigating a . . . claim could easily exhaust assets that would otherwise go to creditors," making it all the more crucial that "the person vested with responsibility for deciding whether to settle or fight is the trustee, not the debtor" or a direct or indirect shareholder of the debtor. *Bauer,* 859 F.2d at 441.

Another good reason exists for prohibiting stakeholders from usurping the sole right of a trustee to settle claims the debtor has against third parties. Allowing an equity holder—or, as in this case, an indirect equity holder—who is unhappy with a settle-

ment to bring his or her own lawsuit against the counterparty to the settlement would violate the priority scheme established by the Bankruptcy Code. *See Hamid v. Price Waterhouse,* 51 F.3d 1411, 1420 (9th Cir. 1995) ("When a creditor suffers injury that is independent of the firm's fate, his injury is direct and he may pursue his own remedy; otherwise the injury is derivative and the creditor must take his place in line as a creditor in the bankruptcy action.") (internal quotation marks omitted).

If Fulson had been permitted to prosecute the 2013 State Court Case on his own behalf, creditors of NGP's estate would recover only cents on the dollar from the settlement between Ransier and TCO while Fulson—an equity holder of an equity holder of NGP—would have pursued full recovery for himself. And if Fulson had somehow recovered damages on account of the NGP Ohio RICO Claims, he would have been required to turn them over to Ransier on behalf of NGP's estate, a result apparently not contemplated by the Fulson Parties. *See In re Mercedes Homes, Inc.,* 431 B.R. 869, 877 (Bankr. S.D. Fla. 2009) ("[B]ecause any derivative action is an asset of the Debtors' estates, any recovery on account of a successful action would be payable to the Debtors' estates, rather than to the Objecting ESOP Participants."). But if that happened, could Ransier take the money and distribute it to creditors of NGP's estate? Not if he wanted to avoid a lawsuit for breach of the settlement agreement he entered into with TCO. In other words, permitting the 2013 State Court Case to continue would place Ransier in the untenable position of either breaching his settlement agreement with TCO or standing by

while the Fulson Parties violated the priorities established by the Bankruptcy Code.

Equity holders also are below creditors in priority under Ohio law. *See* Ohio Rev. Code Ann. § 1705.46 (West 2014) (upon dissolution of limited liability company, assets are distributed to members only if there are assets remaining after distribution to creditors); Ohio Rev. Code Ann. § 1701.882(B) (upon dissolution of corporation, assets are distributed to shareholders only if there are assets remaining after distribution to creditors). Thus, the rule prohibiting stakeholders from usurping the right to settle claims the company has against third parties also applies with equal force outside of bankruptcy.

In sum, the rationale for concluding that the Fulson Parties violated the automatic stay is straightforward. Under Ohio law, only NGP—not Fulson—had the right to assert claims for injuries sustained by NGP, so the NGP Ohio RICO Claims were NGP's property before its bankruptcy. Because the NGP Ohio RICO Claims were NGP's property, § 541(a)(1) made them property of NGP's bankruptcy estate on the Petition Date. And because the claims were property of NGP's estate, § 362(a)(3) prohibited the Fulson Parties from asserting them. To hold otherwise would be inconsistent with the Bankruptcy Code and Ohio law. As applied here, §§ 362(a)(3) and 541(a)(1), as well as Ohio law, are definite and specific, clear and unambiguous. The Fulson Parties accordingly have willfully violated the automatic stay.

C. The Fulson Parties' Counterarguments Are Unavailing

In the face of this well-established law and its clear applicability to the facts of this case, the Fulson Parties assert five arguments for why they should not be held in contempt. In three of those arguments they contend that the NGP Ohio RICO Claims are not property of NGP's estate. In the other two they argue that they should not be held in contempt even if the NGP Ohio RICO Claims are property of NGP's estate. None of these arguments has any merit.

The Sanders Brief and the Lowe Brief expressly make the same five arguments. The Fulson Brief incorporates those arguments by reference. Fulson Br. at 1. In addition, Fulson asserts that he should not be held in contempt because he obtained legal advice from Sanders and one of his other attorneys, Clifford O. Arnebeck, Jr., to the effect that his filing the 2013 State Court Case was permissible. *See* Fulson Br. at 1–3. Sanders and Lowe agree that, if anyone should be held in contempt, it should be Sanders. *See* Sanders Br. at 19–20; Lowe Br. at 19–20.

1. The NGP Ohio RICO Claims Are Property of NGP's Estate Notwithstanding the Fulson Parties' Arguments to the Contrary

a. The Argument Based on the OCPA

No one could disagree that the principle of Ohio common law under which equity holders are prohibited from usurping the company's right to assert claims for injuries it sustained is longstanding and fundamental—and yet, according to the Fulson Parties, the

Ohio legislature intended to brush that principle aside with the enactment of the OCPA in 1985. But "[s]tatutes are to be read and construed in the light of and with reference to the rules and principles of the common law in force at the time of their enactment [.]" *Mann v. Northgate Investors, L.L.C.,* 138 Ohio St.3d 175, 5 N.E.3d 594, 599 (2014) (citing *State ex rel. Morris v. Sullivan,* 81 Ohio St. 79, 90 N.E. 146 (1909)). And "in giving construction to a statute the legislature will not be presumed or held, to have intended a repeal of the settled rules of the common law *unless the language employed by it clearly expresses or imports such intention". Id.* (emphasis added). One way for the Ohio legislature to have clearly expressed an intent to override the common law rule would have been to state something to the effect that "equity holders may bring claims under this section on their own behalf based on injuries sustained by the company of which they are equity holders." The language used in the OCPA does not come close to being such a clear statement of legislative intent. In fact, for the reasons explained below, the Court concludes that the OCPA evidences no intent whatsoever on the part of the Ohio legislature to override Ohio law prohibiting equity holders from bringing a lawsuit on their own behalf to recover for injuries sustained by a company.

See also United States v. Texas, 507 U.S. 529, 534, 113 S. Ct. 1631, 123 L.Ed.2d 245 (1993)(holding that "[s]tatutes which invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident").

Under the OCPA, any person directly or indirectly injured by conduct in violation of section 2923.32 of the Revised Code or a conspiracy to violate that section, other than a violator of that section or a conspirator to violate that section . . . shall have a cause of action for triple the actual damages the person sustained. To recover triple damages, the plaintiff shall prove the violation or conspiracy to violate that section and actual damages by clear and convincing evidence. Damages under this division may include, but are not limited to, competitive injury and injury distinct from the injury inflicted by corrupt activity.

Ohio Rev. Code Ann. § 2923.34(E). In support of their argument that the OCPA permits Fulson to assert the NGP Ohio RICO Claims, Sanders and Lowe rely on three phrases in section 2923.34(E): "any person," "indirectly injured" and "injury distinct from the injury inflicted by corrupt activity." Sanders Br. at 4–5; Lowe Br. at 3–4. None of these phrases supports their position. To the contrary, logic, common sense and case law all demonstrate that their reasoning is faulty.

i. The Fulson Parties' Argument Defies Logic

While the words "any person" in and of themselves are "terms of unlimited extent[,]" *United States v. Palmer,* 16 U.S. 610, 631, 3 Wheat. 610, 4 L.Ed. 471 (1818), such "general words must . . . be limited . . . to those objects to which the legislature intended to apply them." *Id.* Or, as the Sixth Circuit has so aptly put it, "milieu limits the reach of general words" such as the words "all" or "any." *Russell v. Citigroup, Inc.,* 748 F.3d 677, 681 (6th Cir. 2014) (citing *Palmer*). Prop-

erly understood, a statute providing that any injured person may bring a claim does not necessarily mean that each and every injured person may do so without limitation, any more than saying that everyone is welcome to attend a gathering means that the host will permit the number of visitors to exceed the number permitted by applicable zoning and fire codes. Continuing the analogy, if a directly injured company—or, in bankruptcy, the company's trustee—seeks to assert or settle a claim under the OCPA against a third party, then there is no room for the company's equity holders to do so as well. For example, in *Warren,* the sole shareholder of the company argued that he had standing to bring a claim against a third party for harm to the company under the "any person" language of the federal Racketeer Influenced and Corrupt Organizations Act ("RICO"). The Sixth Circuit rejected the argument, *Warren,* 759 F.2d at 544, and the Court likewise must reject the argument that the "any person" language of the OCPA has the effect the Fulson Parties seek to give it.

Sanders and Lowe themselves make an argument predicated on the understanding that the words "any person" are not unlimited in their reach. They contend that NGP's agreement with TCO means that NGP was limited to asserting contractual claims against TCO and that it therefore could not have asserted its own claims under the OCPA. *See* Sanders Br. at 16 ("The Debtor, being in contractual privity with TCO, is limited to contract remedies."); Lowe Br. at 14 (same). The cases on which Sanders and Lowe rely in their post-hearing briefs stand for nothing of the sort, but instead merely reiterate the unremarkable principle that a breach of contract claim does not constitute a

tort claim—a principle wholly inapplicable here given that the NGP Ohio RICO Claims assert more than a breach of contract by TCO. But NGP is a person within the meaning of the OCPA, so Sanders and Lowe could not even make this argument if the phrase "any person" means what they say it does. For if the words "any person" have the meaning Sanders and Lowe suggest, then NGP should have its own claim under the OCPA regardless of whether it also possesses a separate breach of contract claim against TCO. The statute simply does not have the meaning they seek to give it. Nothing in the OCPA's use of the phrase "any person" evidences an intent on the part of the Ohio legislature to upend the longstanding principle of Ohio law discussed above.

They do so even though Sanders suggested during the hearing that NGP had its own claims under the OCPA. Tr. at 79:6–7.

Nor does the OCPA's use of the phrases "indirectly injured" or "injury distinct from the injury inflicted by corrupt activity" suggest such an expansive intent on the part of the legislature. As already discussed, the Ohio Supreme Court's *Adair* decision supports the view that the NGP Ohio RICO Claims are derivative of NGP's claims against the Columbia Gas Entities and therefore cannot be asserted by Fulson. Yet Sanders and Lowe attempt to find support for their own position in *Adair,* noting that the Ohio Supreme Court stated in that decision that where a defendant's actions have caused direct injury to a corporation, "'[t]he personal loss and liability sustained by the shareholder is both duplicative *and indirect* to the corporation's right of action.'" Sanders Br. at 6 (quoting *Adair,* but adding emphasis); Lowe Br. at 5 (same). This language should

sound familiar; the Court already analyzed it in concluding that Fulson had no right to bring the NGP Ohio RICO Claims. Sanders and Lowe, though, misuse the passage. They ignore *Adair's* use of the word *duplicative.* They then extract from the passage the word *indirect* and, playing the sophist's game, insert it into this flawed syllogism: (1) the Ohio Supreme Court held in *Adair* that an injury incurred by a shareholder based on injury to the corporation is an *indirect injury* (major premise), and (2) under the OCPA, *any indirectly injured* person may assert a cause of action, even if the indirect injury is derivative of harm to another (minor premise), therefore (3) under the OCPA, shareholders may bring claims on their own behalf based on indirect injury to the corporation. *See* Sanders Mot. at 10; Sanders Br. at 5–6; Lowe Br. at 5.

The syllogism is flawed because, while the major premise is unassailable, the minor premise is simply false. It is not true that *any indirectly injured* person may bring a claim under the OCPA even if the indirect injury is derivative of harm to another. As already discussed, the phrase "any person" must be limited by its "milieu," *Russell,* 748 F.3d at 681, including longstanding, fundamental principles of law that the Ohio legislature evidenced no intent to overturn. *See Warren,* 759 F.2d at 545("[S]tatutes are to be interpreted with reference to the common law. . . . ") (internal quotation marks omitted). One of those principles is the previously discussed "well-settled [rule] that only a corporation and not its shareholders can complain of an injury sustained by, or a wrong done to, the corporation." *Adair,* 492 N.E.2d at 428. This principle is grounded not only on the fact that

injuries shareholders incur as a result of harm to the company are indirect, but also on the fact that the claims on account of those injuries are "duplicative [of] the corporation's right of action." *Id.* at 429. There is no reason to believe that a plaintiff may bring an indirect claim under the OCPA if there is a bar to bringing the claim—such as its duplicative nature—other than the claim's indirectness. To the extent indirectness is a bar to recovery, the OCPA may remove it, but it does nothing to remove the bar erected by the principle that shareholders have no right of recovery on claims that are derivative and duplicative of claims held by the corporation. Quite simply, Sanders and Lowe ignore the word *duplicative* that appears in the very same sentence of *Adair* on which they rely.

ii. The Fulson Parties' Argument Defies Common Sense

While simple logic shows the unsoundness of the Fulson Parties' reasoning, common sense also demonstrates it. Imagine a regulation that permits only those vehicles whose owners pay a fee to use the *direct* route to certain sections of a state park, but that permits other vehicles to use a more difficult *indirect* route. A visitor to the park approaches a booth from which the two access points diverge, and a law enforcement officer in the booth informs him of the state regulation. The visitor refuses to pay the fee (and does so in such a forceful way that the officer is sure to remember him). Believing that his vehicle will be unable to navigate the difficult terrain of the indirect route, the visitor turns around, goes back to a parking lot in the front of the park and steals a four-wheel-drive vehicle. The visitor then enters the

indirect route, but the law enforcement officer spots him and becomes suspicious. The officer calls for assistance, and the visitor ultimately is stopped before arriving at his destination. Upon being arrested for automobile theft, the visitor protests: "But the state regulation allows me to take the indirect route, and that is what I was doing." No reasonable person would interpret the regulation in this way—as permitting the visitor to ignore other state laws, such as the law against larceny, merely because he was taking the indirect route the state regulation otherwise permitted him to take. But that essentially is how Sanders and Lowe are interpreting the OCPA. According to them, the use of the word *indirect* permitted Fulson to usurp the NGP Ohio RICO Claims from NGP's estate and to assert them on his own behalf in order to arrive at his destination of a recovery for himself while flouting well-established state common law that prohibited him from doing so.

iii. The Fulson Parties' Argument is Contrary to Applicable Case Law

Despite all this, the Fulson Parties still contend that the mere use of the word "indirectly" in the OCPA provided Fulson the right to bring what is clearly a derivative claim of an equity holder as a direct claim, Sanders Br. at 12–13; Lowe Br. at 10–11, or as counsel to Lowe put it during the hearing on the Motion, "oddly enough a direct claim based on indirect damages[.]" Tr. at 14. That conclusion, however, is contrary to a decision by an Ohio court of appeals as well as persuasive authority from another jurisdiction.

In *Cleveland v. JP Morgan Chase Bank, N.A.,* No. 98656, 2013 WL 1183332 (Ohio Ct. App. Mar. 21, 2013), the City of Cleveland sought damages under the OCPA from certain financial institutions, alleging that they had obtained title to real property through foreclosure by "systematically fil[ing] false or misleading paperwork in foreclosure cases indicating that they were entitled to initiate foreclosure actions when they were not." *Id.* at *1. The City argued that the foreclosures "led to greatly diminished housing prices, which resulted in huge losses in property taxes. . . . " *Id.* These losses, of course, constituted indirect injury to the city. But according to the court of appeals, a "reduction in property values [is] more acutely suffered by those who lost homes through foreclosure and those living in foreclosure-ravaged neighborhoods [,]" and a "loss in tax revenue from decreasing property values is a derivative injury to that suffered by property owners." *Id.* at *5. And given that the mortgagors were in default, the foreclosures "would only [have] be[en] delayed, not extinguished" if the defendants had refrained from filing false or misleading documents in foreclosure cases, because some financial institution likely would have been entitled to foreclosure even if one of the defendants was not. *Id.* at *8. Thus, the foreclosures had "caused no damages to the City individually that would not have befallen it without any impropriety." *Id.* at *9. In the final analysis, the court of appeals affirmed the trial court's dismissal of the city's OCPA cause of action for failure to state a claim "because the City's injuries are derivative of the injuries suffered by the individuals whose properties were foreclosed upon." *Id.* at *8. The lesson of *JP Morgan Chase Bank* is clear: a plaintiff may not bring an indirect claim under the OCPA if there is a

bar to bringing the claim other than the claim's indirectness.

Faced with this decision by the Ohio court of appeals, Sanders and Lowe simply ignored it in the Sanders Brief and the Lowe Brief. Previously, they criticized it for containing "no discussion of the unique standing provisions of the OCPA[.]" Sanders Mot. at 10 n.1; Lowe Mot. at 2 (incorporating the Sanders Motion). But the appeals court presumably read the statute it was applying. And this Court cannot accept the Fulson Parties' contention that the decision is "plainly incorrect[,]" *id.,* especially given the principle previously enunciated by the United States Supreme Court and the Sixth Circuit that "a decision of an Ohio appeals court . . . must not be disregarded unless there exists 'other persuasive data that the highest court of the state would decide otherwise.'" *Rhiel v. Cent. Mortg. Co.* (*In re Kebe*), 469 B.R. 778, 790 (Bankr. S.D. Ohio 2012) (quoting *West v. Am. Tel. & Tel. Co.,* 311 U.S. 223, 237, 61 S. Ct. 179, 85 L.Ed. 139 (1940) and citing Sixth Circuit case law). For all the reasons discussed above, no persuasive data suggests that the Ohio Supreme Court would decide that a shareholder may bring a derivative claim on his own behalf merely because a statute provides a cause of action to indirectly injured persons.

Not only that, but the only decision addressing the issue in the shareholder context rejected the argument being made by the Fulson Parties. *See Kelley v. Thompson–McCully Co., LLC,* No. 236229, 2004 WL 1676760 (Mich. App. July 27, 2004). *Kelley* involved a Michigan statute that, like the OCPA, provides indirectly injured persons with a cause of action. In particular, section 8(2) of the Michigan Antitrust

Reform Act ("MARA") provides that "[a]ny . . . person threatened with injury or injured directly or indirectly in his or her business or property by a violation of this act may bring an action for . . . actual damages sustained by reason of a violation of this act. . . . " Mich. Comp. Laws Ann. § 445.778(2) (West 2014). Relying on MARA, Paul Kelley, a shareholder of the West Shore Construction Company, brought a lawsuit alleging that the defendants had conspired to eliminate West Shore as a competitor in the asphalt paving industry, just as Fulson alleged that the Columbia Gas Entities engaged in a scheme to eliminate NGP as a competitor. And just as Sanders and Lowe do on behalf of Fulson, Kelley argued that, even though West Shore was the directly injured party, MARA's "use of the term 'indirectly' mean[t] that [as a shareholder of West Shore] he is a real party in interest for purposes of this antitrust action." *Id.* at *7.

In affirming the trial court, the appeals court disagreed with Kelley's interpretation of MARA, concluding that the Michigan legislature did not intend to overturn longstanding law regarding derivative claims: "The Legislature did not intend to establish in § 8(2) an expansive gateway through which parties with attenuated and derivative claims of injury could file an antitrust action." *Id.* Rather, the Michigan legislature had a more limited intent: to create a "cause of action for indirect purchasers[,]" that is, those purchasers "who bought an illegally monopolized . . . product or service [from] a dealer, distributor, or some other independent reseller who was not a participant in the antitrust violation[.]" *Id.* at *7 & n. 5 (internal quotation marks omitted). The appeals court concluded that, while West Shore may have

been a purchaser, "plaintiff is not West Shore." *Id.* at *5. And because any injury Kelley suffered was derivative of any injury to West Shore, *id.* at *3, "[g]iven the existence of the bankruptcy proceedings, West Shore's claim now belongs to the trustee in bankruptcy[,]" so that "the bankruptcy trustee is the real party in interest with respect to the claims of alleged anticompetitive behavior." *Id.* at *2. The court so held despite MARA's providing a cause of action to any person injured directly or indirectly. The result must be the same in NGP's case.

The OCPA cases on which the Fulson Parties rely are not to the contrary. In the *Iron Workers* line of decisions, union health insurance trusts brought OCPA claims against tobacco companies and other entities for the allegedly smoking-related medical expenses the trusts had paid on behalf of their insureds. The trusts brought the claims even though any injuries they had incurred as a result of paying the medical expenses was only indirectly caused by the defendants, with the direct injuries being those of the insureds. The defendants moved to dismiss for failure to state a claim upon which relief can be granted on the ground that the trusts "were not directly injured and cannot bring a direct action." *Iron Workers,* 23 F. Supp. 2d at 786.

Iron Workers, 23 F. Supp. 2d at 771–97; *Iron Workers Local Union No. 17 Ins. Fund v. Philip Morris Inc.,* 29 F. Supp. 2d 801 (N.D. Ohio 1998); *Iron Workers Local Union No. 17 Ins. Fund v. Philip Morris Inc.,* 29 F. Supp. 2d 825 (N.D. Ohio 1998).

The district court denied the motion on the basis that the OCPA provides a cause of action to indirectly injured persons. Significantly, the trusts did

"not seek personal injury damages, such as pain and suffering or wrongful death damages[,]" *id.* at 790, which were the kinds of damages that the insureds would have been seeking (if any) given that their medical expenses had been paid by the trusts. Compensating smokers for their personal injuries would not compensate the trusts for the medical bills they paid. The district court, therefore, found that "[w]hile related, . . . [the trusts'] injuries are distinct from the personal injury claims of smokers." *Id.* at 791. The claims asserted by the trusts for medical expenses were not duplicative of the personal injury claims of the insureds, so both the trusts and the insureds were entitled to assert claims. That makes *Iron Workers* distinguishable from the case before the Court, where the claims Fulson asserts as a shareholder of NGP (actually, as an indirect shareholder) based on injury to NGP are duplicative of NGP's claims.

Further, *Iron Workers* is distinguishable from the *JP Morgan Chase Bank* case on which the Court relied above for the proposition that a plaintiff may not bring an indirect claim under the OCPA if there is a bar to bringing the claim other than the claim's indirectness. As already discussed, in *JP Morgan Chase Bank* a grounds for dismissal existed based on something other than the indirect nature of the city's injuries (*i.e.*, the finding that the city would have suffered injury even if the defendants had not filed false or misleading documents in foreclosure cases). By contrast, after the district court determined in *Iron Workers* that the indirect nature of an injury could not constitute a bar to recovery under the OCPA, it saw no other reason to dismiss the OCPA claims.

The Fulson Parties next contend that "[u]nder [Ransier's] reading of the statute, the term 'indirectly' is given no meaning." Sanders Br. at 6; Lowe Br. at 5. Not so. As was the case with the statute at issue in *Kelley,* the use of the word "indirectly" in the OCPA has meaning even if it is not given the over expansive interpretation proposed by the Fulson Parties. In fact, the very OCPA cases on which Sanders and Lowe rely illustrate this point as clearly as any hypothetical the Court could construct. In *Iron Workers,* the district court acknowledged that there were "substantial grounds for difference of opinion" as to whether the trusts could bring claims under RICO, but that in light of the phrase "indirectly injured" in the OCPA, the defendants had no plausible argument that they were entitled to dismissal of the trusts' complaint for failure to state a claim under the OCPA. *Iron Workers,* 29 F. Supp. 2d at 835; *see also CSAHA/UHHS v. Aultman Health Found.,* No. 2010CA00303, 2012 WL 750972 at *10 (Ohio Ct. App. Mar. 5, 2012) ("Given Ohio's recognition of recovery for indirect injury—which is broader than the comparable federal RICO requirement—we find the evidence was sufficient to support the jury's inference/conclusion [that] Aultman's pattern of corrupt activities proximately caused damage to Mercy."). Thus, the Fulson Parties are simply wrong when they assert that the word *indirectly* has no meaning in the OCPA if it does not permit shareholders to bring claims on their own behalf based on harm to the corporation. As *Iron Workers* and *Aultman Health* illustrate, the work that the phrase "indirectly" does in the OCPA is to permit claims for indirect injuries to be brought that might not be permitted under RICO. The OCPA accomplishes that work without

opening up an "expansive gateway through which parties with . . . derivative claims of injury [can] file [.]" *Kelley,* 2004 WL 1676760, at *7. In sum, the entire body of relevant case law is contrary to the position taken by the Fulson Parties.

b. The Argument Based on the Settlement with TCO

The Fulson Parties argue that the NGP Ohio RICO Claims will not accrue until after Ransier, on behalf of NGP, provides the Columbia Gas Entities with a global release as part of the settlement with TCO—at which point NGP's estate will no longer be permitted to assert claims against the Columbia Gas Entities—and that the 2013 State Court Case therefore does not attempt to exercise control over property of NGP's estate. *See* Sanders Br. at 2; Lowe Br. at 1. That argument ignores the derivative nature of the claims asserted in the 2013 State Court Case. It also is inconsistent with the Sixth Circuit's pronouncement in *Van Dresser* that a party seeking to assert claims based on harm to a company must, if the injured company is in bankruptcy and the trustee has settled the claims, recoup whatever portion the party is entitled to recover from the settlement funds and other assets of the bankrupt estate. Rather than giving rise to the NGP Ohio RICO Claims, the Court's approval of the Settlement Motion will effectuate a settlement of those purported claims. Further, none of the cases on which Sanders and Lowe rely support their argument that Ransier's releasing NGP's claims against the Columbia Gas Entities will cause claims in favor of Fulson to accrue. The reason these cases are unavailing is that, while the NGP Ohio RICO Claims are based on Fulson's status as an indirect

equity holder of NGP for injury sustained by NGP and therefore are derivative claims, the plaintiffs in the cases Sanders and Lowe cite were not asserting derivative claims.

See First Nationwide Bank v. Gelt Funding Corp., 27 F.3d 763, 768–69 (2d Cir. 1994); *Bankers Trust Co. v. Rhoades,* 859 F.2d 1096, 1101 (2d Cir. 1988); *Goldin v. Primavera Familienstiftung TAG Assocs.* (*In re Granite Partners, L.P.*), 194 B.R. 318, 325 (Bankr. S.D.N.Y. 1996).

In support of their argument that the NGP Ohio RICO Claims do "not seek property of the estate because [the] claims will not accrue, if they accrue at all, until after [NGP] provides TCO with a global release and can no longer assert any claims of its own[,]" Sanders and Lowe rely extensively on *Bankers Trust.* Sanders Br. at 2; Lowe Br. at 1. *See also* Sanders Br. at 10–11, 14–15; Lowe Br. at 8–10, 13–14. In that case, Bankers Trust Company ("Bankers") sued Daniel Rhoades, Herman Soifer and Milton Braten, who were the shareholders, directors and officers of Braten Apparel Corporation ("BAC"). *See Bankers Trust,* 859 F.2d at 1098. The trio had filed a voluntary Chapter 11 petition on behalf of BAC after having agreed to transfer a BAC subsidiary with net assets exceeding $3 million to Soifer in a sham transaction in which Soifer would later transfer the subsidiary back to BAC after confirmation of its Chapter 11 plan. All three men—with Rhoades acting as BAC's Chapter 11 counsel—misrepresented the nature of the transaction to Bankers and the other creditors in connection with the plan confirmation process. *See id.* at 1098. Relying on those misrepresentations, Bankers consented to a plan under which it received

a distribution of only 17.5% on its more than $4 million claim. Had it known of the true nature of the transaction, Bankers would have insisted on a higher recovery and would have opposed confirmation of BAC's Chapter 11 plan. *Id.*at 1098–99.

After the sham nature of the transaction was uncovered, BAC's bankruptcy proceeding resumed, and the bankruptcy court revoked confirmation of its plan. *Id.*at 1099. Bankers sued Rhoades, Soifer and Braten in the district court under RICO, and the district court dismissed its complaint for lack of standing and for untimeliness under the statute of limitations. *See id.* Reversing the district court, the Second Circuit concluded that Bankers had standing to bring the suit because its RICO claim based on the misrepresentations the three men had made to it—misrepresentations that resulted in Bankers receiving much less on its claim than it otherwise would have—"d[id] not seek recovery for injuries suffered by BAC, but for injuries [Bankers] suffered directly." *Id.* at 1101. "Defendants' conduct . . . caused Bankers monetary damage, and the right to recover for that injury belongs, not to BAC or its bankrupt estate, but to Bankers." *Id.* Of course, to the extent the trustee of BAC's bankruptcy estate recovered anything from the defendants on account of their fraudulent transfers of BAC's assets, such a recovery would make more assets available for the trustee to distribute to all of BAC's creditors, including Bankers. And recovering more from BAC's estate would reduce Bankers's claims against Rhoades, Soifer and Braten to the extent those claims were for the difference between the amount Bankers's would have received under BAC's Chapter 11 plan if the three had not com-

mitted fraud and the amount Bankers had in fact received. *See id.* at 1101, 1106. The Second Circuit, therefore, held that Bankers's claims were not untimely under the statute of limitations because the claims would accrue only after the trustee had finished attempting to recover from Rhoades, Soifer and Braten. *See id.* at 1106.

After BAC's trustee was finished pursuing the three, Bankers would be free to pursue the defendants. *See id.* But that was only because Bankers's claims were not derivative of BAC's. In fact, quoting the Sixth Circuit's decision in *Warren* (which the Court discussed above), the Second Circuit expressly distinguished the *Bankers Trust* case from one of its own prior decisions. In a passage Sanders and Lowe fail to mention, the *Bankers Trust* court described the prior case as one in which the Second Circuit had held "that the shareholder of an injured corporation did not have individual standing to bring a claim under civil RICO" and that this result followed from "a standing requirement applicable throughout corporate law: An action to redress injuries to a corporation cannot be maintained by a shareholder in his own name but must be brought in the name of the corporation through a derivative action." *Id.* at 1101 (internal quotation marks omitted). Here, the NGP Ohio RICO Claims that Fulson attempted to assert were entirely derivative of NGP's claims. Given that Ransier has not abandoned NGP's claims against the Columbia Gas Entities but instead is settling them, Fulson never had a right to assert the claims and never would have had such a right. *Bankers Trust,* therefore, is wholly inapposite.

So too is *First Nationwide Bank.* There, the plaintiff bank alleged that the defendants had misrepresented the value of properties they pledged as collateral to secure nonrecourse loans, fraudulently inducing the bank to make the loans and in the process violating RICO. The Second Circuit noted the "general rule [that] a cause of action does not accrue under RICO until the amount of damages becomes clear and definite" and held that the bank's damages with respect to any particular loan would become clear and definite only after the bank was successful in a foreclosure action as to that loan. *First Nationwide Bank,* 27 F.3d at 768–69. But unlike Fulson's claims against the Columbia Gas Entities, the bank's claims against the defendants were not derivative claims. Likewise, in *Goldin* the bankruptcy court noted that a "shareholder may . . . have to await the bankruptcy court's disposition of the common claim since the shareholder cannot measure its injury until then[,]" but it did so only in the context of its discussion of a claim by a "shareholder who suffers an injury particular to itself." *Granite Partners,* 194 B.R. at 325. And another case on which Sanders alone relies, *Sec. Investor Prot. Corp. v. Madoff,* 490 B.R. 59, 73 (S.D.N.Y. 2013), Sanders Br. at 1, also fails to support his position for the reason that the claims in those cases were not derivative claims. *See Sec. Investor Prot. Corp.,* 490 B.R. at 73 ("[T]he Anwar Plaintiffs . . . [are] bringing direct federal and state causes of action against a non-debtor third party alleging claims that the Trustee cannot bring."). In short, the 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.

Sanders and Lowe also rely on *City of Cincinnati v. Beretta U.S.A. Corp.*, 95 Ohio St.3d 416, 768 N.E.2d 1136 (2002), suggesting that it was decided under the OCPA. *See* Sanders Br. at 7; Lowe Br. at 7. *Beretta,* however, did not even mention the OCPA.

Even if the Court could ignore long-standing corporate and bankruptcy law and the rationale on which the law is based to reach the result the Fulson Parties seek—which the Court cannot do—there would be no basis for doing so here. The owner of the equity of NGP was not Fulson, but instead was either NGM or NEM, both also Chapter 7 debtors. As the trustee of the estates of NGM and NEM, Ransier entered into agreements to settle any and all claims—including derivative claims—that they had against the Columbia Gas Entities, and the Court approved those settlements by orders that became final and non–appealable before Fulson commenced the 2013 State Court Case. *See* Order, Doc. 90 in Case No. 09–52884; Order, Doc. 68 in Case No. 09–52885. Accordingly, in addition to the reasons explained above, NGM and NEM are prohibited from asserting derivative claims against the Columbia Gas Entities for the further reason that they have settled those claims. Fulson owned the equity in NGM and NEM, one of which in turn owned the equity in NGP, but that provides him no cover. For the same reasons that a direct equity holder is prohibited from asserting a derivative claim for harm to a company when the trustee of the company's bankruptcy estate has settled the claim, an indirect equity holder is all the more so prohibited from doing so.

c. The Argument Based on the NGP Agreement

As already noted, NGP and TCO were parties to the NGP Agreement, which permitted NGP to use the gas transportation capabilities of TCO. In their post-hearing briefs, Sanders and Lowe contend that, because NGP had a contract with TCO, it is limited to contractual claims against TCO, "cannot bring fraud claims against TCO[,]" Sanders Br. at 2, Lowe Br. at 1, and cannot assert its own claims under the OCPA. *See* Sanders Br. at 2, 16 ("The Debtor, being in contractual privity with TCO, is limited to contract remedies."); Lowe Br. at 14 (same). They make this argument despite the fact that, as a limited liability company, NGP is a person within the meaning of the OCPA with standing to bring claims under the statute. They also make the argument despite the fact that, during the testimony he provided in connection with the Motion, Sanders suggested that NGP had its own claims under the OCPA. Tr. at 79:6–7. It seems likely that Sanders changed course after realizing the import of the statement in *Van Dresser* that "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." *Van Dresser,* 128 F.3d at 947.

Regardless of the reason for the change, the argument that the NGP Agreement prevents NGP from bringing its own claims for fraud or other claims under the OCPA is flatly wrong. Sanders and Lowe cite no authority for the proposition that a party to a contract cannot assert a claim for fraud against the counterparty. The cases on which Sanders and Lowe rely in support of the argument stand only

for the principle that a breach of contract in and of itself does not give rise to a tort claim. But as one of the very cases cited by Sanders and Lowe recognizes, this principle has no applicability where "the acts constituting the breach of contract also constitute a cause of action in tort[,]" such as fraud. *Canderm Pharmacal, Ltd.,* 862 F.2d at 602 (internal quotation marks omitted). The NGP Ohio RICO Claims assert claims extending beyond a breach of contract by TCO; the claims also allege fraud and an illegal scheme to eliminate NGP as a competitor.

See Canderm Pharmacal, Ltd. v. Elder Pharm., Inc., 862 F.2d 597 (6th Cir. 1988); *Wolfe v. Continental Cas. Co.,* 647 F.2d 705 (6th Cir. 1981); *Battista v. Lebanon Trotting Ass'n,* 538 F.2d 111 (6th Cir. 1976); *Ketcham v. Miller*, 104 Ohio St. 372, 136 N.E. 145 (1922).

[. . . .]

Nor do Sanders and Lowe cite any authority for the proposition that an act that both breaches a contract and violates a statute cannot, because of the existence of the contract, give rise to a statutory claim. And a moment's thought should have revealed the absurdity of this argument. For example, under the logic employed by Sanders and Lowe, an employee who is a party to an employment agreement and who is terminated by her employer for a discriminatory reason would be prohibited from bringing a claim under an anti-discrimination statute merely because the termination also violated the agreement. The NGP Agreement provides the Fulson Parties no shield against liability for violating the automatic stay any more than an employment contract provides

an employer a shield against liability for discrimination.

2. The Fulson Parties' Excuses Do Not Absolve Them of Liability for Contempt

It is true, as Sanders and Lowe point out, that the Court previously noted that "[i]t is not entirely clear what the term 'indirectly' means in the context of the OCPA[.]" Sanders Br. at 2; Lowe Br. at 2 (quoting *Nicole Gas,* 502 B.R. at 514). But so what? The Court did not find the term so unclear as to permit Fulson to bring the NGP Ohio RICO Claims. And as the Court also pointed out, "at least one Ohio court has held that a derivative interest is insufficient to support a claim under the [OCPA]." *Nicole Gas,* 502 B.R. at 514 (citing *JP Morgan Chase Bank, N.A.,* 2013 WL 1183332, at *9). Furthermore, the conclusion that the Fulson Parties exercised control over property of NGP's estate when they filed the NGP Ohio RICO Claims finds support in logic, common sense and other case law that long predated the filing of the Complaint. Therefore, Sanders's and Lowe's reliance on cases such as *Waldschmidt v. Columbia Gulf Transmission* (*In re Fulghum Construction Co.*), 1984 U.S. App. LEXIS 14159, at * 12 (6th Cir. July 2, 1984)—in which the "application of the state provisions" to the matter at issue "was of relatively recent origin" and unclear—is misplaced. Here, the law is neither novel nor in flux, and there is nothing ambiguous about the applicable provisions of the Bankruptcy Code or the language of the OCPA as applied to the NGP Ohio RICO Claims. The Fulson Parties offer absolutely no case law or other authority that supports their position that they did not violate the automatic stay.

Finally, Sanders and Lowe argue that their actions were unintentional, harmless and promptly corrected. Sanders Br. at 2; Lowe Br. at 2. If by unintentional they mean that, as they previously said, they "carefully considered whether the filing of the [Complaint] would violate the automatic stay in this case and concluded, in good faith, that it would not[,]" Resp. to Mot. (Doc. 122) at 1, the excuse is unavailing. For reasons explained above, the Court has serious questions as to Sanders's good faith. And even if he, as well as the other Fulson Parties, acted in good faith, a "[g]ood faith [belief] is not a defense in civil contempt proceedings." *Gnesys, Inc. v. Greene,* 437 F.3d 482, 493 (6th Cir. 2005); *see also TWM Mfg. Co. v. Dura Corp.,* 722 F.2d 1261, 1273 (6th Cir. 1983).

The Fulson Parties' actions were not harmless. To the contrary, they have caused Ransier to incur expenses that, if not reimbursed, will reduce the distributions to other creditors. Nor was the Fulson Parties' stay violation promptly corrected. According to the Fulson Parties, "Fulson and his counsel immediately cured any stay violation in the original OCPA complaint[,]" and "[t]hey would have done this had [Ransier] simply alerted them to his concerns by telephone." Sanders Br. at 19; Lowe Br. at 17. While it is true that parties seeking to redress violations of the automatic stay should do so without incurring any more expense than is necessary, *see Gunter v. Kevin O'Brien & Assocs. Co.* (*In re Gunter*), 389 B.R. 67, 76 (Bankr. S.D. Ohio 2008), the telephone calls suggested by Sanders and Lowe clearly would have been ineffectual here. In fact, even after Ransier filed the Stay Notice, and after the State Court entered the Stay Order and this Court entered the Show

Cause Order, the Fulson Parties remained obstinate, going so far as to oppose the injunction that is a prerequisite to TCO's willingness to consummate the settlement with Ransier and then, just recently, substituting Fulson's probate estate as the plaintiff in the 2013 State Court Case.

Each of the arguments propounded by the Fulson Parties is meritless. Having disposed of those arguments, the Court, based on its analysis of the Bankruptcy Code and Ohio law, concludes that the commencement and continuation of the 2013 State Court Case constituted an attempt to exercise control over property of NGP's estate.

Finally, Sanders contends that any contempt order that is entered should be issued only against him because Fulson and Lowe trusted and relied on his explanation for why they could pursue the 2013 State Court Case despite the pendency of the automatic stay. Sanders Br. at 19–20. Sanders has no right to insulate Fulson and Lowe from liability. Trust and reliance on another does not shield a person who knowingly violates the automatic stay from liability for contempt. This is true whether one is an attorney or not. As to Fulson, who was the client, "advice of counsel and good faith conduct do not relieve from liability for a civil contempt, although they may affect the extent of the penalty." *TWM Mfg. Co.,* 722 F.2d at 1273(internal quotation marks omitted). As to Lowe, he was Fulson's counsel, and he reviewed, signed and filed the Complaint and the Amended Complaint. Furthermore, like Sanders, Lowe continues to oppose an injunction against pursuing the NGP Ohio RICO Claims even though there is no reason to do so except to preserve the ability to

amend the Amended Complaint to reassert those claims once the NGP case closes. In determining that the pursuit of the NGP Ohio RICO Claims violates the automatic stay, the Court has carefully analyzed and applied the applicable bankruptcy and state-law authorities. Sanders and Lowe would have been well advised to have done likewise.

VI. Conclusion

In light of the foregoing, the Court holds that the Fulson Parties violated the automatic stay and were in contempt of Court when they commenced and continued the 2013 State Court Case. Ransier requests that the Court award him reasonable attorneys' fees and costs. Ransier shall file a statement of fees and expenses, together with an explanation of why those fees and expenses are reasonable under the circumstances ("Fee Statement"), no later than October 10, 2014. Sanders, Lowe and Fulson's estate shall have until October 24, 2014 to file any objections to the Fee Statement. Any objection must state with particularity why any fees charged or expenses set forth in the Fee Statement are unreasonable or otherwise are not properly recoverable by Ransier as damages caused by the Fulson Parties' contemptuous conduct. If an objection is filed, a hearing on damages will be scheduled by separate order.

IT IS SO ORDERED.