No. 18-1489

In The
Supreme Court of the United States

CURTLAND H. CAFFEY, et al.,

Petitioners,

v.

BRENDA K. BOWERS, CHAPTER 7 TRUSTEE,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

As the Sixth Circuit held below, "[t]his is a case where the Bankruptcy Court did its job and did it well." App. 23a. In so doing its job, the Bankruptcy Court held Petitioners in contempt for violating the automatic stay of the Bankruptcy Code by filing a state court complaint asserting claims belonging to a bankruptcy estate. This was not a close decision. The Bankruptcy Court found that Petitioners' alleged "conclusion that filing the Complaint would not violate the automatic stay is contrary to logic, common sense and case law." App. 138a. Or, as summarized by the Sixth Circuit, "[t]he Bankruptcy Court below did not simply conclude that [Petitioners] had fumbled their way into violating the automatic stay – it deemed their actions willful and called their credibility into question." App. 21a.

Petitioners now appeal to this Court. They recycle meritless arguments that have been rejected multiple times by multiple courts, but now claim that the Sixth Circuit's decision creates conflicts with decisions from other courts. It does not. Respondent files this short brief primarily to address the misplaced assertions of conflict.

The Bankruptcy Court's decision has now been affirmed twice by unanimous appellate panels. Petitioners sought to certify a question of state law to the Supreme Court of Ohio, but the Supreme Court of Ohio declined to answer it. Petitioners have had four bites

at the apple, and, as set forth in greater detail below, they raise no issue here to justify a fifth.

STATEMENT OF THE CASE

Factual Background

The Bankruptcy Court made detailed findings of fact. *See* App. 120a–39a. A brief synopsis of the facts sufficient to dispose of this appeal are presented below.

A. The Parties.

This case arises out of a long history of bankruptcy proceedings for a series of related companies (the "Nicole Companies") owned in some fashion by Freddie L. Fulson. In the instant case, debtor Nicole Gas Production, Ltd. ("NGP") ceased operations in 2004 and an involuntary Chapter 7 petition was filed as to NGP on March 23, 2009. A Chapter 7 Trustee ("Trustee") was appointed for the NGP estate; upon his retirement, the Office of the United States Trustee named Respondent, Brenda K. Bowers, as successor trustee.

Freddie L. Fulson claimed to be the 100% owner of NGP. Mr. Fulson died during the course of this litigation, and Petitioners Randall and Caffey are co-administrators of the Fulson estate. Mr. Fulson was heavily involved with all of the proceedings below, and was the plaintiff in the state court complaint that forms the basis of contempt in this case.

Petitioner Sanders has worn multiple hats and taken many positions in relation to the Nicole Companies, their claims against certain Columbia Gas entities ("Columbia Gas"), and their various bankruptcy cases. Mr. Sanders was special counsel in bankruptcy proceedings for a related company, Nicole Energy Services, Inc. ("NES"), in a lawsuit against Columbia Gas, where he received approximately $1 million from the estate in contingency fees related to those claims; he sought to become a special counsel for NGP related to NGP's claims against Columbia Gas, but Trustee declined to so retain him; he was an objector to Trustee's attempts to settle NGP's claims against Columbia Gas; and he represented Fulson in the state court complaint against Columbia Gas, which reasserted NGP's claims against Columbia Gas that Trustee was attempting to settle. It is this state action that formed the basis of the contempt.

B. Trustee Attempted to Settle NGP's Claims Against Columbia Gas.

Trustee investigated and sought to administer the claims against Columbia Gas on behalf of NGP. Trustee filed a motion in the bankruptcy court to compromise ***any and all*** claims NGP had against Columbia Gas, without any carve-out for Ohio Corrupt Practices Act ("OCPA") or derivative claims. Fulson and Sanders objected.

C. Petitioners Filed a Complaint in Ohio State Court Asserting Claims That the Trustee was Attempting to Settle.

While the NGP bankruptcy proceedings, the motion to compromise, and the Fulson and Sanders objections to the motion to compromise were still pending, Fulson and Sanders commenced an action in the Court of Common Pleas of Franklin County, Ohio styled *Freddie L. Fulson v. Columbia Gas Transmission, LLC, et al.*, Case No. 13CV000972 (the "State Court Action"). The State Court Action essentially reasserted, in Fulson's name, NGP's claims against Columbia Gas that the Trustee was in the process of settling. The action specifically alleged claims and causes of action against Columbia Gas premised upon wrongs alleged to have been done to NGP and sought recovery of damages alleged to have been incurred by NGP. Petitioners asserted that Fulson was bringing the State Court Action "in his capacity as the 100% owner of NES and NGP." The State Court Action similarly asserted causes of action against Columbia Gas arising from wrongs alleged to have been done to NES and sought recovery of damages alleged to have been incurred by NES.

Sanders served as counsel to Fulson in connection with the State Court Action,[1] notwithstanding Sanders' previous retention by the NES estate for purposes of pursuing the same causes of action and same

[1] An Ohio attorney, Mr. Lowe, served as local counsel with Mr. Sanders in the State Court Action. The Bankruptcy Court also found Mr. Lowe in contempt of court. Mr. Lowe participated in the appeals to the Bankruptcy Appellate Panel and the Sixth Circuit, but did not join the Petition to this Court.

damages, his previous (and material) compensation for settling those claims, and Sanders' rebuffed offer to the Trustee to pursue the same causes of action and damages on behalf of the NGP estate.

D. The Bankruptcy Court Held Petitioners in Contempt of the Automatic Stay.

As a result of Petitioners' conduct in filing and pursuing the State Court Action, and after notice and hearing, the Bankruptcy Court held Petitioners in contempt, finding that they knowingly and willfully violated the automatic stay by filing and pursuing the State Court Action. App. 115a. The Bankruptcy Court later awarded the Trustee $91,068 in fees and expenses based on Petitioners' contempt. App. 113a.

Petitioners argued to the Bankruptcy Court that they had acted in good faith. In its unchallenged findings of fact, the Bankruptcy Court found that "[t]here is evidence to the contrary, especially as to Sanders." App. 136a. The Bankruptcy Court also found that Petitioners' alleged "conclusion that filing the Complaint would not violate the automatic stay is contrary to logic, common sense and case law. . . . [F]iling the Complaint without providing [the Trustee] 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." App. 138a–39a.

E. A Unanimous Bankruptcy Appellate Panel and a Unanimous Sixth Circuit Panel Affirmed the Bankruptcy Court.

Petitioners appealed to the Bankruptcy Appellate Panel ("BAP") for the Sixth Circuit. The BAP heard oral argument and then issued an opinion unanimously affirming the Bankruptcy Court. App. 26a. Regarding the contempt finding, the BAP determined that: (1) the OCPA did not give Fulson an individual claim against Columbia Gas; (2) the claims asserted by Petitioners in the State Court Action were property of the NGP estate; and (3) Appellants violated the automatic stay and the finding of contempt was appropriate. App. 32a–43a.

Petitioners then appealed to the Sixth Circuit Court of Appeals. The Sixth Circuit also held oral argument and also issued an opinion unanimously affirming the Bankruptcy Court. App. 4a. The Sixth Circuit held that:

> Whatever corporate wrongs had been visited upon [NGP], 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 [Trustee], who was trying to settle 'any and all' claims with Columbia Gas. Any Corrupt Practices Act claim that [NGP] 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.

App. 20a–21a. The Court continued, explaining that:

> The Bankruptcy Court below did not simply conclude that the [Petitioners] had fumbled their way into violating the automatic stay – it deemed their actions willful and called their credibility into question . . . [t]he Bankruptcy Court made detailed findings in this regard, and it acted diligently and thoughtfully to protect its own procedures and the Bankruptcy Code.

Id.

REASONS FOR DENYING WRIT

A. Petitioners' Arguments are Meritless and There Is No Split in Authority Warranting This Court's Intervention.

The lower courts' opinions are thorough, well-reasoned, correctly decided, and present no viable issue for this Court's review. At various times, the Sixth Circuit referred to Petitioners' arguments as "strained," "the sophist's game," and "nonsense." App. 15a, 20a. Further, accepting discretionary review of this case would require this Court to interpret substantive Ohio state law through the prism of federal bankruptcy contempt proceedings, and to make fact-specific determinations regarding Petitioners' alleged good faith. All of these arguments against accepting discretionary review are apparent from the face of the Petition and the

decisions below, and Respondent will not belabor them here.

Respondent files this short brief primarily to address Petitioners' additional claim that the Sixth Circuit's decision created two circuit conflicts that justify this Court's review. Respondent also highlights Petitioners' waiver of the second issue presented.

1. There is no conflict between the Sixth Circuit's decision and the Second Circuit's decision in *First Nationwide Bank*.

Petitioners argue that there is a conflict between the decision below and the Second Circuit's decision in *First Nationwide Bank v. Gelt Funding Corp*., 27 F.3d 763, 768 (2d Cir. 1994). In *First Nationwide Bank*, a lender bank brought a federal RICO claim pursuant to 18 U.S.C. § 1962(c) and (d) against a borrower, based on allegations that the defendant-borrower fraudulently misrepresented the value of collateral. *Id.* at 765. The Second Circuit determined that because a Federal RICO claim does not accrue until the damages become "clear and definite," the bank could not bring a RICO claim until after it had attempted to foreclose on the collateral. *Id.* at 769.

The Sixth Circuit's decision below does not conflict with *First Nationwide Bank* because the two cases address different statutes. Moreover, the Sixth Circuit's decision turned on the derivative nature of Petitioners' state claims, which is distinct from the ripeness issue in *First Nationwide Bank*. Finally, it is Petitioners'

argument that would conflict with a holding from the Second Circuit if adopoted.

a. The two cases address two different statutes.

There is a facial lack of conflict between the Sixth Circuit's decision below and *First Nationwide Bank*, because they address different statutes. *First Nationwide Bank* addressed the ripeness of claims under the federal RICO statute (18 U.S.C. § 1962(c) and (d)), and the Sixth Circuit's opinion below involved Ohio's Corrupt Practices Act. There can be no direct conflict between these two cases.

b. *First Nationwide Bank* is not relevant to the posture of this case.

Petitioners' mistaken allegations of a conflict stem from their ongoing refusal to recognize the derivative nature of their asserted state claims. As the lower courts all agreed, this is not a case about claim ripeness. Indeed, the Sixth Circuit properly determined that the asserted claims under the OCPA belonged to NGP and that Fulson never had an independent claim, so there was never any need for the Sixth Circuit to analyze when an independent cause of action would have accrued:

> 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.[2] **This is nonsense. Fulson never had any independent claims to assert.**

App. 20a (emphasis added). To the extent any viable OCPA claim existed, it belonged to NGP. The Bankruptcy Court made a factual determination that all damages incurred by NGP had accrued prior to the filing of the bankruptcy petition, which was supported by the fact that NGP had stopped operating in 2004, years before the petition was filed. App. 121a, 129a. *First Nationwide Bank* simply is not relevant to this case, and therefore is not in conflict with the Sixth Circuit's decision below.

c. It is Petitioners' argument that conflicts with a Second Circuit decision.

Petitioners argue that Trustees' settlement of NGP's claims against Columbia Gas for less than Petitioners believed them to be worth is what ripened the claim and made the damages clear and definite. Again, this ignores the derivative nature of the OCPA claims. All damages were to NGP, NGP incurred any damages and stopped operating prior to the filing of the bankruptcy petition, and the claim belonged to NGP. When NGP settled any and all claims against Columbia Gas, any

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[2] Petitioners' own actions belie their position that the OCPA claims did not ripen until after the Trustee settled NGP's claims against Columbia Gas, as Petitioners filed their state court complaint before the settlement was ever finalized.

OCPA claims were extinguished, not ripened. Indeed, the Second Circuit – the court Petitioners claim is in conflict with the Sixth Circuit – holds that derivative claims are "extinguished by [a bankruptcy estate's] 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). Thus, the Trustee's settlement of NGP's claims extinguished any OCPA claim. Petitioners' argument that the settlement instead ripened the claims is contrary to law, including case law from the Second Circuit.

2. There is no conflict between the Sixth Circuit's decision and the Ninth Circuit's decision in *Taggart*.

Petitioners argue that the Sixth Circuit erred by not considering whether Petitioners believed in good faith that their actions were not in violation of the automatic stay, allegedly bringing that decision into conflict with the Ninth Circuit's decision in *Taggart v. Lorenzen*, 888 F.3d 438 (9th Cir. 2018). In *Taggart*, the Ninth Circuit applied a subjective standard to determine that a creditor's "good faith belief" that a discharge order "does not apply to the creditor's claim precludes a finding of contempt, even if the creditor's belief is unreasonable." *Id.* at 444. This Court subsequently reversed the Ninth Circuit. *Taggart v. Lorenzen*, ___ U.S. ___, 139 S. Ct. 1795, 204 L. Ed. 2d 129 (2019).

There was never any direct conflict between the Sixth Circuit's decision, which found Petitioners in contempt for violating the automatic stay of the Bankruptcy Code, and *Taggart*, which involved a finding of contempt for violating a discharge order. Moreover, even if there had been a conflict, this Court has since overruled *Taggart* and foreclosed Petitioners' argument. Finally, Petitioners' arguments are not properly before this Court and were waived below.

a. There was never a conflict between the decision below and *Taggart*.

In the current case, the Bankruptcy Court held Petitioners in contempt for violating the automatic stay under 11 U.S.C. § 362(a)(3). *Taggart*, on the other hand, concerned the criteria for holding an individual in contempt for violating a discharge injunction under 11 U.S.C. § 727(b). *See Taggart*, 888 F.3d at 444; *Taggart*, 204 L. Ed. 2d at 132 ("The question presented here concerns the criteria for determining when a court may hold a creditor in civil contempt for attempting to collect a debt that a discharge order has immunized from collection."). In overturning *Taggart*, this Court expressly explained that the automatic stay differs in purpose and in language from a discharge order, such that contempt proceedings related to one may differ from contempt proceedings related to the other. *Taggart*, 204 L. Ed. 2d 129, 137–38. There was never any conflict between the current case and *Taggart*, and there is no reason for this Court to grant review over this appeal.

b. This Court's *Taggart* decision forecloses Petitioners' argument.

Even if there had been a conflict between the Sixth Circuit's decision and the Ninth Circuit's decision in *Taggart*, this Court recently overruled *Taggart* and foreclosed Petitioners' arguments. Petitioners pointed to the *Taggart* decision to argue that their alleged good faith belief that their actions did not violate the automatic stay precluded a finding of contempt. This Court has since rejected the subjective "good faith belief" standard applied by the Ninth Circuit and relied upon by Petitioners. *See Taggart*, 204 L. Ed. 2d 129, 138 (holding that "a court may hold a creditor in civil contempt for violating a discharge order if there is *no fair ground of doubt* as to whether the order barred the creditor's conduct"). While Respondent asserts that no conflict between the Sixth and Ninth Circuits in fact existed, any conflict alleged by Petitioners has been resolved by this Court's rejection of the subjective "good faith belief" standard espoused by the Ninth Circuit and relied upon by Petitioners.

c. Petitioners have waived the good faith issue.

Putting aside the conflict issue and the impact of this Court's recent decision, the "good faith" issue is not properly before this Court because Petitioners waived it below. The Bankruptcy Court expressly determined that "[g]ood faith" was not a defense to violating the automatic stay. App. 136a. It still proceeded to consider the argument of whether Petitioners acted

in good faith, and made a factual finding that "[t]here is evidence to the contrary, especially to Sanders." App. 136a. The Bankruptcy Court also found that Petitioners' arguments were unreasonable, finding that their arguments were "contrary to logic, common sense and case law." App. 138a. The Sixth Circuit summarized that the Bankruptcy Court "deemed [Petitioners'] actions willful and called their credibility into question." App. 21a.

In the Sixth Circuit proceedings, Petitioners did not assign as error the Bankruptcy Court's rejection of a good faith defense to contempt and did not assign as error the Bankruptcy Court's findings regarding the bad faith and unreasonableness of Petitioners' position. The term "good faith" is not used in any of the Petitioners' briefs in the Sixth Circuit. Although the Sixth Circuit mentions "good faith" in dicta in describing the Bankruptcy Court's findings, it was not asked to and did not issue a ruling as to whether a good faith defense could apply or whether Petitioners acted in good faith. App. 22a.

This issue is waived and the Bankruptcy Court's findings must stand. "Only in exceptional cases will this Court review a question not raised in the court below." *See Lawn v. United States*, 355 U.S. 339, 362 n.16, 78 S. Ct. 311, 2 L. Ed. 2d 321 (1958) (citing *Duignan v. United States*, 274 U.S. 195, 200, 47 S. Ct. 566, 71 L. Ed. 996 (1927)). There are no such exceptional circumstances presented here. The Bankruptcy Court's findings as to whether good faith could serve as a defense or whether Petitioners acted in good faith could

have been appealed in the Sixth Circuit. The *Taggart* decision that Petitioners claim created a conflict with the Sixth Circuit's decision was decided on April 23, 2018, over a month before Petitioners filed their first Sixth Circuit brief, nearly six months before oral argument was held, and nearly 10 months before the Sixth Circuit's decision. Not once did Petitioners ask the Sixth Circuit to consider whether the *Taggart* holding could apply in this case, let alone ask the Sixth Circuit to come into conformity with it.

There is no conflict between the Sixth Circuit's decision and the Ninth Circuit's decision here. Even if there had been, this Court's decision overturning *Taggart* forecloses Petitioners' argument. Finally, any argument about a good faith defense was waived by Petitioners and resolved by the Bankruptcy Court's factual findings.

CONCLUSION

For all of the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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