NO. 18-1489

In the Supreme Court of the United States

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

Petitioners,

v.

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

Respondent.

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

REPLY BRIEF OF PETITIONERS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

STATUTES

ARGUMENT

THE TRUSTEE'S ARGUMENTS THAT THE OCPA CLAIMS ARE ESTATE PROPERTY FAIL

The Trustee's arguments against certiorari on the issue of whether the OCPA claims are estate property are demonstratively incorrect.

The Trustee argues that the OCPA claims at issue are property of the bankruptcy estate because the "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." Trustee's Opposition at p. 3 (Trustee's emphasis). The Trustee ignores that a bankruptcy estate only owns claims that the debtor could have asserted prior to the filing of the bankruptcy petition.[1]

The OCPA claims asserted by Fulson, *by definition*, did not exist when the bankruptcy petition was filed. As the Trustee acknowledged at the sanctions hearing

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[1] *In re Van Dresser Corp.*, 128 F.3d 945, 947 (6th Cir. 1997) ("if the debtor could have raised a state claim *at the commencement* of the bankruptcy case, then that claim is the exclusive property of the bankruptcy estate and cannot be asserted by a creditor.") (emphasis added); *Emoral, Inc. v. Diacetyl* (*In re Emoral, Inc.*), 740 F.3d 875, 879 (3d Cir. 2014) (a cause of action is property of the bankruptcy estate only if it "existed *at the commencement* of the filing.") (citation omitted) (emphasis added); *Bondi v. Bank of Am. Corp.* (*In re Parmalat Sec. Litig.*), 383 F.Supp.2d 587, 594 (S.D.N.Y. 2005) (a trustee "stands in the shoes of the defunct corporation and may assert only claims that the debtor could have asserted *at the moment before* it entered bankruptcy.") (emphasis added).

in bankruptcy court, the OCPA damages are the difference between what NGP would have recovered in a pre-petition breach of contract action and the amount that the Trustee accepted in settling that claim five years after the bankruptcy petition was filed.[2]

When the bankruptcy petition was filed, it was not known whether the Trustee would litigate or settle NGP's pre-petition contract claim or, if she settled the claims, whether the settlement would be less than what NGP would have recovered in litigation. There were, therefore, *no OCPA claims when the bankruptcy petition was filed*. As such, the claims were never property of the bankruptcy estate. They are claims for NGP to prosecute at the conclusion of the bankruptcy. Since the OCPA claims were not property of the bankruptcy estate, Fulson's assertion of them did not violate the automatic stay.

This is true even though the courts below ruled that Fulson himself did not have standing to assert the OCPA claims. The fact that Fulson lacks standing does not mean that the claims are property of the bankruptcy estate. It means that the claims are for the debtor to pursue at the conclusion of the bankruptcy.

The bankruptcy court's reasoning in finding that the OCPA claims were property of the bankruptcy estate is clearly incorrect. The court stated:

> [T]he argument made by Sanders and Lowe—that Fulson's damages will become clear and

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[2] The Trustee stated that "it has also been made quite clear by the Fulson parties that any damages would necessarily be the net amount of the compromise[.]" [Hearing Tr., B.R. Dkt 175 at 9:11-14] (emphasis added).

> definite only after Ransier settles NGP's claims against the Columbia Gas Entities for less than Fulson believed the claims were worth—ignores the derivative nature of Fulson's claims.

App.173a-174a. Derivative claims are not automatically estate claims, however. If a derivative claim could not have been asserted prior to the bankruptcy petition it is not property of the estate.

The Trustee states in her opposition that "[t]he 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." Trustee's Opp. at p. 10 (citations omitted). As just explained, however, the bankruptcy court's "factual determination" was its determination that the OCPA claims were derivative.

Further, the fact that NGP stopped operating in 2004 does not mean that the OCPA claims existed pre-petition. The claims did not accrue until the Trustee's settlement of the contract claim in 2014. It is irrelevant that NGP ceased operations before the OCPA claims accrued. What matters is that the claims accrued post-petition.

The Trustee argues that the OCPA claims must have accrued before the settlement of the contract claim because Fulson filed his OCPA action before the settlement was finalized. Trustee's Opp. at p. 10, n.2. This argument also fails. When the OCPA action was filed in January of 2013, the Trustee had already negotiated the $250,000 settlement. B.R. Dkt 62 (Motion to Approve Compromise, Feb. 8, 2011). At that

point there was a distinct danger that this settlement might be consummated. The OCPA allows a party to file an action when such party is threatened with harm from OCPA violations *even though no claims have yet accrued*. O.R.C. at § 2923.34 (providing standing to any person who is "injured or threatened with injury" by acts violating the statute).[3]

In ruling that the OCPA claims were property of the bankruptcy estate, the Sixth Circuit stated:

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

App.20a. Whether Fulson ever had any independent claims to assert is not determinative whether the claims are property of the estate, however. If the claim could not have been asserted prior to the bankruptcy petition it is not property of the estate even if Fulson had no independent claims to assert.

The Trustee argues that the ruling of the courts below does not conflict with *First Nationwide Bank v. Gelt Funding Corp.*, 27 F.3d 763, 768-769 (2d Cir. 1994), wherein the Second Circuit ruled that "a cause of action does not accrue under RICO until the amount

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[3] Although petitioners believe the NGP's claims against the Columbia entities had a greater settlement value of more than $250,000, a bankruptcy court must approve the compromise of a debtor's claim if the compromise falls anywhere within the range of a reasonable settlement. Petitioners' grievance is not with the bankruptcy court's approval of the settlement, but with the Columbia entities' tortious actions blocking NGP's redress through civil litigation.

of the damages becomes clear and definite." The Trustee concedes that *First Nationwide Bank* addresses claim ripeness, but argues that this case "is not about claim ripeness." Trustee's Opp. at p. 9. As the Trustee sees it, this case turns solely on the fact that the OCPA claims are derivative. *Id.* This reasoning ignores that a claim can be derivative but still not be property of the bankruptcy estate.

The Trustee also argues that *First Nationwide Bank* presents no "direct" conflict with the rulings below because *First Nationwide Bank* is a federal RICO case and this case is a state RICO case. Trustee's Opp. at p. 9. This argument ignores that the Ohio courts look to federal RICO case law in construing the OCPA. *See Aaron v. Durrani*, 2014 U.S. Dist. LEXIS 32693, * 29 ("Ohio courts will look to federal law applying RICO to determine how to apply the federal RICO statute."). Moreover, there is no requirement that a conflict with another court of appeals be "direct" in order for the conflict to weigh in favor of granting certiorari.

The Trustee argues that petitioners' argument that the OCPA claims had not accrued until the settlement of the contract claims conflicts with *Soback v. Am. Nat'l Bank & Trust Co. of Chicago* (*In Re Ionosphere Clubs, Inc.*), 17 F.3d 600, 604 (2d Cir. 1994), which holds that derivative claims of a debtor are extinguished by a bankruptcy court's settlement of those claims. That is true only if the derivative claims that existed prior to the filing of the bankruptcy petition.

The lower courts' ruling that the OCPA claims asserted by Fulson are property of the bankruptcy estate is clearly incorrect and conflicts with the holding of the Second Circuit in *First Nationwide*

Bank that a cause of action for racketeering does not accrue "until the amount of the damages becomes clear and definite."

If permitted to stand, the Sixth Circuit's ruling in this case will cause continued confusion regarding the correct test for determining whether a cause of action is property of a bankruptcy estate or property of the debtor for prosecution post bankruptcy.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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