No. 19-293

In The
Supreme Court of the United States

TKC AEROSPACE INC.,
Petitioner,
v.
CHARLES TAYLOR MUHS,
Respondent.

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

REPLY BRIEF OF PETITIONER

Nicholas M. DePalma
Counsel of Record
Stephen K. Gallagher
Douglas Proxmire
Kevin W. Weigand
VENABLE LLP
8010 Towers Crescent Drive, Suite 300
Tysons, Virginia 22182
(703) 760-1647
nmdepalma@venable.com
skgallagher@venable.com
dcproxmire@venable.com
kwweigand@venable.com

William B. King
VENABLE LLP
750 East Pratt Street, Suite 900
Baltimore, Maryland 21202
(410) 244-7510
wbking@venable.com

Counsel for Petitioner ***Dated: November 12, 2019***

THE LEX GROUP[DC] ♦ 1050 Connecticut Avenue, N.W. ♦ Suite 500, #5190 ♦ Washington, D.C. 20036
(202) 955-0001 ♦ (800) 856-4419 ♦ www.thelexgroup.com

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTE

ARGUMENT

Respondent Charles Taylor Muhs' ("Muhs") opposition misstates the decisions below, which found Muhs "willfully and maliciously" stole trade secrets as part of a plan to injure his employer; misconstrues the Fifth Circuit's decision in *In re Miller*, 156 F.3d 598 (5th Cir. 1998); and ignores the widening circuit split regarding the standard to establish willfulness, which is the basis for seeking this Court's review.

The Fourth Circuit's decision below represents a profound departure from established law, as the Fourth Circuit has now placed an additional burden on all victims of a willful and malicious trade secret misappropriation to prove the subjective intent of the debtor. The United States District Court for the District of Alaska and the Superior Court of Arizona in Maricopa County determined that Muhs willfully and maliciously stole trade secrets from his employer, TKC Aerospace, Inc. ("TKCA"), as part of a scheme to take a $24 million contract from TKCA. As a result of the trial court's detailed findings, the Bankruptcy Court for the Eastern District of Virginia ruled that Muhs' debt to TKCA flowing from Muhs' misappropriation was nondischargeable under 11 U.S.C § 523(a)(6) of the Bankruptcy Code, which prohibits the discharge of a debt arising from "willful and malicious" injury caused by the debtor (Muhs). No bankruptcy court or appellate court reviewing a bankruptcy court's decision has held that a debtor found liable for ***willful and malicious*** misappropriation of trade secrets may discharge that debt in bankruptcy under Section 523(a)(6), until the Fourth Circuit's decision at issue.

Rather than providing any legal support for the Fourth Circuit's decision below, which failed to apply the plain terms of the Uniform Trade Secrets Act to the Bankruptcy Code, Muhs' opposition provides nothing more than a distraction from the issues before this Court. Those issues include the need to resolve a well-documented circuit split as to the standard for assessing "willfulness" under Section 523(a)(6) and the need to correct the Fourth Circuit's decision below, which constitutes an unprecedented attack on the Uniform Trade Secrets Act and, in particular, the Bankruptcy Code's protections for creditors who have suffered a willful and malicious misappropriation of trade secrets. TKCA now submits this reply to address certain misstatements in the opposition brief.

I. The Fourth Circuit did not hold that Muhs' misconduct failed to satisfy both the objective and subjective tests for willfulness.

Muhs' opposition relies on the contention that the Fourth Circuit in the opinion below "found that the meaning of 'willful and malicious' in the Alaska Judgment ***did not meet either [the subjective or the objective] standard."*** Opp'n at p. 1 (emphasis added). While failing to address the circuit split over the application of the willfulness standard under the Bankruptcy Code, Muhs apparently takes the position that this case does not present the facts upon which to resolve the split because the Fourth Circuit applied ***both tests*** and found that Muhs' conduct failed to qualify as "willful and malicious" under both the subjective and objective standard.

But that is not what the Fourth Circuit did at all. The Fourth Circuit, by sidestepping *In re Miller* and its own prior decision in *In re Parks*, 91 Fed. Appx. 817, 819 (4th Cir. 2003), simply ignored the existence of an objective test for willfulness. When the Fourth Circuit reversed the rulings of the Bankruptcy Court and the Eastern District of Virginia, which found that Muhs' debt was not dischargeable, the court limited the willful and malicious inquiry under Section 523(a)(6) to whether Muhs himself "specifically had the requisite intent to injure." App. 26a. The Fourth Circuit's decision and Muhs' opposition disregard clear facts: that Muhs was not simply found to have stolen TKCA trade secrets, but Muhs collaborated with a TKCA competitor to use the misappropriated TKCA trade secrets as part of a plan to divert TKCA business to that competitor, which was objectively certain to, and did in fact, result in injury to TKCA. App. 80a–90a, 143a–144a, 149a–150a. This Court must intervene to correct that ruling.

Muhs further seems to make the argument that his debt is nondischargeable because he only intended ***the act*** of theft of trade secrets, and ***not the injury to TKCA***. *See* Opp'n at p. 3. But this distinction has been rejected by numerous courts when the injury is objectively certain to result from the willful and malicious act, including the Seventh Circuit in *Jendusa-Nicolai v. Larsen*, 677 F.3d 320, 322 (7th Cir. 2012). In that case, the Court rejected the debtor's argument that there was no evidence that the debtor intended to injure the victim (for purposes of nondischargeability under Section 523(a)(6)) and instead only intended discomfort and fear—after he sealed her in a snow-filled garbage can, which

ultimately caused her to lose her toes and suffer other injuries. *Id*. at 322. The court explained the need to apply an objective standard in the absence of evidence confirming the subjective intent to injure:

> [T]he Wisconsin court did not decide that he'd intended to inflict the specific injuries, such as the loss of his ex-wife's toes, that resulted from his attack on her. But obviously he intended to injure her—he was convicted of attempted murder, after all—***and the destruction of her toes and the miscarriage were foreseeable consequences of the intentional torts that gave rise to the debt he seeks to discharge.***

Id. (emphasis added).

In *Larsen*, the court ultimately held that the judgment against the debtor arising from his willful and malicious acts was nondischargeable under Section 523(a)(6), applying a form of the objective test. Similarly, here, a specific finding by the lower court that Muhs subjectively intended the specific harm that befell TKCA was not required. He funneled TKCA trade secrets to a competitor as part of plan to take a particular contracting opportunity from TKCA and give it to a competitor. Given these circumstances, the injury to TKCA was objectively foreseeable under the facts, and therefore the "willful and malicious" standard is met.

II. The Fifth Circuit in *In re Miller* did not hold that a "willful and malicious" theft of trade secrets is dischargeable

Muhs' opposition also mistakenly contends that the Fifth Circuit in *In re Miller* held that a debtor found liable for willful and malicious trade secrets misappropriation could discharge that debt in bankruptcy. *See* Opp'n at p. 3, n.1. This, too, is incorrect. In the *Miller* case, during the trial for the underlying trade secret violation, the jury determined that "Miller [the debtor] did not act with malice mean[ing] ill will, evil motive or flagrant disregard for the rights of others," 156 F.3d at 601 (emphasis added), and as a result, the trial court did not award punitive damages under the UTSA against Miller. Given that Muhs, unlike Miller, was found to have willfully and maliciously misappropriated trade secrets, the Fifth Circuit in *Miller* never addressed whether a bankruptcy court could discharge a debt arising from a willful and malicious misappropriation. As a result, Muhs' opposition is simply wrong when it contends that the Fifth Circuit in *Miller* found that a willful and malicious misappropriation could be dischargeable.

Here, Muhs willfully and maliciously stole TKCA trade secrets as part of a plan to divert a contract opportunity to a TKCA competitor. Under the objective substantial certainty test and under every reported case involving a willful and malicious misappropriation of trade secrets, Muhs' debt to TKCA is nondischargeable under Section 523(a)(6) of the Bankruptcy Code.

CONCLUSION

For the foregoing reasons, and for those additional reasons set forth in the petition itself, the petition for a writ of certiorari should be granted.

Respectfully submitted,

NICHOLAS M. DEPALMA
COUNSEL OF RECORD
STEPHEN K. GALLAGHER
DOUGLAS PROXMIRE
KEVIN W. WEIGAND
VENABLE LLP
8010 TOWERS CRESCENT DRIVE, SUITE 300
TYSONS, VIRGINIA 22182
PHONE: (703) 760-1647
FAX: (703) 821-8949
nmdepalma@venable.com
skgallagher@venable.com
dcproxmire@venable.com
kwweigand@venable.com

WILLIAM B. KING
VENABLE LLP
750 EAST PRATT STREET, SUITE 900
BALTIMORE, MARYLAND 21202
PHONE: (410) 244-7510
FAX: (410) 244-7742
wbking@venable.com

Counsel for Petitioner

November 12, 2019