NO. 20-_____

In the Supreme Court of the United States

SE PROPERTY HOLDINGS, LLC,
AS SUCCESSOR BY MERGER TO VISION BANK,

Petitioner,

v.

JERRY D. GADDY,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case involves two important issues of bankruptcy law designed to protect only the "honest but unfortunate debtor." *See Grogan v. Garner*, 498 U.S. 279, 286-87 (1991). The first issue, involving the exception to discharge found at 11 U.S.C. § 523(a)(2)(A), implicates a Circuit split and this Court's ruling in *Husky International Electronics, Inc. v. Ritz*, 136 S.Ct. 1581 (2016). Granting SEPH's petition would offer the Court an opportunity to clarify *Husky* in light of inconsistent interpretations of *Husky* by the Circuit Courts of Appeal. The second issue, also involving 11 U.S.C. § 523(a)(2)(A), implicates a Circuit split and runs counter to this Court's precedent.

THE QUESTIONS PRESENTED ARE:

1. Does a creditor sufficiently state a claim under 11 U.S.C. § 523(a)(2)(A) to except from discharge a debt "for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by . . . actual fraud" where the creditor alleges that the debtor fraudulently transferred assets while receiving post-transfer benefits derived from those assets?

2. Can a creditor to whom the debtor owes an underlying debt state a claim under 11 U.S.C. § 523(a)(2)(A) where the creditor seeks non-discharge "to the extent of [debtor's fraud]" and alleges that after incurring the underlying debt, the debtor engaged in a pattern of fraudulent transfers to hinder, delay, and defraud the creditor?

PARTIES TO THE PROCEEDINGS

Petitioner

- SE Property Holdings, LLC, as Successor by Merger to Vision Bank ("SEPH")

Respondent

- Jerry D. Gaddy

RULE 29.6 STATEMENT

Petitioner SE Property Holdings, LLC is a wholly-owned subsidiary of its parent company Park National Corporation (NYSE MKT: PRK). To the Petitioner's knowledge, no publicly held company owns 10% or more of PRK stock.

LIST OF PROCEEDINGS

DIRECT PROCEEDING BELOW

United States Court of Appeals for the Eleventh Circuit

No. 19-11699

SE Property Holdings, LLC, Plaintiff-Appellant, v. Jerry Dewayne Gaddy, Defendant-Appellee.

Date of Final Opinion: September 29, 2020

Date of Rehearing Denial: November 3, 2020

United States District Court
for the Southern District of Alabama

No. 1:18-CV-00027

SE Property Holdings, LLC, Appellant, v. Jerry Dewayne Gaddy, Appellee.

Date of Final Order: April 1, 2019

United States Bankruptcy Court
for the Southern District of Alabama

No. 17-01568

SE Property Holdings, LLC, Plaintiff, v. Jerry Dewayne Gaddy, Defendant.

Date of Final Order: January 5, 2018

RELATED PROCEEDINGS

United States Bankruptcy Court
for the Southern District of Alabama

1:17-bk-1568-HAC

In re Gaddy (Chapter 7)

Decision Date: Proceedings remain pending.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

Page

APPENDIX TABLE OF CONTENTS

OPINIONS AND ORDERS

REHEARING ORDER

STATUTORY PROVISION

OTHER DOCUMENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

STATUTES

JUDICIAL RULES

PETITION FOR A WRIT OF CERTIORARI

Petitioner SE Property Holdings, LLC, as successor by merger to Vision Bank ("SEPH"), respectfully petitions for a writ of certiorari to review the United States Court of Appeals for the Eleventh Circuit's decision affirming the judgments of the United States Bankruptcy Court for the Southern District of Alabama and the United States District Court for the Southern District of Alabama.

OPINIONS BELOW

The Eleventh Circuit's opinion, found herein at App.1a-17a, is reported at 977 F.3d 1051. The decision of the United States District Court for the Southern District of Alabama, found herein at App.18a-24a, is not reported in the Federal Supplement but is available at 2019 WL 11316657. The decision of the United States Bankruptcy Court for the Southern District of Alabama, found herein at App.25a-40a, is unreported but is available at 2018 WL 10345329.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The Eleventh Circuit rendered its decision on September 29, 2020. SEPH timely filed a petition for panel rehearing. The Eleventh Circuit panel denied SEPH's petition for panel rehearing on November 3,

2020. App.43a-44a. Therefore, this Petition is timely filed pursuant to Supreme Court Rule 13.4.

STATUTORY PROVISIONS INVOLVED

11 U.S.C. § 523 is reproduced at App.45a-54a.

STATEMENT OF THE CASE

In 2006, SEPH's predecessor in interest Vision Bank made two loans in the amount of $10,000,000 and $4,500,000 to Water's Edge, LLC ("Water's Edge") to fund a construction project in Baldwin County, Alabama. App.57a-58a. Vision Bank required the thirty-plus members of Water's Edge, including Jerry Gaddy ("Gaddy"), to personally guaranty the loans. App.57a-58a. On November 28, 2006, Gaddy executed a "Continuing Unlimited Guaranty Agreement" that guaranteed payment of all sums due under the $10,000,000 note. App.58a. Additionally, on November 28, 2006, Gaddy executed a "Continuing Limited Guaranty Agreement" that guaranteed payment of the $4,500,000 in an amount up to $84,392.00. App.58a-59a. In June 2010, Water's Edge defaulted on the loans and Vision Bank demanded payment from the guarantors. App.60a. Vision Bank filed suit in state court against Water's Edge, Gaddy, and his co-guarantors on October 11, 2010. App.60a-61a. Vision Bank merged into SEPH in 2012. App.56a-57a. On December 17, 2014, the state trial court entered judgment in favor of SEPH against Water's Edge and the guarantors.

App.61a. Specifically, the judgment entered against Gaddy was in the amount of $9,084,076.14 on the $10,000,000 note and $84,392.00 on the $4,500,000 note. App.61a. On February 25, 2015, SEPH obtained a charging order against Gaddy's interest in several entities, including Rembert, LLC ("Rembert") and Gaddy Electric & Plumbing, LLC ("Gaddy Electric"). App.61a.

SEPH learned post-judgment that Gaddy had made numerous transfers to family members or affiliated entities during the time period in which the Water's Edge loans were in default and while the state court litigation was pending. In 2016, SEPH filed suit against Gaddy and the transferees in the United States District Court for the Southern District of Alabama (the "District Court"), raising claims for actual and constructive fraudulent transfer pursuant to the Alabama Uniform Fraudulent Transfer Act ("AUFTA"). SEPH alleged the following transfers were actually fraudulent:

a. Gaddy's transfer of his 41% interest in Gaddy Electric to his wife, Sharon Gaddy, effective as of December 15, 2014;

b. Gaddy's transfer of 46% of the interest in Gaddy Electric to Sharon Gaddy on November 2, 2009;

c. Gaddy's transfer of all of his interest in Rembert to Sharon Gaddy and/or his daughter, Elizabeth Gaddy Rice;

d. Gaddy's transfer of $293,945.51 to Gaddy Electric on December 23, 2014;

e. Gaddy's transfer of two parcels of real property to Rembert on October 16, 2009, two weeks after Water's Edge guarantors were notified that Vision Bank intended to take legal action in the event of default;

f. Gaddy's transfer of three parcels of real property to Sharon Gaddy on November 20, 2009;

g. Gaddy's transfer of a 7.41 acre parcel of real property to Elizabeth Gaddy Rice on October 4, 2010, a week prior to the filing of the lawsuit against Gaddy; and

h Gaddy's April 18, 2012 transfer of two parcels of real property to SLG Properties, LLC, an entity formed by Sharon Gaddy.

See App.62a-69a.

On April 26, 2017, while the litigation in the District Court was pending, Gaddy voluntarily filed a Chapter 7 petition in the United States Bankruptcy Court for the Southern District of Alabama (the "Bankruptcy Court"). On July 21, 2017, SEPH filed a Complaint objecting to discharge of debt owed to SEPH by Gaddy based on the same fraudulent transfers alleged in the District Court litigation. App.55a-73a. SEPH alleged in its Complaint that Gaddy retained control over the assets that were transferred; for example, although Gaddy transferred away all of his interest in Gaddy Electric, Gaddy Electric continued to make monthly payments on Gaddy's personal loans and made other payments to personally benefit Gaddy. App.62a-63a, at ¶¶ 38-39, 44; App.64a, at ¶¶ 49-50. SEPH alleged that the transfers were "actually fraudulent as to SEPH as they were made to hinder SEPH's

collection of its debt owed by Jerry Gaddy." App.70a, at ¶¶ 69-70. Furthermore, SEPH asserted that, "actual fraud in connection with these fraudulent transfers is an exception to discharge to the extent of those transfers under 11 U.S.C. § 523(a)(2)(A)." App.70a, ¶ 71. SEPH sought a judgment that the debt owed by Gaddy is "non-dischargeable to the extent of the fraud." App.70a. SEPH also asserted that in making the fraudulent transfers, Gaddy "willfully and maliciously injured SEPH and/or the property of SEPH" under § 523(a)(6).[1] App.70a-71a, at ¶¶ 73-74.

On October 6, 2017, Gaddy filed a motion for a judgment on the pleadings, arguing that he was entitled to a judgment as a matter of law because SEPH's allegations regarding fraudulent transfers were insufficient to state a cause of action under § 523(a)(2)(A). Gaddy argued that because his debt to SEPH originated before the transfers at issue, SEPH could not maintain a § 523(a)(2)(A) claim because there was no nexus between the guaranty debt and the alleged fraudulent transfers. On November 21, 2017, SEPH filed its response to Gaddy's motion. App.74a-87a. SEPH argued that it had adequately stated a claim under § 523(a)(2)(A), particularly based on this Court's holding in *Husky International Electronics, Inc. v. Ritz*, 136 S.Ct. 1581 (2016). App.76a-78a. SEPH noted that its allegations that Gaddy retained control over the assets transferred and received personal benefits from the use of those assets essentially made him both a transferor and transferee. App.77a-82a. At a hearing on Gaddy's motion, counsel for SEPH asserted that

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[1] SEPH does not in this petition seek review of the Eleventh Circuit's decision regarding SEPH's claims under § 523(a)(6).

its claims as pleaded were sufficient to state a cause of action based on the liability created by the fraudulent transfers.

The Bankruptcy Court granted Gaddy's motion and entered a judgment in his favor on January 5, 2018. App.25a-42a. The Bankruptcy Court held that SEPH failed to state a claim under § 523(a)(2)(A), reasoning that the *Husky* Court did not expand the "obtained by" language in § 523(a)(2)(A). App.36a-39a. Because SEPH did not allege that the underlying debt was obtained by fraud and was merely a "standard contract debt," SEPH's § 523(a)(2)(A) claim failed. App.36a. The Court concluded that "[w]hile *Husky* potentially expanded the universe of § 523(a)(2) causes of action against transferees, it does not reach as far as SEPH argues." App.36a-37a. The Bankruptcy Court also concluded that the AUFTA does not support a claim for money damages against a transferor/debtor. App.33a-36a.

SEPH timely appealed the Bankruptcy Court's judgment to the District Court on January 19, 2018. The District Court had jurisdiction pursuant to 28 U.S.C. § 158(a)(1) because SEPH appealed from a final order and decree of the Bankruptcy Court. On April 1, 2019, the District Court affirmed the Bankruptcy Court's judgment. App.18a-24a. Although SEPH's Complaint clearly stated that SEPH sought a judgment for non-discharge of Gaddy's debt to the extent of the fraudulent transfers, the District Court held that SEPH sought to discharge pre-petition state court judgments, which it concluded was not permissible under § 523(a)(2)(A). App.22a.

SEPH timely appealed the District Court's judgment to the United States Court of Appeals for the

Eleventh Circuit on April 30, 2019. The Eleventh Circuit had jurisdiction pursuant to 28 U.S.C. § 1291 because SEPH appealed from a final decision of the District Court affirming the Bankruptcy Court's judgment. The Eleventh Circuit affirmed the decisions of the lower courts. App.2a. The Eleventh Circuit held that SEPH's § 523(a)(2)(A) claim failed because the loans that Gaddy guarantied were not "obtained by . . . false pretenses, a false representation, or actual fraud." App.7a-8a. Because the "only fraud that SEPH alleges—Gaddy's conveyances of real personal property—happened years after Gaddy incurred the debt by signing the guaranties," the Eleventh Circuit concluded that SEPH failed to state a claim under § 523(a)(2)(A). App.8a. The Eleventh Circuit rejected SEPH's assertion that *Husky International Electronics, Inc. v. Ritz*, 136 S.Ct. 1581 (2016) controlled and allowed SEPH to obtain a judgment for non-discharge based on Gaddy's actual fraud. App.8a-11a. The Eleventh Circuit ignored SEPH's contentions that Gaddy stood on both sides of the transfers such that he was both a transferor and transferee, concluding that *Husky* did not apply because SEPH did not assert that Gaddy was a recipient of fraudulently transferred assets. App.10a. The Eleventh Circuit read *Husky* and other case law as not allowing for an exception to discharge based on fraudulent transfers where the debtor was initially indebted to the creditor before engaging in fraudulent transfers. App.11a.[2] SEPH timely filed a

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[2] SEPH also appealed the decision of the Bankruptcy Court denying SEPH's request for leave to amend its Complaint to further clarify that it only sought to except from discharge Gaddy's debt created by the fraudulent transfers. The Eleventh Circuit also affirmed the Bankruptcy Court's denial of SEPH's request for leave to amend. *See* App.13a-17a. SEPH contended

petition for panel rehearing on October 19, 2020. The Eleventh Circuit denied SEPH's petition on November 3, 2020. App.43a-44a.

REASONS FOR GRANTING THE PETITION

I. THERE IS A CIRCUIT SPLIT REGARDING WHETHER § 523(a)(2)(A) EXCEPTS FROM DISCHARGE LIABILITY FOR FRAUDULENT TRANSFERS WHERE THE DEBTOR IS BOTH TRANSFEROR AND TRANSFEREE OF FRAUDULENTLY TRANSFERRED ASSETS, AND GRANTING SEPH'S PETITION FOR A WRIT OF CERTIORARI WOULD ALLOW THE COURT TO CLARIFY THE EXTENT OF ITS HOLDING IN *HUSKY*.

A. The *Husky* Court Left Open the Question of the Scope of the "Obtained by" Language in § 523(a)(2)(A).

This Court has recognized that a "basic policy animating" the Bankruptcy Code is to afford relief "only to an honest but unfortunate debtor." *Cohen v. de la Cruz*, 523 U.S. 213, 217 (1998) (internal quotations omitted). Section 523(a)(2)(A) of the Bankruptcy Code provides in part that "[a] discharge under section 727, 1141, 1192, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt—for money, property, services, or an extension, renewal,

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below and contends herein that its Complaint as stated was sufficient to state a claim for non-discharge of liability created by Gaddy's fraudulent transfer. *See, e.g.*, App.76a-81a. Therefore, the issues related to SEPH's request for leave to amend are not presented to this Court for review.

or refinancing of credit, to the extent obtained by—false pretenses, a false representation, or actual fraud. . . . " 11 U.S.C. § 523(a)(2)(A). In *Cohen*, the Court held that "[t]he most straightforward reading of § 523(a)(2)(A) is that it prevents discharge of 'any debt' respecting 'money, property, services, or . . .credit' that the debtor has fraudulently obtained, including treble damages assessed on account of the fraud." 523 U.S. at 217.

This case provides an opportunity for the Court to resolve a conflict among the Circuit Courts of Appeal regarding the scope of the Court's ruling in *Husky International Electronics, Inc. v. Ritz*, 136 S.Ct. 1581 (2016) as applied to claims for non-discharge under § 523(a)(2)(A). The *Husky* Court held that "[t]he term 'actual fraud' in § 523(a)(2)(A) encompasses forms of fraud, like fraudulent conveyance schemes, that can be effected without a false representation." 136 S.Ct. at 1586. The *Husky* Court reversed the Fifth Circuit, which had held that the exception for discharge of debts based on "actual fraud" requires a false representation. *Id.* at 1585. There had been a split among the Circuit Courts of Appeal regarding whether a false representation was required. *Id.*

The bankrupt debtor in *Husky* was a director of a corporation that owed a debt to the creditor seeking an exception to discharge. *Id.* The director caused the corporation to transfer large sums to other entities the debtor controlled. *Id.* The creditor filed suit against the debtor to hold him liable for the corporation's debt under Texas law. *Id.* This Court held that "actual fraud" encompasses fraudulent conveyances that are committed with wrongful intent. *See id.* at 1586-87 ("In such cases, the fraudulent conduct is not in dis-

honestly inducing a creditor to extend a debt. It is in the acts of concealment and hindrance.").

The debtor in *Husky* contended that his debt was dischargeable because § 523(a)(2)(A) requires the debt be "for money, property, services, or . . . credit . . . *obtained by* . . . actual fraud," and fraudulent transfers are not committed to "obtain" debt. *Id.* at 1589 (emphasis added by *Husky* debtor in briefing.) The Court rejected this argument:

> It is of course true that the transferor does not "obtai[n]" debts in a fraudulent conveyance. But the recipient of the transfer—who, with the requisite intent, also commits fraud —can "obtai[n]" assets "by" his or her participation in the fraud. . . . If that recipient later files for bankruptcy, any debts 'traceable to' the fraudulent conveyance . . . will be nondischargable under § 523(a)(2)(A). Thus, at least sometimes a debt "obtained by" a fraudulent conveyance scheme could be nondischargeable under § 523(a)(2)(A). Such circumstances may be rare because a person who receives fraudulently conveyed assets is not necessarily (or even likely to be) a debtor on the verge of bankruptcy, but they make clear that fraudulent conveyances are not wholly incompatible with the "obtained by" requirement.

Id. at 1589 (citations omitted). The creditor contended that the debtor "was both the transferor and the transferee in his fraudulent conveyance scheme, having transferred [corporate] assets to other companies he controlled." *Id.* at 1589 n.3. However, the Court took no position on the creditor's assertion and remanded

for the Fifth Circuit to decide whether the debtor's debt to the creditor was "obtained by" his asset-transfer scheme. *Id.* SEPH in this petition seeks the Court to clarify the "obtained by" requirement of § 523(a)(2)(A) in the context of claims for non-discharge related to fraudulent conveyances.

B. The Circuit Courts of Appeal Have Ruled Inconsistently Regarding the Application of the "Obtained by" Language in § 523(a)(2)(A).

As noted in the Statement of the Case above, SEPH, like the creditor in *Husky*, alleged that Gaddy stood on both sides of the transfers such that he was transferor and transferee in his fraudulent conveyance scheme. App.77a-82a. Specifically, Gaddy transferred his interests in real property that he continued to use and transferred limited liability company interests even though the limited liability company continued to pay for his personal expenses. App.62a-63a, at ¶¶ 38-39, 44; App.64a, at ¶¶ 49-50. SEPH asserted below that Gaddy "obtained" money and property through the transfers based on these benefits he retained after transferring assets. App.77a-78a. SEPH additionally argued that Eleventh Circuit law interpreted the "obtained by" element of § 523(a)(2)(A) to apply whenever the debtor receives a benefit either directly or indirectly. App.78a. *See In re Bilzerian*, 100 F.3d 886, 889-91 (11th Cir. 1996); *In re Taylor*, 551 B.R. 506, 517-18 (Bankr. M.D. Ala. 2016). The Eleventh Circuit did not address SEPH's contention head on that Gaddy was both transferor and transferee but affirmed the Bankruptcy Court's decision that SEPH did not allege that Gaddy had obtained money or property in his fraudulent conveyance scheme. App. 10a. The Eleventh Circuit concluded that because

Gaddy was a transferor, the *Husky* Court's statements regarding recipient liability did not apply. App.10a-11a.

The Fifth Circuit also narrowly construed § 523(a)(2)(A) in *Matter of Green*, 968 F.3d 516 (5th Cir. 2020), another case involving a debt owed to SEPH. In *Green*, SEPH alleged, *inter alia*, that the debtor caused an entity he controlled, Green & Sons, LLC ("Green & Sons"), to fraudulently enter a sham "loan" transaction with a Panamanian entity and transferred $225,000 to this entity which was owned by a friend of the debtor. *Id.* at 521 n.11. SEPH held a charging order against debtor's interest in Green & Sons that required distributions made to debtor by Green & Sons to be paid to SEPH. The Fifth Circuit held that SEPH's claim under § 523(a)(2)(A) failed as a matter of law and affirmed summary judgment in favor of debtor. *Id.* at 521. The Fifth Circuit held that, "[e]ven assuming that Green engaged in a fraudulent scheme, SEPH has not produced any facts to suggest that Green *obtained* a debt from his alleged fraud; therefore, SEPH has not raised a genuine dispute of material fact." *Id.* The Fifth Circuit further reasoned that, "[h]ere, Green & Sons is the transferor, not the recipient. Section 523(a)(2)(A) is thus inapplicable." *Id.* at 521 n.13. However, SEPH had asserted that the sham loan transaction constituted a distribution *to the debtor* himself and was being disguised by way of a fraudulent sham loan transaction. Like the Eleventh Circuit, the Fifth Circuit held that § 523(a)(2)(A) could not be applied to transferors even if those

transferors also received money or property in the scheme.[3]

The Ninth Circuit has treated claims for non-discharge for debts for money "obtained by . . . actual fraud" in the fraudulent conveyance context differently. *See DZ Bank AG Deutsche Zentral-Genossenschaft Bank v. Meyer*, 869 F.3d 839 (9th Cir. 2017). In *Meyer*, the Ninth Circuit held that a creditor was entitled to a judgment of nondischargeability based on the debtors' fraudulent transfers from one entity to others owned by the debtors. The debtors in *Meyer* personally guaranteed business debt of a limited liability company, Choice Cash Advance LLC ("Choice") owned solely by the husband-debtor. *Id.* at 840-41. Choice granted creditor a security interest in its assets. *Id.* The debtors then "executed an elaborate series of transfers and sales in an effort to place their assets beyond the reach of their creditors." *Id.* at 841. The

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[3] In the *Husky* case on remand, the Fifth Circuit did not address whether the debt was "obtained by" the debtor's actual fraud because it held that the bankruptcy court as trier of fact failed to make an inference of fraudulent intent even though its findings were consistent with such an inference. *See Matter of Ritz*, 832 F.3d 560, 569 (5th Cir. 2016). The Fifth Circuit remanded to the bankruptcy court to determine if under Texas law the debtor had committed actual fraud and if the fraud was for debtor's "direct personal benefit" as to render him liable for the corporation's debt. *Id.* If so, the bankruptcy court then had to determine if such liability was nondischargeable under § 523(a)(2)(A). *Id.* On remand, the bankruptcy court held that the debtor had obtained funds, directly or indirectly, from the transfers and thus satisfied the "obtained by" requirement. *In re Ritz*, 567 B.R. 715, 764-65 (Bankr. S.D. Tex. 2017). The ruling of the bankruptcy court would seem to be at odds with the Fifth Circuit's ruling in *Green* given that the debtors in both cases allegedly caused the transfers and received assets as a result of the transfers.

husband caused Choice to transfer assets worth $123,200 to a close corporation owned 100% by the husband, Meyer Insurance ("MI"). *Id.* The husband then purchased a close corporation, Insurance Choices 4 U, Inc. ("IC4U"). *Id.* MI then transferred all of its assets, valued at $385,000, to IC4U for no consideration. *Id.* IC4U then "agreed" to pay the husband $385,000. As a result of these transactions, the entities became insolvent all while the husband was receiving payments from IC4U. *Id.* at 841, 843. The bankruptcy court held that creditor could except from discharge the $123,200 traceable to the creditor's security interest under § 523(a)(2)(A) based on the debtor's indirect transfer of corporate assets. *Id.* at 842. The Ninth Circuit agreed that the creditor satisfied the requirements of § 523(a)(2)(A) for debts obtained by actual fraud but held that the bankruptcy court should have entered a judgment for $385,000, the total value of the assets transferred. *Id.* at 842-44. The Court reasoned:

> If MI had retained the $385,000 in assets, [creditor] would have been able to enforce any judgment against the Meyers, prior to their filing for bankruptcy protection, by executing against Louis Meyer's 100% ownership interest in MI to satisfy $385,000 of its claim. . . . When Louis Meyer indirectly transferred all of MI's assets to another corporation, he . . . depleted the value of his assets to the detriment of his creditors. His shares in MI became worthless as a result of his actions as MI's sole owner and shareholder, while, even after filing for bankruptcy, he continued to receive payments from IC4U.

> In other words, he prevented [creditor] from collecting $385,000 of the debt he owed.

Id. at 843.

The Eleventh Circuit's decision in this case and the Fifth Circuit's opinion in *Green* are at odds with the Ninth Circuit's decision in *Meyer*. The Bankruptcy Court, District Court, and Eleventh Circuit held that because Gaddy was the transferor of assets, SEPH could not prove that Gaddy had obtained money or property through his fraudulent conveyances. However, the debtor in *Meyer* similarly transferred assets (albeit indirectly) that the creditor could have executed on and then obtained money through the payments by IC4U. In this case, SEPH alleged that Gaddy continued to receive benefits from Gaddy Electric even after he transferred away his interest in the entity by having the entity pay personal expenses of Gaddy. App.62a-63a. Gaddy also retained the use and control over other property transferred. App.64a. SEPH asserts that the Eleventh Circuit and lower courts in this case incorrectly narrowed *Husky* to prevent the non-discharge of a transferor's debt for fraudulent transfer even when the transferor is alleged to be both transferor and transferee of the assets transferred. This was the exact issue that went unanswered in *Husky*. *See* 136 S.Ct. at 1589 n.3 ("Ritz' situation may be unusual in this regard because Husky contends that Ritz was both the transferor and the transferee in his fraudulent conveyance scheme, having transferred Chrysalis assets to other companies he controlled. We take no position on that contention here and leave it to the Fifth Circuit to decide on remand whether the debt to Husky was 'obtained by' Ritz' asset-transfer scheme.").

Based on the above case law, the Circuit Courts have held inconsistently in interpreting the "obtained by" requirement of § 523(a)(2)(A). The Court clarified prior inconsistent approaches in *Husky* by making it clear that fraudulent conveyance schemes constitute actual fraud. However, the confusion regarding whether "money, property, services, or an extension, renewal, or refinancing of credit" has been "obtained" by "actual fraud" still exists. Section 523 plays a vital role in advancing one of the underlying purposes of the Bankruptcy Code—protecting the honest but unfortunate debtor while ensuring the dishonest and "fortunate" debtors are not allowed to benefit from their improper conduct. SEPH respectfully requests the Court grant its petition so that it can address the inconsistent approaches taken by Circuit Courts regarding the "obtained by" language in § 523(a)(2)(A).

II. THE ELEVENTH CIRCUIT'S HOLDING THAT A CREDITOR WHO HOLDS AN UNDERLYING DEBT CANNOT UNDER § 523(a)(2)(A) EXCEPT DEBT ARISING FROM FRAUDULENT TRANSFERS COMMITTED BY THE DEBTOR IMPLICATES A CIRCUIT SPLIT AND RUNS COUNTER TO THIS COURT'S PRECEDENT.

The Eleventh Circuit emphasized that Gaddy was already indebted to Vision Bank/SEPH at the time he made the fraudulent transfers at issue.[4] *See* App.8a. The Eleventh Circuit distinguished *Husky* by noting that in *Husky*, "someone other than the

[4] SEPH's allegations regarding Gaddy's fraudulent conduct must be accepted as true for purposes of this petition given that the Bankruptcy Court granted a motion for judgment on the pleadings. *See Perez v. Wells Fargo N.A.*, 774 F.3d 1329, 1335 (11th Cir. 2014).

bankruptcy debtor initially owed a debt for which the bankruptcy debtor later became at least partially liable." App.9a. SEPH alleged that "[t]he Debtor's actual fraud in connection with these fraudulent transfers is an exception to discharge to the extent of those transfers under 11 U.S.C. § 523(a)(2)(A),"[5] but the Eleventh Circuit held that SEPH could not except the debt owed by Gaddy to the extent of the fraud. App.10a-11a. The court concluded that:

> [T]he Water's Edge debt existed long before Gaddy began transferring his assets, and that debt is an ordinary contract debt that did not arise from fraud of any kind. SEPH presents no binding authority that supports its assertion that a debtor's fraudulent conveyance of assets in an attempt to avoid collection of a preexisting debt renders that preexisting debt exempt from discharge under § 523(a)(2)(A).

App.11a. This holding also implicates a Circuit split between the Eleventh and Ninth Circuits.

In *Meyer*, the debtors also had personally guaranteed the underlying debt that the debtors avoided through fraudulent transfer. *See* 869 F.3d at 840-41. Even so, the Ninth Circuit held that the debtors' fraudulent transfer liability under Washington's Uniform Fraudulent Transfer Act constituted an exception to discharge to the extent of the fraudulent transfers made. *See id.* at 844. The Seventh Circuit has also recognized that the debtor's commission of a fraudulent transfer creates a new debt to the extent of the transfer. *See McClellan v. Cantrell*, 217 F.3d 890, 895

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[5] *See* App.70a.

(7th Cir. 2000) ("If, however, he had rendered the debt uncollectible by making an actually fraudulent conveyance of the property that secured it, his actual fraud would give rise to a new debt, nondischargeable because created by fraud."). Nothing in the language of § 523(a)(2)(A) restricts a finding of non-discharge if the debtor committing the separate fraud was also liable to the creditor prior to participating in the fraudulent transfer. On the contrary, to the extent a debtor obtains "money, property, services, or an extension, renewal, or refinancing of credit" by committing actual fraud, the debt created by such fraud is rendered nondischargeable.

Furthermore, the Eleventh Circuit's opinion runs counter to this Court's precedent in *Cohen v. de la Cruz*, 523 U.S. 213 (1998). In *Cohen*, the Court noted that the exception to discharge for actual fraud extends beyond the money or property received as a result of the fraud. *See id.* at 218. The Court held that treble damages and attorneys fees awarded as a result of fraud are nondischargeable under § 523(a)(2)(A). *Id.* at 218. The Court discussed the operation of § 523(a)(2)(A) 's "obtained by" requirement:

> [T]he phrase "to the extent obtained by" in § 523(a)(2)(A), as the Court of Appeals recognized, does not impose any limitation on the extent to which "any debt" arising from fraud is excepted from discharge. "[T]o the extent obtained by" modifies "money, property, services, or . . . credit"—not "any debt"—so that the exception encompasses "any debt . . . for money, property, services, or . . .credit, to the extent [that the money, property, services, or . . . credit is] obtained by" fraud. The phrase

> thereby makes clear that the share of money, property, etc., that is obtained by fraud gives rise to a nondischargeable debt. Once it is established that specific money or property has been obtained by fraud, however, "any debt" arising therefrom is excepted from discharge.

Id.

The Bankruptcy Court, District Court, and Eleventh Circuit all emphasized that the underlying debt owed by Gaddy arose from guaranties rather than fraudulent conduct. *See* App.11a, App.23a, App.36a. However, the precedent of *Cohen* provides that once money, property, or services are obtained by fraud, any debt traceable to the fraud is nondischargeable. In this case, SEPH alleged that Gaddy continued to receive benefits derived from the assets transferred. The fact that there was an underlying debt owed by Gaddy does not change the fact that Gaddy obtained money and other benefits via his fraud. At a trial on the merits of SEPH's claims if remanded, SEPH would be able to recover a non-discharge judgment beyond just the money received, which could include punitive damages and attorneys' fees under the AUFTA. *See SE Property Holdings, LLC v. Judkins*, 822 Fed. Appx. 929 (11th Cir. 2020) (affirming award of punitive damages against fraudulent transferor and transferee); Ala. Code § 8-9A-7(a)(3)("In an action for relief against a transfer under this chapter, the remedies available to creditors,. . . include: Subject to applicable principles of equity and in accordance with applicable rules of civil procedure, . . . Any other relief the circumstances may require.").

It makes no logical sense to distinguish between debtors who commit fraud and obtain money or property through the fraud after incurring an underlying debt to the creditor and those whose sole debt to the creditor arose from the fraud. Yet that is what the Eleventh Circuit and lower courts did in this case. Debtors in both cases constitute dishonest debtors whom the Bankruptcy Code is not designed to protect, but the Eleventh Circuit's judgment would offer protection to some dishonest debtors and not others based on an arbitrary distinction of whether the dishonest debtor owed debt to the creditor before committing fraud. SEPH's petition seeks Court review to reverse a decision of the Eleventh Circuit that protects a dishonest and fortunate debtor. Therefore, SEPH respectfully requests the Court grant the petition so that it can address these vital issues of bankruptcy law.

CONCLUSION

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

Respectfully submitted,

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JANUARY 29, 2021