No. 20-457

In the
# Supreme Court of the United States

MARKETGRAPHICS RESEARCH GROUP, INC.,
*Petitioner*,

v.

DAVID PETER BERGE,
*Respondent.*

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

## BRIEF OF *AMICUS CURIAE* OF COMMERCIAL LAW LEAGUE OF AMERICA IN SUPPORT OF PETITIONER


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## IDENTITY AND INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37, the Commercial Law League of America ("CLLA") respectfully submits this brief amicus curiae in support of Petitioner MarketGraphics Research Group, Inc.[1]

Founded in 1895, the CLLA is the nation's oldest organization of attorneys, collection agencies, judges, accountants, trustees, turnaround managers and other credit and finance experts working in the commercial law, bankruptcy and insolvency fields. CLLA is a leader in providing legal and educational services to the business and credit communities. CLLA members are experienced professionals who regularly provide counsel about issues regarding the impact of bankruptcy filings on the credit community and individual clients. CLLA is a trusted voice in the credit community and maintains a reputation as being an honest broker on behalf of both creditors and debtors in navigating the commercial business environment. CLLA submits that this professional experience on the subject of the Petition will provide a useful additional

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[1] Pursuant to this Court's Rule 37.2, all parties with counsel listed on the docket have consented to the filing of this brief. Counsel of record for all listed parties received notice at least 10 days prior to the due date of the Amicus Curiae's intention to file this brief.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

viewpoint to assist the Court in its consideration of this case.

## SUMMARY OF ARGUMENT

11 U.S.C. §523(a)(6) excepts from discharge in bankruptcy "any debt … for willful and malicious injury by the debtor to another entity or to the property of another entity." In *Kawaauhu v. Geiger*, 523 U.S. 57, (1998), this Court held that the "willful and malicious injury" exception applies only to "acts done with the actual intent to cause injury." *Id.* at 61. There is now a split in eleven Circuit Courts of Appeal in applying this holding to subsequent cases, resulting in a lack of uniformity in the application of law, with the result that the outcome of such cases can depend entirely upon the circuit in which the underlying bankruptcy case was filed.

Both debtors and creditors are left in substantial doubt regarding whether conduct alleged – or, commonly, found to support a damages verdict at a trial in state or federal court – constitutes a willful and malicious injury. Amicus urges the Court to grant certiorari in this case in order to address the deep and substantial split in the circuits and provide much-needed uniformity in applying the Bankruptcy Code.

## REASONS FOR GRANTING THE WRIT

### I. Circuits are split on how to implement 11 USC §523(a)(6)

The Bankruptcy Code is intended to provide "a fresh start to the honest but unfortunate debtor." *Marrama v. Citizens Bank of Massachusetts*, 549 U.S. 365, 367, 127 S.Ct. 1105, 166 L.Ed.2d 956 (2007). The Code recognizes that not all debtors are or should be entitled to a fresh start from all debts. *Bullock v. BankChampaign, N.A.* , 569 U.S. 267, 275-76, 133 S.Ct. 1754 1760, 185 L.Ed.2d 922 (2013) (discussing a variety of exceptions from discharge and the policy reasons behind them). Debts arising from intentional wrongful acts of a debtor are among those which Congress expressly excepted from that fresh start. "A discharge under … this title does not discharge an individual debtor from any debt – for willful and malicious injury by the debtor to another entity or to the property of another entity." 11 USC § 523(a)(6). In its last examination of the statutory exception from discharge for debts arising from "willful and malicious injury," this Court determined that "nondischargeability takes a deliberate or intentional injury, not merely a deliberate or intentional act that leads to injury." *Kawaauhau v. Geiger*, 523 U.S. 57, 61, 118 S.Ct. 974, 140 L.Ed.2d 90 (1998). This Court in *Geiger*, addressing whether a damage award arising from professional malpractice could be excepted from the discharge, ultimately held that "debts arising from recklessly or negligently inflicted injuries do not fall within the compass of §523(a)(6)." *Geiger*, 523 U.S. at 64. Circuit courts continue to interpret the meaning of

"willful and malicious injury" differently from each other, resulting in the "deep circuit split" that Petitioner asks the Court to address.

The split in the circuits creates uncertainty and inconsistency in two ways. The first inconsistency is a disagreement as to exactly what elements a creditor must prove to successfully demonstrate that a debtor caused a "willful and malicious injury." Petitioner characterizes this split as whether there is a unitary standard or a two-pronged standard, but a review of the cases also demonstrates inconsistency as to how exactly to apply either test. *Cf. In re Miller,* 156 F.3d 598, 603-606 (5th Cir. 1998); *In re Williams*, 337 F.3d 504, 509 (5th Cir. 2003) with *In re Jercich*, 238 F.3d 1202, 1208-09 (9th Cir. 2001) and *In re Su*, 290 F.3d 1140, 1145-47 (6th Cir. 2002) (disagreement as to elements and standard for malice). The second inconsistency is whether a "willful and malicious injury" can be proven using the objective likelihood of harm or if subjective awareness of that harm is needed. *Compare In re Miller*, 156 F.3d 598, 603-606 (5th Cir. 1998) *with In re Jercich*, 238 F.3d 1202, 1208-09 (9th Cir. 2001) and *In re Su*, 290 F.3d 1140, 1145-47 (6th Cir. 2002) (disagreement as to objective v. subjective standards for proving "substantial certainty of harm). The circuit split and the inconsistency in the application of the law is clear. This Court should take up this case in order to resolve these disparate approaches.

## II. The circuit split results in unnecessary additional litigation to establish a creditors' right to recover or a debtor's right to discharge.

Petitioner fully outlines the nature of the split; Amicus writes to emphasize the need for this Court to address the circuit split. Clarity regarding both the legal standard to be applied and the evidence required to meet the standard(s) is necessary to prevent litigants from unnecessarily expending significant resources. In the typical §523(a)(6) case, as in this case, the parties litigate the debtor's conduct in civil court for a number of years. If the essential elements of the tort claim or statutory violation are proven, the result is a damage award in favor of the creditor. The debtor then files bankruptcy and the creditor initiates an adversary proceeding to have the judgment award held nondischargeable. The creditor argues that under the doctrine of collateral estoppel, the trial court judgment establishes a willful and malicious injury, or at least some of the elements thereof. However, the essential elements of the tort claim or statutory violation proven at trial may or may not be congruent with the particular circuit's analysis of what constitutes "willful and malicious injury" under §523(a)(6). As a result, in some circuits, some or all of the trial court's findings are not given preclusive effect and the claims must be re-litigated in the bankruptcy court, whereas in other circuits that preclusive effect is established.

In the *Berge* case before the Court, the original trial court decision specifically ruled that the Active

Defendants infringement was willful. [Petition Appendix G, p. 10, par. X]. Initially, the bankruptcy court held that "[t]he debtor having conceded all other elements of 11 U.S.C. §523(a)(6), the only issue at trial was whether the debtor acted with malice." [Petition Appendix D, p. 3] On remand from the District Court, the bankruptcy court found, and the Sixth Circuit agreed, that "two of the key claims at issue … each defined 'willful' more broadly than did §523(a)(6)." *Berge,* 953 F.3d at 913. By affirming the dismissal of the action, the Sixth Circuit did not provide Petitioner with an opportunity to prove that Respondent's conduct was willful as the term is now defined by the Sixth Circuit. In effect, Petitioner is penalized for its failure to prove something in the original trial which was not at issue there.

The different approaches as to intent among the circuits is central to the circuit split that should be resolved. For example, the subjective intent requirement adopted by the Sixth Circuit (along with the First, Eighth, Ninth and Tenth) will almost always result in additional litigation and creates a much higher burden of proof for the creditor. Extremely rare are the cases where the debtor has admitted having a subjective intent to injure (similar to the very few cases where a debtor admits to fraud). "Because debtors generally deny that they had a subjective motive to cause harm, most cases that hold debts to be non-dischargeable do so by determining whether "[the debtor's] actions were at least substantially certain to result in injury." *In re Vollbracht*, 276 Fed. Appx. 360, 362 (5th Cir. 2007) (*citing In re Miller*, 156 F.3d 598, 606 (5th Cir. 1998)). But in those circuits where

subjective intent is required, the trial court's determination of willfulness or malice often will not be considered conclusive in the trial court or preclusive in an ensuing §523(a)(6) bankruptcy proceeding.

While Petitioner here may benefit from having another opportunity to present evidence, the need for such additional litigation arises from the absence of clear standards for "willful and malicious injury." There is uncertainty for the parties to an adversary proceeding in the bankruptcy court as to both the elements and analysis required for proving the action and whether the creditor must prove, and overcome the testimony of the debtor denying, the subjective intent of the debtor to cause harm. The filing creditor has already been victimized by the debtor and suffered substantial harm. The need to re-litigate these issues in the bankruptcy court imposes substantial additional cost on parties, and should be addressed by this Court.

## III. A clear definition of willful and malicious injury and the burden of proof required will assist creditors across a wide spectrum of legal actions.

### A. PERSONAL INJURY

While *Geiger* established that reckless actions alone are not sufficient to except the damages arising from them, personal injury-related torts are a category of claims that practitioners must be able to properly analyze when advising someone about bankruptcy as a viable option or when advising someone as to whether a debt is exempt from discharge. Take the example of a club goer that finds pills in a parent's cabinet and

decides to hand them out to patrons at a night club. Or a street drug seller lacing heroin with fentanyl without notifying the recipient. In both scenarios the person involved is not only committing a crime, but is also committing a tort whereby people are likely to be harmed. *See e.g. United States v. Harris*, 774 Fed. Appx. 937, 941 (6th Cir. 2019) (quoting the Sentencing Commission's finding that "Because of fentanyl's extreme potency, the risk of overdose death is great, particularly when the user is inexperienced or unaware of what substance he or she is using"). In both scenarios, while the actor may not subjectively intend to cause a specific injury, the objective risk is substantial and justification non-existent.

### B. INVENTORY FINANCE

The tort of conversion regularly occurs in the context of inventory financing. In the typical "floor plan" financing agreement, the proceeds from the sale of inventory are to be held in trust when received and then paid to the creditor. If a debtor misapplies those proceeds, the inventory is said to be sold "out of trust" and such action is considered a conversion of the secured creditor's property. *See e.g. Ford Motor Credit Co. v. Owens*, 807 F.2d 1556, 1559-60 (11th Cir. 1987) (upholding district court finding that sale out of trust was willful and malicious injury caused by both dealership entity and entity president). Although the Eleventh Circuit excepted the debt from discharge in the foregoing case, the same issue has been the subject of "extensive litigation" and other circuits disagree with the Eleventh Circuit. *See In re Morrison*, 110 B.R. 578, 582 (M.D. Fla. Bankr. 1990). *See also In re Phillips*,

882 F.2d 302, 305 (8th Cir. 1989) (holding that debtor may not be liable under 11 USC § 523(a)(6) if inventory was sold out of trust if debtor subjectively thought the money would eventually be paid back).

C. UNFAIR COMPETITION

As in the case at bar, business torts are also commonplace. Employers often provide employees with contacts and business introductions needed to develop relationships with customers for the benefit of the employer, but always at the risk that an employee will usurp that relationship for his own benefit. The employee often does not have the capital available to pay a judgment entered against him for the business tort, and bankruptcy frequently follows. The employee, as here, might claim that the intent was not to hurt the employer's business so much as to start his or her own. The harm to the existing business nonetheless may be catastrophic and any reasonable person should know that such harm is the likely result.

D. PONZI SCHEMES

The primary motivation of a Ponzi scheme is wealth-generation; the objective result is substantial financial harm to investors. Bernie Madoff, after being in prison, told Harvard Professor Eugene Soltes "I, sort of, you know, I sort of rationalized that what I was doing was OK, that it wasn't going to hurt anybody." https://hbswk.hbs.edu /item/bernie-madoff-explains-himself. In a circuit which requires proof of the subjective intent to injure, it is not clear that Madoff's statement would be sufficient, even though he plead guilty to fraud. *See In re Bernard L. Madoff*

*Investment Securities, LLC*, 515 B.R. 117, 125 (S.D.N.Y. Bankr. 2014). Another statement by Mr. Madoff - "I knew what I was doing [was] wrong, indeed criminal"- may not be sufficient to conclusively demonstrate malice as interpreted by some of the circuits. *Id*.

## IV. A clear definition of willful and malicious injury is needed to provide guidance on the application of collateral estoppel.

By defining "willful and malicious injury" to require the subjective intent to injure on the part of the debtor, the Sixth Circuit rejected the conclusive effect of the District Court's finding that the debtor had acted "willfully" infringing Petitioner's copyrights. The Sixth Circuit specifically held that the Copyright Act "defined 'willful' more broadly than did §523(a)(6)." *Berge,* 953 F.3d at 913. As §523(a)(6) contains no definition of willfulness, the Sixth Circuit is necessarily creating one and then using it to disregard a trial court finding. Where the bankruptcy court is the initial trier of fact on this issue, it would be appropriate for the bankruptcy court to make a determination of willfulness, but where another court has determined that the injury satisfied the element of "willfulness" as found in the applicable state or federal law, then that determination should be given preclusive effect.

Petitioner describes the need for clarity "so that [Plaintiffs] can draft judgments and propose judicial findings sufficient to trigger the exception if the defendant later files for bankruptcy." [Petition, p. 30] In the current state of jurisprudence, it is not clear

what findings would be sufficient to trigger the exception.

Moreover, the *Berge* decision appears to contain an exception to its own rule requiring evidence of subjective intent, which will create additional uncertainty regarding trial court decisions. "Put differently, the debtor must desire to cause consequences of his act or believe that the consequences are substantially certain to result from it. A debtor need not actually admit his intent; intent may be inferred from the circumstances of the injury." *Berge*, 953 F.3d at 915 (internal quotes omitted; emphasis added). The first sentence is a clear statement of the subjective intent requirement. The second, though, suggests that where the injury is sufficiently egregious, the subjective intent requirement may be set aside, creating an exception which can consume the rule. The evidence at trial showed that 75% of Petitioner's customers were lured away by the "willful or knowing" misappropriation of customers and copyrights. *Berge,* 953 F.3d at 911. Had the trial court known that the "circumstances of the injury" could be a factor in whether its damage award could be non-dischargeable, it might have emphasized the resulting destruction of the creditor's business as additional support for finding that the acts were intentional.

## V. The circuit split creates different results depending on where the bankruptcy case is filed.

Where the debtor files her bankruptcy case presently determines how the "willful and malicious

injury" exception will be applied. Petitioner challenges the determination by the Sixth Circuit that willful and malicious are two separate elements to be proven and that the requisite showing for a finding of willfulness is the subjective intent of the debtor to cause injury. Respondent Berge's co-Defendant, Donald Berge, filed bankruptcy in Mississippi prior to the District Court decision (N.D. MS Case No. 13-13248-JDW)[Petition Appendix G, p. 8]. As noted above, the Fifth Circuit applies a very different standard for determining "willful and malicious injury" and in that circuit the findings by the District Court would be viewed through the lens of whether "'the debtor intentionally took action that necessarily caused, or was substantially certain to cause, the injury." *In re Miller*, 156 F.3d 598, 604 (5th Cir. 1998) (quoting *In re Delaney*, 97 F.3d 800 (5th Cir. 1996)).

Just across the Mississippi River from Memphis is Arkansas, which lies in the Eighth Circuit. In a 2016 opinion, the Eighth Circuit reviewed a case on very similar facts – creation of a competing business in violation of contractual and common law duties, resulting in a damage award – and found that the trial court's decision was collateral estoppel on both willfulness and maliciousness (the Eighth Circuit having also adopted the position that §523 (a)(6) required both willful and malicious as elements). *Roussel v. Clear Sky Properties, LLC; LuAnn Deere*, 829 F.3d 1043 (8th Cir. 2016). As parts of both Mississippi and Arkansas are within the geographical area of Greater Memphis, such that three people sharing office space can be residents of three different Circuits, the potential exists for three different interpretations of

the same facts, depending upon the residence of each of the debtors. Federal law must be uniformly applied in federal courts. Amicus urges the Court to grant certiorari in this case to establish that uniformity in application of the Bankruptcy Code.

Petitioner contends that the Sixth Circuit erred in answering each of the Questions Presented. Particularly as a result of courts utilizing multiple interpretations of willfulness (as highlighted in the Petition at pages 15-20) and malice (see Petition at pages 36-37), creditors would find more equitable recourse for the harms they have suffered, and would be best served by uniformity in application of the law. Accordingly, Amicus contends that certiorari is warranted to resolve the questions and that a clear ruling on these issues will substantially benefit debtors and creditors nationwide. Statutory language, to be effective, needs to provide bright lines wherever possible.

This Petition for Certiorari provides the Court with a proper vehicle to bring statutory clarity in this critically important bankruptcy matter, where up to this point the circuits have reached several different answers. The case before the Court urged by Petitioners is sufficient, factually and legally, for the Court to hear the concerns involved relating to the circuit split and to resolve such issues for the benefit of the nation and the court system. Amicus has confidence in this Court's ability to define terms which have been in the legal lexicon for centuries brightly enough to serve.

## CONCLUSION

For the reasons stated above, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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