No. 21-1430

In The
Supreme Court of the United States

JAMES K. COLLINS, M.D.,

Petitioner,

v.

MICHELL ZOLNIER,

Respondent.

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

KIRBY D. HOPKINS
Counsel of Record
ALEXIS L. ESPEJEL
HOPKINS CENTRICH
8701 New Trails, Suite 200
The Woodlands, Texas 77381
Telephone: (281) 210-0140
Facsimile: (281) 369-5597
Email: hopkins@hopkinscentrich.com

Attorneys for Respondent

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

PARTIES TO THE PROCEEDING BELOW

Petitioner here, and Appellee below, is James K. Collins, M.D., an individual residing in Montgomery County, Texas.

Respondent here, and Appellant below, is Michell Zolnier, an individual residing in Montgomery County, Texas.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents respectfully file this Brief in Opposition to the Petition for Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at *Collins v. Zolnier (In re Zolnier)*, No. 21-20260, 2021 WL 5778461 (5th Cir. Dec. 6, 2021). Pet. App. 1-15. The United States District Court for the Southern District of Texas entered Findings of Fact and Conclusions of Law on April 9, 2021. Pet. App. 19-22. The United States Bankruptcy Court for the Southern District of Texas entered a Final Judgment on August 22, 2016. Pet. App. 16-18.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on December 6, 2021. *Collins v. Zolnier (In re Zolnier)*, No. 21-20260, 2021 WL 5778461 (5th Cir. Dec. 6, 2021). This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

Section 523(a)(2)(A) of the Bankruptcy Code provides, in relevant part:

> (a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt –
>
> * * *
>
> (2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by –
>
> (A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition[.]
>
> * * *

11 U.S.C. § 523(a)(2)(A).

STATEMENT OF THE CASE

A. Legal Background

A creditor has the burden of proof in an action to determine the dischargeability of a debt under § 523(a). *Grogan v. Garner*, 498 U.S. 279, 286 (1991). Through discharge, the Bankruptcy Act provides "a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt." *Local Loan Co. v. Hunt*, 292 U.S.

234, 244 (1934). To this end, the courts have narrowly construed exceptions to discharge against the creditor and in favor of the bankrupt. *Gleason v. Thaw*, 236 U.S. 558, 562 (1915).

Section 523(a)(2)(A) exempts from a debtor's discharge "any debt . . . for money, property, services, or an extension, renewal, 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). That is, "it prevents discharge of 'any debt' respecting 'money, property, services, or . . . credit' that the debtor has fraudulently obtained." *Cohen v. de la Cruz*, 523 U.S. 213, 218 (1998). "Actual fraud" as used in § 523(a)(2)(A) "encompasses forms of fraud, like fraudulent conveyance schemes, that can be effected without a false representation." *Husky Internat'l Electronics, Inc. v. Ritz*, 578 U.S. 356, 359 (2016). "Fraudulent conveyances typically involve 'a transfer to a close relative, a secret transfer, a transfer of title without a transfer of possession, or grossly inadequate consideration.'" *Id.* at 361. There is no evidence in the record that Michell Zolnier disposed of or parted with Collins' secured assets, and pursuant to the law set forth by this Court in *Husky*, the Fifth Circuit correctly affirmed the judgment of the bankruptcy court.

B. Factual Background

In May 2003, Michell Zolnier, William Zolnier, and Collins entered into a commercial lease for the commercial real property located at 5814 FM 1488, Magnolia, TX 77354, called the "Big Red Barn." *Collins v.*

Zolnier (In re Zolnier), No. 21-20260, 2021 WL 5778461, *1 (5th Cir. Dec. 6, 2021). Collins is the owner of the property, and the Zolniers operated a furniture business on the premises called Mattresses & More. *Id.* In 2007, the Zolniers fell behind on their rent and Collins agreed to work with them, and for the next two years, the Zolniers leased the Big Red Barn on a month-to-month basis. *Id.* In 2009, the parties renewed their lease and the Zolniers agreed to repay their rental delinquency. *Id.*

> Subsequently, the Zolniers did not pay their arrearage, causing Dr. Collins to sue them in state court for back rent in early 2012. Pursuant to that litigation, Dr. Collins and the Zolniers executed an agreement under Texas Rule of Civil Procedure 11 in which the Zolniers agreed not to "sell, mortgage, transfer, liquidate or distribute" any of their inventory encumbered by Dr. Collins' lien without first providing him ten days' notice. After two years of litigation, the parties attempted mediation on February 18, 2014. Settlement talks failed, however, and within hours, the Zolniers began removing inventory from the Big Red Barn. The Zolniers say they only removed items that were on consignment, awaiting delivery, or on layaway. Allegedly, they left "about $105,000 worth of merchandise" in the store. Dr. Collins, in contrast, says the Zolniers removed their entire inventory, including items encumbered by his lien, in violation of the Rule 11 agreement.

Id.

C. Disposition in the courts below

On February 6, 2012, Collins sued the Zolniers under Cause No.12-02-01349-CV, in the 284th Judicial District of Montgomery County, Texas. Collins asserted numerous causes of action including breach of contract, declaratory judgment, quantum meruit, unjust enrichment, fraud, and sought a temporary restraining order and a writ of attachment, plus claims for attorney's fees and costs. The trial court entered the judgment on the jury's verdict on August 27, 2014. Pet. App. 20. The jury awarded Collins $218,649.15 plus $23,300 in attorney's fees plus pre- and post-judgment interest for unpaid rent. *Id.*

The Zolniers filed for relief under Chapter 7 of the Bankruptcy Code on October 28, 2014. Pet. App. 20. Collins filed a nondischargeability action on February 2, 2015, in the United States Bankruptcy Court for the Southern District of Texas, Houston Division, under Adv. No. 15-03051. Collins sought a declaration that the judgment debt was non-dischargeable under 11 U.S.C. §§ 523(a)(2) and (a)(6).

After several days of testimony, the bankruptcy court issued an oral ruling that the debt was dischargeable and denied all of Collins' relief. Pet. App. 16-18. The court did not enter separate findings of fact or conclusions of law into the record. A final judgment was entered on August 22, 2016. Pet. App. 16-18. The bankruptcy court addressed Collins' claim under 523(a)(2)(A) and specifically found,

> In closing there has been an additional argument that's been made that the fraudulent transfer of property can sustain a claim under 523(a)(2)(A). *And I agree with that concept; it's just simply been misapplied in this case*. The facts don't come anywhere close to supporting the conclusion that there was a fraudulent transfer sufficient to establish a claim under 523(a)(2)(A). So, I will deny the plaintiff's claim for a holding of nondischargeability under 523(a)(2)(A).

ROA.1570 (italics added).[1]

Collins appealed the bankruptcy court's judgment to the district court. The appeal involved a review of the bankruptcy court's determination that Collins' state court judgment was dischargeable under 11 U.S.C. §§ 523(a)(2) and (a)(6). Pet. App. 19-22. In the Findings of Fact and Conclusions of Law, the district court ruled in favor of Collins, finding that the bankruptcy court's decision that the judgment debt was dischargeable was "predicated on an erroneous decision that what the Zolniers were doing was not intentional diversion of assets. The Zolniers engaged in an intentionally wrongful conveyance scheme that impaired Dr. Collins' ability to collect his debt, so committed 'actual fraud,' and such debt shall not be discharged in bankruptcy." Pet. App. 19-22. The district court reversed and vacated the bankruptcy court's judgment. Pet. App. 21.

---

[1] "ROA" refers to the record on appeal in the Fifth Circuit.

On May 10, 2021, Michell Zolnier appealed the district court's decision to the United States Court of Appeals for the Fifth Circuit. After full briefing, the court issued an opinion on December 6, 2021. Pet. App. 1-15. The Fifth Circuit held that the bankruptcy court "correctly determined that Michell Zolnier did not commit 'actual fraud' under § 523(a)(2)(A), it erred to the extent it found that she did not willfully and maliciously injure Dr. Collins under § 523(a)(6). However, we agree with the bankruptcy court that Dr. Collins failed to prove damages as to his § 523(a)(6) claim." *In re Zolnier*, 2021 WL 5778461, *5. Accordingly, the Fifth Circuit reversed the district court's decision and affirmed the bankruptcy court's judgment. *Id.*

SUMMARY OF THE ARGUMENT

This Court should deny certiorari because petitioner has failed to show that the Fifth Circuit's decision below is in direct conflict with the Bankruptcy Code's meaning of "actual fraud" under 11 U.S.C. § 523(a)(2)(A) and/or this Court's decision in *Husky*.

ARGUMENT

Collins asserts four reasons that this Court should grant certiorari: (1) a court of appeals of the United States has entered a decision in conflict with the decision of this Court on the exact same important matter of law creating a direct schism in the law; (2) the circuit

courts have expressly divided on the meaning of "actual fraud" under § 523(a)(2)(A), that this Court resolved in *Husky* only for the controversy to be resurrected in the instant case; (3) this issue is important because it recurs throughout the lower courts, and the position espoused by the Fifth Circuit subverts the equitable purposes of the Bankruptcy Code and turns bankruptcy law into an engine for fraud; and (4) the decision below is wrong because it misinterprets the statutory language and fails to recognize that the common-law concept of "actual fraud" codified in § 523(a)(2)(A) and this Court encompasses deliberate fraudulent transfer schemes that are actually intended to cheat a creditor. For the reasons set forth below, Zolnier respectfully asserts this petition for certiorari should be denied.

I. No conflict with *Husky*

In four subparts, Collins asserts the Fifth Circuit's decision in this matter is "in direct conflict with this Court's precedent and 11 U.S.C. § 523" because it disregards this Court's decision in *Husky*. Collins argues Zolnier's alleged "fraudulent transfer under both state and bankruptcy law constituted 'actual fraud' under § 523(a)(2)(A)'s exception to discharge."

A. Transferor/Recipient

Collins focuses on this Court's language in *Husky*, which states:

> [i]t is of course true that a transferor does not "obtain" debts in a fraudulent conveyance. But the recipient of the transfer – who, with the requisite intent, also commits fraud – can "obtain" 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 nondischargeable under § 523(a)(2)(A).

Husky, 578 U.S. at 365-66. Collins contends Zolnier's movement of the furniture out of the Big Red Barn is "directly traceable to the fraudulent conveyance" and "the district court properly held Michell Zolnier committed fraud under *Husky* for the intentional and wrongful conveyance that impaired Dr. Collins' ability to collect her debt owed to him."

The Fifth Circuit specifically addressed the "obtained by" language in the *Husky* opinion and its inapplicability to the facts of this case as follows:

> Although Dr. Collins says the Zolniers fraudulently transferred secured assets to avoid his lien, neither the record nor law support that conclusion. To be sure, the Zolniers intentionally sought to hinder Dr. Collins' collection of his collateral. But because there is no evidence that the Zolniers disposed of or parted with those assets, Dr. Collins failed to prove a 'transfer,' which is an essential element of a fraudulent transfer claim. . . . *Husky* does not require otherwise despite its holding that 'actual fraud' in § 523 (a)(2)(A) covers 'forms of fraud, like fraudulent conveyance schemes,

> that can be effected without a false representation.' In *Husky*, it was undisputed that the director and partial owner of a corporate debtor 'drained [his company] of assets it could have used to pay its debts to creditors . . . by transferring large sums of . . . funds to other entities [the director] controlled.' In other words, there was no question that the director transferred assets. Dr. Collins, in contrast, failed to show that the Zolniers similarly 'dispos[ed] of or part[ed] with an asset or an interest in an asset.' . . . In any event, even if the Zolniers had engaged in a fraudulent transfer scheme, Dr. Collins' claim would fail because he 'has not produced any facts to suggest that [they] *obtained* a debt from [their] alleged fraud,' as § 523(a)(2)(A) requires. To review, for a debt to be excluded from discharge under § 523(a)(2)(A), it must be, among other things, '*obtained by* . . . false pretenses, a false representation, or actual fraud. The Court in *Husky* observed that 'it is of course true that the transferor does not 'obtain' debts in a fraudulent conveyance.' Instead, only 'the recipient of the transfer . . . can 'obtain' assets 'by' his or her participation in the fraud.' Here, to the extent any asset transfer occurred, the Zolniers were the transferors, not the recipients. Section 523(a)(2)(A) is thus inapplicable.

In re Zolnier, 2021 WL 5778461, *3. (citations omitted). As set forth by the Fifth Circuit below, pursuant to this Court's guidance in *Husky*, Collins failed to prove a transfer, and Section 523(a)(2)(A) is inapplicable.

B. No impairment of the creditor's ability to collect a debt

Collins argues that the Fifth Circuit erred because "rather than attempting to categorize the Zolniers' position relative to converting Dr. Collins' collateral to themselves, courts should directly answer the right question – whether the 'debtor's transfer of assets impaired a creditor's ability to collect his debt.'" Collins then asserts that because "the Fifth Circuit recognizes Michell Zolnier obtained a personal benefit by converting and transferring Dr. Collins' collateral to herself, just as in *Husky*, so under its own precedent, Michell Zolnier committed a fraudulent transfer under § 523(a)(2)(A) and Dr. Collins' debt should not be dischargeable."

The Fifth Circuit agreed with the district court below as follows:

> Michell Zolnier is culpable for injuring Dr. Collins. Although Michell Zolnier testified that she and William only removed "stuff that was already purchased" and therefore excluded from the scope of their agreements with Dr. Collins, the bankruptcy court found otherwise when it observed "that Mr. Zolnier did improperly take property that was subject to [Dr. Collins'] liens." It is undisputed that Michell Zolnier actively participated in that conduct.

In re Zolnier, 2021 WL 5778461, *4. But, there is no evidence that Michell Zolnier disposed of or parted with the property that was the subject of Collins' lien.

Because there is no evidence, Collins failed to prove that there was a "transfer." Furthermore, the Fifth Circuit recognizes "[a]lthough the Zolniers may have literally physically 'conveyed' or 'transferred' secured property from one location to another to evade Dr. Collins' lien, holding that conduct was a 'fraudulent transfer' constituting 'actual fraud' under § 523(a)(2)(A) would be inconsistent with the principle that '[e]xceptions to dischargeability should be construed in favor of the debtor.'" *In re Zolnier*, 2021 WL 5778461, *5 fn. 3.

C. *In re Life Partners*

Collins makes an obscure argument that the Fifth Circuit erred because it cited *In re Life Partners Holdings, Inc.*, 926 F.3d 103 (5th Cir. 2019), for the elements of fraudulent transfer under Texas law, and then followed it with the definition of "transfer" under Texas law pursuant to the Texas Business and Commerce Code § 24.002 (12). Collins asserts that in this case the Fifth Circuit "incorrectly analogizes *Life Partners* to TUFTA § 24.002 (12) law, which has no relevance nor is even referenced in the *Life Partners* opinion." Collins is conjuring an error where there isn't one. The Fifth Circuit simply set forth the elements of a fraudulent transfer under Texas law, and cited *Life Partners* – "Under Texas law, the elements of fraudulent transfer include '(1) a creditor; (2) a debtor; (3) the debtor *transferred* assets shortly before or after the creditor's claim arose; (4) with actual intent to hinder, delay, or defraud any of the debtor's creditors.'" *Zolnier*, 2021

WL 5778461, *3. The court then defined "transfer" under Texas law – "Texas law defines 'transfer' to encompass 'every mode . . . of disposing of or parting with an asset or an interest in an asset,' including 'payment of money, release, lease, and creation of a lien or another encumbrance.' " *Id*. This is simply the court setting out the elements of fraudulent transfer and the definition of transfer. There is nothing close to the Fifth Circuit "not following its own precedent" as alleged by Collins. Collins' argument amounts to nothing more than a little red herring.

D. Failure to prove a "transfer"

Collins asserts, in a vague manner, the Fifth Circuit erred as a matter of law because Collins' debt is not dischargeable. Collins states that under Texas law, "a transfer made or obligation incurred by a debtor is fraudulent as to a creditor . . . if the debtor made the transfer or incurred the obligation with the actual intent to hinder, delay or defraud any creditor of the debtor. TUFTA § 24.005 (a)(10)." Collins then states, in a similarly conclusory manner, that because the court found that the Zolniers intentionally sought to hinder Collins' collection of his collateral, the debt is not dischargeable. But, as stated above, because there is no evidence that the Zolnier, much less Michell Zolnier, disposed of or parted with those assets, Collins failed to prove a 'transfer,' which is an essential element of a fraudulent transfer claim.

II. No Circuit Division on "Actual Fraud"

Collins argues that the Fifth Circuit's decision in this case "re-opens the controversy and the need for this Court to create uniformity in the law" on the "actual fraud" issue in *Husky*. Collins asserts "the Fifth Circuit has held categorically that a false representation is a necessary element of 'actual fraud' under Section 523(a)(2)(A). By contrast, the First and Seventh Circuits have held that 'actual fraud' occurs when a debtor participates in a deliberate fraudulent-transfer scheme with intent to cheat a creditor, even without a false representation."

Collins' argument is a convoluted array of pre-*Husky* circuit cases. Collins begins by stating that the Fifth Circuit "expressly acknowledges that the Seventh Circuit had reached an opposite conclusion from it on the same issue in *McClellan v. Cantrell*, which involved allegations of a similar fraudulent-transfer scheme." Although no citation is given, it appears that Collins' argument is based on the Fifth Circuit's opinion that was reversed by this Court in *Husky.* In *In re Ritz*, the Fifth Circuit found "no subsequent appellate court has adopted the interpretation of Section 523(a)(2)(A) endorsed by the *McClellan* majority, and we decline to do so today." 787 F.3d 312, 317 (5th Cir. 2015), *rev'd and remanded sub nom. Husky Int'l Elecs., Inc. v. Ritz*, 578 U.S. 356 (2016). But, this analysis was before this Court's decision in *Husky*, and is the opinion that was reversed by *Husky*. Collins' discussion of what the Fifth Circuit decided as to *McClellan* prior to the *Husky* decision is without merit.

Collins then recites the findings in *McClellan* and states "the court further reasoned that fraudulent transfers 'may [involve] either constructive or actual' fraud: The fraud 'is constructive if the only evidence of it is the inadequacy of the consideration,' but 'it is *actual*,' and thus non-dischargeable as 'actual fraud' under Section 523(a)(2)(A), 'if the debtor intended by the transfer to hinder his creditors.' " Collins then jumps to the conclusion that "because it holds that 'actual fraud' encompasses fraudulent transfers intended to cheat creditors even without any false representation, the Seventh Circuit's decision in *McClellan* squarely conflicts with the Fifth Circuit's decision below." In *Husky*, this Court cited *McClellan*, "[i]t is of course true that the transferor does not 'obtain' debts in a fraudulent conveyance. But the recipient of the transfer – who, with the requisite intent, also commits fraud – can 'obtain' assets 'by' his or her participation in fraud. . . . Thus, at least sometimes a debt 'obtained by' a fraudulent conveyance scheme could be nondischargeable under § 523(a)(2)(A)." *Husky*, 578 U.S. at 365-66. As set forth above and discussed in the Fifth Circuit on this case,

> Dr. Collins, in contrast, failed to show that the Zolniers similarly 'dispos[ed] of or part[ed] with an asset or an interest in an asset.' . . . In any event, even if the Zolniers had engaged in a fraudulent transfer scheme, Dr. Collins' claim would fail because he 'has not produced any facts to suggest that [they] *obtained* a debt from [their] alleged fraud,' as § 523(a)(2)(A) requires. To review, for a debt

> to be excluded from discharge under § 523(a)(2)(A), it must be, among other things, '*obtained by* . . . false pretenses, a false representation, or actual fraud. The Court in *Husky* observed that 'it is of course true that the transferor does not 'obtain' debts in a fraudulent conveyance.' Instead, only 'the recipient of the transfer . . . can 'obtain' assets 'by' his or her participation in the fraud.' Here, to the extent any asset transfer occurred, the Zolniers were the transferors, not the recipients. Section 523(a)(2)(A) is this inapplicable.'

In re Zolnier, 2021 WL 5778461, *3. (citations omitted). Therefore, the Fifth Circuit's opinion in this matter does not conflict with the Seventh Circuit's pre-*Husky* opinion in *McClellan*.

Collins next argues that the First Circuit's opinion in *Sauer, Inc. v. Lawson*, 791 F.3d 214 (1st Cir. 2015), which follows the reasoning set forth in *McClellan*, creates a "clear and acknowledged circuit split on whether the 'actual fraud' discharge bar of Section 523(a)(2)(A) applies when a debtor deliberately participates in a fraudulent-conveyance scheme, even absent a misrepresentation." Once again, the *Lawson* case was decided pre-*Husky* and must be viewed in light of this Court's subsequent decision in *Husky.* Contrary to Collins' assertion, the First Circuit's opinion in *Lawson* does not provide evidence of a split in the circuits. In fact, case law citing *Husky* and *Lawson* together when discussing dischargeability is common. *See In re Lombard*, 577 B.R. 1, *4-5 (Bankr. D.N.H. 2017), *amended and superseded on other grounds*, 2017 WL 4857416 (Bankr.

D.N.H. 2017); *In re Siverio*, 253 F.Supp.3d 418, 424 (D.P.R. 2017). And contrary to Collins' assertion that this Court should analyze the *Lawson* decision for its enlightening findings as to "actual fraud," the court in *In re Siverio*, finds that the Lawson opinion had a narrower reading of "actual fraud" than the *Husky* opinion. *See In re Siverio*, 253 F.Supp.3d 418, 424 (D.P.R. 2017).

III. *Husky* has settled the law in this matter.

Collins argues that this Court should grant certiorari because the question presented is an important question of federal law that has not been, but should be, settled by this Court. Collins cites to *Lawson* and *McClellan* for their expressions of the significance of the issue, and cites a myriad of bankruptcy cases and exclaims that "the issue had led to disarray in the lower courts." Collins asks this Court to "seize this opportunity to provide needed guidance to the lower courts AND alleviate the confusion and uncertainty that has been resurrected by the Fifth Circuit's rejection of this Court's precedent in *Husky.*"

Collins' argument lacks merit. Despite arguing that the Fifth Circuit rejected this Court's precedent in *Husky*, he misses the fact that the Fifth Circuit in this matter relied heavily on this Court's guidance in *Husky*. Collins bases his argument on citations to pre-*Husky* case law that he claims evidence the confusion in the lower court over "actual fraud," but choses to

ignore that this Court's decision in *Husky* was this Court's guidance to the lower courts on "actual fraud."

IV. The Fifth Circuit correctly reversed the district court.

Collins once again attempts to argue that the Fifth Circuit erred in not affirming the district court. Collins cites to the Fifth Circuit findings that Michell Zolnier engaged in the wrongful transfer of Collins' assets and argues "this Court astutely holds when a debtor engages in an intentionally wrongful conveyance scheme that impairs a creditor's ability to collect the debt, such debt shall not be discharged." But, there is no evidence that Michell Zolnier disposed of or parted with the property that was the subject of Collins' lien. As the Fifth Circuit held, "neither the record nor the law support [a] conclusion [otherwise]." *In re Zolnier*, 2021 WL 5978461, *5. Because there is no evidence, Collins failed to prove that there was a "transfer." Furthermore, the Fifth Circuit recognizes "[a]lthough the Zolniers may have literally physically 'conveyed' or 'transferred' secured property from one location to another to evade Dr. Collins' lien, holding that conduct was a 'fraudulent transfer' constituting 'actual fraud' under § 523(a)(2)(A) would be inconsistent with the principle that '[e]xceptions to dischargeability should be construed in favor of the debtor.'" *Id.* at fn. 3. Therefore, the Fifth Circuit did not err in affirming the bankruptcy court.

CONCLUSION

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

Respectfully submitted,

KIRBY D. HOPKINS
Counsel of Record
ALEXIS L. ESPEJEL
HOPKINS CENTRICH
8701 New Trails, Suite 200
The Woodlands, Texas 77381
Telephone: (281) 210-0140
Facsimile: (281) 369-5597
Attorneys for Respondent