No. 22-346

In The
Supreme Court of the United States

ROBERT F. ANDERSON, AS CHAPTER 7 TRUSTEE FOR INFINITY BUSINESS GROUP, INC.,
Petitioner,

v.

MORGAN KEEGAN & COMPANY, INC., KEITH E. MEYERS,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF BANKRUPTCY TRUSTEES IN SUPPORT OF PETITIONER ROBERT ANDERSON, CHAPTER 7 TRUSTEE

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STATEMENT OF INTEREST OF NABT AS AMICUS CURIAE[1]

The National Association of Bankruptcy Trustees ("NABT" or the "Association") is a non-profit association formed in 1982 to address the needs of chapter 7 bankruptcy trustees throughout the country and to promote the effectiveness of the bankruptcy system as a whole. The membership of NABT consists of approximately 477 Chapter 7 Trustees and 153 Subchapter V Trustees.

In this case, NABT is interested in the proper understanding of the power of an individual trustee to administer an asset of the bankruptcy estate in accordance with the view of the Association about the proper meaning of 11 U.S.C. § 541(a)(3) and its connection to 11 U.S.C. § 544 through 11 U.S.C. § 550. These issues are frequently encountered by members of NABT and its resolution would have widespread influence beyond the dispute presented here.

JURISDICTION

The Amicus adopts the Statement of Jurisdiction in the Brief of Petitioner, Robert F. Anderson.

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[1] Notice pursuant to Sup. Ct. R. 37.2(a) was given to all parties, all parties consented to the NABT filing this amicus brief, no party or counsel for a party helped to draft this brief, and this brief was funded solely by the NABT. Sup. Ct. R. 37.6.

CONSTITUTIONAL AND STATUTORY PROVISIONS

11 U.S.C. § 541. Property of the estate

(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

(2) All interests of the debtor and the debtor's spouse in community property as of the commencement of the case that is-

(A) under the sole, equal, or joint management and control of the debtor; or

(B) liable for an allowable claim against the debtor, or for both an allowable claim against the debtor and an allowable claim against the debtor's spouse, to the extent that such interest is so liable.

(3) Any interest in property that the trustee recovers under section 329(b), 363(n), 543, 550, 553, or 723 of this title.

(4) Any interest in property preserved for the benefit of or ordered transferred to the estate under section 510(c) or 551 of this title.

(5) Any interest in property that would have been property of the estate if such interest had been an interest of the debtor on the date of the filing of the

petition, and that the debtor acquires or becomes entitled to acquire within 180 days after such date-

(A) by bequest, devise, or inheritance;

(B) as a result of a property settlement agreement with the debtor's spouse, or of an interlocutory or final divorce decree; or

(C) as a beneficiary of a life insurance policy or of a death benefit plan.

(6) Proceeds, product, offspring, rents, or profits of or from property of the estate, except such as are earnings from services performed by an individual debtor after the commencement of the case.

(7) Any interest in property that the estate acquires after the commencement of the case.

11 U.S.C. § 544. Trustee as lien creditor and as successor to certain creditors and purchasers

(a) The trustee shall have, as of the commencement of the case, and without regard to any knowledge of the trustee or of any creditor, the rights and powers of, or may avoid any transfer of property of the debtor or any obligation incurred by the debtor that is voidable by-

(1) a creditor that extends credit to the debtor at the time of the commencement of the case, and that obtains, at such time and with respect to such credit, a judicial lien on all property on which a creditor on a simple contract could have obtained such a judicial lien, whether or not such a creditor exists;

(2) a creditor that extends credit to the debtor at the time of the commencement of the case, and obtains, at such time and with respect to such credit, an execution against the debtor that is returned unsatisfied at such time, whether or not such a creditor exists; or

(3) a bona fide purchaser of real property, other than fixtures, from the debtor, against whom applicable law permits such transfer to be perfected, that obtains the status of a bona fide purchaser and has perfected such transfer at the time of the commencement of the case, whether or not such a purchaser exists.

(b)

(1) Except as provided in paragraph (2), the trustee may avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law by a creditor holding an unsecured claim that is allowable under section 502 of this title or that is not allowable only under section 502(e) of this title.

(2) Paragraph (1) shall not apply to a transfer of a charitable contribution (as that term is defined in section 548(d)(3)) that is not covered under section 548(a)(1)(B), by reason of section 548(a)(2). Any claim by any person to recover a transferred contribution described in the preceding sentence under Federal or State law in a Federal or State court shall be preempted by the commencement of the case.

STATEMENT OF THE CASE

The Amicus adopts of the Statement of the Case in the Brief of Petitioner, Robert F. Anderson.

SUMMARY OF THE ARGUMENT

Bankruptcy has historically been the remedy of creditors. As part of the protection of creditors, a trustee must have some powers derived from the traditional powers of creditors. Those powers are part of the bankruptcy code in 11 U.S.C. § 541(a)(3) and §§ 544(a) and (b).

Imputing knowledge of corrupt managers to a corporation and through the corporation to the bankruptcy estate is illogical. Corrupt management does not disclose its wrongdoing. Instead such persons hide their wrongdoing. This principle is widely recognized at state law, and particularly in the context of the doctrine of adverse domination.

Section 544 allows a trustee to act without imputation knowledge of wrongdoing.

Application of the doctrine of in pari delicto to deny recovery is inconsistent with legal concept that a trustee takes free of any imputation of knowledge of wrongdoing.

This principle is of significant importance to trustees nationwide.

REASONS FOR GRANTING THE WRIT

I.

Bankruptcy began as a creditor's remedy. Warren, W., Busssel, D., Skeel, D., Bankruptcy 18-20 (Foundation Press 2012). Originally, bankruptcy cases were only begun by the filing of an involuntary petition by creditors of a debtor. Voluntary bankruptcy petitions first became possible in 1841. Id.

Although, involuntary petitions in bankruptcy may still be filed today under 11 U.S.C. § 303, the vast majority of bankruptcy cases are voluntary petitions filed by debtors under 11 U.S.C. § 301.

Nevertheless, obtaining recoveries for the benefit of creditors remains a basic principle of the modern bankruptcy system. To further this goal, section 544 of the bankruptcy code preserves for the trustee and the bankruptcy estate all of the collection rights available to creditors under generally applicable non-bankruptcy law. The role of bankruptcy as a central, organized forum for creditors to seek collection against a debtor explains some of the actual and necessary features of bankruptcy law. Bankruptcy is an in rem proceeding. Central Virginia Community College v. Katz, 546 U.S. 356 (2006) and Tennessee Student Assistance Corp. v. Hood, 540 U.S. 440 (2004). Many persons interested in the assets of a particular Debtor have an interest in the property that comes before the bankruptcy court and the distributions made out of the bankruptcy estate. Bringing property before the bankruptcy court protects creditors from one another, as well as providing relief to a debtor. Creditors are protected because bankruptcy allows for the equitable division of a debtor's assets among all creditors and not just to the one creditor, or the few creditors, who won the race to a courthouse to obtain judgments against a particular debtor. Bankruptcy endeavors to treat all similarly situated creditors the same.

To achieve this equality of treatment, bankruptcy must provide certain powers to a trustee. A trustee must be able to look back in time, at least briefly, so that creditors who have just obtained a

judgment can be characterized similarly to creditors who have not yet done so. The preference provisions in 11 U.S.C. § 547 allow for that possibility.

A trustee may also pursue fraudulent transfer actions under 11 U.S.C. § 548. This provision allows a trustee to undo gifts and other transfers for inadequate value to anyone. See generally, BFP v. Resolution Trust Corp., 511 U.S. 531 (1992).

Section 544 works similarly. That provision allows a trustee to act like a "hypothetical judicial lien creditor [2]" who had obtained a judgment at the moment a bankruptcy was filed, 11 U.S.C. § 544(a), and pursue any remedy, including a remedy at state law, available to such a creditor. Alternatively, a trustee may act pursuant to 11 U.S.C. § 544(b) as any "actual creditor" of a particular Debtor might have acted and pursue remedies available under state law that the actual creditor could have pursued. 11 U.S.C. § 544(b). In these ways, the trustee acts for the common benefit of all creditors. Bankruptcy, supra, at 18-20. Here again, the remedies which can be pursued includes remedies available at state law.[3]

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[2] When real estate is involved, the trustee is a "hypothetical bone fide purchaser for value." 11 U.S.C. § 544(a)(3).

[3] This Court has explained:

> We think that Congress . . . meant to permit the trustee in bankruptcy to have the benefit of state laws of this character which do not conflict with the aims and purposes of the federal law. And certainly, in view of the provisions of section 70e of the Bankruptcy Act, Congress did not intend to permit a conveyance such as

These remedies, under the bankruptcy code, and at state law, are powers being exercised by a trustee as a creditor in order to benefit the entire body of creditors holding claims against the estate. These are not remedies solely defined in the bankruptcy code. While the bankruptcy code establishes certain causes of action that can be brought by the trustee, the code also preserves for the trustee, through section 544, all of the state law remedies available to actual creditors as well as remedies that could be exercised by a hypothetical judicial lien creditor. These remedies have long been available to a trustee. Stellwagen v. Clum, 245 U.S. 605 (1918).

These remedies constitute property of the bankruptcy estate under 11 U.S.C. § 541(a)(3) which provides:

> Such estate is comprised of all the following property, wherever located and by whomever held. (a). . . . (3) Any interest in property that the trustee recovers under section 329(b), 363(n) 543, 550, 553, or 723 of this title."

Section 550 provides a remedy for recoveries under sections 544, 545, 547, 549, 553(b), and 724(a).

When pursuing remedies under these statutes, the trustee is exercising the traditional power of a creditor.

> is here involved to stand which creditors might attack and avoid under the state law for the benefit of general creditors of the estate.

Stellwagen v. Clum, 245 U.S. 605, 618 (1918).

A trustee and the bankruptcy estate which is served by a trustee are often described as the successor in interest to a debtor's interest in property. This notion is often expressed in the phrase that "the trustee stands in the shoes of the debtor." Most of section 541 defines property of the estate as relating to property rights of a debtor held at filing, and the short hand expression is accurate in such a context. It is clear that sub-paragraph (a)(1) of 541 includes all legal and equitable interests of the debtor as of the commencement of a case as property of the estate. Other sub-paragraphs are similar; (a)(2) pertaining to community property; (a)(4) pertaining to preserved property; (a)(5) pertaining to inherited property; (a)(6) pertaining to proceeds of property of the estate; and (a)(7) pertaining to after-acquired property. Each leads inexorably to a focus on property, and the associated rights in property, held by a debtor. The provisions all seems to represent a "natural" definition of property of the estate derived from the relationship of the debtor to such property.

But, the definition of property of the estate also includes section 541(a)(3). This provision is unique. It defines property of the bankruptcy estate to include property which may be recovered, by the bankruptcy estate under various provisions of the bankruptcy code, outlined above. As noted, the recovery of property is a traditional the remedy of a creditor. No property right has ever existed in a debtor to such remedies. Because of this, a bankruptcy estate must be considered to be more than the successor in interest to interests in property held by a debtor at filing. That something extra which is added to the powers of a trustee by section 541(a)(3) includes the power necessary to vindicate the interests of creditors

as discussed above. It is the power necessary to treat all similarly situated creditors similarly. When exercising such a power by filing a cause of action under section 544, the trustee "stands in the shoes of creditors,[4]" and not "in the shoes of a debtor."

II.

The statutory basis for the cause of action, and the party whose shoes the trustee is standing in, dictate the defenses that may be raised in response to the trustee's claim. Here, Trustee Anderson brought a claim under section 544(a). Under that statutory provision, the trustee is standing in the shoes of a creditor to augment the bankruptcy estate through that creditor's collection powers. The trustee is not standing in the shoes of the debtor; instead, Section 544 is designed to allow a bankruptcy trustee to enhance the recovery of monies that can be distributed to all creditors and parties-in-interest. Sometimes, in this process the trustee enforces a hypothetical status to augment pro rata distributions to the benefit of some creditors.[5] At other times, the

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[4] See Pacific Metal Company v. Joslin, 359 F. 2d 396 (9th Cir. 1966).

[5] Because the payment of creditors is superior to payment to equity, or shareholders, per 11 U.S.C. § 726, it is unlikely that any recovery from those who aided and abetted would be made to any portion of equity.

If such a situation did occur, it is possible to isolate any insiders who were wrongdoers from any recovery. See e.g., Reed v. City of Arlington, 650 F.3d 571(5th Cir. 2011) (en banc) (Holding that a debtor was bound by the doctrine of estoppel when the debtor failed to disclose a cause of action in bankruptcy, but finding that the non-disclosure should not prevent recovery by a trustee for the benefit of creditors. Trustee was allowed to make a recovery to the extent necessary to make

trustee stands in the shoes of a single creditor, exercising the collection powers of that creditor in order to gain a recovery for the benefit of all creditors.[6]

When a trustee pursues rights held by a particular debtor—for instance enforcing payment on a completed contract between a debtor and third party—the trustee, standing in the shoes of the debtor, must be susceptible to valid defenses available to the third party against a debtor. Those principles of state law remain unchanged in the bankruptcy context. So, for example, a trustee of a bankrupt contractor who seeks to enforce a claim for payment under a completed construction contract must defend against allegations of shoddy workmanship by that contractor where such circumstances exist.

But when a trustee is pursuing the rights of creditors that belong to the bankruptcy estate under 11 U.S.C. § 541(a)(3) and § 544, the only defenses enforceable against the trustee are those defenses that could have been enforced against creditors. It makes no sense for defenses against a debtor, or the trustee standing in the shoes of a debtor, to be available when the trustee is standing in the shoes of a creditor. Allowing defenses available against the

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a 100% distribution to creditors, but was prohibited from making any recovery that would have any distribution to the debtor.)

[6] There are other causes of action that allow trustees to pursue causes of action against creditors in order to provide an equality of the distributions from the bankruptcy estate to all similarly situated creditors. For instance, in recovering preferences and, sometimes in undoing fraudulent transfers, a trustee can act for the ultimate benefit of all creditors against a one or more creditors, who otherwise were paid prior to filing, or who may have won the race to obtain the first judgment.

debtor to extend against claims brought by a trustee standing in the shoes of a creditor diminishes the intention of Congress to maximize recovery for the body of creditors in enacting section 544 of the bankruptcy code. The purpose of that section is to preserve the traditional role of bankruptcy as a forum for an organized creditor collection process.

III.

The doctrine of in pari delicto [7] is thus a perfectly valid defense against a debtor asserting causes of action belonging to the debtor under applicable non-bankruptcy law. The defense flows from the notion that a person who knew of, or participated in, improper behavior should not be able to complain, after the fact, of harm from that improper conduct. Similarly, in the bankruptcy context, the doctrine of in pari delicto may also be validly asserted against a trustee when the trustee truly stands in the shoes of the debtor and brings claims rooted in the debtor's contract, property, or other litigation claims.

But when a trustee stands in the shoes of a creditor under 11 U.S.C. § 541(a)(3) and § 544, permitting use of the in pari delicto defense is illogical. Section 544 is a cause of action provided by Congress to allow the trustee to obtain for the bankruptcy estate the same collection powers that were available outside of bankruptcy by creditors. The basis for the in pari delicto defense—knowledge and complicity in improper behavior—is wholly lacking against a trustee. A newly appointed trustee

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[7] For an example of application of the in pari delicto defense, see Pinter v. Dahl, 486 U.S. 622 (1988).

enters a case as a disinterested and independent professional, see 11 U.S.C. § 701(a)(1), and clearly that trustee did not have knowledge, complicity, or personal participation in any such conduct. Applying the defense of in pari delicto depends on the trustee having the imputed knowledge of wrongdoing that the corporation would have had.[8]

The language of 11 U.S.C. § 544(a) rejects imputation of such knowledge. That statute provides;

> The trustee shall have, as of the commencement of the case, and without regard to any knowledge of the trustee or of any creditor, the rights and powers of, and may avoid any transfer of property of the debtor, or any obligation incurred by the debtor that is voidable. . . .

(Emphasis added.) Application of the doctrine of in pari delicto, which depends on some quantum of knowledge, against a bankruptcy trustee, is inconsistent with this specific statute as well as, the policy of 11 U.S.C. § 541(a)(3).

Here, Infinity Business Group, Inc., established an undisputedly fraudulent accounting policy with the assistance of Morgan Keegan & Company, Inc., and Keith E. Meyers. The policy overstated revenues and accounts receivables by counting check collection proceeds before such proceeds were earned. Some members of senior

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[8] As will be addressed below, even this rationale is wrong. Many state laws hold that knowledge of corporate insiders who did participate in wrongdoing should not be imputed to the corporate entity.

management of Infinity Business Group, Inc., participated. That policy tended to mislead persons who dealt with the company.

The discovery by the bankruptcy trustee of this scheme, as part of his investigation of the origin of the financial problems of the Debtor, began a new day. Instead of the corrupt involvement of rogue agents, hiding their involvement in overstating value, management and oversight became vested in Trustee Anderson, a fiduciary bound to honor the law, 28 U.S.C. § 959(b). The former corrupt managers were replaced with a person who might be described as "Mr. Clean." Limiting the trustee's ability to pursue collection remedies available to creditors in order to enhance the bankruptcy estate effectively makes creditors bear the cost of the Debtor's improper conduct. Imputing knowledge of corrupt insiders to Trustee Anderson, or any trustee, logically depends on the corrupt having made a disclosure of their involvement in wrongdoing to Mr. Anderson or some other honest group of persons who would have been able to act.[9] Assuming that wrongdoers will disclose their own wrongdoing is neither a logical nor coherent approach to human behavior. Those involved in corporate wrongdoing do not generally disclose their wrongdoing to anyone, let alone to a trustee, with authority to pursue damage claims for wrongdoing.

Many States recognize this limitation as part of the "doctrine of adverse domination." This aspect of the law provides that knowledge of corporate officers, who dominate and act in violation of fiduciary duties

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[9] Sometimes, a minority of a board of directors might learn of a fraud being perpetrated by a majority. Where discovered, the minority can sometimes act to protect the corporation.

to the corporation is knowledge that is not imputed to a corporate victim of insider wrongdoing, or by those who aided and abetted such wrongdoing. The wrongdoing of such persons is not imputed to a corporation for statute of limitations purposes when a receiver or trustee pursues claims of wrongdoing. For example, in Clark v. Milam, 192 W.Va. 398, 452 S.E.2d 714 (W. Va. 1994) in answering a certified question from the United States District Court for the Southern District of West Virginia, the West Virginia Supreme Court reasoned as follows:

> Generally, a corporation "knows," or "discovers," what its officers and directors know. But when officers and directors act against the interests of the corporation, their knowledge, like that of any agent acting adversely to his principal, is not imputed to the corporation. Citizens' Nat'l Bank of Parkersburg v. Blizzard, 80 W.Va. 511, 520, 93 S.E. 338, 341 (1917) (knowledge of misappropriation of funds by controlling directors and officer not imputed to bank); First Nat'l Bank of New Martinsville v. Lowther-Kaufman Oil & Coal Co., 66 W.Va. 505, 66 S.E. 713 (1909) (bank director's knowledge of contract between himself and bank which favored director at bank's expense would not be imputed to bank and its other directors); see also, 3 W. Fletcher, Fletcher Cyclopedia of the Law of Private Corporations § 793, at 29 (1994).
>
> Thus, as a matter of law, . . . claims are preserved under that subspecies of the discovery rule denominated "the doctrine of adverse domination."

Id. at ____, 452 S.E.2d at ___. See also, Clark v. Milam, 872 F. Supp. 307 (S.D. W.Va. 1994).

This is a widely recognized aspect of state law. See e.g., Burt v. Irvine Co., 237 Cal. App. 2d 828 (1952) Lease Resolution Corp. v. Larney, 308 Ill. App. 3d 80, 719 N.E.2d 165 (Ill. App. 1999); City of Marion v. London Witte Grp., LLC, 169 N.E.3d 382 (Ind. 2021); Resolution Trust Corp. v. Scaletty, 257 Kan. 348, 891 P.2d 1110, (1995); Wilson v. Paine, 288 S.W.3d 284 (Ky. 2009) Hecht v. RTC, 333 Md. 328, 635 A.2d 394, 406 (1994); Resolution Trust Corp. v. Grant, 901 P.2d 807 (Okla. 1995); F.D.I.C. v. Smith, 328 Or. 420, 980 P.2d 141 (1999); Alexander v. Sanford, 181 Wash. App. 135, 325 P.3d 341 (2014). In Cedar Rapids Lodge & Suites, LLC v. JFS Development, Inc., 789 F.3d 821 (8th Cir. 2015) (applying Iowa law) the Court held, in reliance on Bornstein v. Poulos, 793 F.2d 444, 447–49 (1st Cir. 1986); IIT, an International Investment Trust v. Cornfeld, 619 F.2d 909, 929–30 (2d Cir. 1980); and Resolution Trust Corp. v. Gardner, 798 F. Supp. 790, 795 (D.D.C. 1992) that adverse domination could extend the applicable statute of limitations against co-conspirators of corrupt corporate agents.

Having discovered wrongdoing in this case, Trustee-Anderson pursued claims against the wrongdoers and their confederates; that is, the persons who aided and abetted the scheme. He sought to make the creditors of Infinity Business Group, Inc., whole through the bankruptcy process.

The Bankruptcy Court, the District Court and the Court of Appeals all wrongly concluded that the doctrine of in pari delicto prohibited recovery by the

Trustee. The courts recognition of this defense had the practical effect of preventing any assessment of responsibility against those bad actors who aided and abetted corrupt former management of the debtor-company.

As set forth by Mr. Anderson, the Petitioner, the basis for decision in this case, i.e., that the doctrine of in pari delicto is available to defeat a Trustee's claim under 11 U.S.C. § 544, has divided Courts of Appeals. See e.g., Sandy Ridge Oil Co. v. Centerre Bank N.A. (In re Sandy Ridge Oil Co.), 807 F.2d 1332, 1335–1336 (1986); Boudreaux v. Dolphin Press Inc. (In re Dolphin Press Inc.), 196 F.3d 1257, 1999 WL 800170 (Sept. 17, 1999)(unpublished); Wonder-Bowl Props. v. Kim (In re Kim), 161 B.R. 831, 836–837 (1998).

This Amicus, the National Association of Bankruptcy Trustees, recognize the important reasons for which Petitioner has sought review by certiorari. Each of those reasons do warrant grant of the Petition in this case.

NABT also urges review of the issue in this case. NABT supports review because this Court should correct the recurring failure to recognize that a trustee and the bankruptcy estate are more than the successor-in-interest to a debtor. Trustees are also empowered by Congress to exercise traditional powers of creditors, which is a foundational principle of bankruptcy law. When trustees are exercising these creditor collection powers, imputing the debtor's wrongdoing against the trustee and the bankruptcy estate, though in pari delicto doctrine is inconsistent with the statutory scheme enacted by Congress. The

failure of lower courts to regularly appreciate this distinction harms creditors purposelessly shifting responsibility of corrupt management to the economic detriment of the creditor body. A distinction which the NABT understands this issue is fully subsumed in the question presented by Trustee Anderson, and the lower court's recognition of the in pari delicto doctrine as a defense to claims brought under section 544 causes widespread and recurring failure to implement the bankruptcy code as written. This error hampers the routine administration of bankruptcy cases by members of NABT and prevents the recovery of significant sums for innocent creditors due to the malevolent practices of other actors who aid and abet wrongdoing by corporate insiders.

CONCLUSION

Based on the foregoing, the National Association of Bankruptcy Trustees, as Amicus Curiae for Robert F. Anderson, Trustee-Appellant, Chapter 7 Trustee, respectfully urges this Court to grant the petition for certiorari.

Respectfully submitted,

NATIONAL ASSOCIATION OF
BANKRUPTCY TRUSTEES

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