IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

JAMES F. HUMPHREYS & ASSOCIATES, L.C.

Plaintiff,

v.

Cir. Ct. Kanawha Cnty.
Civil Action No. 20-C-413
Judge Carrie Webster

THE CALWELL PRACTICE, LC and
CALWELL LUCE DITRAPANO PLLC,

Defendants.

TO: CHIEF JUSTICE TIM ARMSTEAD

PLAINTIFF'S MOTION TO REFER TO BUSINESS COURT DIVISION

This dispute between three professional business entities arises from the alleged breach of a fee sharing agreement and the concealment of monies owed thereunder. On its surface this case appears to be a simple breach of contract, but the claims and defenses thereto present significant commercial issues that require specialized expertise in the areas of bankruptcy, business organizations, and successor liability.

In particular, Defendants suggest that James F. Humphreys & Associates, L.C. ("JFHA") is foreclosed from prosecuting its claims because it failed to disclose its contractual interests during its Chapter 11 bankruptcy. Thus, as a threshold matter, a court must explore the circumstances of JFHA's reorganization and determine whether the contractual interest was subject to disclosure and, if so, whether that interest was properly disclosed and administered by the bankruptcy court. Next, a court will be asked to determine whether certain "incentive payments" are subject to the terms of the parties' fee sharing agreement, which was modified over the course of the decade-

long Monsanto Litigation.[1] A court's determination will be further complicated by the winding history of the Monsanto Litigation and the various orders, liens, and agreements that arose out of that matter. And finally, because The Calwell Practice ("TCP") was class counsel and party to the fee sharing agreement, a court will have to assess issues of successor liability now that TCP has ceased all operations. Recovery thus hinges on issues of successor liability, which, in turn, require a court to examine the structure and operations of the two firms to determine whether Calwell Luce diTrapano's ("CLD") inherited the obligations of TCP. These unique issues distinguish this case from your run-of-the-mill contract case.

As a final point for consideration, the parties regularly appeared (or, in the case of CLD, continue to appear) in the Circuit Court of Kanawha County and these regular appearances are likely to cause recusals. Referral would thus avoid anticipated delays caused by the recusal process and avoid any appearance of partiality. Because referral would promote a fair and prompt disposition of this case—which is properly defined as business litigation—this matter should be referred to the Business Court Division.

Operative Facts

In 2004, Plaintiff and Defendants[2] agreed to jointly prosecute personal injury claims against The Monsanto Company. Compl. ¶¶ 6-8. This joint representation agreement was ultimately superseded by another agreement wherein the parties agreed, *inter alia*, that Plaintiff

[1] Beginning in 2004, Monsanto was the subject of fifty-five civil suits in West Virginia, all seeking damages based on exposure to the substances and byproducts produced and emitted from its plant (the "Monsanto Litigation"). The Monsanto Litigation consisted of fifty-three individual suits and two class actions suits—one of which was a case styled *Bibb, et al. v. Monsanto Co., et al.*, No. 04-C-465 (Cir. Ct. Putnam Cnty.) ("*Bibb*"). Fees awarded in the *Bibb* global settlement are the subject of this dispute.

[2] Although The Calwell Practice is the named party to the Agreement, Calwell Luce diTrapano is a mere continuation and reincarnation of The Calwell Practice and therefore jointly and severally liable for the amounts due and owing from The Calwell Practice.

shall receive 12.5% of any attorneys' fees awarded in the Monsanto Litigation (the "Agreement"). *Id.* at ¶ 8.

In 2012, the parties in the Monsanto Litigation reached a global settlement in excess of $90 million. *Id.* at 9. Pursuant to the settlement agreement—which was approved by the Circuit Court of Putnam County—The Calwell Practice was awarded $20 million in attorneys' fees and expenses. *Id.* at 10. In recognition of the Agreement, Plaintiff received his negotiated share of attorneys' fees. Important here, the global settlement agreement also provided for future "incentive payments," the receipt of which was contingent upon the satisfaction of certain triggering events. *Id.* These incentive payments were, from time to time, made as various claimants qualified for the medical monitoring program and home cleaning. Class counsel received a per-person fee for each qualifying claimant. And again, in April 2015, in continued recognition of the Agreement years later, Plaintiff received his 12.5% negotiated share of these periodic incentive payments.

The Settlement Agreement also provided for an additional incentive payment based on the results of the medical monitoring program. Because this specific triggering event would never come to pass, the global settlement agreement was revised. In September 2017, under the revised settlement agreement, an additional $3 million in attorneys' fees were awarded to class counsel as a final incentive payment. *Id.* at 13. Defendants, however, did not pay the amounts owing to Plaintiff under their Agreement, much less notify Plaintiff of the final award. *Id.* at 14. Defendants' failure to notify Plaintiff of the subsequent award was intentional and intended to conceal the receipt of additional fees awarded years later. *Id.* In February 2019, TCP changed its name to CLD.

On May 20, 2020, Plaintiff filed its Complaint against Defendants for breach of contract and unjust enrichment. *See* Exhibit A (Complaint). On July 17, 2020, Defendants moved to dismiss on the basis that Plaintiff supposedly failed to disclose its contractual interest in its 2016 bankruptcy schedules and is therefore judicially estopped from prosecuting its claims. *See* Exhibit B (Defs.' Motion to Dismiss). Defendants have asked the court to take judicial notice of certain bankruptcy filings and various orders in the Monsanto Litigation. *Id.* A copy of the docket is attached hereto as Exhibit C.

Argument

First, the claims in this case fit squarely within the parameters of "business litigation," which is defined, in part, as an action in which "the principal claim or claims involve matters of significance to the transactions, operations, or governance between business entities." W. VA. T.C.R. 29.04(a)(1). Consistent with this definition, Plaintiff's claims arise from a significant transaction (here, the Agreement and a concealed $3 million payment) between three professional business entities (here, JFHA, TCP, and CLD). That the parties are law firms does not change the commercial nature of this dispute.

Second, "business litigation" is further defined as a dispute that "presents commercial and/or technology issues in which specialized treatment is likely to improve the expectation of a fair and reasonable resolution of the controversy because of the need for specialized knowledge or expertise in the subject matter or familiarity with some specific law or legal principles that may be applicable." W. VA. T.C.R. 29.04(a)(2). Here, a court will have to explore the circumstances of JFHA's bankruptcy and determine whether JFHA's contractual interest in the Agreement was reportable under U.S. Bankruptcy Code; whether JFHA sufficiently disclosed the Agreement; whether the Agreement was administered by the bankruptcy court for the benefit of creditors; and,

if not, whether the bankruptcy court and creditors nonetheless had notice of the Agreement. This case therefore requires "expertise in the subject matter or familiarity with some specific law or legal principles"—here, bankruptcy law and creditors rights—to improve the expectation of a fair and reasonable resolution of the controversy. Also, because JFHA seeks to hold CLD liable for the obligations of its predecessor, TCP, a court will need to analyze successor liability issues. In doing so, a court need necessarily determine whether there is a continuity of ownership between the two firms; whether there is a continuity of management, personnel, physical location, assets and/or general business operations between the two firms; whether TCP dissolved or discontinued operations shortly after organizing under CLD; and whether CLD assumed TCP's liabilities expressly, implicitly or by *de facto* merger.

Third, just as the rules define what is "business litigation," they also define what is not. *See* W. VA. T.C.R. 29.04(a)(3). This case is not the type of case excepted from the definition—e.g., consumer litigation, personal injury, and malpractice. Because this case satisfies the definition of "business litigation" and presents complex commercial issues that require specialized treatment, this matter should be referred to the Business Court Division.

Fourth, referral will circumvent anticipated delays caused by recusals and avoid the appearance of partiality. This case is currently pending in the Circuit Court of Kanawha County, a court in which the parties regularly appear (or, if not currently appearing, have appeared regularly in recent past). Plaintiff anticipates that some or all of the judges in this circuit may choose to recuse themselves because of these regular appearances.[3] If there are multiple recusals, there is

[3] For example, in *Jeffries, et al. v. W. Va. American Water Co.*, No. 17-C-765 (Cir. Ct. Kanawha Cnty.), Judge Webster recently certified a class of plaintiffs represented by Calwell Luce diTrapino. Given the firm's current appearance, Judge Webster may choose to recuse herself from a case in which Calwell Luce diTrapino is a named defendant.

substantial risk that this case will be delayed while the recusal process runs its course. Because no Kanawha County judges currently sit on the Business Court panel, referral would circumvent anticipated delays and avoid any appearance of partiality.

Conclusion

In light of the commercial nature of this dispute and the need for specialized treatment, this case should be referred to the Business Court Division. Copies of the complaint, motion to dismiss, and docket sheet are submitted herewith.

JAMES F. HUMPHREYS & ASSOCIATES, L.C.

By Counsel:

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CERTIFICATE OF SERVICE

I hereby certify that on August 10, 2020, a true and correct copy of the foregoing document was served upon the below individuals and parties via U.S. Mail:

Calwell Luce diTRrapino, PLLC
The Calwell Practice, LC
500 Randolph Street
Charleston, WV 25302

Judge Carrie L. Webster
Kanawha County Judicial Building
P.O. Box 2351
111 Court Street
Charleston, WV 25301

Clerk Cathy S. Gatson
Kanawha County Judicial Building
P.O. Box 2351
111 Court Street
Charleston, WV 25301

Berkeley County Judicial Center
Business Court Division
Suite 2100
380 W. South Street
Martinsburg, WV 25401

Michael B. Hissam (WVSB #11526)
Andrew C. Robey (WVSB #12806)

EXHIBIT A

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

FILED
2020 MAY 20 P 3:04
KANAWHA COUNTY CIRCUIT COURT

CIVIL CASE INFORMATION STATEMENT
(Civil Cases Other than Domestic Relations)

I. CASE STYLE:

Case No. 20-C-413

Judge: Webster

Plaintiff(s)

JAMES F. HUMPHREYS & ASSOCIATES, L.C.

vs.

Defendant(s)

Days to Answer	Type of Service
30	Secretary of State

THE CALWELL PRACTICE, LC
Name

500 Randolph Street
Street Address

Charleston, WV 25302
City, State, Zip Code

II. TYPE OF CASE:

- ☑ General Civil
- ☐ Mass Litigation *[As defined in T.C.R. 26.04(a)]*
  - ☐ Asbestos
  - ☐ FELA Asbestos
  - ☐ Other:
- ☐ Habeas Corpus/Other Extraordinary Writ
- ☐ Other:
- ☐ Adoption
- ☐ Administrative Agency Appeal
- ☐ Civil Appeal from Magistrate Court
- ☐ Miscellaneous Civil Petition
- ☐ Mental Hygiene
- ☐ Guardianship
- ☐ Medical Malpractice

III. JURY DEMAND: ☑ Yes ☐ No CASE WILL BE READY FOR TRIAL BY (Month/Year): 02 / 2021

IV. DO YOU OR ANY OF YOUR CLIENTS OR WITNESSES IN THIS CASE REQUIRE SPECIAL ACCOMMODATIONS?

☐ Yes ☑ No

IF YES, PLEASE SPECIFY:

- ☐ Wheelchair accessible hearing room and other facilites
- ☐ Reader or other auxiliary aid for the visually impaired
- ☐ Interpreter or other auxiliary aid for the deaf and hard of hearing
- ☐ Spokesperson or other auxiliary aid for the speech impaired
- ☐ Foreign language interpreter-specify language:
- ☐ Other:

Attorney Name: Michael B. Hissam
Firm: Hissam Forman Donovan Ritchie PLLC
Address: 707 Virginia Street East, Suite 260
Telephone: (681) 265-3802

Representing:
☑ Plaintiff ☐ Defendant
☐ Cross-Defendant ☐ Cross-Complainant
☐ 3rd-Party Plaintiff ☐ 3rd-Party Defendant

☐ **Proceeding Without an Attorney**

Original and 1 copies of complaint enclosed/attached.

Dated: 05 / 20 / 2020 Signature:

SCA-C-100: Civil Case Information Statement (Other than Domestic Relations) Revision Date: 12/2015

PYMT Type K
Rcpt # 580088 $200 ✓ $135
Iss. Sum. + 4 cc No Sum. Iss
✓ Ret. to Atty. $20cm X
Mailed CM/RM $5 clk X
Mailed to sos w/ck#
Sent to w/ck# ✓ $15 mdf X 2

EXHIBIT A

Plaintiff: JAMES F. HUMPHREYS & ASSOCIATES, L.C, *et al* **Case Number:** _____

vs.

Defendant: THE CALWELL PRACTICE, LC , *et al*

CIVIL CASE INFORMATION STATEMENT
DEFENDANT(S) CONTINUATION PAGE

CALWELL LUCE DITRAPANO PLLC
Defendant's Name

500 Randolph Street
Street Address

Charleston, WV 25302
City, State, Zip Code

Days to Answer: 30

Type of Service: Secretary of State

Defendant's Name

Street Address

City, State, Zip Code

Days to Answer: _____

Type of Service: _____

Defendant's Name

Street Address

City, State, Zip Code

Days to Answer: _____

Type of Service: _____

Defendant's Name

Street Address

City, State, Zip Code

Days to Answer: _____

Type of Service: _____

Defendant's Name

Street Address

City, State, Zip Code

Days to Answer: _____

Type of Service: _____

Defendant's Name

Street Address

City, State, Zip Code

Days to Answer: _____

Type of Service: _____

Defendant's Name

Street Address

City, State, Zip Code

Days to Answer: _____

Type of Service: _____

EXHIBIT A

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

JAMES F. HUMPHREYS & ASSOCIATES, L.C.

Plaintiff,

v.

THE CALWELL PRACTICE, LC and
CALWELL LUCE DITRAPANO PLLC,

Defendants.

FILED
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2020 MAY 20 P 3:04
KANAWHA COUNTY CIRCUIT COURT

Civil Action No. 20-C-413
Judge: Webster

COMPLAINT

Plaintiff James F. Humphreys & Associates, L.C. states as follows for its Complaint against Defendants The Calwell Practice, LC and its successor entity, Calwell Luce diTrapano PLLC (collectively, the "Calwell Defendants"):

PARTIES AND JURISDICTION

1. Plaintiff James F. Humphreys & Associates, L.C. is a legal corporation organized under the laws of West Virginia. Its sole owner is James F. Humphreys, who is a resident of the District of Columbia.

2. Defendant The Calwell Practice, LC is a legal corporation organized under the laws of West Virginia with a principal place of business in Kanawha County, West Virginia.

3. Defendant Calwell Luce diTrapano PLLC is a professional limited liability company organized under the laws of West Virginia with a principal place of business in Kanawha County, West Virginia. Upon information and belief, Calwell Luce diTrapano's members are residents of Kanawha County, West Virginia.

4. Calwell Luce diTrapano is the successor entity to The Calwell Practice. Calwell Luce diTrapano is a mere continuation and reincarnation of The Calwell Practice and retains commonality of ownership, employees, and principal place of business. Indeed, Calwell Luce diTrapano holds itself out to be a simple reorganization of The Calwell Practice and has issued press releases announcing that The Calwell Practice "has changed its name to Calwell Luce diTrapano PLLC, effective January 1, 2019."

5. This Court has jurisdiction and venue in this Court is proper because the acts or omissions giving rise to Humphreys's claims occurred in Kanawha County, West Virginia.

OPERATIVE FACTS

6. The Monsanto Company produced the defoliant Agent Orange in its Nitro, West Virginia plant. Beginning in 2004, Monsanto was the subject of fifty-five civil suits in West Virginia, all seeking damages based on exposure to the substances and byproducts produced and emitted from its plant (the "Monsanto Litigation"). The Monsanto Litigation consisted of fifty-three individual suits and two class actions suits—one of which was a case styled *Bibb, et al. v. Monsanto Co., et al.*, No. 04-C-465 (Cir. Ct. Putnam Cnty.) ("*Bibb*").

7. Before the Monsanto Litigation was commenced, The Calwell Practice and Humphreys entered into a Memorandum of Understanding (the "MOU") wherein The Calwell Practice and Humphreys agreed to share in the costs associated with investigating and prosecuting the claims in the Monsanto Litigation. The parties also agreed to share equally in any attorneys' fees awarded in the Monsanto Litigation.

8. The MOU was superseded by that certain Agreement, dated January 18, 2012, by and between The Calwell Practice and Humphreys, wherein the parties agreed, *inter alia*, that Humphreys shall receive 12.5% of any attorneys' fees awarded in the Monsanto Litigation. The

Agreement is attached as **Exhibit A**. The Agreement is binding upon the parties' successors and assigns.

9. The parties to the Monsanto Litigation ultimately reached a global settlement, which resolved the class claims in *Bibb*. As to *Bibb*, Monsanto agreed to pay up to $84 million for medical monitoring claims and $9 million for cleanup.

10. By Order dated January 23, 2013, the circuit court in *Bibb* awarded The Calwell Practice $20,000,000 in attorneys' fees and expenses. In addition, the Order contemplated an additional $9.5 million in future incentive payments, the receipt of which was contingent upon the satisfaction of certain triggering events (the "Incentive Payments").

11. The Incentive Payments in *Bibb* are necessarily subject to the Agreement, as they constitute attorneys' fees awarded in the Monsanto Litigation and The Calwell Practice agreed that Humphreys shall be entitled to a 12.5% negotiated share of fees awarded in all Monsanto Litigation cases.

12. Certain Incentive Payments were, from time to time, made as various claimants qualified for the medical monitoring program and home cleaning. Class counsel received a per-person fee for each qualifying claimant. In recognition of the Agreement, Humphreys received his 12.5% negotiated share of Incentive Payments.

13. By Order dated September 8, 2017, the circuit court in *Bibb* awarded The Calwell Practice an additional $3 million in attorneys' fees which were part of the ongoing Incentive Payments.

14. The Calwell Practice, however, did not pay the amounts owing to Humphreys under the Agreement, much less notify Humphreys of this award. The Calwell Practice's failure to notify

Humphreys of the subsequent award was intentional and intended to conceal the receipt of additional fees.

COUNT I – BREACH OF CONTRACT

15. Humphreys incorporates by reference the allegations set forth above and adopts the same as though fully set forth herein.

16. Humphreys and The Calwell Practice were parties to the Agreement, wherein The Calwell Practice agreed to pay to Humphreys 12.5% of any attorneys' fees awarded in the Monsanto Litigation.

17. Pursuant to the terms of the Agreement, The Calwell Practice was obligated to pay $375,000—the negotiated share of attorneys' fees—to Humphreys.

18. Humphreys fully performed all of its obligations under the Agreement. The Calwell Practice materially breached its contractual relationship by failing to make payment as required by the Agreement.

19. Humphreys suffered injury as a foreseeable, direct and proximate result of The Calwell Practice's breach of contract.

20. Calwell Luce diTrapano PLLC is the successor entity to The Calwell Practice and is therefore jointly and severally liable for the amounts due and owing from The Calwell Practice.

COUNT II – UNJUST ENRICHMENT

21. Humphreys incorporates by reference the allegations set forth above and adopts the same as though fully set forth herein.

22. The Calwell Practice knowingly accepted the benefit of Humphreys's services and investment without reciprocal remuneration or compensation to Humphreys.

23. The Calwell Practice accepted and retained the benefit under such circumstances as to make it inequitable for The Calwell Practice to retain the benefit without payment for the value of services rendered and investment provided.

24. The Calwell Practice have been unjustly enriched in an amount not less than $375,000.

25. Calwell Luce diTrapano PLLC is the successor entity to The Calwell Practice and is therefore jointly and severally liable for the amounts due and owing from The Calwell Practice.

WHEREFORE, Plaintiff requests that this Court: (i) find that Calwell Defendants are in breach of the Agreement; (ii) find that Calwell Defendants are jointly and severally liable to Plaintiff pursuant to the terms of the Agreement; (iii) award Plaintiff judgment against Calwell Defendant in the amount of $375,000, plus any and all sums already due and owing or that may accrue from the date of this filing, plus interest from the date of judgment until paid at the rate prescribed by law; (iv) require the Calwell Defendants to provide an itemized accounting of all settlements arising out of the Monsanto Litigation and total attorneys' fees awarded to Calwell Defendants; and (v) award Plaintiff all of its attorneys' fees and expenses incurred in bringing this suit. Plaintiff further requests such other and further relief as this Court may deem just and proper under the circumstances.

PLAINTIFFS DEMAND A JURY TRIAL.

EXHIBIT A

JAMES F. HUMPHREYS & ASSOCIATES, L.C.

By Counsel:

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EXHIBIT B

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

JAMES F. HUMPHREYS & ASSOCIATES, L.C.,

Plaintiff,

Civil Action No. 20-C-413
(Hon. Carrie Webster, Judge)

THE CALWELL PRACTICE, LC and
CALWELL LUCE DITRAPANO PLLC,

Defendants.

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

For the reasons stated below, Defendants hereby move to dismiss Plaintiff's Complaint for failure to state a claim pursuant to Rule 12(b)(6) of the *West Virginia Rules of Civil Procedure.*

I BACKGROUND

While not determinative of the instant motion, it is helpful to understand the background of the instant dispute. Plaintiff ("Humphreys") in 2005 entered into a co-counsel agreement with defendant The Calwell Practice, LC[1] ("Calwell") an agreement that required both law firms share equally in work and expenses in an underlying lawsuit filed against Monsanto. Plaintiff failed to perform the agreed work. In order to avoid litigation over his breach of that co-counsel contract, Plaintiff in 2012 agreed his portion of attorneys fee for that case would be reduced from 50% to 12.5%, and was reimbursed his expense input in the case, $2,764,342.02 ("the Agreement"). Nevertheless, thereafter, Plaintiff filed numerous unwarranted liens on the personal injury cases to try to get 50% of The Calwell Practice's earned attorney fees. The Hon. Derek Swope, Judge, who presided over the Monsanto case, quashed all of Plaintiff's attorney fee liens in that regard. Plaintiff

[1]Plaintiff has sued Calwell Luce DiTrapano PLLC despite the fact that firm was not in existence during any time relevant. Plaintiff misrepresents that Calwell Luce DiTrapano is a successor to The Calwell Practice, LLC.

was paid 12.5% of the attorney fees from property damage and personal injury claims against Monsanto. In his August 15, 2014 Order, Judge Swope ordered, "that Mr. Humphreys receive twelve (12) and a half percent of any attorneys fee payments that Mr. Calwell receives *based upon the occurrence of the triggering event*." The triggering event for the payment of medical monitoring attorney fees in the Monsanto case *did not occur*. Therefore, no attorney fees were received on that basis.

Long after Plaintiff withdrew as counsel from the Monsanto case, The Calwell Practice became aware of new circumstances and potential claims against third parties who could be liable to the medical monitoring class. These circumstances and potential claims were not contemplated by Plaintiff or The Calwell Practice at the time of the 2012 agreement over which Plaintiff has filed the instant lawsuit, and thus were not covered thereby. After it became obvious the medical monitoring triggering event would not be met, in which case neither the Class nor the lawyers would receive anything, The Calwell Practice began exploring whether there were potential new claims against third parties. The new investigation by The Calwell Practice required the hiring of expert witnesses and developing new possible theories of liability against a hospital, a third party laboratory and a third party shipping company. As a result of the introduction of the possibility of these new claims, Monsanto agreed to modify the prior settlement agreement so that the Class continued to get medical monitoring benefits. Monsanto also agreed, for its work in exposing the new potential claims and securing benefits to the Class it otherwise would not have received because the failure of the triggering event, to pay The Calwell Practice an attorneys fee and to reimburse its expenses in working up the alternate liability theory. This was a new settlement not covered or contemplated by the 2012 agreement and was based on conduct that occurred long after Plaintiff withdrew from

the case. Plaintiff did not participate in or contribute anything that led to this latter agreement, and it isn't covered by the 2012 agreement. Therefore, Plaintiff is not entitled to any portion of the fees from that settlement.

Moreover, after Plaintiff withdrew as counsel in the Monsanto case in 2012, The Calwell Practice spent years continuing to represent the Class in the Monsanto case, through settlement negotiations, and lengthy settlement approval and appeal proceedings, and assisting Class members in applying for benefits, and monitoring the settlement process. Plaintiff, on the other hand, after being sued by numerous former clients, filed for bankruptcy in 2016. The bankruptcy is significant because Plaintiff's representations to the bankruptcy court create an estoppel barring his claim in this case. Upon filing for bankruptcy, Plaintiff was obligated to identify to the bankruptcy court Plaintiff's creditors all receivables, assets and claims it had, including the claim to the attorney fees it seeks in this case. Tellingly, Plaintiff **did not disclose** any interest in the attorney fees it claims here when it made its obligatory bankruptcy filings.

As shown below, Plaintiff's failure to identify the attorney fees it seeks in this lawsuit as a receivable in its bankruptcy creates an estoppel barring Plaintiff from taking a contrary position here, that such a right did then and continues now to exist, in this later proceeding. If Plaintiff truly believed it had an interest in the attorney fees it now seeks in the case at bar, surely it would not have misled the bankruptcy court or its bankruptcy creditors by omitting mention of the interest it now claims it had in the instant fee all along. The doctrine of judicial estoppel bars Plaintiff from taking such contradictory positions in different legal proceedings.

II HUMPHREYS IS JUDICIALLY ESTOPPED FROM ASSERTING ITS ALLEGED BREACH OF CONTRACT CLAIM AGAINST CALWELL

EXHIBIT B

The Monsanto Litigation consisted of fifty-three individual suits and two class action suits ("Monsanto Litigation"). One of the class action suits was the case *Bibb, et al. v. Monsanto Co., et al.*, No. 04-C-465 (Cir. Ct. Putnam Cnty.) ("*Bibb*"). On January 23, 2013, the circuit court in *Bibb* entered an Order awarding Calwell $20,000,000 in attorneys' fees and expenses and anticipated an additional $9.5 million in future incentive attorney fee payments ("Incentive Payments"). The Incentive Payments were contingent upon the satisfaction of certain triggering events. Before and during the bankruptcy, Humphreys received its 12.5% share of the Incentive Payments.

On January 13, 2016, Humphreys filed for Chapter 11 bankruptcy. In its schedules, Humphreys failed to disclose any potential Incentive Payments or the prepetition Agreement as receivable assets of the bankruptcy estate. Humphreys' bankruptcy plan was confirmed on February 10, 2017. The plan created a trust and a number of Humphreys clients' claims were channeled to this trust for payment. That trust provides that claimants will be paid only a percentage of their claims, indicating that Humphreys' creditors were paid some percentage less than 100% of their claims. Now, Humphreys is asserting a claim against Calwell based on the prepetition Agreement and the Incentive Payments that were not disclosed in Humphreys' bankruptcy proceedings.

Humphreys now asserts a claim under the prepetition Agreement for $375,000. However, under prevailing law, by failing to disclose the prepetition Agreement and any right to a portion of Incentive Payments as receivable assets in its bankruptcy proceedings, even if money is owed under the Agreement, Humphreys is judicially estopped from now asserting, post-bankruptcy, that Humphreys has any right to payment under the prepetition Agreement.[2] In the instant case, by not

[2]The Court may take judicial notice of the fact Humphreys did not disclose the Agreement or any right consistent with the instant claim in his bankruptcy disclosure filings.

reporting the prepetition Agreement and any rights thereunder as receivable assets of the bankruptcy estate, Humphreys took the position in the bankruptcy court that it had no valuable rights under that prepetition Agreement. Now, in the instant case, Humphreys asserts the exact opposite, that it has valuable rights under the prepetition Agreement. The law does not permit such a shell game. "The doctrine of "[j]udicial estoppel is a common law principle which precludes a party from asserting a position in a legal proceeding inconsistent with a position taken by that party in the same or a prior litigation." *In re C.Z.B.*, 151 S.W.3d 627, 633 (Tex.Ct.App.2004)." *W. Virginia Dep't of Transp., Div. of Highways v. Robertson*, 618 S.E.2d 506, 513 (W.Va. 2005). See *King v. Herbert J. Thomas Mem'l Hosp.*, 159 F.3d 192, 196 (4th Cir.1998). "'The policies underlying the doctrine include preventing internal inconsistency, precluding litigants from playing fast and loose with the courts, and prohibiting parties from deliberately changing positions according to the exigencies of the moment.' *United States v. McCaskey*, 9 F.3d 368, 378 (5th Cir.1993)." *W. Virginia Dep't of Transp., Div. of Highways v. Robertson*, 618 S.E.2d 506, 514 (W.Va. 2005).

It long has been the law in West Virginia that, "[p]arties will not be permitted to assume successive inconsistent positions in the course of a suit or a series of suits in reference to the same fact or state of facts." *Syllabus, McDonald v. Long*, 100 W.Va. 551, 131 S.E. 252 (1926). Judicial estoppel is appropriate where a party fails to disclose a receivable asset to a bankruptcy court, but then pursues a claim in a separate proceeding based on that undisclosed asset. *Reed v. City of Arlington*, 650 F.3d 571, 574 (5th Cir. 2011). See also *In re Coastal Plains, Inc.*, 179 F.3d 197, 204 (5th Cir. 1999) (the Fifth Circuit held that the plaintiff's claims were judicially estopped because of the nondisclosure of the claims in the bankruptcy schedules); *In re USinternetworking, Inc.*, 310 B.R. 274 (Bankr. D. Md. 2004) (finding that a third party could raise the affirmative defense of judicial

estoppel against a Chapter 11 debtor who failed to disclose its breach of contract claim during bankruptcy proceedings). See also *Syl.* pt. 2, *Dillon v. Board of Educ. of Mingo County*, 171 W.Va. 631, 301 S.E.2d 588 (1983) ("Parties will not be permitted to assume successive inconsistent positions in the course of a suit or a series of suits in reference to the same fact or state of facts."); *Gelwicks v. Homan*, 124 W.Va. 572, 583, 20 S.E.2d 666, 671 (1942) ("One may not defend a suit upon one ground, and then later defend the same suit, or one growing out of the same transaction, on grounds separate and distinct from those formerly asserted[.]"). "The doctrine [of judicial estoppel] fulfills its goals by 'bind[ing] a party to his or her judicial declarations, and precludes [that] party from taking a position inconsistent with previously made declarations in a subsequent action or proceeding.' *Kauffman–Harmon v. Kauffman*, 307 Mont. 45, 36 P.3d 408, 412 (2001)." *W. Virginia Dep't of Transp., Div. of Highways v. Robertson*, 618 S.E.2d 506, 514 (W.Va. 2005).

While "'the circumstances under which judicial estoppel may appropriately be invoked are not reducible to any general formulation.' *New Hampshire v. Maine*, 532 U.S. 742, 743, 121 S.Ct. 1808, 1810, 149 L.Ed.2d 968, 973 (2001)," *W. Virginia Dep't of Transp., Div. of Highways v. Robertson*, 618 S.E.2d 506, 514 (W.Va. 2005),[3] the Court of Appeals for the Fourth Circuit has

[3]Although the *Robertson* court observed that all circumstances to which judicial estoppel may apply is not reducible to any general formulation, it did address one formulation where it determined the doctrine would apply. See *Syllabus* Point 2, *W. Virginia Dep't of Transp., Div. of Highways v. Robertson*, 217 W. Va. 497, 499, 618 S.E.2d 506, 508 (2005) ("Judicial estoppel bars a party from re-litigating an issue when: (1) the party assumed a position on the issue that is clearly inconsistent with a position taken in a previous case, or with a position taken earlier in the same case; (2) the positions were taken in proceedings involving the same adverse party; (3) the party taking the inconsistent positions received some benefit from his/her original position; and (4) the original position misled the adverse party so that allowing the estopped party to change his/her position would injuriously affect the adverse party and the integrity of the judicial process."). Other West Virginia cases hold an estoppel applies to prevent a party from changing its position on a material fact, including *Syllabus* Pt. 5, in part, *Guthrie v. First Huntington Nat. Bank*, 184 S.E.2d 628 (W.Va. 1971) ("A party cannot take successive inconsistent positions

recognized four requirements for invoking the doctrine of judicial estoppel in circumstances such as those in the case at bar: 1) the party to be estopped advances an assertion that is inconsistent with a position taken during previous litigation; (2) the position is one of fact, rather than law or legal theory; (3) the court in the first proceeding accepted the prior position; and (4) the party to be estopped acted intentionally and not inadvertently. *Casto v. Am. Union Boiler Co. of W. Virginia*, No. CIV.A. 2:05-CV-00757, 2006 WL 660458 (S.D.W. Va. Mar. 14, 2006). All four elements are present here.

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concerning the same fact or state of facts or where a pleading in effect changes a fundamental fact in the case[.]"). See also *Haba v. Big Arm Bar & Grill, Inc.*, 468 S.E.2d 915 (W.Va. 1996) (holding that fact that parties presented evidence in prior action that lighting in area of accident was adequate for purposes of crossing highway, estopped them from asserting in subsequent trial that establishment was negligent in failing to provide adequate lighting); *E.H. v. Matin*, 428 S.E.2d 523 (W.Va. 1993) (holding that Petitioners who had agreed to court-approved behavioral health system plan would not be permitted shift positions so as to challenge wisdom of building new mental hospital under plan; petitioners did not challenge wisdom of building hospital until revenue bonds were issued, construction plans were finalized, and construction started); *Dillon v. Bd. of Educ. of Mingo Cty.*, 301 S.E.2d 588 (W.Va. 1983) (holding that Board of education could not contend that there was no violence or intimidation involved in parents' picketing which prevented teachers from entering school where that contention was directly contrary to board's earlier position on which they successfully obtained injunction against picketing parents); *Kap-Tex, Inc. v. Romans*, 67 S.E.2d 847 (W.Va. 1951) (holding in an action of detinue to recover possession of sewing machines and equipment delivered to defendants under conditional sales agreement, where defendants assumed and undertook to maintain by itemized statement of claim and testimony of one of the defendants that another corporation was indebted to defendants for labor performed in manufacturing wearing apparel, defendants could not seek to establish in such action, the same claim against plaintiff corporation); *Watkins v. Norfolk & W. Ry. Co.*, 23 S.E.2d 621, 623 (W.Va. 1942) ("[H]ere we have more than a mere shifting from one to another theory or legal contention. The change is to a wholly antithetical statement of a fundamental fact in the case. This may sometimes amount to an estoppel, and is always a very potent admission against interest."); *Greenbrier Laundry Co. v. Fid. & Cas. Co. of N. Y.*, 178 S.E. 631 (W.Va. 1935) (holding that laundry company which on first trial in action on fidelity bond produced evidence that it looked to its driver alone for payment for laundry work could not on second trial introduce testimony that it looked to customers in case of driver's default). The application of an estoppel in the foregoing cases is consistent with the application of an estoppel in the case at bar.

EXHIBIT B

A Humphrey's change of position meets the factors of judicial estoppel

1. Humphreys' present breach of contract claim is inconsistent with the position Humphreys took in its 2016 bankruptcy proceedings.

The United States Code imposes a duty on bankruptcy debtors to disclose all receivables and assets. *Casto v. Am. Union Boiler Co. of W. Virginia*, No. CIV.A. 2:05-CV-00757, 2006 WL 660458 (S.D.W. Va. Mar. 14, 2006). "The duty to disclose is a continuing one that does not end once the forms are submitted to the bankruptcy court; rather the debtor must amend financial statements if circumstances change." *Robinson v. Tyson Foods, Inc.*, 595 F.3d 1269, 1274 (11th Cir. 2010). By not disclosing the prepetition Agreement or any claim to payment under that Agreement as a receivable asset of the bankruptcy estate, Humphreys took the position in the bankruptcy court that no such claim existed. In addition, when Humphreys later amended its bankruptcy schedules and still did not disclose any claim against Calwell, Humphreys reiterated its position in the bankruptcy court that any such claim did not exist. Humphreys current claim against Calwell in this post-bankruptcy lawsuit is clearly inconsistent with, indeed diametrically opposite to, the position Humphreys adopted during its previous bankruptcy proceedings, that no such claim existed. Accordingly, the first element for the application of judicial estoppel is fulfilled here.

2. Humphreys alleged claim against Calwell, if it had any merit, is a factual matter that must be disclosed during its bankruptcy.

The existence of a potential claim is considered factual subject matter, which must be disclosed during bankruptcy. *In re USinternetworking, Inc.*, 310 B.R. 274, 284 (Bankr. D. Md. 2004) (The court found the failure of a debtor to a disclose breach of contract claim in its reorganization case was failure to disclose fact, rather than position of law). Therefore, Humphreys' instant claim against Calwell, based on events and the Agreement that arose prepetition, was a fact

that should have been disclosed in Humphreys bankruptcy proceeding, had Humphreys really believed it had a meritorious claim against Calwell. Thus, the second element for the application of judicial estoppel is met here.

3. The Bankruptcy court, and the creditors, accepted and relied on Humphreys' prior position that any claim against Calwell was not meritorious and was not a receivable asset of Humphreys.

The court relied upon Humphreys' disclosures and representations to confirm a plan and close the bankruptcy case. The bankruptcy court's acceptance of a debtor's schedules constitutes acceptance of a debtor's sworn averments that the debtor reported all receivable assets it believed it had. A majority of courts have held that the confirmation of a debtor's Chapter 11 or 13 plan qualifies as acceptance for judicial estoppel purposes. *In re Residential Capital, LLC*, 519 B.R. 606, 612 (S.D.N.Y. 2014). The presence of a substantial receivable asset in the bankruptcy, such as the cause of action based on the Agreement and Incentive Payments now alleged by Humphreys in this lawsuit and which Humphreys now alleges has substantial value, would have significantly affected distributions to creditors and the bankruptcy court's confirmation of the plan. Because the bankruptcy court, the creditors, and other interested parties in the bankruptcy relied on the disclosures set forth in Humphreys' schedules to confirm the plan and close the bankruptcy case, the third element for the application of judicial estoppel to Humphreys claims against Calwell is met here.

4. Humphreys failure to disclose the receivable asset that the cause of action against Calwell is based on was intentional.

Courts generally consider the nondisclosure of a claim to be intentional when a claimant has both knowledge of a claim and motive to conceal a claim. *Casto v. Am. Union Boiler Co. of W.*

Virginia, 2006 WL 660458, at *3 (citing *In re USinternetworking, Inc.*, 310 B.R. 274, 284 (Bankr. D. Md. 2004)). If Humphreys truly believed he had a meritorious and valuable cause of action against Calwell when filing for bankruptcy, Humphreys had the obligation and numerous opportunities to disclose the claim in his schedules and amended schedules. That Humphreys failed to do so was an intentional omission and reflects that either Humphreys was trying to hide the asset from creditors or he did not really believe at the time that any such cause of action had merit. Humphreys certainly had motive to conceal its potential claim against Calwell. By not disclosing its cause of action, Humphreys benefitted from the protections of the bankruptcy code and now, if judicial estoppel is not applied, seeks to recover a significant amount of money on an asset that should have been disclosed to, and been part of a plan of distribution to, its bankruptcy creditors. Alternatively, if Humphreys thought its rights under the prepetition Agreement had already been satisfied or otherwise had no value, his nondisclosure would also have been intentional. There is no question that Humphreys intentionally failed to report this claim in its bankruptcy. Thus, the fourth element for the application of judicial estoppel is met here.

III CONCLUSION

Humphreys intentionally did not report the prepetition Agreement or the rights Humphreys now asserts he has under that Agreement as a receivable asset of its bankruptcy estate. Whether this was the failure to report an asset that Humphreys knew had no value – that is, was a meritless claim—or this failure was an attempt to conceal an asset from creditors and sneak that asset through bankruptcy so that he could pocket all the value post-bankruptcy, in either case, judicial estoppel prevents Humphreys from now asserting that claim against Calwell. For this reason, the Complaint should be dismissed.

EXHIBIT B

THE CALWELL PRACTICE, LC and
CALWELL LUCE DITRAPANO PLLC,
----------By Counsel----------

Sean McGinley, Esq. (Bar No. 5836)
DIPIERO SIMMONS MCGINLEY & BASTRESS, PLLC
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3. Summary of Significant Reporting Policies. The Schedules and Statements have been signed by James F. Humphreys, the President and an authorized officer of the Debtor. In reviewing and signing the Schedules and Statements, Mr. Humphreys has necessarily relied upon the efforts, statements and representations of the accounting and non-accounting personnel and management and the Debtor's advisors. Mr. Humphreys has not personally verified the accuracy of each such statement and representation, including statements and representations concerning amounts owed to creditors. The Debtor made its best effort to report asset, liability, disbursement and other information on the Debtor's Schedules and Statement of Financial Affairs ("Statements").

In addition, the following should be noted:

Statements Part 2 - Transfers Made Before Filing Bankruptcy; Insider Payments. Payments related to salary or draws of Debtor's President are listed at the gross amount. Additionally, to the extent a payment was made on behalf of an Insider the names and addresses of the recipient are listed in Part 13 - Item 30 of the Statements. Wages paid to Rebecca Snodgrass, Debtor's Secretary, are not stated inasmuch as she has no control over the corporation and received no compensation as an officer. Her wages were all based on her status as an hourly employee. The information will be provided to the Court and to the U.S. Trustee upon request.

Schedules Part 1 - Cash and Cash Equivalents. The cash balance excludes the IOLTA Trust account as these funds are not an asset of the Debtor but held in Trust for the Debtor's clients.

Schedules Part 3 – Accounts Receivable. The Debtor is due receivables from various law firms as a result of settlement of personal injury claims for asbestos illnesses. Debtor's fee is due upon payment to the clients. As of the date hereof, the Debtor cannot ascertain the amounts due to it from these firms.

Schedules Part 10 – Intangible and Intellectual Property. The debtor did not include any ordinary course of business licenses such as software licenses as the debtor does not own such licenses.

Schedules Part 11 – All Other Assets. The Debtor has not set forth all causes of action, including contingent or unliquidated counterclaims against third parties in the Schedules. The Debtor reserves all of its rights with respect to any causes of action that it may have, and neither these Global Notes nor the Schedules and Statements shall be deemed a waiver of any such causes of action.

Schedules D, E, and F - Dates Debt Incurred. The claims listed in Schedules arose or were incurred on various dates. In certain instances, the date on which the claim arose is an open issue of fact. While best efforts have been made, determination of each date upon which each claim in the Schedules was incurred or arose would be unduly burdensome and cost prohibitive and, therefore, the Debtors do not list a date for each claim listed in the Schedules. Additionally, the account number included on the Schedules has been assigned by the Debtor's Claims and Noticing Agent for administrative purposes.

EXHIBIT B

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

JAMES F. HUMPHREYS & ASSOCIATES, L.C.,

Plaintiff,

Civil Action No. 20-C-413
(Hon. Carrie Webster, Judge)

THE CALWELL PRACTICE, LC and
CALWELL LUCE DITRAPANO PLLC,

Defendants.

CERTIFICATE OF SERVICE

I, Sean P. McGinley, do hereby certify that a copy of the foregoing **MEMORANDUM IN SUPPORT OF MOTION TO DISMISS** was served on counsel of record on the 17th day of July, 2020, through email and the United States Postal Service, postage prepaid, to the following:

Michael B. Hissam, Esq.
Andrew C. Robey, Esq.
Hissam Forman Donovan Ritchie PLLC
P.O. Box 3983
Charleston, WV 25339

Sean McGinley, Esq. (Bar No. 5836)

EXHIBIT B

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

JAMES F. HUMPHREYS & ASSOCIATES, L.C.,

Plaintiff,

Civil Action No. 20-C-413
(Hon. Carrie Webster, Judge)

THE CALWELL PRACTICE, LC and
CALWELL LUCE DITRAPANO PLLC,

Defendants.

MOTION TO DISMISS

Defendants hereby move the Court to dismiss the Complaint in the above-styled matter for failure to state a claim pursuant to Rule 12(b)(6) of the *West Virginia Rules of Civil Procedure*. For the reasons stated in the accompanying Memorandum in Support of Motion to Dismiss, the Motion to Dismiss should be granted.

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304-342-0133
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EXHIBIT B

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

JAMES F. HUMPHREYS & ASSOCIATES, L.C.,

Plaintiff,

Civil Action No. 20-C-413
(Hon. Carrie Webster, Judge)

THE CALWELL PRACTICE, LC and
CALWELL LUCE DITRAPANO PLLC,

Defendants.

CERTIFICATE OF SERVICE

I, Sean P. McGinley, do hereby certify that a copy of the foregoing **MOTION TO DISMISS** was served on counsel of record on the 17th day of July, 2020, through email and the United States Postal Service, postage prepaid, to the following:

Michael B. Hissam, Esq.
Andrew C. Robey, Esq.
Hissam Forman Donovan Ritchie PLLC
P.O. Box 3983
Charleston, WV 25339

Sean McGinley, Esq. (Bar No. 5836)

West Virginia Circuit Express (/DEFAULT.ASPX)

Civil

Case Information

Thirteenth Judicial Circuit of Kanawha County

20-C-413

Judge: CARRIE WEBSTER

JAMES F. HUMPHREYS & ASSOCIATES, L.C. VS. CALWELL PRACTICE, LC

Plaintiff(s)

Plaintiff Attorney(s)

JAMES F. HUMPHREYS & ASSOCIATE
L.C., JAMES F. HUMPH

MICHAEL B. HISSAM|ANDREW C. ROBEY

Defendant(s)

Defendant Attorney(s)

CALWELL LUCE DITRAPANO PLLC
CALWELL PRACTICE, LC
PLLC, CALWELL LUCE D
PRACTICE., THE CALWE

SEAN P. MCGINLEY

Date Filed: 05/20/2020
Case Type: CIVIL
Appealed: 0
Final Order Date: N/A
Statistical Close Date: N/A

Line	Date	Action / Result
0001	05/20/2020	# CASE INFO SHEET; COMPLAINT; ISSUED SUM & 4 CPYS; F FEE; RCPT
0002		580088; $230.00
0003	05/28/2020	@ COS AS TO P'S 1ST SET OF DICOV
0004	06/03/2020	# LET FR SS DTD 5/29/20; SUM W/RET ON C & DISCOV (5/29/20 SS)
0005		AS TO CALWELL PRACTICE LC
0006	06/03/2020	# LET FR SS DTD 5/29/20; SUM W/RET ON C & DISCOV (5/29/20 SS)
0007		AS TO CALWELL LUCE DITRAPANO PLLC
0008	07/22/2020	*MOT TO DISM W/COS
0009	07/22/2020	*MEMO IN SUPP OF MOT TO DISM W/COS
0010	08/05/2020	# D'S MOT TO STAY DISCOV W/COS

0011 08/05/2020 # COS AS TO D'S RESP'S TO REQ FOR ADM
