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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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A. KARIM KATRIB, M.D.,

Petitioner,

v. **No. 21-0843**

HERBERT J. THOMAS MEMORIAL HOSPITAL ASSOCIATION, and THOMAS HEALTH SYSTEM, INC.

Respondents.

REPLY BRIEF ON BEHALF OF THE PETITIONER

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REPLY BRIEF ON BEHALF OF PETITIONER

I. INTRODUCTION

Pursuant to Rule 10(g) of the West Virginia Rules of Appellate Procedure, Petitioner A. Karim Katrib, M.D., by counsel, submits this Reply to the Response brief of Respondents Herbert J. Thomas Memorial Hospital Association ("Thomas Memorial Hospital") and Thomas Health System, Inc., and in further support of his appeal.

Petitioner reiterates that this appeal involves the consideration of the Circuit Court's decision to dismiss the Petitioner's complaint pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure for failing to state a claim upon which relief can be granted. This Court has noted that its review of an appeal of a dismissal under Rule 12(b)(6) "is limited to the sufficiency of the complaint; thus, [this Court] must accept as true all well-pled facts and must draw all reasonable inferences in favor of the dismissed party." State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc. 194 W.Va. 770, 776 n.7, 461 S.E.2d 516, 522 n.7 (1995). Similarly, in appraising the sufficiency of a complaint on a Rule 12(b)(6) motion, a court should not dismiss the complaint unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Chapman v. Kane Transfer Co., Inc., 160 W.Va. 530, 236 S.E.2d 207 (1977).

II. ARGUMENT

A. The Petitioner Was a Known Creditor of the Respondents.

The Respondents' brief demonstrates that the parties to this case agree on certain fundamental propositions of bankruptcy law that control the disposition of this appeal. No party disputes that pre-existing obligations of a debtor can only be discharged through bankruptcy if the creditor was on notice of the bankruptcy filing and the claims bar date; that the law

recognizes a distinction between known creditors and unknown creditors of the debtor; that the type of notice required depends on the status of the creditor; and that inadequate notice is a defect which precludes discharge of a claim in bankruptcy. *Petitioner's Brief at 9-11; Respondents' Brief at 10-12.* Both parties cite to Chemetron Corp. v. Jones, 72 F.3d 341, 346 (3d Cir. 1995) for the proposition that actual written notice is required to a known creditor, while constructive notice is sufficient if the creditor qualifies as an unknown creditor.

In their brief, the Respondents also admit that, prior to the filing of their bankruptcy petitions, they were aware of the dispute over the suspension of the Petitioner's clinical privileges; they were aware that the Petitioner had requested a hearing as mandated by the Thomas Memorial Hospital Bylaws;[1] and they were "in negotiations over this dispute until the filing of this civil action." *Respondents' Brief at 12.* Yet the Respondents argue that, notwithstanding these admitted facts, the Petitioner's claims arising from the suspension of his privileges were merely potential, speculative and not "reasonably ascertainable" in January 2020 when the bankruptcy petitions were filed. In making this argument, the Respondents gloss over the federal bankruptcy cases that have defined the distinctions between known and unknown creditors and simply ignore the West Virginia substantive law that controls the matters in dispute between the Petitioners and the Respondents.

Over thirty years ago, this Court recognized that "there are basic, common-law procedural protections which must be accorded a medical staff member by a private hospital in a disciplinary proceeding which could seriously affect his or her ability to practice medicine."

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[1] Respondents assert that the Petitioner "sought a hearing to challenge the temporary suspension of his clinical privileges." *Respondents' Brief at 12.* To be clear, Petitioner sought a hearing to challenge the Respondents' September 19, 2019 implementation of the "suspension of all [of the Petitioner's] clinical privileges and medical staff membership pending the Board [of Trustees] review and decision on the recommended action." *A.R. at 5, Complaint at ¶19.* Because the Respondents have never complied with their duty under the Bylaws to hold such a hearing, the Petitioner's suspension remains in effect.

Mahmoodian v. United Hosp. Center., Inc., 185 W. Va. 59, 65, 404 S.E.2d 750, 756 (1991). This Court also noted in Mahmoodian that: "Under the Federal Health Care Quality Improvement Act of 1986, 42 *U.S.C.* §§ 11101–11152, as amended, both public and private hospitals are encouraged to comply with that Act's standards for adequate notice and fair hearing with respect to health care peer review, in order to be immune generally from monetary damages." Id. at 65, n. 10, 404 S.E.2d at 756, n. 10. Further, in Garrison v. Herbert J. Thomas Mem'l Hosp. Ass'n, 190 W. Va. 214, 222, 438 S.E.2d 6, 14 (1993), this Court concluded that, "an individual's right to conduct a business or pursue an occupation is a property right."

Respondents knew on September 19, 2019 that their actions that are at issue in this lawsuit resulted in the suspension of the Petitioner's clinical privileges and medical staff membership. *See A.R. at 5, Complaint at ¶19.* Thus, Respondents knew by September 19, 2019 that their actions had deprived the Petitioner of a property right; that the disciplinary proceeding that they had initiated would seriously affect the Petitioner's ability to practice medicine; and that they were required to provide the Petitioner with a "fair hearing" to challenge their actions. Moreover, Respondents were aware that, if their actions were deemed to have been taken in bad faith, they could be subject to civil liability for damages. Garrison, 190 W. Va. at 218, 438 S.E.2d at 10. And this Court's holding in Camden-Clark Mem'l Hosp. Corp. v. Nguyen, 240 W. Va. 76, 807 S.E.2d 747 (2017), put Respondents on notice that, as a result of their conduct, the Petitioner could allege claims of "torts, breach of contract, violation of hospital bylaws or other actions that contravene public policy." The Respondents also knew in January 2020 when they filed their bankruptcy petitions that they had not complied with the requirement under their own Bylaws to provide a hearing to the Petitioner.

As both parties agree, "[k]nown [creditors] are those whose identity and interest are either known or reasonably ascertainable by the debtor." In re HNRC Dissolution Co., 3 F.4th 912, 919 (6th Cir. 2021) *quotations omitted.* The face of the Petitioner's complaint demonstrates that both the Petitioner's identity and his interest[2] were actually known to the Respondents before their bankruptcy petitions were filed. That should be the end of the inquiry. If Respondents actually knew of the Petitioner's identity and interest in January 2020 (and they clearly did), he was a known creditor.

Yet even if it were necessary to ascertain whether the Petitioner's identity and his interest were "reasonably ascertainable" to the Respondents in January 2020, the result would be the same. In discussing the concept of "reasonably ascertainable," federal courts have focused on the temporal aspects of a creditor's potential claim. In re Placid Oil Co., 753 F.3d 151 (5th Cir. 2014), is cited by the Respondents as authority. *Respondents' Brief at 12.* In that case, the Fifth Circuit recognized that the federal decisions "establish that the claim of a known creditor must be based on an actualized injury, as opposed to merely foreseeable." Id. at 156. As Respondents note in their brief, the Fifth Circuit Court of Appeals also observed in Placid Oil that, "conjectural claims of a creditor that arise too far in the future cannot make that creditor 'known.'" Id.

In this case, however, the Petitioner's claim against the Respondents did not "arise in the future." In this case, the Petitioner's claim against the Respondents already existed when the Respondents filed for bankruptcy protection. The Petitioner suffered an actual injury in 2019 when his privileges were suspended. Indeed, the Respondents themselves argue as much in their

[2] As noted above, the Petitioner has a property interest in his medical practice that has undoubtedly been adversely affected by the Respondents' conduct. "A bankruptcy court cannot discharge one's property interest without adequate notice." In re HNRC Dissolution Co., 3 F.4th 912, 919 (6th Cir. 2021).

brief. *See Respondents' Brief at 23 ("Here, ..., the claims at issue arise solely from Respondents' decision to suspend Petitioner's hospital privileges.").*

The issue is not whether the Respondents knew how the Petitioner might ultimately articulate the legal bases for his claims, the issue is whether the Petitioner had already suffered an injury that might give rise to claims at the time of the Respondents' bankruptcy filing. He clearly had. The Petitioner's injury initially arose at the point that his privileges were suspended. Indeed, Respondents have admitted that they were "in negotiations" with the Petitioner after they had suspended his privileges. Negotiations would only be necessary if the Petitioner had suffered some type of injury to his legally protected interests. At a minimum, that made the Petitioner's claims "reasonably ascertainable" to the Respondents by the January 10, 2020 bankruptcy filing date. If the Petitioner's claims were "reasonably ascertainable" to the Respondents, then he qualified as a known creditor who was entitled to actual notice.

In their brief, the Respondents also cite to In re Arch Wireless, Inc., 534 F.3d 76 (1st Cir. 2008). *Respondents' Brief at 12.* In that case, the First Circuit stated:

> Thus, in order for a claim to be reasonably ascertainable, the debtor must have in his possession ... some specific information that reasonably suggests both the claim for which the debtor may be liable and the entity to whom he would be liable. ... On the other hand, there is no requirement that the debtor have information suggesting the financial magnitude of the claim. *See* 11 U.S.C. § 101(5)(A) (defining "claim" to include both liquidated and unliquidated liabilities).

Id. at 81, *quotations omitted.* Here the Respondents had such specific information in their possession, even if they did not know the financial magnitude of the Petitioner's potential claim.

As the Sixth Circuit has stated in HNRC Dissolution, "the 'general rule' is that 'notice by publication is not enough with respect to [an entity] whose name and address are known or very easily ascertainable and whose legally protected interests are directly affected by the proceedings

in question.'" 3 F.4th at 919, *quoting* Schroeder v. City of New York, 371 U.S. 208, 212–13 (1962). Respondents have asserted and continue to argue that the Petitioner's legally protected interests as set forth in his complaint have been extinguished by their bankruptcy proceedings.[3] This would certainly constitute a "direct effect" on the Petitioner's legally protected interests. Yet the only notice of the proceedings that they provided to the Petitioner was notice by publication. Such notice clearly does not comply with the "general rule" noted above. The Circuit Court erred in concluding that the Petitioner was an unknown creditor and that notice of the Respondents' bankruptcy by publication was sufficient to effectuate a discharge of the Petitioner's claims.

B. At a Minimum, Whether the Petitioner Was a Known or Unknown Creditor is a Question of Fact.

The Respondents concede in their Response that "discharge in bankruptcy" is an affirmative defense under the West Virginia Rules of Civil Procedure for which they bear the burden of proof. *Respondents' Brief at 15.* However, the Respondents' argument that they are entitled to rely on *res judicata* principles to support their claim of discharge based on the face of the Petitioner's complaint is fundamentally flawed.

Citing the Fourth Circuit's discussion of *res judicata* in the context of a bankruptcy court's discharge order in In re Varat Enterprises, Inc., 81 F.3d 1310 (4th Cir. 1996), the Respondents point to the requirement that "the prior judgment [of the bankruptcy court] was final and on the merits, and rendered by a court of competent jurisdiction in accordance with the

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[3] Petitioner notes that two more months have passed since the September 30, 2020 effective date of the Respondents' reorganization plan and the Respondents still have not provided the Petitioner with the hearing mandated by the By-Laws. The only reasonable inference is that the Respondents consider this obligation to have been extinguished by the bankruptcy proceedings. The Petitioner reiterates that, if the obligation to provide the hearing is subject to the bankruptcy court's discharge order, then there can be no question that the Petitioner qualified as a known creditor who was entitled to actual notice. *See Petitioner's Brief at 15-16.*

requirements of due process." Id. at 1315. Respondents then argue that this requirement has been met with regard to the August 19, 2020 Discharge Order in their bankruptcy cases because they "provided adequate notice of the Plan through publication." *Respondents' Brief at 16.* This argument simply begs the question. Whether constructive notice by publication was adequate ***to this potential creditor*** in accord with the requirements of due process is the fundamental issue raised by this appeal.

More specifically in this regard, the Second Circuit has indicated that a confirmed bankruptcy plan does not have *res judicata* effect to the extent notice provided to a claimant was constitutionally deficient. Whelton v. Educ. Credit Mgmt. Corp., 432 F.3d 150, 154–55 (2d Cir.2005) *abrogated on other grounds by* United Student Aid Funds, Inc. v. Espinosa, 559 U.S. 260 (2010). *See also* In re Mansaray-Ruffin, 530 F.3d 230, 239 (3d Cir. 2008) ("we have refused to treat confirmed bankruptcy plans as *res judicata* with respect to the claims of creditors who did not receive notice that was sufficient under the circumstances—even where adherence to the plain language of the relevant statute would have made the confirmed plan binding on all creditors."); In re Barton Indus., Inc., 104 F.3d 1241, 1245 (10th Cir. 1997) ("a creditor's claim is not subject to a confirmed bankruptcy plan when the creditor is denied due process because of inadequate notice"); In re Weiand Auto. Indus., 612 B.R. 824, 848 (Bankr. D. Del. 2020) ("a confirmed plan of reorganization that discharges claims and enjoins attendant causes of action against the debtors pursuant to [11 U.S.C.] § 1141(d) is 'unenforceable against entities that did not receive adequate notice of the bankruptcy or an opportunity to contest confirmation,'" *quoting* 8 Collier on Bankruptcy P 1141.06. 16th Edition.).

Moreover, in order for the Circuit Court to resolve this issue on a motion to dismiss, it would be necessary that the Petitioner's status ***as an unknown creditor*** be apparent on the face

of the complaint. This is clearly not the case. Indeed, as discussed above and in the Petitioner's initial brief, the allegations on the face of the complaint if taken as true would make the Petitioner a known creditor of the Respondents.

The cases cited by the Respondents do not help their cause. In Goodman v. Praxair, Inc., 494 F.3d 458 (4th Cir. 2007), for example, the Fourth Circuit stated:

> It follows, therefore, that a motion to dismiss filed under Federal Rule of Procedure 12(b)(6), which tests the sufficiency of the complaint, generally cannot reach the merits of an affirmative defense, such as the defense that the plaintiff's claim is time-barred. But in the relatively rare circumstances where facts sufficient to rule on an affirmative defense are alleged in the complaint, the defense may be reached by a motion to dismiss filed under Rule 12(b)(6). This principle only applies, however, if all facts necessary to the affirmative defense clearly appear *on the face of the complaint.*

Id. at 464, *quotations and brackets omitted, emphasis in original. See also* Richmond, Fredericksburg & Potomac R. Co. v. Forst, 4 F.3d 244, 250 (4th Cir. 1993) ("A motion under Rule 12(b)(6) is intended to test the legal adequacy of the complaint, and not to address the merits of any affirmative defenses. .... Because neither of the asserted defenses appears on the face of the complaint, it is inappropriate to address them in the current posture of the case. These defenses are more properly reserved for consideration on a motion for summary judgment.").

It should also be noted that, while "discharge in bankruptcy" was removed as an affirmative defense from Rule 8(c) of the Federal Rules of Civil Procedure in 2010, it remains an affirmative defense under Rule 8(c) of the West Virginia Rules of Civil Procedure. Significantly however, the Advisory Committee Notes to the 2010 federal amendment explained:

> "[D]ischarge in bankruptcy" is deleted from the list of affirmative defenses. Under 11 U.S.C. § 524(a)(1) and (2) a discharge voids a judgment to the extent that it determines a personal liability of the debtor with respect to a discharged debt. The discharge also operates as an injunction against commencement or continuation of

> an action to collect, recover, or offset a discharged debt. For these reasons it is confusing to describe discharge as an affirmative defense. ***But § 524(a) applies only to a claim that was actually discharged.*** Several categories of debt set out in 11 U.S.C. § 523(a) are excepted from discharge. ***The issue whether a claim was excepted from discharge may be determined either in the court that entered the discharge or--in most instances--in another court with jurisdiction over the creditor's claim.***

Emphasis added.

As the Petitioner has previously noted, "[t]he bankruptcy courts and state courts have concurrent jurisdiction to determine the dischargeability of unscheduled debts. ... In fact, a discharge in bankruptcy is a recognized affirmative defense under state law." In re Candidus, 327 B.R. 112, 119 (Bankr. E.D.N.Y. 2005), *citations omitted.* See also In re Pavelich, 229 B.R. 777, 783 (B.A.P. 9th Cir. 1999), *as amended* (Feb. 22, 1999) ("With respect to the discharge itself, state courts have the power to construe the discharge and determine whether a particular debt is or is not within the discharge. Indeed, discharge in bankruptcy is a recognized defense under state law."). Because discharge in bankruptcy remains an affirmative defense under the controlling West Virginia procedural rules, the Respondents have the burden of proof to establish the facts necessary to implement the defense.

And the federal cases make clear that whether a creditor qualifies as known or unknown depends on the facts. *See e.g.,* In re Weiand Auto. Indus., 612 B.R. 824, 851 (Bankr. D. Del. 2020) ("The factual record is not sufficiently developed for the Court to determine if the Plaintiffs were known creditors or if the Debtors' publication notice was constitutionally adequate."); DePippo v. Kmart Corp., 335 B.R. 290, 295 (S.D.N.Y. 2005) ("Whether a creditor received adequate notice is a fact-specific inquiry and depends on the facts and circumstances of each case."); Selman v. Delta Airlines, No. CIV 07-1059 JB/WDS, 2008 WL 6022017, at *15 (D.N.M. Aug. 13, 2008) ("While the Confirmation Order would otherwise discharge and enjoin

[the plaintiff's] claims, there is a factual dispute whether [the plaintiff] was a known or unknown creditor at the time of the Bankruptcy. Accordingly, the Court will allow the case to proceed so that this factual issue can be resolved after some discovery takes place."); In re HNRC Dissolution Co., No. 02-14261, 2018 WL 2970722, at *6 (Bankr. E.D. Ky. June 11, 2018) *aff'd*, 3 F.4th 912 (6th Cir. 2021) ("A debtor ... has the burden to prove that notice is sufficient.... Whether a party received adequate notice is a fact-specific inquiry and depends on the totality of the circumstances." *Citations omitted.*).

In moving to dismiss the Petitioner's complaint, the Respondents, as the parties with the burden of proof, made the bald assertion that they were unaware of the Petitioner's potential claims when they filed their bankruptcy petitions in January 2020. They did so without submitting any evidence in support of this proposition. The Circuit Court simply accepted the Respondents' assertion as true without allowing the Petitioner to conduct any discovery on the issue.

Yet it is a fundamental principle of bankruptcy law that, "[b]ecause the debtor ... controls who receives notice, it is the *debtor's* knowledge of a creditor, not the creditor's knowledge of his claim, which controls whether the debtor has a duty to list that creditor." In re Arch Wireless, 332 B.R. 241, 255 (Bankr. D. Mass. 2005), *subsequently aff'd sub nom* In re Arch Wireless, Inc., 534 F.3d 76 (1st Cir. 2008), *emphasis in original.* The Respondents' knowledge of the Petitioner's potential claims in January 2020 is the critical issue in resolving this affirmative defense. This is why factual development and discovery would be necessary before it would be possible to conclude that the Respondents were ignorant of the Petitioner's claims when they filed for bankruptcy protection.

C. Petitioner's Complaint Alleges Actionable Post-Discharge Conduct.

The Thomas Memorial Hospital Bylaws require that the Petitioner be given a hearing before the recommendation of the revocation of his medical staff membership and clinical privileges could become final. *A.R. at 8, Complaint at ¶38.* Federal law mandates that peer review action, such as the suspension and potential revocation of the Petitioner's clinical privileges that is at issue here, comport with due process. Freilich v. Upper Chesapeake Health, Inc., 313 F.3d 205, 211 (4th Cir. 2002). West Virginia law requires basic, common-law procedural protections to be accorded by a private hospital to a medical staff member (such as the Petitioner) in a disciplinary proceeding which could seriously affect his ability to practice medicine. Mahmoodian, *supra.*

These requirements did not magically disappear on the September 30, 2020 effective date of the Respondents' plan of reorganization. Indeed, if they did, then the Petitioner was clearly a known creditor of the Respondents because Respondents were aware of these requirements when they filed their bankruptcy petitions. *See footnote 3, supra.*

The Petitioner's complaint undoubtedly alleges that the Respondents violated these requirements prior to the January 10, 2020 filing of the bankruptcy petitions. But it also undoubtedly alleges that the Respondents violated these requirements ***after*** the September 30, 2020 effective date of the Respondents' plan of reorganization.

The Petitioner's complaint asserted that the Respondents had not given the Petitioner the required hearing as of the date that the complaint was filed (May 14, 2021). *A.R. at 5,8, Complaint at ¶¶ 21, 41.* The complaint asserted that the suspension of the Petitioner's clinical privileges and medical staff membership had been continuous from May 16, 2019 to the date of the complaint. *A.R. at 5, Complaint at ¶ 22.* Likewise, the denial of due process asserted in the

complaint was also alleged to be continuous. *A.R. at 8, Complaint at ¶ 45.* To the extent that the Respondents argue that the complaint does not assert any actionable post-discharge conduct, they are simply wrong.[4]

Respondents ignore the fact that the Circuit Court was required to construe the complaint in the light most favorable to the Petitioner. John W. Lodge Distrib. Co. v. Texaco, Inc., 161 W. Va. 603, 605, 245 S.E.2d 157, 158 (1978). Similarly, they ignore the fact that the Circuit Court was also required to liberally construe the complaint so as to do substantial justice when considering the Respondents' motion to dismiss under Rule 12(b)(6). Cantley v. Lincoln Cty. Comm'n, 221 W. Va. 468, 470, 655 S.E.2d 490, 492 (2007).

A liberal construction in the light most favorable to the Petitioner mandates the conclusion that the Petitioner's complaint asserts claims resulting from the Respondents' post-confirmation conduct. The Circuit Court was wrong to conclude otherwise.

D. The Circuit Court Failed to Address Due Process Concerns.

In responding to the Petitioner's argument that the Circuit Court failed to assure that the Petitioner received due process in the bankruptcy proceedings, Respondents once again resort to begging the question. The Respondents' arguments that no due process violations are present herein are premised on the unsupported conclusion that the Petitioner was an unknown creditor of the Respondents. *Respondents' Brief at 25.* As amply demonstrated above and in the Petitioner's initial brief, that conclusion is much in dispute. Moreover, it is the Respondents, not the Petitioner, who bear the burden of proving that conclusion.

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[4] Respondent also contend that "the Petitioner's complaint does not make any claim for equitable relief." *Respondents' Brief at 24.* This is also wrong. In its prayer for relief, the Petitioner's complaint seeks "all appropriate ... equitable relief..." *A.R. at 12, Complaint at 11.*

The federal courts have clearly indicated that, "[p]rocedural due process is a fundamental component of chapter 11 bankruptcy because of the broad authority that may be granted to those that seek its protection." In re Weiand Auto. Indus., 612 B.R. 824, 847 (Bankr. D. Del. 2020). If the Petitioner qualifies as a known creditor of the Respondent, due process dictates that his claims herein cannot be barred by the Discharge Order because he did not receive actual notice of the bankruptcy filing and claims bar date. *See* In re Arch Wireless, Inc., 534 F.3d 76, 83 (1st Cir. 2008) ("because the Code and Rules themselves do not provide an exception to the discharge injunction when notice rules are violated, we must look to due process principles to evaluate the claim of a known-but-unnotified creditor that the discharge injunction does not bar the creditor's claims.").

Respondents cite to the case DPWN Holdings (USA), Inc. v. United Air Lines, Inc., 871 F. Supp. 2d 143 (E.D.N.Y. 2012) to support their position. *Respondents' Brief at 26.* In fact, DPWN Holdings supports the Petitioner's position. In that case, the district court observed that, "[a]ny determination of whether a claim has been discharged 'cannot be divorced from fundamental principles of due process.'" DPWN Holdings (USA), Inc. v. United Air Lines, Inc., 871 F. Supp. 2d 143, 153 (E.D.N.Y. 2012), *citing* In re Grossman's Inc., 607 F.3d 114, 125 (3d Cir. 2010). The district court concluded that the plaintiff's claim "was not discharged by the [defendant's bankruptcy] confirmation order on due process grounds." 871 F. Supp. 2d at 160.

Respondents also suggest that the Petitioner had the obligation "to make his claims known in the Bankruptcy Case," citing to Elmco Properties, Inc. v. Second Nat. Fed. Sav. Ass'n, 94 F.3d 914 (4th Cir. 1996). *Respondents' Brief at 26.* Elmco involved a claim by a borrower for a declaratory judgment pertaining to escrow funds that were seized by Resolution Trust Corporation acting as receiver for a failed savings association. In dicta, the Fourth Circuit

observed that some courts "have held that, once creditors actually learn that their debtors have filed for bankruptcy, they have a duty to inquire as to what they might be required to do to protect their interests, and, failing such inquiry, cannot claim lack of due process when those debts are discharged." Id. at 921. The Court of Appeals noted that, "*if* [the borrower] had timely, actual knowledge that [failed savings association] had entered receivership, its due process argument *might* be defeated by its own failure to act on that knowledge to protect its rights. But nothing in the record suggests that [the borrower] had such knowledge." Id. at 922, *emphasis added.*

In this case, the record is completely devoid of what "timely, actual" knowledge, if any, the Petitioner had about the Respondents' bankruptcy. More importantly, however, "[t]he majority rule ... is that 'the fact that the creditor may ... be generally aware of the pending reorganization, does not of itself impose upon him an affirmative burden to intervene in that matter and present his claim.... [T]he creditor has a right to assume that proper and adequate notice will be provided before his claims are forever barred.'" Arch Wireless, *supra* at 83, *citing* In re Intaco Puerto Rico, Inc., 494 F.2d 94, 99 (1st Cir.1974).

Similarly, the Ninth Circuit has stated:

> Generally, if a known contingent creditor is not given formal notice, he is not bound by an order discharging the bankruptcy's obligations. The fact that a creditor has actual knowledge that a Chapter 11 bankruptcy proceeding is going forward involving a debtor does not obviate the need for notice.
> ...
> The burden is on the debtor to cause formal notice to be given; the creditor who is not given notice, even if he has actual knowledge of reorganization proceedings, does not have a duty to investigate and inject himself into the proceedings.

In re Maya Const. Co., 78 F.3d 1395, 1399 (9th Cir. 1996).

These holdings stem from the holding of the United States Supreme Court in New York v. New York, New Haven & Hartford R.R. Co., 344 U.S. 293 (1953), where the Court stated:

> Nor can the bar order against New York be sustained because of the city's knowledge that reorganization of the railroad was taking place in the court. The argument is that such knowledge puts a duty on the creditors to inquire for themselves about possible court orders limiting the time for filing claims. But even creditors who have knowledge of a reorganization have a right to assume that the statutory 'reasonable notice' will be given them before their claims are forever barred....
>
> The statutory command for notice embodies a basic principle of justice—that a reasonable opportunity to be heard must precede judicial denial of a party's claimed rights.

Id. at 296-97.

These authorities make clear that the Circuit Court was required to recognize and acknowledge that a trial court should not defer to a bankruptcy court confirmation order if doing so would result in a denial of due process in violation of the Fifth Amendment to the United States Constitution and Article III, Section 10 of the West Virginia Constitution. The Circuit Court erred by accepting Respondents' argument that the bankruptcy discharge order barred the Petitioner's claims, without first assuring that the Petitioner's constitutional rights to due process were protected.

III. CONCLUSION

For the reasons set forth herein as well as in his initial brief, the Petitioner submits that the Circuit Court committed error in granting the Respondents' Motion to Dismiss. Therefore, this Court should reverse and vacate the Order of the Circuit Court of Kanawha County, direct the Circuit Court to deny the Respondents' Motion to Dismiss, allow the Petitioner's case to proceed to resolution on the merits, and grant the Petitioner such other and further relief as the Court deems appropriate.

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CERTIFICATE OF SERVICE

I, John J. Polak, counsel for Petitioner, do hereby certify that service of the "**REPLY BRIEF ON BEHALF OF PETITIONER**" was made upon the parties listed below by emailing a true and exact copy thereof to:

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Counsel for Respondents

on this 30th day of March, 2022.

John J. Polak
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