THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA
NO. 23-ICA-220

THE CALWELL PRACTICE, PLLC and
CALWELL LUCE DITRAPANO, PLLC
Defendants Below, Petitioners

vs.

(Circuit Cout of Putnam County
Civil Action No. 04-C-465)

JAMES F. HUMPHREYS & ASSOCIATES, L.C.,
Plaintiff Below, Respondent

PETITIONERS' BRIEF

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CALWELL LUCE DITRAPANO PLLC,

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ASSIGNMENTS OF ERROR

1. The Circuit Court of Putnam County erred when it refused to hold that the August 15, 2014 Order (the "2014 Order") in the underlying case bars Respondent Humphreys from receiving 12.5% of the 2017 attorney's fee at issue here. The 2014 Order was entered by the Circuit Court after Humphreys—not Petitioner CLD—attacked in Court the Fee Sharing Agreement between Humphreys and CLD. At Humphreys' request, the 2014 Order supplanted the fee agreement and expressly defined the parameters of future fee sharing between the parties. The Order specifically conditioned Humphreys' right to share in future contingent fees upon the occurrence of a precisely defined "triggering event." Such "triggering event" undisputedly never occurred. To the contrary, the fee at issue was generated by new claims pursued by CLD alone. Humphreys' right to share in future fees thus never materialized, and the Circuit Court erred in finding otherwise.

2. The Circuit Court erred when it refused to hold that Humphreys was judicially estopped from sharing in the 2017 fee. Humphreys went through bankruptcy proceedings in 2016. During its bankruptcy, Humphreys never disclosed to its creditors the contingent fee that it now claims. Case law is abundantly clear that debtors are judicially estopped from pursuing claims that they did not disclose in bankruptcy. This rule protects creditors and prevents debtors from taking unfair advantage of bankruptcy protections. It bars debtors from benefitting from fraud upon their creditors. The Circuit Court erred by not estopping Humphreys under this rule. The Circuit Court in fact erred deeply by refusing to even directly consider this issue. The Circuit Court conceded such refusal in its May 2, 2023 Order (from which this appeal arises), stating that: "Even if the disclosures were wanting of more detail, the Court declines to step into the shoes of the bankruptcy court and second guess the sufficiency of that disclosure." Respondent should be judicially estopped from sharing in the 2017 fee at issue, and the Circuit Court erred in finding otherwise.

STATEMENT OF THE CASE

This appeal involves an attorney's fee awarded in 2017 ("2017 Fee") by the Circuit Court of Putnam County to Petitioners The Calwell Practice, PLLC and Calwell Luce DiTrapano, PLLC (collectively, Petitioner "CLD"). Respondent law firm James F. Humphreys & Associates, L.C. ("Humphreys") claims it is entitled to a share of the 2017 Fee. Petitioner CLD disputes that claim. Below, the Circuit Court of Putnam County sided with Humphreys and awarded it summary judgment. CLD contends such award to be clearly erroneous.

The origins of the dispute date back to 2004. At that time, CLD and Humphreys served as co-counsel in mass litigation against Monsanto Company seeking damages for toxic environmental exposure caused by Monsanto's plant in Nitro, West Virginia (the "Monsanto Litigation"). CLD-Appx-000001. CLD and Humphreys originally agreed to share costs and fees equally in the Monsanto Litigation. *Id.* at 2.

In 2012, however, CLD and Humphreys mutually agreed to terminate Humphreys' involvement as counsel in the Monsanto Litigation and modify his entitlement to attorney's fees in the case. *Id.* They entered into a written Fee Sharing Agreement (the "Agreement") to effectuate that termination. *Id.* The Agreement states, in relevant part:

> In addition to the Expenditure Reimbursement Amount described herein, solely in the event of a settlement or a favorable verdict, JH shall further be entitled to receive a negotiated share of Attorney's fees ("Attorney's fees") of 12.5% of Attorney's fees calculated as a percentage of any settlement or verdict up to $110,000,000.00. By way of example, if the case is awarded a judgment or is settled for $110,000,000.00 or less, JH shall be entitled to receive an amount equal to 12.5% of any attorney's fees awarded.

See CLD-Appx-000124. The Agreement does not define the scope of the litigation or the types of claims, parties, or disputes in which Humphreys is permitted to share. It is silent on those issues. It does not say or suggest, for example, that Humphreys would ever be permitted to share in a settlement occasioned by new claims by CLD against third parties. Because of its silence on these

points, it is naturally limited to the existing claims pending against Monsanto at the time that the Agreement was formed.

The Monsanto Litigation settled. CLD-Appx-000002. Humphreys, however, was not satisfied with the Agreement after the case settled. In stark contrast to its current position, Humphreys refused to rely on the Agreement with CLD. Humphreys wanted the Circuit Court to award higher fees than it thought it would get from the Agreement alone. Humphreys filed liens on personal injury cases in Monsanto and was actually seeking fifty percent (50%) of those fees in plain violation and repudiation of the most basic terms of the Agreement. CLD-Appx-000285-86. Humphreys hired its own attorney, Timothy N. Barber, who filed an additional lien for fees in the Monsanto Litigation on June 23, 2014. CLD-Appx-000367. Mr. Barber then represented Humphreys at a June 26, 2014 status conference addressing pending issues regarding the settlement. *See* CLD-Appx-000270.

At that hearing, Mr. Barber openly agreed, on the record—and on behalf of his client, Humphreys—to replace Humphreys' liens and fee entitlements and existing disputes under the Agreement with a single Court order signed by Judge Swope:

> **The Court:** … Mr. Barber, I understand you filed all of these liens, correct?
>
> **Mr. Barber:** That's correct.
>
> **The Court:** I thought we had—wasn't that worked out, gentlemen?
>
> **Mr. Barber:** Well, you thought wrong if you thought we had it all worked out, because we didn't.
>
> **The Court:** Sir, you do not talk to me like that.
>
> **Mr. Barber:** I'm not.
>
> **The Court:** Sir, you do not talk to me like that in this courtroom. I don't have lawyers get up and say, "You thought wrong." All right? Do you understand that? We're going to get this straight from the git-go.

Mr. Barber: All right.

The Court: All right. Do you understand that?

Mr. Barber: I do.

The Court: Now, did you not have this worked out, gentlemen?

Mr. Barber: No.

The Court: I'm asking these guys.

Mr. Barber: Oh, I'm sorry.

Mr. Love: Yes, Your Honor. In terms of the attorneys' fees and costs, that lien was satisfied and has been released, as I understand.

The Court: So why is he saying this then?

Mr. Love: Because I believe he's filed additional liens since then.

The Court: On what? On the personal injury cases, right?

Mr. Barber: Yes.

The Court: Do you have any liens on the class?

Mr. Barber: Yes.

The Court: On the 6.5 million?

Mr. Barber: No.

The Court: What else?

Mr. Barber: Yes, to the 6.5 million, that's the trigger.

The Court: What else?

Mr. Barber: The payments on the remediation and the medical monitoring.

The Court: That's not been worked out?

Mr. Barber: No, sir.

The Court: All right, I'll tell you what we're going to do, we're going to— … I'm going to take about a five minute break and let Mr. Barber Mr. Calwell, and Mr. Love step out and try to tell me what the hell is still left here to be settled as far as liens.

. . . .

The Court: Okay. Now, the next thing. What's the story on this lien? It's like being pregnant. Either you are or you're not. Either it's settled or it's not. What's the story?

Mr. Calwell: All right. I'll give you the shortest version that I can. When Mr. Humphreys basically backed out of the case, we entered into a dissolution agreement that provided that Mr. Humphreys would be reimbursed whatever hard cash he had put in the case. And he was, in fact, reimbursed that amount of money. Should it have developed, as it did, that there would be a settlement where fees would be approved, Mr. Humphreys, by written agreement with my firm and his firm, was to receive 12.5 percent of any fees that were realized. I understand—

The Court: Mr. Calwell, I don't want to interrupt you.

Mr. Calwell: And so—

The Court: Is that—are we done or not?

Mr. Calwell: As far as I'm concerned, I don't know why Mr. Barber filed a lien for, you know, 12.5 percent. **We've already agreed to pay it if the contingency ever comes about.** So there is no dispute on our part, but I can't—

The Court: Well, let me ask Mr. Barber. Mr. Barber, is Humphreys' claim satisfied, whatever he was owed out of the property settlement, yes or no? Mr. Barber?

Mr. Barber: I'm sorry, Judge, I don't know if I misunderstood you. You said the "property settlement."

The Court: I'm asking—I'm going one at a time.

Mr. Barber: Oh, I'm sorry.

The Court: Is Mr. Humphreys' attorney's lien settled as to the property settlement, the clean up?

Mr. Barber: No. I mean, what Mr. Calwell had just said is accurate. There was an agreement that Mr. Humphreys get 12-and-a-half percent. Because you—have been your very well-done order say that there is an incentive for him—and not only the property, but the medical monitoring—to do something, $200, $500.

The Court: All right. You're talking about the kickers?

Mr. Barber: That's correct.

The Court: Let me tell you what I see here. . . . I've put kickers in there for a couple of reasons. You know, Mr. Calwell, I think you'll have every incentive when people call you up and say, "We can't get—well, we can't—they're fighting over me cleaning up." You've got an incentive to get people to sign up, which will solve the public policy, and you're cleaning up as much of Nitro as possible. I understand that your client may get something of a kicker, correct?

Mr. Barber: All he—

The Court: Do you agree with that, Mr. Calwell?

Mr. Calwell: Yes. We've agreed to pay him any money that we're able to get.

The Court: So if you signed up 4500 people—and I forget what your kicker was—whatever your kicker was.

Mr. Calwell: I think it's 12 and a half of that.

The Court: All right. You're going to give him that, right?

Mr. Calwell: Yes.

The Court: You're done with that, right, Mr. Barber?

Mr. Barber: That's why I filed the lien.

The Court: Okay. All right. Well, see, I thought it was done ahead of time. **So that's why I'm trying to put this to bed right now so you're not fighting over this anymore.** All right. Now, we've got the medical monitoring. . . . But 4,000-some-odd people here that could be—that can have this monitoring. And I want every damn one of them to have it, because I want to see if they have any problem. And I hope they don't. And if they do have problems, then there's a kicker in place to monitor them down the road. **And then if that kicker comes in and we get that number, then, Mr. Calwell, there will be more fees paid out of that, too.** So, Mr. Barber, as to the medical monitoring absent the kicker, right, absent the little incentive that Mr. Calwell gets for making sure that he gets as many people to sign up as possible, you have an agreement with him, right?

Mr. Barber: Yes, Your Honor. Like the property, it's memorialized in the lien. That's all it is. The lien just simply memorializes it.

The Court: All I want to do is replace the lien with an order. I want to replace the lien with an order. I know about liens in cases, sir. . . . I want an order memorializing what y'all are going to do.

Mr. Calwell: That's fine with us, your honor.

The Court: What's wrong with that, Mr. Barber? Why can't we do an order?

Mr. Barber: There's nothing wrong with it, Judge. I just haven't heard that that. All I was doing—if you'll just listen to me one minute, Judge, please.

The Court: Sure.

Mr. Barber: All I was doing here is—**Mr. Calwell has accurately stated that we have 12-and-a-half percent coming. All I did as a lawyer representing my client to memorialize that in a lien. That's so if Mr. Calwell drops dead or I do or somebody, that something is down there in writing in a court proceeding that everyone knows about. Now, that's why I filed the thing. If the Court wants to replace that with a direct order that we get 12-and-a-half percent for both the property and the medical monitoring, great. That's fine. It's a court order. It would have the same effect certainly as a lien, and I have no problem with that at all. And you say the "trigger"—**

The Court: The trigger is out there.

Mr. Barber: That's the trigger thing.

The Court: That's that when so many people—when you have to have a hundred people, right—at least a hundred people had to be tested . . . and then when that comes in, the trigger kicks . . . and that's when extra money gets paid in. . . . And then if it happens quick, then you're entitled to that. **And then, sir, I mean, I think what you need to do, and I'm going to require this, is just memorialize this with an order.**

Mr. Barber: That's fine, Judge. We just have to carefully craft the terminology.

The Court: But you would rather have my signature on it, wouldn't you, right? I mean, I'll sign it. You just draft what you want between y'all.

Mr. Barber: We'll see what we can do.

The Court: All right.

Mr. Barber: We haven't been very successful yet, but I think we probably can.

> **The Court:** I think we did say with the exception, didn't we? Mr. Humphreys is going to 12-and-a-half percent of whatever gets paid from any of this. **And if the contingency kicks in, he's going to 12-and-a-half percent of that.** Has he been reimbursed his costs?
>
> **Mr. Calwell:** He has, Your Honor.
>
> **Mr. Barber:** He has.
>
> **The Court: Well, then just whip me up an order that says that.**
>
> . . . .
>
> **The Court:** … So now, Mr. Barber, with that, **can y'all, you two, whip up an order that will take care of all of these things? And that order will take care of whatever comes out of the class, right?**

See CLD-Appx-000272-84 (bold emphasis and underlining added).

These excerpts show that Humphreys openly agreed for the Circuit Court to enter an order memorializing his exact fee entitlements. Humphreys clearly did not trust the original Agreement or think it was sufficient. In fact, in this same hearing, Humphreys' attorney demanded 50% of the fees from the individual personal injury cases—openly rejecting the Agreement's most basic term, that Humphreys would receive only 12.5%. CLD-Appx-000285-86.

Following this hearing, Humphreys (through Mr. Barber) submitted a proposed order to the Circuit Court on August 11, 2014. CLD-Appx-000287-93. The proposed order is noteworthy in that it was extremely overbroad—exactly like Humphreys' current overbroad claim in this fee dispute—and was rejected by the Circuit Court. Humphreys' proposed order unsuccessfully asked the Circuit Court to hold as follows:

> On June 26, 2014, … counsel appeared for the respective parties for a hearing on certain pending matters … [t]he matters presented and the rulings there on are:
> 1. The issue of the attorney's fee lien filed by Barber in (sic) behalf of Humphreys was addressed. The effected (sic) parties agreed that Humphreys will receive 12.5% of any sums obtained by Calwell **from any aspect of this class action** including the property remediation remedy and the medical monitoring process. Further that upon the memorialization of that exchange between Calwell and

> Humphreys by the entry of this order, Humphreys will dismiss and withdraw his filed lien. Therefore, it is hereby ORDERED that 12.5% **of any sums from any source of this class action received by Calwell as a fee** will be promptly forwarded to Humphreys.

Id. (bold emphasis added).

The Circuit Court rejected Humphreys' invitation to issue such an overbroad ruling. Instead of adopting Humphreys' wide-open language, the Circuit Court entered an Order in 2014 that expressly defined and limited the scope of Humphreys' potential fee recovery. The 2014 Order (which is dispositive of the instant fee dispute) states, in relevant part:

> The Court FINDS and ORDERS that Mr. Calwell and Mr. Humphreys have agreed that Mr. Humphreys shall receive twelve (12) and a half percent from the attorneys' fees Mr. Calwell receives as Class Counsel in both the property and medical monitoring class settlements. The Court further ORDERS that Mr. Humphreys receive twelve (12) and half percent of any incentive payments Mr. Calwell receives for the number of Class Members who register for medical monitoring or property clean-up benefits. Once a level of five hundred (500) participants are registered, the Court will release the incentive fee payments to Mr. Calwell in the amounts of Five Hundred Dollars ($500) for each medical monitoring participants and Two Hundred Dollars ($200) for each property remediation participants. These fees will be released at each interval of 500 persons registered and at the end of the Registration Period. **Finally, the Court ORDERS 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.** Mr. Calwell must also reimburse Mr. Humphreys for his costs.

CLD-Appx-000015-16 (bold emphasis added). This 2014 Order only arose because Humphreys repudiated the Agreement, asked the Circuit Court for more money, and asked the Circuit Court to enter an order memorializing its fee rights. The 2014 Order is the law of this case. Humphreys is bound by its statements on the record, and by this ruling—which it never appealed.

It is undisputed that Humphreys received his full share of all fees generated by the property settlements, medical monitoring, and incentive payments—namely, all fees specified in the 2014 Order that Humphreys wanted. CLD-Appx-000002-03. Specifically, Humphreys received 12.5% of all incentive payments for property clean-up and medical monitoring, and 12.5% of the fees

from the personal injury cases in Monsanto. The terms of the 2014 Order were fully satisfied with regard to Humphreys. The only possible remaining fee that could be owed to Humphreys was "twelve (12) and a half percent of any attorneys' fee payments that Mr. Calwell receives based upon the occurrence of the triggering event."[1] CLD-Appx-000016. If the "trigger" had been met, Humphreys would have received 12.5% of that award as well, as required by the 2014 Order. It is undisputed, however, that the "triggering event" never occurred. CLD-Appx-000003.[2] All obligations to Humphreys, as defined by the 2014 Order that Humphreys wanted the Court to enter, have thus been satisfied in full and he is entitled to nothing more.

The 2017 fee at issue here was not generated by the "triggering event," which undisputedly did not occur. To the contrary, it was generated by immense time, effort, and cost expended by CLD alone—with zero contributions by Humphreys—from 2014 to 2017 to diligently investigate facts and circumstances separate from the medical monitoring tasks contemplated by the 2014 Order. CLD identified and pursued potential claims against third parties, including Thomas Health System, Inc., who were uninvolved in the underlying Monsanto litigation. CLD alone sought these new and additional avenues of recovery for its clients. The new investigations by CLD required the hiring of expert witnesses and developing new possible theories of liability against Thomas Health System, Inc., a third party laboratory, and a third party shipping company. These claims

[1] The "Triggering Event" was defined and described in the 2013 "Order Approving Final Settlement" entered in the Monsanto Litigation. According to the 2013 "Order Approving Final Settlement," "[a] Triggering Event will occur when greater than 25 percent of the participants sampled have dioxin TEQs greater than the background range. . . . In order to account for statistical chance and error, at least 100 participants' serum samples must be drawn and be capable of analysis following the procedure during any monitoring period for a Triggering Event to occur." CLD-Appx-000062.

[2] The Circuit Court specifically held in 2017 that it never occurred, stating, "the Court finds that the Triggering Event did not occur in the Initial Screening Period and is unlikely to ever occur." *See* CLD-Appx-000031 (bold emphasis added). Humphreys' response to CLD's motion for summary judgment similarly admits: "'The triggering event' did not occur. This fact is not disputed." *See* CLD-Appx-000091.

were necessitated *because* the triggering event did not occur. These circumstances and claims were not contemplated by Humphreys or CLD at the time of the original Agreement or the 2014 Order.

The separateness and novelty of these new claims is attested to and affirmed by the Affidavits of Thomas V. Flaherty, Scott Partridge, and Thomas J. Hurney, Jr. *See* CLD-Appx-000038-42; CLD-Appx-000262-67. Mr. Hurney represented Thomas Hospital while it was being pursued separately by CLD. The sole exhibit to Mr. Hurney's affidavit—an email that he wrote to CLD in 2016 to protest a subpoena—succinctly emphasizes the extent to which these new claims were separate from the original claims in *Bibb*. Mr. Hurney wrote: "To that point, since the *Bibb* action is settled, I don't believe there is a case pending that allows issuance of a subpoena. While Judge Swope has continuing jurisdiction over the implementation of the settlement, but we do not believe that allows the issuance of subpoenas by counsel absent a controversy." CLD-Appx-000266. Similarly, Mr. Flaherty attested: "It became apparent that these issues would likely be the subject of continued litigation between class counsel and Monsanto (**and potentially the third-party contractors**) during the life of the Medical Monitoring Program and might delay the implementation of future Screening Periods. I was instructed by the Court to assist the Parties in negotiating a resolution of these issues to avoid future litigation and further delay." CLD-Appx-000038-39 at (bold emphasis added). The separateness and novelty of these claims is further confirmed (under oath) by Mr. Hurney in his Affidavit. *See generally* CLD-Appx-000262-67. As Mr. Hurney describes in detail, separate and contentious litigation involving subpoenas, deposition notices, and document collection against the third parties had already commenced when the settlement modification was undertaken. *Id.* Indeed, CLD had already obtained (at its own expense) "an expert affidavit which criticized the collection of blood samples at Thomas Hospital." *Id.*

In other words, a new case and controversy was developing against Thomas Hospital and other third parties that may have necessitated the filing of an entirely new action. This was not the same litigation that Humphreys briefly participated in, and it did not involve claims for which Humphreys had any right to fee sharing. This new situation—rather than the core Monsanto Litigation in which Humphreys was originally involved—is what gave rise to the 2017 Fee that Humphreys now wants to seize in this case.

Monsanto would have been inextricably tied to the third party claims, and thus had new incentive to resolve them. That Monsanto did not want to be embroiled in such claims and subjected to further litigation itself does not change the fact that these claims were based on the misconduct of third parties that was never contemplated by the Agreement between CLD and Humphreys. Monsanto's decision to pay to settle such claims arose separately from the underlying litigation for which Humphreys has already been compensated. The settlement modification and fees at issue here were developed after the Agreement with Humphreys and after the settlement with Monsanto, for which Humphreys has already been paid in full, and resulted from the separate negligence of third parties. These facts are unequivocal and established by the unrebutted affidavits of highly respected members of the West Virginia legal community.

These circumstances and new potential claims were not remotely contemplated by Humphreys or CLD at the time of the original 2012 Agreement or the 2014 Order and were never intended to be included in any fee award to Humphreys. Based solely on these separate efforts against third parties—which were not provided for in the 2014 Order, or the fee sharing described therein—Monsanto and CLD agreed to a resolution that was memorialized by the Court in an "Agreed Order Adopting Modifications to MMCSA," entered on September 8, 2017 (the "2017 Order"). *See* CLD-Appx-000031. CLD had advanced—by itself—$83,500.72 in expenses

(primarily for experts) in pursuit of the new claims. In the 2017 Order, the Court reimbursed CLD for those expenses, which further illustrates that these efforts constituted new work on behalf of the class rather than a continuation of cost and fee allocations from *Bibb* (which had already been issued). *Id.*

In the meantime, while CLD was pursuing these new and separate claims for its Monsanto clients, Humphreys was pursuing bankruptcy. Humphreys filed for Chapter 11 bankruptcy in 2016 after being sued by former clients. The bankruptcy is significant because Humphreys did not disclose any aspect of the fee at issue in its bankruptcy disclosures and filings. These representations and omissions to the bankruptcy court create an estoppel barring his claim in this case as a matter of law. Humphreys was required to identify to the bankruptcy court and to Humphreys' creditors all receivables, assets, and claims that it had, including any potential future or contingent attorney's fees such as the one that it seeks in this case. Humphreys made no such disclosure regarding this fee. Indeed, Humphreys' bankruptcy disclosures never even mention Monsanto or CLD. Humphreys' bankruptcy docket is available for judicial notice as Case No. 2:16-bk-20006 in the United States Bankruptcy Court for the Southern District of West Virginia. The relevant excerpt from Humphreys' disclosures—which completely omits any mention of the alleged fee that it now seeks—was attached as Exhibit 5 to CLD's motion for summary judgment, and the disclosures were attached in full to Humphreys' motion for summary judgment. CLD-Appx-000043; CLD-Appx-000198–000225.

In 2017, CLD was paid an attorneys' fee of $3 million (the "2017 Fee") and reimbursed for $83,500.72 in expenses related to its separate pursuit of claims against the third parties described above. *See* CLD-Appx-000031. Because the 2017 Fee resulted from different claims and was unrelated to the litigation tied to the "Triggering Event," Humphreys had no entitlement

to the 12.5% share tied to such Triggering Event by Judge Swope in 2014. Accordingly, no portion of the 2017 Fee was paid to Humphreys. Humphreys neither worked on nor expended any money in connection with CLD's efforts in the separate, subsequent case against the third parties. The Circuit Court's 2017 Order unsurprisingly (and appropriately) omitted any mention of payment due to Humphreys.

On May 5, 2020, Humphreys filed its Complaint against CLD. The Complaint alleges that Humphreys is entitled to a twelve and a half percent (12.5%) share of the 2017 Fee. This matter was initially litigated before the Honorable Judge Carrie L. Webster in Kanawha County. Upon CLD's motion, and with Humphreys' initial opposition to transfer withdrawn, the matter was transferred to the Circuit Court of Putnam County and made a part of Civil Action No. 04-C-465 (the underlying class action dispute against Monsanto Company) by an order entered January 24, 2022. The Honorable Derek C. Swope was assigned to the matter because he was the presiding judge in the underlying Monsanto litigation. Undersigned counsel was substituted for CLD shortly thereafter and a status hearing was held on February 17, 2022. Due to statements made during the status hearing, CLD submitted a Motion to Recuse, which led to this matter being transferred to Judge Joseph Reeder.[3] CLD requested an opportunity for discovery against Humphreys; such request was refused. The parties filed cross-motions for summary judgment against each other. Judge Reeder entered the May 2, 2023 Order granting Humphreys' motion for summary judgment from which this appeal arises.

[3] Humphreys made comments below suggesting that Judge Swope's comments during the hearing are somehow evidence that Judge Swope disagrees with CLD's arguments regarding the import of the 2014 Order (which was written almost a decade before Judge Swope held the hearing). Humphreys may offer similar suggestions during this appeal. A close reading of the transcript, however, strongly indicates that Judge Swope was simply mistaken and referring not to the 2014 Order but to some earlier order such as his 2013 class certification order. *See* CLD-Appx-000518; CLD-Appx-000397. Judge Swope's apparent confusion on these issues, combined with his own admitted prejudgment of the issues, prompted CLD to file the motion to recuse him.

As set forth below, the Circuit Court's ruling should be reversed, this unfortunate saga should finally end, and CLD should no longer be forced to expend resources and time to defend itself against Humphreys' baseless claims.

SUMMARY OF ARGUMENT

Humphreys is not entitled to share in the 2017 Fee that the Circuit Court has erroneously awarded to him. There are two reasons for this, both involving past inconsistent conduct by Humphreys that Humphreys now wrongfully seeks to ignore to its own benefit.

First, Humphreys was deeply unhappy with the Agreement with CLD, attacked it in 2014 with multiple liens and courtroom challenges, and then agreed on the record with the Circuit Court to replace all of these disputes with a single court order memorializing and specifying all of Humphreys' fee entitlements. Humphreys got exactly what it bargained for—the 2014 Order. Humphreys was undisputedly paid in full for all components of the 2014 Order, save one—the additional contingent fee that would materialize if the "triggering event" occurred. Such event never occurred. No additional fee was ever realized for Humphreys. The 2017 Fee was generated by additional, new, and separate efforts by CLD against third-party entities and involved claims that arose after the Monsanto settlement had occurred and the 2014 Order entered. Humphreys has absolutely no right to share in the 2017 Fee, and the Circuit Court erred deeply in holding otherwise, ignoring both the plain language of the 2014 Order and Humphreys' own litigious conduct that invited and welcomed the 2014 Order—which Humphreys never appealed.

Second, in 2016 Humphreys received all of the significant benefits of bankruptcy protection—but, in violation of its black-letter obligations to the bankruptcy court and to its creditors, never mentioned the Monsanto Litigation, CLD, or any possible right to future fees from Monsanto or CLD in any of its bankruptcy disclosures. This non-disclosure was not inadvertent,

and carries serious consequences under black-letter law. As a matter of bankruptcy law and creditor protection, Humphreys must be estopped from pursuing this claim and fee that it never disclosed.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner CLD respectfully submits that oral argument is necessary in this case, and further submits that this matter is appropriate for Rule 20 argument. It is suitable for Rule 20 argument because it involves: (1) apparent issues of first impression in West Virginia regarding whether and to what extent a debtor should be judicially estopped from pursuing claims that it failed to disclose to its creditors during its bankruptcy proceedings; (2) issues of fundamental public importance, regarding the duties of full disclosure owed by debtors in bankruptcy, and regarding the duties of litigants and attorneys to maintain consistent positions in litigation; and (3) inconsistencies between the instant Circuit Court ruling awarding summary judgment to Respondent Humphreys and the 2014 ruling by a different judge in the Circuit Court of Putnam County who conditioned Humphreys' future fee sharing on a "triggering event" that never occurred. CLD believes that the minimum time set for argument under Rule 20 will be sufficient and that additional time is unnecessary.

ARGUMENT

This appeal arises from a Circuit Court's order granting summary judgment. The standard of review is therefore *de novo*. Syl. Pt. 1, *Edward S. v. Raleigh Cnty. Housing Auth.*, 248 W. Va. 458, 889 S.E.2d 31 (2023) ("A circuit court's entry of summary judgment is reviewed *de novo*." (quoting Syl. Pt. 1, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994))). The Circuit Court's May 2, 2023 Order is thus entitled to no deference and the arguments against Humphreys must be reviewed anew.

I. The Circuit Court of Putnam County erred when it refused to hold that the August 15, 2014 Order in the underlying case operates to bar Respondent Humphreys from receiving 12.5% of the 2017 attorney's fee at issue in this case.

Petitioner CLD argued at length during summary judgment that Humphreys was barred from sharing in the 2017 Fee because the "triggering event" defined by the 2014 Order never occurred. CLD-Appx-000009-10; CLD-Appx-000075-85; CLD-Appx-000098-106. The Circuit Court not only erred in finding otherwise, it failed to even consider the full merits of CLD's arguments. It erroneously held that "the single issue in this matter is whether the final $3 million payment was subject to the Fee Sharing Agreement"—a framing that completely ignores CLD's argument that the 2014 Order not only supplanted the Agreement, but supplanted it at Humphreys' own behest. CLD-Appx-000004. (This erroneous framing also completely ignores and omits CLD's second argument—that Humphreys is judicially estopped by his bankruptcy omissions from sharing in this fee—an issue that is addressed below, in part II, *infra*.) *Id.*

The question for this Court is not the one posed by the Circuit Court. At its essence, the proper question is simply this: does the 2014 Order—that Humphreys' attorney wanted and agreed to and never appealed—control this dispute and bar him from this fee?

Humphreys now wants to focus exclusively on the Agreement and ignore the 2014 Order. In 2014, however, Humphreys sang a different tune. At that time, Humphreys largely rejected the Agreement; sought upwards of 50% of attorney's fees in some of the Monsanto cases in repudiation of the Agreement; filed liens ignoring the Agreement; and hired an attorney to attack the Agreement in Court. His attorney then specifically agreed on the record to end all of these fights with a single order memorializing Humphreys' exact fee entitlements:

> **The Court: All I want to do is replace the lien with an order. I want to replace the lien with an order.** I know about liens in cases, sir. . . . **I want an order memorializing what y'all are going to do.**

Mr. Calwell: That's fine with us, your honor.

The Court: What's wrong with that, Mr. Barber? Why can't we do an order?

Mr. Barber: There's nothing wrong with it, Judge. I just haven't heard that that. All I was doing—if you'll just listen to me one minute, Judge, please.

The Court: Sure.

Mr. Barber: All I was doing here is—Mr. Calwell has accurately stated that we have 12-and-a-half percent coming. All I did as a lawyer representing my client to memorialize that in a lien. **That's so if Mr. Calwell drops dead or I do or somebody, that something is down there in writing in a court proceeding that everyone knows about. Now, that's why I filed the thing. If the Court wants to replace that with a direct order that we get 12-and-a-half percent for both the property and the medical monitoring, great. That's fine. It's a court order. It would have the same effect certainly as a lien, and I have no problem with that at all. And you say the "trigger"—**

The Court: The trigger is out there.

Mr. Barber: That's the trigger thing.

The Court: That's that when so many people—when you have to have a hundred people, right—at least a hundred people had to be tested . . . and then when that comes in, the trigger kicks . . . and that's when extra money gets paid in. . . . And then if it happens quick, then you're entitled to that. **And then, sir, I mean, I think what you need to do, and I'm going to require this, is just memorialize this with an order.**

Mr. Barber: That's fine, Judge. We just have to carefully craft the terminology.

The Court: But you would rather have my signature on it, wouldn't you, right? I mean, I'll sign it. You just draft what you want between y'all.

Mr. Barber: We'll see what we can do.

The Court: All right.

Mr. Barber: We haven't been very successful yet, but I think we probably can.

The Court: I think we did say with the exception, didn't we? Mr. Humphreys is going to 12-and-a-half percent of whatever gets paid from any of this. **And if the contingency kicks in, he's going to 12-and-a-half percent of that.** Has he been reimbursed his costs?

Mr. Calwell: He has, Your Honor.

Mr. Barber: He has.

The Court: Well, then just whip me up an order that says that.

See CLD-Appx-000280-83 (bold emphasis added).

Following that hearing, Humphreys' lawyer unsuccessfully submitted a proposed order advancing the exact overbroad position that Humphreys now chases. *See* CLD-Appx-000287-93. Humphreys' proposed order stated in relevant part:

> On June 26, 2014, … counsel appeared for the respective parties for a hearing on certain pending matters … [t]he matters presented and the rulings there on are:
> 1. The issue of the attorney's fee lien filed by Barber in (sic) behalf of Humphreys was addressed. The effected (sic) parties agreed that Humphreys will receive 12.5% of any sums obtained by Calwell **from any aspect of this class action** including the property remediation remedy and the medical monitoring process. Further that upon the memorialization of that exchange between Calwell and Humphreys by the entry of this order, Humphreys will dismiss and withdraw his filed lien. Therefore, it is hereby ORDERED that 12.5% **of any sums from any source of this class action received by Calwell as a fee** will be promptly forwarded to Humphreys.

CLD-Appx-000289-90. (bold emphasis added). Judge Swope therefore had the chance in 2014 to embrace the exact overbroad reading of the Agreement that Humphreys advances now. Did Judge Swope accept Humphreys' invitation in 2014? No. Instead of adopting Humphreys' incredibly overbroad language, Judge Swope expressly limited Humphreys' fee recovery to 12.5% of the property and medical monitoring settlements (which Humphreys has undisputedly already received), plus 12.5% of the fee payments that would be realized **if** the triggering event actually occurred:

> The Court FINDS and ORDERS that Mr. Calwell and Mr. Humphreys have agreed that Mr. Humphreys shall receive twelve (12) and a half percent from the attorneys' fees Mr. Calwell receives as Class Counsel in both the property and medical monitoring class settlements. The Court further ORDERS that Mr. Humphreys receive twelve (12) and half percent of any incentive payments Mr. Calwell receives for the number of Class Members who register for medical monitoring or property

> clean-up benefits. Once a level of five hundred (500) participants are registered, the Court will release the incentive fee payments to Mr. Calwell in the amounts of Five Hundred Dollars ($500) for each medical monitoring participants and Two Hundred Dollars ($200) for each property remediation participants. These fees will be released at each interval of 500 persons registered and at the end of the Registration Period. **Finally, the Court ORDERS 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.** Mr. Calwell must also reimburse Mr. Humphreys for his costs.

See CLD-Appx-000015-16 (bold emphasis added).

Humphreys wanted this Order in 2014. His attorney agreed to it. He tried to slip an overbroad interpretation of the Agreement into the order. The Circuit Court rejected that attempt and more narrowly prescribed the contours of Humphreys' fee sharing rights. It is undisputed that Humphreys was paid in full as set forth in the 2014 Order, except for the "triggering event" contingency—which undisputedly never occurred. Humphreys never appealed the 2014 Order.[4]

In granting summary judgment to Humphreys, the Circuit Court not only erred, it failed to even consider these arguments. The 2014 hearing at which Humphreys agreed to the 2014 Order is not even mentioned in the Circuit Court's opinion. *See generally* CLD-Appx-000001-08. The rejection of Humphreys' proposed order and its overbroad language is not even mentioned in the Circuit Court's opinion. *Id.* Instead, the Circuit Court erroneously adopted the very same overbroad entitlement that was previously rejected, holding: "Under the Fee Sharing Agreement, Humphreys has an unqualified right (save a limitation on amount) to share in all attorney's fees awarded in the Monsanto Litigation." CLD-Appx-000005. Not only was this overbroad reading rejected in 2014, it is also wrong—the Agreement is entirely silent regarding the situation presented here, and does not say that Humphreys is entitled to fees generated by new, unforeseen

[4] Humphreys also never disclosed the Fee Agreement during its 2016 bankruptcy proceedings, as explained in detail in part II, *infra*. This failure to disclose the Fee Agreement—as required by law, if Humphreys thought it was even a contingent future asset—further proves that Humphreys had wholly abandoned the Agreement in favor of the 2014 Order.

claims against new parties. The Circuit Court completely ignored that issue as well. The separateness and novelty of the claims giving rise to the 2017 fee, and the Affidavits of Thomas V. Flaherty, Scott Partridge, and Thomas J. Hurney, Jr. attesting to that separateness and novelty, are not mentioned anywhere in the Circuit Court's opinion. *Compare* CLD-Appx-000034-42 & CLD-Appx-000262-67 *with* CLD-Appx-000005.

The Circuit Court's opinion completely ignores the actual history and law of this case. As a result, it committed clear error in awarding Humphreys a portion of the 2017 Fee in plain violation of the 2014 Order. This case should be reversed and remanded with instructions to enter judgment in favor of CLD, and CLD respectfully requests that result.

II. The Circuit Court erred when it refused to hold that Humphreys was judicially estopped from sharing in the 2017 Fee because Humphreys never disclosed any aspect of such fee during its bankruptcy proceedings.

CLD also argued at length during summary judgment that Humphreys was barred from sharing in the 2017 Fee because Humphreys failed to disclose the potential existence of such fee to its creditors during its bankruptcy proceedings. CLD-Appx-000009-000010; CLD-Appx-000075-76; CLD-Appx-000106-08; CLD-Appx-000256-58. In other words, even if this Court finds that the 2014 Order does not preclude Humphreys from the 2017 Fee, Humphreys should still be estopped from receiving it because of Humphreys' own conduct during its bankruptcy proceeding.

The Circuit Court erred grossly on this issue. The Circuit Court not only erred in refusing to apply such estoppel, it openly (and improperly) refused to fully consider the issue, stating: "Even if the disclosures were wanting of more detail, the Court declines to step into the shoes of the bankruptcy court and second guess the sufficiency of that disclosure." CLD-Appx-000007. This

refusal was plain error. The duty to consider Humphreys' conduct and omissions fell squarely on the Circuit Court as a matter of law—and was apparently ignored.

"A long-standing tenet of bankruptcy law requires one seeking benefits under its terms to satisfy a companion duty to schedule, for the benefit of creditors, **all** his interests and property rights." *Oneida Motor Freight v. United Jersey Bank*, 848 F.2d 414, 416 (3d. Cir. 1988) (bold emphasis added). "Viewed against the backdrop of the bankruptcy system and the ends it seeks to achieve, the importance of this disclosure duty cannot be overemphasized." *In re Coastal Plains, Inc.*, 197 F.3d 197, 208 (5th Cir. 1999). Concurrently, and of equal importance, "it is well-established that a failure to identify a claim as an asset in a bankruptcy proceeding is a prior inconsistent position that may serve as the basis for application of judicial estoppel, barring the debtor from pursuing the claim in a later proceeding." *Guay v. Burack*, 677 F.3d 10, 17 (1st Cir. 2012). "Under the rules governing the bankruptcy proceeding," Humphreys:

> **[H]ad an obligation to disclose all assets to the bankruptcy court . . . including legal claims and potential claims. . . . This disclosure must take the form of a schedule identifying all assets . . . and the debtor must amend his asset schedules and petition if circumstances change during the bankruptcy proceeding[.]**

Id. (bold emphasis added). In other words, as a matter of plain fairness, common sense, and black-letter law, when a debtor fails to comply with its disclosure obligations, it must be estopped from cheating its creditors by subsequently pursuing the nondisclosed asset:

> Failure to disclose an asset to a bankruptcy court constitutes taking a factual position in litigation that no such asset exists, because **the bankruptcy court relies on a debtor's complete disclosure of all assets in evaluating the bankruptcy estate. In fact, "[j]udicial estoppel is particularly appropriate where . . . a party fails to disclose an asset to a bankruptcy court, but then pursues a claim in a separate tribunal based on that undisclosed asset."** *Castillo v. E.M. Dimitri*, 2020 U.S. Dist. LEXIS 60719, 2020 WL 1689871, at *2 (E.D. La. Apr. 7, 2020) (quoting *Fornesa v. Fifth Third Mortg. Co.*, 897 F.3d 624, 627 (5th Cir. 2018)). The purpose of judicial estoppel in that context is to "deter dishonest debtors, whose **failure to fully and honestly disclose all their assets undermines the integrity**

> **of the bankruptcy system**." *Id.* (quoting *U.S. ex rel Long v. GSDMIdea City, L.L.C.*, 798 F.3d 265, 271 (5th Cir. 2015)); *see also Robertson*, 2012 U.S. Dist. LEXIS 29854, 2012 WL 830097, at *6 ("**Plaintiff's assertion . . . that he has a valid cause of action against Defendant is a factual assertion inconsistent with his previous position in the bankruptcy court that he had no contingent or unliquidated claims.**").

Vaccaro v. Monte Nido Roxbury Mills, No. SAG-21-1840, 2022 WL 19775, at *3 (D. Md. Jan. 3, 2022) (bold emphasis added).

Humphreys' current claim against CLD, based on events and a fee agreement and court orders that existed before his bankruptcy petition was filed, is clearly a potential asset that Humphreys had a duty to disclose in the bankruptcy proceeding (if Humphreys actually believed it had a meritorious claim against CLD for this alleged fee). The presence of a potentially substantial receivable asset in the bankruptcy, such as the claims now alleged by Humphreys against CLD, could have significantly affected distributions to creditors in the bankruptcy and the bankruptcy court's confirmation of the plan (if Humphreys' claims had substantive merit—which they do not).

Humphreys completely failed to comply with these requirements during its bankruptcy proceeding. *See* CLD-Appx-000043; CLD-Appx-000198-225.[5] Humphreys has identified zero disclosures to the Bankruptcy Court regarding any potential future contingent fees that it thought it might receive in the Monsanto Litigation. As shown in Exhibit 5 to CLD's motion for summary judgment, Humphreys was clearly conscious and aware of its disclosure obligations. CLD-Appx000043. Under the "Accounts Receivable" section of its disclosures, Humphreys only listed certain asbestos-related receivables and completely omitted any mention of fees that it thought it could receive in the Monsanto cases, stating:

[5] The Court may take judicial notice of the bankruptcy proceedings and the fact that Humphreys did not disclose the alleged fee agreement on which it now relies—or any right consistent with the instant claim for fees—in the bankruptcy proceedings.

> 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.

See also CLD-Appx-000199. (Bold emphasis added.) This disclosure proves Humphreys' awareness of its fee-related disclosure obligations. This disclosure was made on page 2 of Humphreys' bankruptcy filing—front and center—and was clear and arguably specific enough to pass muster with Humphreys' creditors regarding his asbestos-related fees. Notably absent is any mention of CLD or Monsanto. If Humphreys believed it might also receive fees from CLD related to the Monsanto Litigation, then it was required to specifically disclose such contingent fee in these bankruptcy filings. It did not do so. If anything, by specifically disclosing asbestos-related fees but omitting Monsanto-related fees, Humphreys engaged in overt misdirection towards its creditors regarding the fee it now seeks.

Although the Circuit Court ultimately "punted" and erroneously "decline[d] to step into the shoes of the bankruptcy court and second guess the sufficiency of [Humphreys'] disclosure," the Circuit Court's order did halfheartedly identify three items that it thought might be "evidence that the Fee Sharing Agreement and payments previously made thereunder were both disclosed and administered by the bankruptcy court," stating as follows:

> First, Humphreys produced the Debtor's Schedule of Assets and Liabilities, filed in the bankruptcy case, showing that "Referral/Joint Representation Agreements" were disclosed as firm assets. Second, Humphreys produced communications with Calwell, directing that an earlier fee award be directed to the firm's bank account (rather than Humphreys personally), which was under the control and supervision of the bankruptcy court and trustee. Third, Humphreys produced a Monthly Operating Report and bank statements, filed in the bankruptcy case, demonstrating that the earlier fee award was disclosed and administered by the bankruptcy court.

CLD-Appx-000006-07. Each of these items is patently insufficient under black-letter law.

First, the initial item listed by the Circuit Court was not even a real "disclosure"—it was a generic, meaningless "catch-all" phrase that was buried in the written disclosures and provided zero actionable information to the bankruptcy court or to Humphreys' creditors. On page 4 of "Schedule G" (and page 25 of Humphreys' overall bankruptcy filing), part 2.18, in a long list of "Executory Contracts and Unexpired Leases," Humphreys only wrote: "Referral/Joint Representation Agreements." *See* CLD-Appx-000222.

Those four words are the entirety of the "disclosure" that Humphreys now contends was sufficient to alert its creditors of potential Monsanto Litigation fees. The disclosure does not mention CLD; it does not mention Monsanto; it does not mention any 12.5% contingency fee; it mentions nothing related to this case. Yet Humphreys contends—and the Circuit Court somehow agreed—that this "disclosure" was legally sufficient. It was not. Case law is clear that bankruptcy disclosures must be formal and specific. As the United States Court of Appeals for the Ninth Circuit has held, informal and vague "disclosures" such as these do not satisfy a debtor's obligations during bankruptcy:

> [N]otifying the trustee by mail or otherwise is insufficient to escape judicial estoppel. 11 U.S.C. § 521(1) provides that, "the debtor shall file a list of creditors, and unless the court orders otherwise, a schedule of assets and liabilities, a schedule of current income and current expenditures, and a statement of the debtor's financial affairs." [The debtor] is required to have amended his disclosure statements and schedules to provide the requisite notice, because of the express duties of disclosure imposed upon him by 11 U.S.C. 521(1), and because both the court and [the debtor's] creditors base their actions on the disclosure statements and schedules. . . . Judicial estoppel will be imposed when the debtor has knowledge of enough facts to know that a potential cause of action exists during the pendency of the bankruptcy, but fails to amend his schedules or disclosure statements to identify the cause of action as a contingent asset.

Hamilton v. State Farm Fire & Cas. Co., 270 F.3d 778, 784 (9th Cir. 2001) (bold emphasis added).

The remaining two "examples" cited by the Circuit Court are even more deficient. Humphreys in fact received a sizeable fee from CLD—as required by the 2014 Order—during the

bankruptcy proceedings. Humphreys now wants to pretend that the mere administration of that earlier fee during the bankruptcy somehow operates as a disclosure of the future contingent fee that Humphreys now seeks. This is flatly wrong under both the facts and the law. Nothing in the administration of the earlier fee remotely suggested to the bankruptcy court or to Humphreys' creditors that additional future fees might be realized, what they might be, or where they might come from. Neither Humphreys nor the Circuit Court identified anything even approaching the requisite level of specificity. In contrast, one need look no further than the "Accounts Receivable" disclosure from page 2 of Humphreys' bankruptcy filing quoted above:

> 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.** . . .

See CLD-Appx-000199. (Bold emphasis added.) For whatever reason, Humphreys chose to specifically identify future fees from its asbestos-related cases, but omit any specific mention of the Monsanto Litigation or fee sharing arrangement with CLD. Humphreys must bear the consequences of that decision now.

The administration of the earlier Monsanto fee during the bankruptcy does, however, spotlight one additional and critical fact: Humphreys had an ongoing duty to supplement its disclosures at all times. If Humphreys' initial failure to disclose the Monsanto Fees in bankruptcy was somehow inadvertent, despite all evidence to the contrary, then receipt of the earlier fee should absolutely have reminded Humphreys of such receivables and triggered a full and specific amendment or supplement to its bankruptcy filings. Humphreys never made any such supplement in plain derogation of bankruptcy law:

> The Bankruptcy Code and Rules impose upon the bankruptcy debtors an express, affirmative duty to disclose all assets, *including contingent and unliquidated claims*. . . . The debtor's duty to disclose potential claims as assets does not end

> when the debtor files schedules, but instead continues for the duration of the bankruptcy proceeding.

Hamilton, 270 F.3d at 785 (internal quotation marks and citations omitted; italics in original). *See also Robinson v. Tyson Foods, Inc.*, 595 F.3d 1269, 1274 (11th Cir. 2010) ("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.").

Judicial estoppel fundamentally protects the legal system by preventing a party from making "improper use of judicial machinery." *Dennis v. Jackson*, 258 A.3d 860, 868 (D.C. 2021) (citation omitted). In the context of bankruptcy, a debtor is obligated to make full disclosure of all its assets, which necessarily includes disclosure of any potential rights or claim to future payments. Disclosure of assets is a cornerstone of the bankruptcy process, during which obligations to creditors are discharged and creditors are paid only a portion of money owed by the debtor receiving the discharge. *Lyudmila Rybakova v. Yefimova (In re Yefimova)*, Nos. 09-20049PM & 08-0819PM, 2012 WL 2087081 (Bankr. D. Md. June 8, 2012). Courts have not hesitated to bar discharged debtors from asserting claims in post-bankruptcy proceedings that were not disclosed during a prior bankruptcy. *See Dennis*, 258 A.3d at 871 (barring former debtor-plaintiff from pursuing medical malpractice claim post-bankruptcy when claim was not disclosed during bankruptcy because "the nondisclosure hid from [creditors] the potential proceeds of litigation there were not exempt as bankruptcy assets").

All of these black-letter legal principles apply here to bar Humphreys from trying to seize any share of the fee in question. The specific elements of judicial estoppel are:

> (1) the party to be estopped [is] advancing an assertion that is inconsistent with a position taken during previous litigation; (2) the position [is] one of fact instead of law; (3) the prior position [was] accepted by the court in the first proceeding; and (4) the party to be estopped [has] acted intentionally, not inadvertently.

Folio v. City of Clarksburg, 134 F.3d 1211, 1217-18 (4th Cir. 1998) (citing *Lowery v. Stovall*, 92 F.3d 219, 224 (4th Cir.1996)). All four of these elements are met in spades in this case. Indeed, Humphreys never disputed the existence of these elements below—he merely asserted, wrongly, that he had made adequate disclosures. *See generally* CLD-Appx-000091-97; CLD-Appx-000111-22; CLD-Appx-000294-98. Similarly, the Circuit Court's order did not dispute the existence of the first three elements of estoppel, but only halfheartedly suggested—without any legal support—that Humphreys' abject failure to disclose the potential fee in bankruptcy was not "intentional," stating:

> That said, Calwell acknowledges that intent to conceal is a necessary element of his judicial estoppel defense. Defs' Motion, at 13-14. Calwell, however, has presented no evidence to suggest that the Fee Sharing Agreement was intentionally concealed from the bankruptcy court. Indeed, the evidence presented by Humphreys demonstrates the opposite. As a result, Humphreys is not judicially estopped from prosecuting a claim for breach of contract.

CLD-Appx-000007. The Circuit Court is wrong on this point as well. And, yet again, it completely failed to even consider or address CLD's arguments in its order. Not only did CLD argue this exact "intentionality" point at length, below, (CLD-Appx-000087-90), it is clear that the "intentionality" prong is fully satisfied as a matter of law.

Courts generally consider the nondisclosure of a claim to be sufficiently intentional when a claimant has both knowledge of a claim and motive to conceal a claim. *Casto v. Am. Union Boiler Co. of W. Va.*, No. 2:05-cv-00757, 2006 WL 660458, at *3 (S.D. W. Va. Mar. 14, 2006) (citing *In re USinternetworking, Inc.*, 310 B.R. 274, 284 (Bankr. D. Md. 2004)). As the United States Court of Appeals for the Fifth Circuit has observed, "in considering judicial estoppel *for bankruptcy cases*, the debtor's failure to satisfy its statutory disclosure duty is 'inadvertent' **only** when, in general, the debtor either lacks knowledge of the undisclosed claims *or* has no motive for

their concealment." *In re Coastal Plains, Inc.*, 197 F.3d at 210 (italics in original; bold emphasis added). Stated differently,

> In determining whether the debtor acted inadvertently or in bad faith, the court should consider whether he has both knowledge of a potential claim, and a motive to conceal it. *See In re Lowery,* 398 B.R. at 515-16 (reasoning that an affirmative finding to this effect would negate the inference that non-disclosure was the product of an innocent mistake); *In re Meneses,* No. 05-86811-ast, 2010 Bankr. LEXIS 700, at *7-8 (Bankr. E.D.N.Y. 2010) (same); *Casto,* 2006 U.S. Dist. LEXIS 14781, 2006 WL 660458, at *3 (same).

Steel of W. Va., Inc. v. McMellon (In re McMellon), 448 B.R. 887, 893 (S.D. W. Va. 2011); *United States ex rel. Long v. GSDMIdea City, L.L.C.*, 798 F.3d 265, 272 (5th Cir. 2015) ("To show inadvertence through lack of knowledge, a debtor must show . . . she was unaware of the facts giving rise to [her claims] . . . [b]ankruptcy law imposes the duty to disclose as long as the debtor has enough information to suggest that he may have a potential claim; the debtor need not know all of the underlying facts or even the legal basis for the claim." (citations and quotation marks omitted)). Here, Humphreys undisputedly had knowledge of the undisclosed potential claim and a financial motive to conceal it.

As a participant in the 2014 Order, Humphreys clearly had knowledge of the potential claim before its bankruptcy and cannot credibly claim otherwise. Moreover, Humphreys is a law firm. Its only assets and receivables are its fees that it generates. It knew it had to disclose such fees—it did so regarding its asbestos cases. Moreover, Humphreys received and administered an earlier Monsanto fee *during* its bankruptcy. Humphreys cannot reasonably claim to have "inadvertently" omitted future potential Monsanto fees when making its bankruptcy disclosures.

The lack of inadvertence can further be shown here because Humphreys undisputedly had a financial motive to conceal its potential additional fees from its creditors. "A motivation to conceal may be shown by evidence of a potential financial benefit that could result from the

concealment." *Long v*, 798 F.3d at 272. Indeed, a motive to conceal may be "**presumed** from the failure to disclose a known claim." *Stanley v. FCA US, LLC*, No. 3:19-cv-640, 2021 WL 5760546, at *6 (N.D. Ohio 2021) (collecting cases; bold emphasis added).

If Humphreys truly believed it had potential claims to additional fees flowing from the Monsanto litigation, Humphreys had the concomitant obligation and numerous opportunities to disclose such claims in its schedules and amended schedules. That Humphreys repeatedly failed to do so speaks volumes and now bars Humphreys from trying to seize a part of the instant fee from CLD. Humphreys, at best, submitted vague, insufficient language regarding potential fees to the bankruptcy court but now very specifically claims a right to a fee here. Humphreys' omission was clearly knowing and intentional and reflects that either Humphreys was trying to hide the asset from creditors or it did not really believe that the potential asset had any true value. This omission was not inadvertent. Humphreys is a sophisticated law firm charged with knowledge of its duties and obligations in the bankruptcy proceeding and knowledge of its potential claims to additional fees from the Monsanto litigation.

Frankly, the Circuit Court's finding that Humphreys inadvertently and excusably failed to disclose anything about Monsanto or CLD or the potential 2017 Fee during the bankruptcy is patently illogical. In 2014, a mere two years before its bankruptcy, Humphreys hired counsel to file liens and pursue court proceedings in an aggressive effort to grab every penny that it could find in the Monsanto Litigation. Yet, in 2016, while shielding itself with the protections of the bankruptcy code, Humphreys—a sophisticated and experienced law firm—somehow completely and innocently "forgot" to even mention such potential fees to its creditors? The Circuit Court's ruling is not only erroneous, it sends a disturbing and unwelcome message to debtors seeking to hide assets during bankruptcy and then later benefit from such concealment.

The Circuit Court's "finding" that "[e]ven if the disclosures were wanting of more detail, the Court declines to step into the shoes of the bankruptcy court and second guess the sufficiency of that disclosure," is also illogical and wrong and prejudicial to CLD. CLD-Appx-000007. As many of the above-cited cases make clear, it is the duty of the trial court considering the later-advanced and previously-concealed claim to determine whether judicial estoppel should be applied. It is not the duty of the bankruptcy court. The whole point is that the bankruptcy proceedings are already closed and the debtor is trying to pursue a nondisclosed asset. There is absolutely no obligation on a litigant such as CLD to go back to the bankruptcy court for such ruling. Humphreys never cited any law for such proposition below, and the Circuit Court cited no authority for such finding, either. Because the Circuit Court apparently never even fully considered this issue, it falls upon this Court to do so—under the clearly established *de novo* standard of review set forth above.

All elements of judicial estoppel, as well as all policy concerns supporting the application of judicial estoppel flowing from bankruptcy proceedings, are presented here. Humphreys should be barred as a matter of law from pursuing this claim that it never revealed in its bankruptcy proceedings. The Circuit Court erred in finding otherwise, and should be reversed and remanded with instructions to enter judgment in favor of Petitioner CLD.

CONCLUSION

In addition to the many omissions discussed above, also notably absent from the Circuit Court's opinion is any discussion of any actual work or other contribution that Humphreys made to generate the 2017 Fee. This omission is unsurprising: the 2017 Fee is undisputedly a fee for which Humphreys did zero work and contributed zero costs or expenses. *See, e.g.*, W. Va. R. Prof. Conduct 1.5 ("A lawyer shall not make an agreement for, charge, or collect an unreasonable fee .

. . the factors to be considered include . . . the time and labor required, the novelty and difficulty of the questions involved, and skill requisite to perform the legal service properly[.]"). Humphreys' total lack of work or any contribution to said fee heavily underscore the fact that the Agreement never contemplated the fee that Humphreys now tries to seize. Humphreys' "extrication from the Monsanto litigation" was compensated by a very generous 12.5% share of fees for the (minimal) work he had done to that point. It was clearly based on the existing claims against Monsanto—not the new claims involving the third parties that gave rise to the 2017 Fee at issue here.

As set forth above, the 2014 Order—which Humphreys wanted at the time and never appealed—bars it from this recovery because the "triggering event" undisputedly never occurred. Humphreys' own bankruptcy also bars it from this recovery because Humphreys undisputedly refused to disclose this potential fee to its creditors. The Circuit Court clearly erred in holding otherwise on both points.

Petitioner CLD respectfully asks this Court to reverse the Circuit Court's erroneous May 2, 2023 Order granting summary judgment to Humphreys and to remand this case to the Circuit Court with instructions to enter judgment in favor of CLD.

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CERTIFICATE OF SERVICE

I, R. Booth Goodwin II, do hereby certify that the foregoing "**PETITIONERS' BRIEF**" was served through the Court's E-Filing System in accordance with Rule of Appellate Procedure 38A(q) on all counsel of record as follows:

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