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 Court of Putnam County
Civil Action No. 04-C-465)

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

PETITIONERS' REPLY BRIEF

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SUMMARY OF ARGUMENT

Humphreys opens its response by stating "This case is about keeping your promises." Resp. at 1. In other words, this case is about honesty. CLD agrees. CLD paid Humphreys every single penny that Humphreys was entitled to share in this case—as Humphreys' response repeatedly concedes. Resp. at 1 ("Humphreys received its negotiated share of the initial fee award and several of the periodic awards that followed[.]"); Resp. at 3 ("Calwell paid Humphreys his 12.5% negotiated share of this initial fee award [of $20 million]."); Resp. at 4 ("Again, in recognition of the Fee Sharing Agreement, Calwell paid Humphreys his 12.5% negotiated share of these periodic incentive awards."). Humphreys' conduct during the Monsanto litigation, during its bankruptcy, and during this case should absolutely be examined through the lens of "honesty."

The question of "honesty" looms over Humphreys' bankruptcy like a cloud. Humphreys admits that when it filed for bankruptcy,[1] it held the 2014 Order stating that Humphreys was entitled to receive "twelve (12) and a half percent" of a Contingent Attorney's Fees Fund containing $6.5 million, "based upon the occurrence of the triggering event." *See* Resp. at 14, 20; CLD-Appx-000015-17. When its bankruptcy disclosures were due, Humphreys thus held a contingent claim potentially worth $812,500 if the "triggering event" occurred. The "triggering event" was still an open question at that time. When Humphreys filed for bankruptcy, the Circuit Court had not yet ruled that the "triggering event" did *not* occur—as Humphreys is forced to admit. Resp. at 20 (conceding that Humphreys' bankruptcy "predate[d] . . . by months" the 2017 Order finding "the Triggering Event did not occur"); *see also* CLD-Appx-000030-31. Is a contingent claim valued at nearly one million dollars a material asset that must be disclosed in bankruptcy?

[1] The bankruptcy proceeding at issue in this case, *In re James F. Humphreys & Assocs*., *L.C.*, No. 2:16-cv-20006 (Bankr. S.D. W. Va.) was filed by James F. Humphreys & Associates, L.C., as opposed to James Humphreys individually.

Case law uniformly says "yes," but Humphreys continues to engage in every imaginable contortion to try to convince this Court otherwise. Humphreys was not honest with its creditors.

Humphreys' brief at least admits (for the first time in this entire case) that Humphreys wanted and agreed to and in fact "prompted" the 2014 Order granting him a 12.5% share of the contingent settlement fund if the "triggering event" occurred. Resp. at 4-5; 12. The 2014 Order arose because of liens filed by Humphreys which involved attempts by Humphreys to disavow the Fee Agreement and break Humphreys' promises under that Fee Agreement. Instead of abiding by its promise to take 12.5% of fees under that Agreement, Humphreys tried to seize 50% of the personal injury case fees in the Monsanto litigation. Humphreys' attorney in 2014, hired for the sole purpose of maximizing Humphreys' share irrespective of the Fee Agreement, agreed on the record to the memorialization of the fee-sharing terms in the 2014 Order, but then tried to submit a vastly overbroad *proposed* order—seeking the exact wide-open fee entitlements that Humphreys seeks here—to Judge Swope following the hearing. Judge Swope *rejected* Humphreys' *proposed* order and instead entered the 2014 Order that Humphreys' attorney had agreed to abide by. Humphreys never appealed that ruling or the fee-sharing terms specified in the 2014 Order that was actually entered. Humphreys studiously ignores and does not mention these events in its response. It is unequivocally bound by the terms of the 2014 Order. "That's called the rule of law," as Humphreys states, smugly, later in its response. Resp. at 18.

Humphreys' response lectures this Court at length regarding all of the minute ways it believes (incorrectly) that the instant fee is tied to the original Monsanto litigation rather than arising from separate claims resulting from defective testing procedures (which is what actually happened). Resp. at 16-17. But Humphreys offered no such detail to its bankruptcy creditors. Humphreys has still not identified a single place in the bankruptcy record where it gave actual

notice of any potential right to future Monsanto fees or any contingent claim regarding same. The 2014 Order is never mentioned in Humphreys' bankruptcy disclosures. Nor is the Fee Agreement ever identified. In fact, Humphreys did not disclose *any* contingent claim related to Monsanto.

Instead of identifying a legally cognizable and specific bankruptcy disclosure, Humphreys says that "even if the disclosure is now wanting of more detail" (Resp. at 24) Humphreys should not be held accountable for its dishonesty towards its creditors but rather should be allowed to keep the fruits of its deceit. To that end, Humphreys invents brand-new arguments, never raised below, involving purported differences between bankruptcies arising under Chapter 7 and Chapter 11. Resp. at 22. Humphreys does not cite a single case to support this argument. CLD can find no case adopting Humphreys' position. Indeed, the judicial estoppel cases cited in CLD's opening brief arise from Chapter 7 *and* Chapter 11 (*and* Chapter 13) bankruptcies. Hiding assets from creditors carries the same penalty across the bankruptcy spectrum—judicial estoppel against pursuing claims that were not disclosed.

Humphreys also asserts, for the first time in this entire litigation, that CLD's judicial estoppel defense somehow amounts to an improper "collateral attack" on the bankruptcy proceedings. Resp. at 23. This assertion is patently false. This Court need look no further than the plethora of cases applying judicial estoppel against sly debtors—all without even mentioning collateral attacks as an issue. Such cases would not exist if Humphreys was correct that judicial estoppel defenses amount to collateral attacks. Indeed, Humphreys cites only two cases as "support" for this ill-founded argument, neither of which even slightly involves judicial estoppel. Resp. at 23 n.9.

Finally, Humphreys invents a brand-new argument, never raised before, that CLD had some purported obligation to intervene in Humphreys' bankruptcy and object to Humphreys'

deceptively incomplete disclosures. Resp. at 24. Humphreys cites exactly zero cases to support this novel suggestion. Nor could it; CLD was no creditor of Humphreys and had no such obligation. Yet again, there are many reported cases applying bankruptcy judicial estoppel in a variety of contexts without mentioning any underlying "objection" obligations—and no such cases would exist if Humphreys was correct. Humphreys is not correct. It is wrong.

This Court should hold Humphreys accountable to the plain terms of the 2014 Order that Humphreys now finally admits it wanted Judge Swope to enter and never appealed. In trying to avoid that outcome, Humphreys talks from both sides of its mouth. It admits that it "prompted" the 2014 Order but denies that it is bound by the specific terms of that Order. It then flip-flops again and—despite having hired its own lawyer to "memorialize" Humphreys' 12.5% in liens and the 2014 Order—takes the position that Humphreys' failure to mention a contingent 12.5% of $6.5 million to its bankruptcy creditors was "inadvertent" and should be excused. These diametrically opposed positions are an affront to the integrity of the bankruptcy process and to this Court and should not be embraced. This Court should instead follow the overwhelming number of cases holding debtors accountable and estopping them from pursuing claims they never disclosed while purposefully availing themselves of bankruptcy protections. *That's* called the rule of law.

ARGUMENT

As noted in Petitioner's opening Brief, this Court's standard of review is *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))). This Court need not, and should not, defer to any findings by the Circuit Court's order improvidently granting summary judgment to Humphreys in this case. Humphreys' response concedes this standard. Resp. at 12.

I. Humphreys now admits, for the first time, that it wanted and agreed to the 2014 Order, which it never appealed, and Humphreys should be required to abide by the plain terms of that Order.

Despite ignoring CLD's arguments below regarding the highly material events that gave rise to the 2014 Order, Humphreys now begrudgingly admits:

> Humphreys filed a charging lien against the "Bibb v. Monsanto" settlement fund. This lien was eventually the subject of a June 2014 hearing. At that hearing, Humphreys made clear that the lien was only intended to "memorialize" the Fee Sharing Agreement. Questioning the procedural propriety of that maneuver, Judge Swope instead suggested that he replace the lien (not the Fee Sharing Agreement) with an order memorializing Humphreys' 12.5% negotiated share of future fee awards. **Humphreys assented, reasoning that an order would fulfill the intended goal: memorialize the parties' fee sharing agreement in the record. . . . The 2014 hearing (and, by extension, the 2014 Order) were prompted by Humphreys, who filed charging liens against the settlement fund.**

(*Compare* Resp. at 4-5; 12 (bold emphasis added; appendix citations omitted) *with* CLD-Appx-000091-97; 000111-000122; 000294-298.) To be clear, these passages in Humphreys' response are the first time in this case that Humphreys has even acknowledged its strenuous efforts to generate the 2014 Order—an Order that it now admits was "prompted by Humphreys." *Id*. (Of course, a mere two years later, Humphreys studiously avoided making any similar efforts to "memorialize the parties' fee sharing agreement in the record" of its bankruptcy for the benefit of its creditors. *See infra* at 9–12; CLD-Appx-000198-225.)

But these admissions by Humphreys are still not the complete truth. During the hearing in which Humphreys' attorney "prompted" the 2014 Order, Judge Swope clearly indicated that he intended to replace the entire dispute between the parties—from Fee Agreement to liens—with specific terms that would govern the parties' fee sharing obligations moving forward:

> **The Court:** I'm trying to put this to bed right now so that you're not fighting over this anymore. . . . I want an order memorializing what y'all are going to do. . . . I'm going to require this, is just memorialize this with an order. . . . **And that order will take care of whatever comes out of the class, right?**

CLD-Appx-000279-84 (bold emphasis added). The specific terms of the 2014 Order were plainly intended to be the governing fee-sharing framework moving forward.

Humphreys' response also continues to entirely ignore other key facts. Humphreys wants to pretend that the 2014 Order was a mere formality that only "memorialized" the Fee Agreement—but if Humphreys was so content with the Fee Agreement, why did it file the liens in the first place? Humphreys has never answered that question, but the record provides some clues. Humphreys' response omits any mention of the fact that its attorney repudiated the most basic term of the Fee Agreement—that Humphreys was entitled to 12.5%—*and not only filed liens seeking 50% of the personal injury cases, but also openly demanded 50% on the record at the hearing*. CLD-Appx-000285-86.

Humphreys' response also completely omits any mention of the fact that its attorney submitted a *proposed* order *after* the hearing, which unsuccessfully asked Judge Swope to adopt the following overbroad interpretation of the Fee Agreement:

> 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-000287-93 (bold emphasis added). Humphreys' *proposed* order thus sought the *exact* overbroad position urged by Humphreys in this case. That attempt by Humphreys was expressly rejected by Judge Swope, who entered the specific terms of the 2014 Order instead.

Humphreys' attempt to rewrite the history of this case is wrong. In 2014, Humphreys was not merely trying to memorialize its fee-sharing rights—it was trying to openly disavow the Fee

Agreement and grab far more than its 12.5% share. Judge Swope rejected those attempts and entered an Order with clear terms intended to define what Humphreys was entitled to receive—12.5% of the property and medical monitoring settlements and the incentive payments, which were undisputedly paid in full, plus a contingent 12.5% of fees "based upon the occurrence of the triggering event" that never occurred. CLD-Appx-000015-16. The 2014 Order and its terms were "prompted by Humphreys." Resp. at 12. Humphreys is bound to those terms.

Humphreys' response also omits any mention of its undisputed failure to ever appeal any aspect of the 2014 Order. That failure is material because it further binds Humphreys to the plain terms of that Order and bars Humphreys from trying to artificially expand the terms of that Order at this late date. "[R]ulings of lower courts that are not appealed become the law of the case and are conclusive in subsequent proceedings in that case." *Siddy W. v. Charles W.*, No. 17-0416, 2018 WL 679507, at *3 (W. Va. Feb. 2, 2018) (mem. dec.); *see also In re B.W.*, 244 W. Va. 535, 539, 854 S.E.2d 897, 901 (2021) ("As a result, we find that Petitioners have waived arguments . . . by failing to appeal the 2017 dispositional order[.]"); *Pauley v. Walker*, No. 14-0933, 2015 WL 6844532, at *5 (W. Va. Nov. 5, 2015) (memorandum decision).

Instead of providing an honest accounting of events, Humphreys tries to infer Judge Swope's unspecified intentions based on events that occurred *after* Humphreys filed this lawsuit. Resp. at 8; 15. Unlike Humphreys, CLD does not pretend to know what Judge Swope meant in the statements that lead to his disqualification. It appears that during those statements Judge Swope was not referring to the 2014 Order but to a different order entirely, such as his class certification order. *See* CLD-Appx-000518; CLD-Appx-000397. In any event, we need not speculate about Judge Swope's thought processes in 2022 versus 2014, because we have an Order that he wrote in 2014 (that Humphreys now concedes that it "prompted") that contains plain and clear terms

intended to define Humphreys' fee sharing entitlements. As the Supreme Court of Appeals has "repeatedly recognized," it is "a paramount principle of jurisprudence that a court speaks only through its orders." *Terrance E. v. Christopher R.*, 243 W. Va. 202, 842 S.E.2d 755, 762-63 (2020) (citations and internal quotations omitted) (collecting cases for the proposition that when a circuit court's oral statements conflict with its written order, "the written order controls").

Moreover, Judge Swope certainly thought he was awarding fees to Humphreys under the terms of his 2014 Order and not under the Fee Agreement that Humphreys had litigated in his courtroom. In 2015, Judge Swope entered *three* orders granting partial distributions to Humphreys of the fees flowing from the Monsanto settlement. Those three orders state, respectively:

> **In accordance with the Court's Order of August 15, 2014**, the Court hereby authorizes and directs the Class Settlement Administrator to make payment[] of . . . Fifty-One Thousand Nine Hundred Eighty-Seven Dollars and Fifty Cents ($51,987.50) (12.5%) to James Humphreys from the Attorneys Fees Escrow Fund[.]
>
> **In accordance with the Court's Order of August 15, 2014**, the Court hereby authorizes and directs the Class Settlement Administrator to make payment[] of . . . Thirty-Three Thousand Two Hundred Sixty-Two Dollars Fifty Cents ($33,262.50) (12.5%) to James Humphreys from the Attorneys' Fees Escrow Fund[.]
>
> **In accordance with the Court's Order of August 15, 2014**, the Court hereby authorizes and directs the Class Settlement Administrator to make payment[] of . . . $23,637.50 (12.5%) to James Humphreys from the Attorneys' Fees Escrow Fund[.]

CLD-Appx-000547-48; CLD-Appx-000549-50; & CLD-Appx-000552-53 (Bold emphasis added.) The Fee Agreement is never mentioned in these orders directing payments to Humphreys—only the 2014 Order is mentioned. Humphreys took no issue with the terms of the 2014 Order while receiving payments under it in 2015.

Humphreys' response repeatedly admits that CLD made all required payments to Humphreys save one—a final payment contingent on a "triggering event" that never occurred.

And contrary to Humphreys' halfhearted suggestions otherwise, (Resp. at 16), the fee that Humphreys now tries to grab *was* based on new events and new potential claims involving third-party testing entities. The record bears unrefuted evidence submitted by CLD which demonstrates the separateness of this final fee—which Humphreys is not entitled to share.[2] *See* CLD Petitioners' Brief at 9-13; CLD-Appx-000038-42; CLD-Appx-000012-29. Nothing in the 2014 Order or the original Fee Agreement remotely suggests that Humphreys would ever be permitted to share in a settlement occasioned by new claims by CLD against third parties.

II. Humphreys' bankruptcy disclosures were inadequate as a matter of law and Humphreys should be judicially estopped from pursuing this claim against CLD.

"It goes without saying that the Bankruptcy Code and Rules impose upon bankruptcy debtors an express, affirmative duty to disclose all assets, *including contingent and unliquidated claims*." *In re Coastal Plains, Inc.*, 179 F.3d 197, 207-08 (5th Cir. 1999) (citing 11 U.S.C. § 521(1)) (italics in original); *see also Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 785 (9th Cir. 2001) (same). "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,*

[2] The affidavits of Thomas V. Flaherty and Thomas J. Hurney, Jr. are particularly compelling on this point. Mr. Flaherty was appointed by Judge Swope to administer the class action settlement in perpetuity, so he is in the best position to confirm the separate and distinct litigation against third-party testing entities including Thomas Hospital and Axis Labs. CLD-Appx-000038. Mr. Flaherty has affirmed, under oath, that: "Following its review of class members' exam records, chain-of-custody documents and lab data, the Calwell Firm **alleged that these third-party contractors had not fully complied with proper medical and scientific practices related to the collection and analysis of class members' blood/serum samples.** 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). . . . 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 (bold emphasis added). Mr. Hurney also affirmed under oath the separateness of the litigation that gave rise to the fee at issue here. He was retained by Thomas Hospital to defend the new litigation pursued by CLD. Mr. Hurney defended his client against CLD in part based on his belief that the Monsanto case was "settled" and that no ongoing "controversy" or "case pending" existed "that allows issuance of a subpoena"—in other words, CLD's dispute on behalf of its clients against Thomas Hospital was an entirely new claim and controversy that would likely require its own separate litigation if it were to move forward. CLD-Appx-000262-267.

Inc. 179 F.3d at 208 (applying these principles to judicially estop a Chapter 11 debtor from pursuing a claim that was not disclosed in its bankruptcy).

When Humphreys filed for bankruptcy in 2016, it had already "prompted" the 2014 Order—which specifically provided for Humphreys to receive "twelve (12) and a half percent" of the Contingent Attorney's Fees Fund that contained $6.5 million, "based upon the occurrence of the triggering event." *See* Resp. at 4-5; 12; 20; CLD-Appx-000015-16. Humphreys thus unequivocally withheld a court-ordered "contingent and unliquidated claim" of almost one million dollars when it filed for bankruptcy. *In re Coastal Plains, Inc.*, 179 F.3d at 207-08. Humphreys *never* disclosed this contingent claim during its bankruptcy. And it was not until 2017—after Humphreys' bankruptcy had concluded—that the Circuit Court held "that the Triggering event did not occur . . . and is unlikely to ever occur." Resp. at 20; CLD-Appx-000031. Humphreys' failure to disclose this claim is fatal to its current efforts to now grab part of the 2017 fee award, which Humphreys points out was paid from the Contingent Attorney's Fee Fund (albeit as a result of new, separate disputes with third-party testing companies). Resp. at 16.

Humphreys' response points to only three items that it contends satisfied its strict disclosure requirements—a generic reference to unspecified "referral/joint representation agreements;" a Monthly Operating Report and bank statement, showing proceeds of an earlier fee from Monsanto; and correspondence with CLD related to said fee. Which one of these items showed the bankruptcy court, the trustee, and the creditors that Humphreys held additional contingent claims, including one potentially worth nearly a million dollars if the "triggering event" had occurred? Humphreys' response offers no answer because it knows these are not honest "disclosures."

These three wholly inadequate items listed in Humphreys' response not only prove that Humphreys violated its initial disclosure requirements, but also prove that Humphreys violated its

strict obligation to amend its disclosures during the bankruptcy. "[T]he debtor must amend his asset schedules and petition if circumstances change during the bankruptcy proceeding[.]" *Guay v. Burack*, 677 F.3d 10, 17 (1st Cir. 2012). As the Ninth Circuit has observed,

> [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 on 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. . . . **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 784-85 (bold emphasis added); *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.") (ellipses added). If Humphreys' failure to initially disclose his contingent claim to additional Monsanto fees was truly inadvertent—a proposition that strains all credulity given its fee litigation in 2014, its liens, the 2014 Order, and the three 2015 orders directing partial payments to Humphreys—then surely the partial payment *during* its bankruptcy should have reminded Humphreys to be honest and to correct the record for the benefit of its creditors.

Instead of acknowledging the glaring deficiency of its disclosures, Humphreys offers a lecture on the meaning of "receivables" that only hurts its case even more. Resp. at 20. In contrast to its complete omission of anything Monsanto-related, Humphreys' disclosures *do* contain the following item:

> 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.

CLD-Appx-000199 (bold emphasis added.) Humphreys' response engages in severe contortions to distinguish this item as "an amount then due and owing" as opposed to future Monsanto fees which were contingent. Resp. at 20. But the law recognizes no such distinction. *In re Coastal Plains, Inc.*, 179 F.3d at 207-08 ("It goes without saying that the Bankruptcy Code and Rules impose upon bankruptcy debtors an express, affirmative duty to disclose all assets, *including contingent and unliquidated claims*.") (citing 11 U.S.C. § 521(1)) (italics in original). Humphreys' response unsurprisingly cites no law as support for its "argument"—because none exists.

Humphreys received fee payments for Monsanto in the year prior to and during its bankruptcy. Humphreys was clearly aware that the 2014 Order—that it "prompted"—provided for even more potential payments, including a contingent 12.5% of $6.5 million if the "triggering event" occurred. Yet Humphreys tries to convince this Court that hiding such contingent claim is acceptable? That almost a million dollars would not be material to its creditors or its bankruptcy process? Humphreys' position defies all rationality—and it is not the law.

III. This Court should not consider brand-new arguments raised by Humphreys without citing any support that Humphreys never raised below and the Circuit Court never considered.

Humphreys' response contains multiple brand-new arguments that it has never raised before. It is axiomatic that this Court should not consider such arguments or give them any weight. "In the exercise of its appellate jurisdiction, this Court will not decide nonjurisdictional questions which were not considered and decided by the court from which the appeal has been taken." Syl. Pt. 1, *Mowery v. Hitt*, 155 W. Va. 103, 181 S.E.2d 334 (1971); *see also Hecker v. McIntire*, No. 22-ICA-15, 2023 WL 152889, at *3 (W. Va. Ct. App. 2023) ("Appellate courts will not decide nonjurisdictional questions raised for the first time on appeal.") (mem. dec.); *Zaleski v. W. Virginia*

Mut. Ins. Co., 224 W. Va. 544, 550, 687 S.E.2d 123, 129 (2009) ("Because this argument is now being raised for the first time on appeal, we must necessarily find that the argument as to this record has been waived.").

Noticeably absent from Humphreys' new arguments is any legal authority to support them. As the Supreme Court of Appeals has observed,

> Blackrock's argument consists of four sentences and no citation to legal authority. A "skeletal 'argument,' really nothing more than an assertion, does not preserve a claim. Judges are not like pigs, hunting for truffles buried in briefs. Furthermore, this Court has adhered to the rule that although we liberally construe briefs in determining issues presented for review, issues mentioned only in passing but not supported with pertinent authority, are not considered on appeal. . . . We refuse to consider this argument."

Blackrock Cap. Inv. Corp. v. Fish, 239 W. Va. 89, 102, 799 S.E.2d 520, 533 n.49 (2017) (quoting *State v. Kaufman*, 227 W.Va. 537, 555 n.39, 711 S.E.2d 607, 625 n.39 (2011) (citations, quotations, and ellipses omitted)); *see also Birchfield v. Zen's Dev., LLC*, 245 W. Va. 82, 94, 857 S.E.2d 422, 434 (2021) (same). The almost complete lack of *any* legal authority in Humphreys' brief, especially regarding Humphreys' brand-new bankruptcy-related arguments, is striking. Humphreys cites a grand total of six cases in its response, consisting of: (1) Humphreys' own bankruptcy proceeding; (2) a 1929 case addressing only burdens of proof for affirmative defenses and touching on no substantive issue in this case; (3) two "collateral attack" cases that do not involve judicial estoppel; (4) a case which only addresses a rule of professional conduct; and (5) a case that agrees with CLD that this Court applies a *de novo* standard of review. Resp. at ii; 6; 12; 18; 20; 22-23. Humphreys also cites 11 U.S.C. § 1125 and Federal Rules of Bankruptcy Procedure 2002 and 3017, which merely prove that CLD was not an "interested party" in the Humphreys bankruptcy and had no obligation to intervene or object in any way. *Id*. at 23-24. The complete

absence of "pertinent authority" from Humphreys' response calls its entire appellate brief into question. *Blackrock*, 799 S.E.2d at 533 n.49.

IV. The necessary intent for bankruptcy judicial estoppel has been proven as a matter of law, and there is no material distinction between Chapter 11 proceedings and Chapter 7 proceedings for purposes of judicial estoppel and intent.

Humphreys' response tacitly concedes that "Calwell instead endeavors to prove motive, which can serve as a proxy for intent." Resp. at 21. But this concession is another half-truth. The law and the facts of this clearly show that Humphreys had the required intent for judicial estoppel to apply.

CLD proved intent as a matter of law in its opening brief (Pet. Br. at 27-30) and will not belabor those points in repetitive fashion here. In short, 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. *United States ex rel. Long v. GSDMIdea City, L.L.C.*, 798 F.3d 265, 272 (5th Cir. 2015); *Steel of W. Va., Inc. v. McMellon (In re McMellon)*, 448 B.R. 887, 893 (S.D. W. Va. 2011); *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)); *In re Coastal Plains, Inc.*, 197 F.3d at 210.

Humphreys had both. Its response does not actually dispute that it had knowledge—nor could it, given the Fee Agreement, liens, fee litigation, 2014 Order, and partial payments in 2015-2016. Humphreys' response instead takes the technical position that CLD has failed to prove "motive." This is flatly wrong. "A motivation to conceal may be shown by evidence of a potential financial benefit that could result from 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).

Humphreys' response does not address these cases when discussing intent and motive—in fact, it does not cite any cases (save one, a 1929 case regarding burden of proof for affirmative defenses that does not mention or involve judicial estoppel or bankruptcy). Resp. at 21-22. Instead, Humphreys' response invents a brand-new argument regarding a purported difference between applying judicial estoppel based on Chapter 11 versus Chapter 7 bankruptcies.[3] There is good reason for the fact that Humphreys was unable to find a single case to support this novel theory—it is flatly wrong.

Abundant cases have applied judicial estoppel *against Chapter 11 debtors* who failed to disclose assets. In fact, CLD cited several such cases in its opening brief. *See, e.g.*, *In re USinternetworking, Inc.*, 310 B.R. 274 (Bankr. D. Md. 2004); *In re Coastal Plains, Inc.*, 179 F.3d 197; *Oneida Motor Freight v. United Jersey Bank*, 848 F.2d 414 (3d. Cir. 1988) (stating, in Chapter 11 context, that "[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."). Not only do these cases (and others) apply judicial estoppel in the Chapter 11 context, they stand for the opposite proposition of what Humphreys' response tries to assert. Assets not disclosed by a Chapter 11 debtor *are* assets that are withheld from creditors to the financial benefit of the debtor, and accordingly, the Chapter 11 debtor's savings from nondisclosure *are* evidence of the debtor's motive and intent. *See, e.g.*, *In re USinternetworking, Inc.*, 310 B.R. at 285 (applying judicial estoppel against Chapter 11 debtor and noting: "What [the debtor] had to gain was preservation of all potential recoveries on the claim for itself, without the need to share any portion thereof with its creditors."); *Payless Wholesale Distributors, Inc. v. Alberto Culver (P.R.) Inc.*, 989 F.2d 570, 571 (1st Cir. 1993) (Observing in the Chapter 11 context that debtors

[3] As noted above, in Section III, *supra*, this argument was not raised below and should not be considered.

should not be permitted to "[c]onceal your claims; get rid of your creditors on the cheap, and start over with a bundle of rights. This is a palpable fraud that the court will not tolerate, even passively."); *In re Okan's Foods, Inc.*, 217 B.R. 739, 756 (Bankr. E.D. Pa. 1998) (applying judicial estoppel against Chapter 11 debtor and noting that withheld claims "would have inured to [the creditors'] benefit" and that "Debtor sought to preserve for its own uses, to the exclusion of its creditors, any recovery it might obtain upon a successful prosecution of such claim.").

Humphreys' creatively unfounded "Chapter 11 distinction" argument thus offers no shelter for Humphreys from the intentionality element of judicial estoppel. Humphreys cites zero cases discussing any relevant difference between failing to disclose assets in Chapter 11 proceedings versus Chapter 7 proceedings, much less holding that such imaginary differences somehow bar judicial estoppel in a post-Chapter 11 proceeding. Resp. at 22. Courts freely—and appropriately—apply judicial estoppel in the Chapter 11 context.

Humphreys had undisputed knowledge of its contingent claim and unequivocal motive to conceal it as a matter of law. The element of intent is fully satisfied and judicial estoppel should apply.

V. There is no collateral attack on the bankruptcy proceedings.

Humphreys' brand-new "collateral attack" argument[4] is as unfounded and easily dismissed on the merits as its "Chapter 11 distinction" argument. CLD does not attack the bankruptcy court's confirmation order—it merely contends that Humphreys should be held to account for its deceptive conduct during the bankruptcy proceeding. If such arguments indeed amounted to a "collateral attack," then the many cases applying judicial estoppel in this exact context would not exist. These many cases exist for a simple reason: raising judicial estoppel is in no way a collateral attack on

[4] As noted above, in Section III, *supra*, this argument was not raised below and should not be considered.

the bankruptcy proceedings. *See Adkins v. Adkins*, 142 W. Va. 646, 662 (1957) ("A collateral attack is an attempt to impeach a judgment or decree in a proceeding not instituted for the express purpose of annulling, correcting, or modifying such judgment or decree.") (quotations and citations omitted).

CLD is not attacking or impeaching any order of the bankruptcy court. It is, however, the role of this Court and the judicial system to hold Humphreys to account for its litigation conduct in misinforming the bankruptcy court and its creditors about its assets. Indeed, the claim that Humphreys is trying to pursue was not even addressed by the bankruptcy court in any final order, judgment, or decree because Humphreys failed to disclose it in the first place—which is the entire point of judicial estoppel.

Ignoring these obvious flaws, Humphreys cites two completely unrelated cases as purported "support" for this argument. *See* Resp. at 23-24 n.9 (citing *Browning v. Prostock*, 165 S.W.3d 336 (Tex. 2005) and *Wallis v. Justice Oaks II, Ltd*., 898 F.2d 1544, 1552 (11th Cir. 1990)). *Browning* does not mention or remotely involve judicial estoppel—it involved a class of bondholders attempting *to sue a debtor* post-bankruptcy based on alleged misconduct committed by the debtor during the bankruptcy. Likewise, *Justice Oaks* involved affirmative claims brought by guarantors *against a debtor*. It never mentions or involves judicial estoppel, which is an entirely different issue. In stark contrast, here, Humphreys is not being sued—it is suing CLD. Thus, unlike *Browning* and *Justice Oaks*, CLD does not assert a claim against Humphreys that could implicate the bankruptcy confirmation order; CLD raises judicial estoppel as a defense.

By definition, judicial estoppel *requires* that the bankruptcy court's ruling involved a final yet incomplete understanding as to the debtor's available claims and assets. The court's acceptance of the debtor's prior inconsistent statement is a required element of judicial estoppel. *See Lowery*

v. Stovall, 92 F.3d 219, 224 (4th Cir. 1996) (noting that "the prior inconsistent position must have been accepted by the court."). That is exactly what occurred here when Humphreys failed to disclose its contingent Monsanto claim and obtained bankruptcy relief. If "collateral attack" theories applied to judicial estoppel arguments, as Humphreys incorrectly asserts, there would be no bankruptcy judicial estoppel cases.

VI. CLD was no creditor of Humphreys and had no obligation to intervene in the bankruptcy and file objections.

Humphreys' final brand-new argument[5] that CLD was an "interested party" and should have intervened or otherwise objected during the bankruptcy is also easily dismissed as meritless. Resp. at 23-24. CLD was not an "interested party" in those proceedings. Humphreys is, again, wrong. If any such intervention obligation existed and barred judicial estoppel, then, again, none of the many cases applying judicial estoppel in this exact context would exist.

The Federal Bankruptcy Rules cited by Humphreys drive this point home squarely in favor of CLD. (Resp. at 24.) Rule 2002(b) applies to "the debtor, the trustee, [and] all creditors and indenture trustees." Rule 3017 defers to Rule 2002(b) for the scope of its application. *See* 3017(a) (referencing "parties in interest as provided in Rule 2002"). CLD was not Humphreys' bankruptcy trustee. CLD was not an indentured trustee. And CLD was not a creditor of Humphreys.

Humphreys has cited nothing to show any obligation of CLD to intervene or object in the bankruptcy proceedings. Judicial estoppel is an entirely valid defense. It has properly been raised by CLD. The abundant cases applying bankruptcy judicial estoppel in this exact context amply show the propriety—and critical importance—of this approach.

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)

[5] As noted above, in Section III, *supra*, this argument was not raised below and should not be considered.

(citation omitted). When a debtor fails to comply with its disclosure obligations, it must be estopped from subsequently pursuing the nondisclosed asset in a new proceeding:

> 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."** … 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**."

Vaccaro v. Monte Nido Roxbury Mills, No. SAG-21-1840, 2022 WL 19775, at *3 (D. Md. Jan. 3, 2022) (bold emphasis added; internal citations omitted). This is the exact result that should occur here. Humphreys has failed to cite any fact or law to justify a contrary result.

VII. Because CLD's judicial estoppel argument is an entirely valid defense, the Circuit Court's open refusal to even consider the adequacy of Humphreys' bankruptcy disclosures is reversible error.

As argued in CLD's Petitioners' brief, the Circuit Court not only erred in refusing to apply judicial estoppel against Humphreys, it erred by openly ignoring existing law and refusing 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. When juxtaposed against the plethora of cases in which trial and appellate courts do not hesitate to analyze a debtor's bankruptcy disclosures to protect the justice system, and then judicially estop said debtors from pursuing nondisclosed assets, it is clear that the Circuit Court wrongfully refused to fully engage in its judicial responsibilities below. *See, e.g.*, *Hamilton*, 270 F.3d at 785 ("In this case, we must invoke judicial estoppel to protect the integrity of the bankruptcy process."). The Circuit Court's order should be reversed, with instructions to enter judgment in favor CLD, for this reason as well.

CONCLUSION

CLD agrees that this case is about honesty. Honesty to one's creditors in bankruptcy. Honesty to bankruptcy courts. Honesty regarding one's own prior litigation positions and conduct.

For almost a decade, Humphreys has engaged in no such honesty. It now falls upon this Court to hold Humphreys accountable. Humphreys should be required to abide by the plain terms of the 2014 Order that it "prompted" and never appealed, and it should be judicially estopped from further pursuit of this claim. Humphreys has no entitlement to the fee at issue because the "triggering event" never occurred, and because it knowingly refused (with financial motive) to disclose such contingent claim during its bankruptcy.

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' REPLY 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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