IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
No. 21-0843

A. KARIM KATRIB, M.D.,

Petitioner,

v.

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

Respondents.

RESPONSE BRIEF OF RESPONDENTS HERBERT J. THOMAS MEMORIAL HOSPITAL ASSOCIATION AND THOMAS HEALTH SYSTEM, INC.

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I. STATEMENT OF THE CASE

A. Respondents' Bankruptcy Proceeding

On January 10, 2020, Respondent Thomas Health System, Inc. ("Thomas Health"), and its subsidiaries, including Respondent Herbert J. Thomas Memorial Hospital Association ("Thomas Hospital") (collectively, "Respondents" or "Thomas"), filed voluntary petitions for relief under chapter 11 of title 11 of the United States Code, 11 U.S.C. §§ 101-1532 (the "Bankruptcy Code"). Respondents' Chapter 11 cases were jointly administered in the United States Bankruptcy Court for the Southern District of West Virginia under the lead case, *In re Thomas Health System, Inc., et al.*, Case No. 2:20-bk-20007 (the "Bankruptcy Case").

On June 18, 2020, Respondents filed with the Bankruptcy Court a proposed disclosure statement and chapter 11 plan of reorganization, which were both later modified to address certain concerns and comments of various parties. As a result, on August 3, 2020, Respondents filed the "Disclosure Statement for Amended Joint Chapter 11 Plan of Reorganization" and the "Amended Joint Chapter 11 Plan of Reorganization" (the "Plan"). (A.R. at 75.)

On August 19, 2020, the Bankruptcy Court entered "Findings of Fact, Conclusions of Law, and Order Granting Final Approval of the Debtors' Disclosure Statement and Confirming Debtors' Joint Chapter 11 Plan of Reorganization" (the "Discharge Injunction"), (A.R. at 18), whereby the Respondents' Plan was confirmed. The Plan became effective on September 30, 2020, and, except as otherwise expressly provided for in the Plan, fully releases and discharges all claims against Respondents and completely extinguishes all liability with respect thereto. (A.R. at 38 ¶ 6, 49 ¶ 23, 126 Art. VIII.) The discharge constitutes a permanent statutory injunction prohibiting the commencement and continuation of released and discharged actions against Respondents. (A.R. at 49-50 ¶ 23; 54-55 ¶ 27; 59-60 ¶ 36.) Any actions taken in violation of the Discharge Injunction,

and judgments entered or enforced against Respondents at any time subsequent to the entry of the Discharge Injunction, are void and without effect.

Between the time of the petition date of January 10, 2020, and the Plan effective date of September 30, 2020, Respondents' bankruptcy was widely known, and Respondents took all the appropriate steps to publish required notices, including publishing a notice of the entry of the Disclosure Statement Order in *The Wall Street Journal*, *The Register-Herald*, *The Charleston Gazette-Mail*, and *The Herald-Dispatch* on July 14, 2020. (A.R. at 19 ¶ iv.) During the pendency of their Bankruptcy Case, Respondents also provided sufficient notice of the deadline for filing proofs of claim (the "claims bar date") and Respondents' intent to confirm the Plan.

B. Petitioner's Civil Action Against Respondents

On May 14, 2021 – eight months after the Respondents' Plan became effective – Petitioner Dr. Karim Katrib ("Katrib" or "Petitioner") filed a complaint against Respondents in the Circuit Court of Kanawha County, West Virginia. Petitioner's complaint asserted the following pre-petition conduct:

a. Katrib is a "self-employed" Otolaryngology (ear, nose, and throat) specialist that "had clinical privileges and medical staff membership" with Thomas Hospital. (A.R. at 3 ¶¶ 4, 6.)

b. In 2018, Thomas Hospital's Medical Executive Committee ("MEC") required Katrib to engage in a six-month "Focused Profession Practice Evaluation" with regard to the timeliness of his medical documentation. (*Id.* ¶ 9.)

c. Katrib complied with all of the MEC's requests and was informed by Respondents on December 17, 2018, that he was found to be in "sufficient compliance" with regard to the timeliness of his record documentation. (*Id.* ¶ 10.)

d. On the same day, Katrib was informed of Thomas Hospital's Peer Review Committee's concerns about "a standard of care issue" with regard to a patient he treated in September 2018. (A.R. at 3-4 ¶ 11.)

e. Katrib was asked to address his treatment of the patient in writing and he did so by letter dated January 21, 2019. (A.R. at 4 ¶ 12.)

f. The Peer Review Committee sent the matter for external peer review without informing Katrib that it had done so. (*Id.* ¶ 13.)

g. By letter dated May 16, 2019, Respondents informed Katrib that "[e]ffective immediately, a precautionary suspension of all [of Katrib's] clinical privileges at Thomas Memorial Hospital has been ordered. . . " and "the medical staff peer review and investigation process" would be completed "within 30 days of this notice." (*Id.* ¶ 14.)

h. As a result of the suspension of his privileges, Katrib alleges that, at the age of 68 years old, he was unable to treat his patients at Thomas Hospital, which substantially limited his ability to provide medical services. (*Id.* ¶¶ 15–16.)

i. Katrib further alleges he heard nothing from Respondents about his privileges between May 17, 2019, and June 15, 2019, the 30-day period referenced in the May 16, 2019 letter. (*Id.* ¶ 17.)

j. By letter dated August 14, 2019, Katrib's then counsel provided Respondents with the opinion of Dr. Jeremy Tiu, a physician board certified in Otolaryngology, regarding Katrib's treatment of the patient in question and opining the patient received "excellent care" and Katrib "saved [the patient's] life." (A.R. at 5 ¶ 18.)

k. By letter dated September 19, 2019, Respondents informed Katrib that "a recommendation for revocation of [his] medical staff membership and all clinical privileges" has been made by MEC to the Thomas Hospital Board of Trustees. (*Id.* ¶ 19.)

l. By letter dated October 2, 2019, Katrib's prior counsel requested a hearing regarding the MEC's recommendation. (*Id.* ¶ 20.)

m. To date, Katrib has not been given a hearing by Respondents to contest the MEC's recommendation, and Katrib asserts that the suspension of his clinical privileges and medical staff membership at Thomas Hospital has been continuous from May 16, 2019 to the date of the Complaint. (*Id.* ¶¶ 21–22.)

Based on these allegations, Petitioner asserted five causes of action against Respondents: (1) Count I – violation of medical staff bylaws; (2) Count II – retaliation in violation of the West Virginia Patient Safety Act or a substantial public policy of West Virginia; (3) Count III – discrimination based on age, national origin, and religion in violation of the West Virginia Human Rights Act or a substantial public policy of West Virginia; (4) Count IV – tortious interference; and (5) Count IV – intentional infliction of emotional distress. Specifically, in Count I of the

complaint, Petitioner sets forth five arguments as to why Respondents violated Thomas Hospital's Medical Staff Bylaws by: (1) placing Katrib's privileges under an immediate "precautionary suspension" on May 16, 2019, even though there was no imminent danger to the health and safety of any individual or the orderly operations of Thomas Hospital; (2) failing to complete their investigation within 30 days of the May 16, 2019 "precautionary suspension" notice; (3) not allowing Katrib to participate in the review process of the investigation; (4) not providing Katrib with a hearing "as soon as reasonable" after he timely requested a hearing on October 2, 2019; (5) denying him due process, acting in bad faith, and lacking substantial evidence to support the suspension of his privileges on May 16, 2019 and September 19, 2019. (A.R. at 6.)

As for Count II, Petitioner asserted a violation of the West Virginia Patient Safety Act, alleging he was a "health care worker" as defined under the Patient Safety Act and that Respondents' suspension of his clinical privileges and medical staff membership on May 16, 2019 and September 19, 2019 was in retaliation for him voicing patient safety concerns at various times prior to 2018. (A.R. at 9.) Petitioner alleges in Count III violations of West Virginia's anti-discrimination laws, claiming Respondents suspended his clinical privileges and medical staff membership on May 16, 2019 and September 19, 2019 because of his age, national origin, and religion. (A.R. at 10.) In Count IV, Petitioner alleges Respondents committed tortious interference by suspending his clinical privileges and medical staff membership on May 16, 2019 and September 19, 2019. (A.R. at 11.) Finally, Count V asserts a claim of intentional infliction of emotional distress as a result of the suspension of Katrib's clinical privileges and medical staff membership on May 16, 2019 and September 19, 2019. (A.R. at 12.) All of these claims arose from alleged conduct in 2018 and 2019, *prior to January 10, 2020*, the date Respondents commenced their chapter 11 bankruptcy case before the Bankruptcy Court.

On June 4, 2021, Respondents filed a Notice of Bankruptcy and Discharge of Proceedings with the Circuit Court, advising that Respondents could not proceed with the litigation because Katrib's claims violate the Discharge Injunction of the Bankruptcy Court. (A.R. at 14.) On June 10, 2021, Respondents filed a motion to dismiss and accompanying memorandum of law, arguing that Katrib's complaint must be dismissed under Rules 12(b)(1) and 12(b)(6) of the West Virginia Rules of Civil Procedure because his claims were discharged in the Bankruptcy Case and, consequently, are permanently enjoined from preceding. (A.R. at 72, 146.) Petitioner filed a response in opposition to Respondents' motion on August 19, 2021, (A.R. at 156), and Respondents served a reply on September 2, 2021, (A.R. at 173).

The Circuit Court heard oral argument by counsel for the parties on September 13, 2021, and subsequently entered an Order granting Respondents' motion to dismiss on September 24, 2021. (A.R. at 182.) The Circuit Court found that the complaint asserted sufficient facts to resolve the bankruptcy discharge issue under Rule 12(b)(1) and Rule 12(b)(6); that Respondents' alleged conduct, which gave rise to Petitioner's claims, occurred in 2018 and 2019, prior to Respondents' bankruptcy petition; Petitioner's claims were discharged in the Bankruptcy Case and, consequently, are permanently enjoined. Additionally, the Circuit Court found that the dispute over Petitioner's clinical privileges at Thomas Hospital did not make him a "known" creditor and, thus, he was simply entitled to constructive notice, rather than actual notice, of Respondents' bankruptcy. As a result, the Circuit Court held that it lacked jurisdiction under Rule 12(b)(1) and, thus, the complaint fails to state a claim upon which relief can be granted under Rule 12(b)(6). It is from this Order that Petitioner now appeals.

II. SUMMARY OF THE ARGUMENT

Petitioner argues that the Circuit Court made four assignments of error in granting Respondents' motion to dismiss. First, Petitioner argues that the Circuit Court misapplied the law in determining that he was an "unknown creditor" of Respondents and, thus, not entitled to actual written notice of Respondents' Bankruptcy Case to satisfy due process. (A.R. at 1, Assignment of Error A.) Although Respondents were aware Petitioner disputed his denial of hospital privileges, such awareness does not translate into knowledge that Katrib would present new claims wholly unrelated to the privileges issue, such as those sounding in tort or statutory violations under the Patient Safety Act, in Respondents' Bankruptcy Case. Second, Petitioner contends that the Circuit Court failed to find that the issue of whether he was a known or unknown credit was an issue of fact for which Respondents bore the burden of proof and upon which Petitioner was entitled to discovery. (*Id.*, Assignment of Error B.) However, the facts of the bankruptcy discharge were not disputed and the application of the same to Petitioner's claims was apparent from the face of the complaint. The allegations in the complaint constitute judicial admissions which are binding against Petitioner in the instant action. *See Wheeling-Pittsburgh Steel Corp. v. Rowing*, 205 W. Va. 286, 302, 517 S.E.2d 763, 779 (1999) ("'Judicial admissions are formal concessions in the pleadings, or stipulations by a party or its counsel, that are binding upon the party making them.'") (quoting *Keller v. U.S.*, 58 F.3d 1194, 1198 n.8 (7th Cir. 1959)). Therefore, the matter was appropriate for disposition without discovery.

Next, Petitioner claims that the Circuit Court erred in concluding that the complaint does not seek relief for conduct that Respondents allegedly committed after the effective date of the Plan. (A.R. at 1, Assignment of Error C.) There can be no dispute, however, that the claims in the complaint arise solely from conduct that occurred in 2018 and 2019. The complaint does not allege any wrongful conduct on the part of Respondents following the bankruptcy discharge nor

does the complaint seek injunctive or other equitable relief. Last, Petitioner argues that the Circuit Court's summary dismissal of his complaint unlawfully denies him due process in violation of the Fifth Amendment to the United States Constitution and Article III, Section 10 of the West Virginia Constitution. (*Id.*, Assignment of Error D.) This argument ignores the fact that Katrib had at least three opportunities to protect his interests. Indeed, like any other alleged creditor, Katrib had ample time and numerous opportunities to file a proof of claim with the Bankruptcy Court for an alleged "claim," as defined under the Plan, request a modification to the Plan to exclude his alleged claims from the Discharge Injunction, or object to the confirmation of the Plan. Petitioner, however, sat idly by and did not take any such actions during Respondents' Bankruptcy Case.

Petitioner arguments work a dramatic expansion of a bankruptcy debtor's onus with respect to providing Petitioner with notice and opportunities to object to the confirmation of Respondents' Plan. Bankruptcies are intended to set the debtor's financial affairs in order, shed claims, and obtain a fresh start. Under Petitioner's theory, the protections and purpose of the bankruptcy system would be null and void because brand new claims could be asserted, pre-existing claims could be re-labeled as "continuing" claims, and creditors would be able to avoid their obligations to protect their interests during the bankruptcy—especially where, as here, a sophisticated individual has legal representation. For these reasons as discussed in more detail below, the Circuit Court did not err in granting Respondents' motion to dismiss, and the decision of the Circuit Court should be affirmed.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Respondents submit that this appeal should be resolved without oral argument because the facts and legal arguments are adequately presented in the parties' briefs and the record on appeal. As such, a memorandum decision affirming the Circuit Court's September 24, 2021 Order granting

Respondents' motion to dismiss is appropriate under Rule 21 of the West Virginia Rules of Appellate Procedure. W. Va. R. App. P. 21.

To the extent the Court finds that the decisional process would be significantly aided by oral argument, Respondents contend that oral argument under West Virginia Rule of Appellate Procedure 19 is warranted because the dispositive issues of this appeal involve routine matters under federal bankruptcy law. W. Va. R. App. P. 19.

IV. STANDARD OF REVIEW

This Court reviews a circuit court's order granting a motion to dismiss a complaint under a *de novo* standard. Syl. Pt. 4, *Ewing v. Bd. of Educ. of Cty. of Summers*, 202 W. Va. 228, 230, 503 S.E.2d 541, 543 (1998). Under Rule 12(b)(1) of the West Virginia Rules of Civil Procedure, a court may dismiss a case when it lacks subject matter jurisdiction. As recognized by the Supreme Court of Appeals of West Virginia, "[w]henever it is determined that a court has no jurisdiction to entertain the subject matter of a civil action, the forum court must take no further action in the case other than to dismiss it from the docket." Syl. Pt. 1, *Hinkle v. Bauer Lumber & Home Bldg. Ctr., Inc.*, 158 W. Va. 492, 211 S.E.2d 705 (1975). The burden of proving subject matter jurisdiction is upon the party asserting subject matter jurisdiction exists. *See State ex rel. Bell Atl.-W. Virginia, Inc. v. Ranson*, 201 W. Va. 402, 414, 497 S.E.2d 755, 767 (1997) ("the burden on the plaintiff is to make a mere prima facie showing of jurisdiction to survive the jurisdictional challenge.") (citations omitted).

The primary purpose of a motion to dismiss under Rule 12(b)(6) is "to test the formal sufficiency of the complaint." *Mey v. Pep Boys-Manny, Moe & Jack*, 228 W. Va. 48, 52, 717 S.E.2d 235, 239 (2011) (citation omitted). "Dismissal for failure to state a claim is proper where it is clear that no relief could be granted under any set of facts that could be proved consistent with

the allegations." *Id.* (internal quotation marks and citation omitted). "The trial court, in appraising the sufficiency of a complaint on a Rule 12(b)(6) motion, should not dismiss the complaint unless it appears beyond doubt that the plaintiff could prove no set of facts in support of his claim which would entitle him to relief." Syl. Pt. 2, *Roth v. DeFeliceCare, Inc.*, 226 W. Va. 214, 700 S.E.2d 183 (2010). When entertaining a motion to dismiss, the trial court "construe[s] the complaint in the light most favorable to plaintiff, taking all allegations as true." *Id.* at 188 (citing *Sedlock v. Moyle*, 222 W. Va. 547, 550, 668 S.E.2d 176, 179 (2008)).

V. ARGUMENT

A. Petitioner was an unknown creditor of Respondents and, therefore, was only entitled to constructive notice of the Respondents' Bankruptcy Case.[1]

Section 1141(d)(1)(A) of the Bankruptcy Code provides that the confirmation of a reorganization plan "discharges the debtor ***from any debt that arose before the date of such confirmation***," notwithstanding whether "the holder of such claim has accepted the plan." 11 U.S.C. § 1141(d)(1)(A) (emphasis added). As used in section 1141(d), "debt" is defined as "liability on a claim." 11 U.S.C. § 101(12). In turn, a "claim" is a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." 11 U.S.C. § 101(5).

Section 524 of the Bankruptcy Code governs the effect of a discharge in a bankruptcy case. In relevant part, section 524(a) states that a discharge in a case under the Bankruptcy Code "voids any judgment at any time obtained, to the extent that such judgment is a determination of the personal liability of the debtor with respect to any debt discharged under section . . . 1141 . . . of this title" and "operates as an injunction against the commencement or continuation of an action,

[1] According to Rule 10(d) of the West Virginia Rules of Appellate Procedure, Respondents' brief is not required to specifically restate the assignments of error claimed by Petitioner. W. Va. R. App. P. 10(d). Nevertheless, for clarity, this argument responds to Petitioner's Assignment of Error A. (Pet.'s Brief at 8.)

the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived." 11 U.S.C. § 524(a).

Respondents' Plan contains discharge and injunctive provisions mirroring the language in sections 1141 and 524 of the Bankruptcy Code, which were incorporated in and given effect by the Discharge Injunction. (A.R. at 47, Art. VIII.) Article VIII of the Plan provides that the Plan

> shall be in complete satisfaction, discharge, and release, effective as of the Effective Date, of Claims . . . and Causes of Action of any nature whatsoever . . . , including demands, liabilities, and Causes of Action that arose before the Effective Date . . . and all debts . . . whether or not: (1) a Proof of Claim based upon such debt or right is filed or deemed filed . . . or (3) the Holder of such a Claim has accepted the Plan or voted to reject the Plan. The Confirmation Order shall be a judicial determination of the discharge of all Claims subject to the occurrence of the Effective Date, except as otherwise specifically provided in the Plan.

(*Id.*) The Plan goes on to describe the injunctive effect of the Plan and Discharge Injunction:

> From and after the Effective Date . . . all persons and entities that have, hold, or may hold claims that have been release, discharged, or are subject to the exculpation restrictions below are permanently enjoined, from and after the Effective Date, from . . . commencing . . .any cause of action released or to be released pursuant to the Plan or the Confirmation Order.

(A.R. at 130.)

It well-established that "[a] pre-existing debt can be discharged through bankruptcy only if the creditor was on notice of a debtor's bankruptcy filing and the claims bar date." *Bosiger v. U.S. Airways*, 510 F.3d 442, 451 (4th Cir. 2007); *Chemetron Corp. v. Jones*, 72 F.3d 341, 346 (3d Cir. 1995) ("Inadequate notice is a defect which precludes discharge of a claim in bankruptcy."). This principle of bankruptcy law is based on a landmark United States Supreme Court case which held that due process requires "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity" to object. *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314, 70 S. Ct. 652, 657, 94 L. Ed. 865 (1950). In

line with this standard, Petitioner's claims are permanently barred so long as his claims arose prior to the confirmation of Respondents' Plan and he received adequate notice of the claims bar date.

What constitutes adequate notice varies according to the knowledge of the parties. When a creditor is unknown to the debtor, "notice by publication" or constructive notice is sufficient. *Bosiger*, 510 F.3d at 451; *In re Drexel Burnham Lambert Grp.*, 151 B.R. 674, 680 (Bankr. S.D.N.Y. 1993) ("unknown creditors are entitled to no more than constructive notice (i.e., notice by publication) of the bar date."). Conversely, if a creditor is known to the debtor, actual written notice of the debtor's bankruptcy filing and claims bar date must be afforded to the creditor. *Chemetron*, 72 F.3d at 346.

A "known" creditor is one whose identity and interests are either known or "reasonably ascertainable" by the debtor. *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478, 489, 108 S. Ct. 1340, 1347, 99 L. Ed. 2d 565 (1988). The United States Court of Appeals for the Third Circuit has thoroughly discussed on a number of occasions what it means to be "reasonably ascertainable." According to the Third Circuit, "[a] creditor's identity is 'reasonably ascertainable' if that creditor can be identified through 'reasonably diligent efforts.'" *Chemetron*, 72 F.3d at 346 (citing *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 798 n.4, 103 S.Ct. 2706, 2711 n.4, 77 L.Ed.2d 180 (1983)). Reasonable diligence does not require a debtor to conduct a "vast, open-ended investigation," nor must it "search out each conceivable or possible creditor and urge that person or entity to make a claim against it." *Chemetron*, 72 F.3d at 346. Rather, it requires a "search focused on the debtor's own books and records," and a "careful examination of those documents." *Sweeney v. Alcon Lab'ys*, 856 F. App'x 371, 374 (3d Cir. Apr. 20, 2021), *cert. denied sub nom. Sweeney v. Eastman Kodak Co.*, 142 S. Ct. 565 (2021) (alterations and citation omitted).

In contrast, an "unknown" creditor is one whose "interests are either conjectural or future or, although they could be discovered upon investigation, do not in due course of business come to knowledge [of the debtor]." *Chemetron*, 72 F.3d at 346 (alteration in original) (citing *Mullane*, 339 U.S. at 317, 70 S.Ct. at 659); *Bosiger*, 510 F.3d at 451 (finding that notice by publication is sufficient "[i]f a creditor possesses either a 'conjectural or future' interest that 'does not in due course of business come to the knowledge' of the debtor"); *In re Placid Oil Co.*, 753 F.3d 151, 156 (5th Cir. 2014) (noting, "conjectural" claims of a creditor that arise too far in the future cannot make that creditor "known."); *In re Arch Wireless, Inc.*, 534 F.3d 76, 80 (1st Cir. 2008) (same).

Petitioner and Respondents do not dispute the distinctions between known and unknown creditors and the requisite notice for each. Yet, Petitioner contends that the Circuit Court misapplied the controlling bankruptcy law in finding the Petitioner was an unknown creditor and, thus, entitled only to notice by publication. The allegations in the complaint demonstrate otherwise. Respondents do not contest that Petitioner and Thomas Hospital had a dispute over his hospital privileges resulting from a standard of care issue with a patient Petitioner treated in 2018. (A.R. at 3-4 ¶ 11.) Petitioner retained an expert to render an opinion on his standard of care and sought a hearing to challenge the temporary suspension of his clinical privileges. (A.R. at 5 ¶ 18.) Thereafter, Thomas Hospital and Petitioner through two prior law firms were in negotiations over this dispute until the filing of this civil action. (A.R. at 178 n.1.)

At all times prior to filing the petition for reorganization, Petitioner's sole interest was to contest the MEC's suspicions of malpractice by him in order to maintain his hospital privileges. Knowledge of this administrative issue does not equate to knowledge that Petitioner would assert various claims sounding in tort and statutory violations during the pendency of Respondents' Bankruptcy Case. Indeed, there are no allegations in the complaint that suggest Petitioner was

seeking money damages from Respondents prior to their Bankruptcy Case. And the complaint is devoid of any allegation that Petitioner reported or complained that Respondents' conduct violated the bylaws; that the suspension of his privileges interfered with his ability to practice medicine; or that he believed he was being discriminated against due to his age, national origin, and religion and being retaliated against for allegedly reporting prior safety concerns several years prior. Nor would Respondents have had any reason to perceive these novel claims, particularly given that Petitioner was not an employee of Respondents.[2] (A.R. at 3 ¶ 4.)

Petitioner urges that because he sought a hearing to dispute the suspension of his privileges, Respondents had knowledge of its liability for violations of the medical staff bylaws. Petitioner's position suggests that Respondents had a duty to speculate and search out all persons that they could "reasonably foresee" holding a claim—that is, Respondents should have listed Petitioner as a creditor because it should have foreseen his claim. Such request for a "vast, open-ended investigation" would have placed an impossible and impractical burden on Respondents. *Chemetron*, 72 F.3d at 346. In fact, the Third Circuit expressly rejected a foreseeability analysis in evaluating due process of bankruptcy notices in *Chemetron* on the basis that such an "expansive test depart[s] from established rules of law . . . ." *Id.* at 347 (finding that, "in substituting a broad 'reasonably foreseeable' test for the 'reasonably ascertainable' standard, the bankruptcy court applied the incorrect rule of law").

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[2] Notably, the West Virginia Human Rights Act prohibits unlawful discriminatory conduct in the context of employment, public accommodation, and procurement of or financing for housing. *See* W. Va. Code § 5-11-9. For an employer to be liable under section 5-11-9(1), as asserted in Petitioner's complaint, the alleged discrimination must affect "conditions or privileges ***of employment***." W. Va. Code § 5-11-9(1) (emphasis added). Likewise, prohibited discrimination and retaliation under the Patient Safety Act protects only "health care workers," who "provide[] direct patient care to patients of a health care entity ***and who is an employee of the health care entity***, a subcontractor, or independent contractor for the health care entity, or an employee of the subcontractor or independent contractor." W. Va. Code § 16-39-3 (emphasis added). As a self-employed physician, Petitioner does not fall within the purview of these Acts, and, consequently, his claims could not have been reasonably ascertainable by Respondents.

In *Chemetron*, a group of former residents and occasional visitors to a neighborhood in proximity to nuclear waste dump maintained by debtor claimed injury from exposure to toxic chemicals because of time spent in the neighborhood. *Id.* at 345. The lawsuit was brought four years after the debtor filed for chapter 11 bankruptcy, and the plaintiffs did not receive actual notice of the claims bar date. The bankruptcy court ruled that the plaintiffs were known creditors because the defendant "knew or should have known that it was ***reasonably foreseeable*** that it could suffer claims from individuals living near the" landfill. *Id.* at 347 (emphasis added). The Third Circuit held that the bankruptcy court should have applied a "reasonably ascertainable" standard, not a "reasonably foreseeable" standard. *Id.* The court noted, "Debtors cannot be required to provide actual notice to anyone who ***potentially*** could have been affected by their actions; such a requirement would completely vitiate the important goal of prompt and effectual administration and settlement of debtors' estates." *Id.* at 348 (emphasis added). Under a "reasonably ascertainable" standard, the court found that the plaintiffs were unknown, so publication notice satisfied due process. *Id.* at 348-49.

During Respondents' Bankruptcy Case, Petitioner's claim for violations of the medical staff bylaws was merely foreseeable. Distinctly, however, this claim was not known or reasonably ascertainable from a search focused on Respondents' own books and records. *Sweeney*, 856 F. App'x at 374. "Since due process demands only what is reasonable, not what it is impossible or impracticable," Respondents were not required to give notice of Respondents' speculative claims. *DPWN Holdings (USA), Inc. v. United Air Lines, Inc.*, 871 F. Supp. 2d 143, 157 (E.D.N.Y. 2012) (Debtors "should not have to engage in inefficient, exhaustive investigations in an attempt to identify and catalog every conceivable claim against them, and then invite claimants to assert

them."); *In re J.A. Jones, Inc.*, 492 F.3d 242, 251 (4th Cir. 2007) ("A debtor need not be omnipotent or clairvoyant.") (citation omitted).

Notice by publication in both national newspapers, such as *The Wall Street Journal*, and newspapers near the debtor's operations is routinely upheld to bar unknown creditors' claims. *Bd. v. AMF Bowling Worldwide, Inc.*, 533 B.R. 144, 152 (E.D. Va. 2015) (citing numerous cases). Because Petitioner, an unknown creditor, received the requisite notice through publication, Respondents' notice satisfies due process. Applying the applicable legal authorities, the Circuit Court correctly reached this conclusion, and its decision should be affirmed.

B. Whether Petitioner was a known or unknown credit was readily determinable from the face of the complaint and was proper for disposition under the doctrine of *res judicata*.[3]

Petitioner claims that the Circuit Court erred in failing to find that the issue of whether Petitioner qualified as an "unknown creditor" was an issue of fact upon which the Respondents bore the burden of proof and upon which the Petitioner was entitled to discovery. Petitioner's argument misconstrues the Circuit Court's Order. As a general matter, Respondents do not dispute that discharge in bankruptcy is an affirmative defense under the West Virginia Rules of Civil Procedure on which Respondents bear the burden of proof. W. Va. R. Civ. P. 8(c). However, in evaluating a bankruptcy discharge, federal courts apply *res judicata* to bar litigation of issues that could have been raised in the Bankruptcy Case. To allow otherwise would eviscerate the purpose of section 524(a) and chapter 11 bankruptcy.

"[F]ederal courts have consistently applied *res judicata* principles to bar a party from asserting a legal position after failing, without reason, to object to the relevant proposed plan of reorganization or to appeal the confirmation order." *In re Varat Enter., Inc.*, 81 F.3d 1310, 1315

[3] This argument responds to Petitioner's Assignment of Error B. (Pet.'s Brief at 16.)

(4th Cir. 1996). In other words, "parties may be precluded from raising claims or issues that they ***could have or should have*** raised before confirmation of a bankruptcy plan, but failed to do so." *Id.* (emphasis added) (citing *Turshen v. Chapman*, 823 F.2d 836, 839 (4th Cir. 1987)).

Broadly phrased, *res judicata* refers to "claim preclusion." *Sattler v. Bailey*, 184 W. Va. 212, 217, 400 S.E.2d 220, 225 (1990). A prior bankruptcy judgment has claim preclusion effect on future litigation when the following three conditions are met:

> (1) the prior judgment was final and on the merits, and rendered by a court of competent jurisdiction in accordance with the requirements of due process; (2) the parties are identical, or in privity, in the two actions; and (3) the claims in the second matter are based upon the same cause of action involved in the earlier proceeding.

Varat, 81 F.3d at 1315 (citations omitted). All three requirements are met here.

The first requirement is easily satisfied because the confirmation of the Plan is a final judgment on the merits. *See id.* ("the [bankruptcy plan] confirmation order constitutes a final judgment on the merits with *res judicata* effect."); *Covert v. LVNV Funding, LLC*, 779 F.3d 242, 246 (4th Cir. 2015) (same). Section 1141(d)(1)(A) states the general rule that "the confirmation of a plan [] discharges the debtor from any debt that arose before the date of such confirmation, . . . whether or not a proof of the claim based on such debt is filed or deemed filed . . . or the holder of such claim has accepted the plan." 11 U.S.C.A. § 1141(d)(1)(A). It is this provision that gives the Plan *res judicata* effect of a final judgment.

Second, Respondents provided adequate notice of the Plan through publication, and Petitioner had the opportunity to participate in the Plan confirmation process but failed to raise those claims at the appropriate time. *See In re Weidel*, 208 B.R. 848, 851 (Bankr. M.D.N.C. 1997) (explaining that a creditor which (1) participated in the plan confirmation process or had the opportunity to do so and (2) filed a claim but chose not to object to a plan or its treatment under the plan constituted a party for purposes of *res judicata*).

Finally, in confirming Respondents' Plan, the bankruptcy court allocated Respondents' debts among their creditors and discharged all pre-confirmation claims, including those of Petitioner that he was aware existed and could have raised prior to the Bankruptcy Case. *In re Frontier Ins. Grp., Inc.*, 585 B.R. 685, 695 (Bankr. S.D.N.Y. 2018), *aff'd*, 598 B.R. 87 (S.D.N.Y. 2019) (noting that for purposes of *res judicata*, a claim arises from the same cause of action as a confirmed plan if it concerned an allocation of the debtor's property or claims against it). Applying these principles, there can be no dispute that Petitioner's claims are barred by *res judicata*. *See Varat*, 81 F.3d 1310, 1317 ("When all of the requirements for claim preclusion are satisfied, the judgment in the first case acts as an absolute bar to the subsequent action with regard to every claim which was actually made or [*sic*] and those which might have been presented.").

There is no dispute that an affirmative defense, such as the effect of a bankruptcy discharge, can be resolved on a motion to dismiss where facts sufficient to rule on the motion are apparent on the face of the complaint. *See, e.g., S.U. v. C.J.*, No. 19-1181, 2021 WL 365824, at *3 (W. Va. Feb. 2, 2021) (resolving the affirmative defense of *res judicata* on a motion to dismiss); *Sweeney v. Alcon Lab'ys*, 856 F. App'x 371, 374 (3d Cir.), *cert. denied sub nom. Sweeney v. Eastman Kodak Co.*, 142 S. Ct. 565, 211 L. Ed. 2d 353 (2021) (granting motion to dismiss based on discharge in bankruptcy); *Goodman v. Praxair, Inc.*, 494 F.3d 458, 464 (4th Cir. 2007) ("where facts sufficient to rule on an affirmative defense are alleged in the complaint, the defense may be reached by a motion to dismiss filed under Rule 12(b)(6)."); *Richmond, Fredericksburg & Potomac R.R. v. Forst*, 4 F.3d 244, 250 (4th Cir. 1993) (acknowledging that a motion to dismiss based upon an affirmative defense may be granted where all facts necessary to the affirmative defenses clearly appear on the face of the complaint).

In *S.U. v. C.J.*, this Court rejected the argument made here that "a Rule 12(b)(6) motion to

dismiss cannot be granted as to the affirmative defense of *res judicata* because such defense requires looking beyond the pleadings and would convert the motion to dismiss into a summary judgement." 2021 WL 365824 at *3. Instead, the Court acknowledged that *res judicata* could be resolved on a motion to dismiss, stating "[r]es judicata 'relieve[s] parties of the cost and vexation of multiple lawsuits, conserve[s] judicial resources, and, by preventing inconsistent decisions, encourage[s] reliance on adjudication.'") (citing *Dan Ryan Builders, Inc. v. Crystal Ridge Dev., Inc.*, 239 W. Va. 549, 803 S.E.2d 519 (2017)); *see also Gulas v. Infocision Mgmt. Corp.*, 215 W. Va. 225, 229 n.4, 599 S.E.2d 648, 652 n.4 (2004); *Andrews v. Daw*, 201 F.3d 521, 524 n.1 (4th Cir. 2000) ("[W]hen entertaining a motion to dismiss on the ground of *res judicata*, a court may take judicial notice of facts from a prior judicial proceeding when the *res judicata* defense raises no disputed issue of fact . . . Because [plaintiff] does not dispute the factual accuracy of the record of his previous suit against [defendant] . . . the district court did not err in taking judicial notice of this prior case.").

This logic furthers the purpose of section 524 of the Bankruptcy Code. 11 U.S.C. § 524(a) (providing that a discharge "operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived."). The purpose of section 524 is to "effectuate the discharge and ***make it unnecessary to assert it as an affirmative defense in a subsequent state court action***." 4 *Collier on Bankruptcy* ("Collier") ¶ 524.LH [1], at 524-66 (Richard Levin & Henry J. Sommers eds., 16th ed.) (emphasis added). The drafters of section 524 had the exact concern for cases like this one. *Id.* (expressing their concern that, a creditor whose debt was discharged, would bring suit "in a local court after the granting of the discharge, and if the debtor failed to plead the discharge affirmatively, the defense was deemed

waived and an enforceable judgment could then be taken against him or her"). Thus, under section 524(a), if a creditor brings a collection suit after discharge, and obtains a judgment against the debtor, the judgment is rendered null and void by section 524(a). *Id.* at 524-68–69 (emphasizing that "the purpose of the provision is to make it absolutely unnecessary for the debtor to do anything at all in the collection action").[4]

In asserting that the Circuit Court lacked subject matter jurisdiction over Petitioner's claims, Respondents presented undisputed evidence of the bankruptcy discharge[5] and relied on the allegations asserted in the complaint to establish that the bankruptcy discharge applied to Petitioner's claims. As explained previously, Respondents' Plan became effective on September 30, 2020. (A.R. at 18.) The Plan, which was confirmed by entry of the Discharge Injunction, discharged all pre-confirmation claims against Respondents and permanently enjoined them from being brought in the future. (A.R. at 126 Art. VIII; 49-50 ¶ 23; 54-55 ¶ 27; 59-60 ¶ 36.) Further, because Petitioner's claims arise from his suspension of hospital privileges which occurred in 2019, prior to the confirmation of Respondents' Plan, the bankruptcy discharge applies to his claims. *See infra* at IV.C. Based on the evidence of the bankruptcy discharge and the allegations

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[4] Based on the statutory language of section 524(a) and the Bankruptcy Reform Act of 1978, some courts have found that a bankruptcy discharge is no longer an affirmative defense. *See, e.g., In re Meadows*, 428 B.R. 894, 906 (Bankr. N.D. Ga. 2010) ("The statutory language of § 524(a), as well as its derivation and legislative history discussed above, make it clear that the bankruptcy discharge is not an affirmative defense."); *In re Hamilton*, 540 F.3d 367, 373 (6th Cir. 2008) (noting that "a debtor need not raise his discharge in bankruptcy as an affirmative defense, because thanks to § 524(a) 'such an affirmative defense is unnecessary and has been since 1970.'") (citing *In re Braun*, 141 B.R. 133, 138 (Bankr. N.D. Ohio 1992)); *In re Gurrola*, 328 B.R. 158, 168 (B.A.P. 9th Cir. 2005) ("in 1970 the bankruptcy discharge lost its status as an affirmative defense.").

[5] Because the court can "consider matters that are susceptible to judicial notice", the Circuit Court was permitted to take judicial notice of the documents from the Bankruptcy Case without converting the motion to dismiss into one for summary judgment. *Forshey v. Jackson*, 222 W. Va. 743, 747, 671 S.E.2d 748, 752 (2008) (internal quotations and citation omitted.). *See also Gulas*, 599 S.E.2d at 652 n.4; *Watkins v. Wells Fargo Bank*, No. 3:10-CV-1004, 2011 WL 777895, at *13 n.9 (S.D.W. Va. Feb. 28, 2011) (taking "judicial notice of the docket sheet, petition, discharge order, and schedules associated with [the plaintiff's] bankruptcy proceeding").

asserted in Petitioner's complaint, which are to be accepted as true, the Circuit Court concluded that the Plan discharged Respondents from any debt that arose prior to the confirmation date, and the Discharge Injunction and discharged provisions contained within the Plan "operate[] as an injunction against the commencement or continuation" of Petitioner's present claims. 11 U.S.C. §§ 524(a)(2); 1141(d)(1)(A). In other words, the evidence and allegations in the complaint suffice to establish *res judicata* and the discharge in bankruptcy.

As in any other matter where jurisdiction is challenged, Petitioner had the opportunity to submit additional evidence to refute the arguments of Respondents that Petitioner was an unknown creditor. *Elmore v. Triad Hosps., Inc.*, 220 W. Va. 154, 158 n.7, 640 S.E.2d 217, 221 n.7 (2006) (recognizing that matters outside the pleadings can be considered in deciding a Rule 12(b)(1) motion). Petitioner, however, did not come forward with any evidence, such as an affidavit, to refute Respondents' evidence of the bankruptcy discharge and its application to bar Petitioner's claims. Now, on appeal, Petitioner asserts that the parties were entitled to discovery on the issue of whether he was an unknown creditor prior to disposition. While discovery is available to ascertain jurisdictional facts relative to a motion to dismiss, it is not mandatory.

> Whether to permit discovery to aid its decision of a motion to dismiss . . . , or whether to decide such a motion based solely upon the pleadings, affidavits and other documentary evidence, is within the trial court's sound discretion. *See* 2 James Wm. Moore, Moore's Federal Practice § 12.31[7] (3d ed. 1997). The court's decision will not be overturned absent an abuse of discretion. *Id.*

Bowers v. Wurzburg, 202 W. Va. 43, 48, 501 S.E.2d 479, 484 (1998).

In response to Respondents' motion to dismiss, Petitioner pointed to the allegations in the complaint and argued that "there can be little doubt that [] Katrib was a 'known creditor' of [Respondents]" during their Bankruptcy Case. (A.R. at 166.) Petitioner did no more than point to the complaint as support for this assertion. Petitioner did not respond with an affidavit or any other

evidence demonstrating that the parties were in a dispute over the medical staff bylaws or alleged patient safety violations. Thus, according to Petitioner, the jurisdictional issue before the Circuit Court was clear. *See Bowers*, 501 S.E.2d at 481 (the court need not order discovery "unless the court's jurisdiction, or lack thereof, is clear."). To that extent, the Circuit Court correctly reviewed the complaint and determined that Petitioner was not a known creditor (since there are no allegations supporting that argument).

Similarly, in his alternative request for discovery, Petitioner did not make a threshold showing of a factual dispute that would warrant discovery. Petitioner provided no support for the argument that he was a known creditor, nor did he identify what kind of evidence would be helpful in resolving the issue. Because the issue of whether Petitioner was a known or unknown creditor could be resolved from the face of the complaint, the Circuit Court did not abuse its discretion and commit reversible error in denying Petitioner discovery on the issue.

C. Because Petitioner's complaint neither alleges wrongful conduct that occurred or harmed him after the effective date of the Plan nor seeks injunctive relief, his claims are not actionable.[6]

Federal courts have consistently recognized the broad definition to be given to the word "claim" in bankruptcy.

> Congress intended that the definition of claim in the [Bankruptcy] Code be as broad as possible, noting that "the bill contemplates that all legal obligations of the debtor, ***no matter how remote or contingent***, will be able to be dealt with in the bankruptcy. It permits the broadest possible relief in the bankruptcy court."

Grady v. A.H. Robins Co., 839 F.2d 198, 200 (4th Cir. 1988) (emphasis added) (quoting H.R. Rep. No. 595, 95th Cong. (1977), S. Rep. No. 989, 95th Cong. (1978)); *UMWA 1992 Ben. Plan v. Leckie Smokeless Coal Co.*, 201 B.R. 163, 172 (S.D.W. Va.), *aff'd sub nom. In re Leckie Smokeless Coal Co.*, 99 F.3d 573 (4th Cir. 1996) (same); *Goudelock v. Sixty-01 Ass'n of Apartment Owners*, 895

[6] This argument responds to Petitioner's Assignment of Error C. (Pet.'s Brief at 21.)

F.3d 633, 638 (9th Cir. 2018) ("This definition of a claim is very broad, encompassing all of a debtor's obligations 'no matter how remote or contingent.'").

To determine whether a claim has arisen, the Fourth Circuit employs the "conduct test" set forth in *Grady*. *Holcombe v. US Airways, Inc.*, 369 F. App'x 424, 428 (4th Cir. 2010) ("Although *Grady* dealt with an automatic stay, our reasoning and holding may properly be applied to discharge injunctions."). Pursuant to the conduct test, "a claim arises when the conduct giving rise to the alleged liability occurred." *Sprint Commc'ns Co., L.P. v. Ntelos Tel. Inc.*, No. 5:11-CV-00082, 2012 WL 3255592, at *4 (W.D. Va. Aug. 7, 2012); *Grady*, 839 F.2d at 203 ("We do not believe that there must be a right to the immediate payment of money in the case of a tort or allied breach of warranty or like claim . . . when the acts constituting the tort or breach of warranty have occurred prior to the filing of the petition").

Here, all of Petitioner's claims stem from alleged pre-confirmation conduct by Respondents; indeed, Petitioner does not dispute this. In addition to the claim for violation of the medical staff bylaws, Petitioner's tort claims arise from the suspension of his clinical privileges. Specifically, Petitioner's Patient Safety Act claim in Count II is based on the assertion that "[t]he suspension of [his] clinical privileges and medical staff membership was done" in retaliation for Petitioner's reporting of safety concerns "prior to 2018." (A.R. at 9 ¶ 47, 10 ¶ 50.) In Count III, Petitioner alleges that "[t]he suspension of [his] clinical privileges and medical staff membership was based upon" Petitioner's age, national origin, and religion. (A.R. at 10-11 ¶¶ 54-56.) In Count IV, Petitioner alleges that "[t]he suspension of [his] clinical privileges and medical staff membership . . . was an intentional act of interference in that business and/or contractual/professional relationship," (A.R. at 11 ¶ 60), and, finally, in Count V, that Respondents "acted with the intent to inflict emotional distress" "[i]n suspending [Petitioner's] clinical

privileges and medical staff membership . . . ." (A.R. at 12 ¶ 64.) These allegations support Respondents' position that Petitioner, at all times prior to and during Respondents' Bankruptcy Case, had pre-petition claims against Respondents that he could have or should have asserted prior to the confirmation of Respondents' Plan. Petitioner, as a sophisticated individual, who had access to counsel, clearly has the ability and where withal to assert such claims.

Petitioner attempts to avoid the litigation bar of the Discharge Injunction by arguing that the claims asserted in his complaint arise from Respondents' ongoing post-discharge conduct. Petitioner cites to *O'Loghlin v. County of Orange*, 229 F.3d 871 (9th Cir. 2000) for the "continuing violation" doctrine and relies on the allegation in his complaint that "[t]o date, [Petitioner] has not been given a hearing by [Respondents] to contest" the suspension of his privileges. (A.R. at 5 ¶ 21.) Petitioner's argument is misplaced.

In *O'Loghlin*, the plaintiff brought an action against her municipal employer under the Americans with Disabilities Act (the "ADA"), alleging three separate violations of the ADA, two occurring prior to and one occurring after the discharge of the employer's debts pursuant to a bankruptcy plan of reorganization. 229 F.3d at 873. The district court determined that all three of the plaintiff's claims were barred by the reorganization because the post-discharge violations arose from a "continuing course of conduct" for which the plaintiff could have sued prior to the discharge. *Id.* at 874. Although the Ninth Circuit agreed that the plaintiff's claims relating to pre-discharge violations of the ADA were barred by the bankruptcy discharge, it reversed the district court with respect to the post-discharge claim on the ground that it arose from additional "illegal conduct occurring *after [the] discharge*." *Id.* at 875 (italics added).

Here, in contrast, the claims at issue arise solely from Respondents' decision to suspend Petitioner's hospital privileges. The complaint plainly alleges that the suspension of Katrib's

clinical privileges occurred on May 16, 2019 and September 19, 2019—dates prior to entry of the effective date of the Plan of September 30, 2020. (A.R. at 4 ¶ 14, 5 ¶ 19.) While Petitioner alleges that Respondents have not given him a hearing to challenge the suspension of his privileges, any liability for Respondents' "continuing" failure to provide Petitioner with a hearing would be based solely on its failure to do so when requested by Petitioner. According to the allegations in the complaint, this request was made on October 2, 2019—almost a year prior to the effective date of the Plan. (A.R. at 5 ¶ 20.)

Unlike in *O'Loghlin*, Petitioner does not allege *any* post-confirmation acts by Respondents. Indeed, Petitioner's complaint does not make any claim for equitable relief or seek to require Respondents to hold a hearing. The complaint seeks only compensatory and punitive damages for the pre-confirmation conduct. (A.R. at 12 ¶¶ 67-68 (seeking damages for lost wages, "emotional distress, indignity, embarrassment, humiliation, worry and annoyance and inconvenience" in addition to "punitive damages").)

Courts unanimously agree that when determining "when a claim arises for bankruptcy purposes, reference is to be made to federal bankruptcy law rather than to state law." *Butler v. NationsBank, N.A.*, 58 F.3d 1022, 1029 (4th Cir. 1995). Accordingly, this Court is bound to follow the conduct test used by the Fourth Circuit in determining when Petitioner's claims arose. Because the allegations in the complaint make clear that Petitioner's claims arise from his suspension of hospital privileges that occurred in 2019, the confirmation of Respondents' reorganization Plan discharges Respondents from liability on Petitioner's claims. *See* 11 U.S.C. § 1141(d)(1)(A) ("the confirmation of a plan [] discharges the debtor from any debt that arose before the date of such confirmation, . . . "whether or not . . . the holder of such claim has accepted the plan.").

D. Petitioner received sufficient notice of Respondents' Bankruptcy Case to satisfy due process, and his failure to take any action to secure his claims is of no fault of Respondents.[7]

A finding that Petitioner, as an unknown creditor with pre-petition claims, was not afforded due process, would interfere with the fundamental purpose of bankruptcy law. The "central purpose of the [Bankruptcy] Code is to provide a procedure by which certain insolvent debtors can reorder their affairs, make peace with their creditors, and enjoy a new opportunity in life with a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt." *Grogan v. Garner*, 498 U.S. 279, 286, 111 S. Ct. 654, 659, 112 L. Ed. 2d 755 (1991) (internal quotation marks and citation omitted). *See, e.g., Bosiger v. U.S. Airways*, 510 F.3d 442, 448 (4th Cir. 2007) ("The 'principal purpose' of bankruptcy is straightforward: 'to grant a fresh start to the honest but unfortunate debtor.'") (quoting *Marrama v. Citizens Bank of Massa.*, 549 U.S. 365, 127 S.Ct. 1105, 1107, 166 L.Ed.2d 956 (2007)); *In re W.R. Grace & Co.*, 729 F.3d 332, 346 (3d Cir. 2013) (noting objectives and purposes of the Bankruptcy Code include "giving debtors a fresh start" and "achieving fundamental fairness and justice.") (quotation omitted). There is a strong public policy in favor of allowing individuals and entities their right to a fresh start in bankruptcy. If the Petitioner's position were to be adopted, every claimant with a pre-confirmation claim who had not yet been made whole for his or her purported injuries as of the post-confirmation date would be able to avoid the bar, and a significant purpose of bankruptcy—to provide for appropriate distribution of the debtor's estate and fully and finally resolve those claims—would be defeated.

As the Fourth Circuit has recognized, "once creditors actually learn that their debtors have filed for bankruptcy, they have a duty to inquire as to what they might be required to do to protect their interests, and, failing such inquiry, cannot claim lack of due process when those debts are

[7] This argument responds to Petitioner's Assignment of Error D. (Pet.'s Brief at 24.)

discharged." *Elmco Properties, Inc. v. Second Nat. Fed. Sav. Ass'n*, 94 F.3d 914, 921 (4th Cir. 1996); *DPWN Holdings (USA), Inc. v. United Air Lines, Inc.*, 871 F. Supp. 2d 143, 157 (E.D.N.Y. 2012) ("Claimants should not have an incentive to delay asserting their claims until after the debtor is reorganized, in the hopes of obtaining a complete recovery rather than the partial recovery they would likely get as part of the reorganization plan.").

Here, Petitioner had ample time and several opportunities to make his claims known in the Bankruptcy Case. For example, Petitioner could have filed a proof of claim in the Bankruptcy Case. *Bosiger*, 510 F.3d at 449 (holding that a claimant must file a proof of a claim before the claim bar date when that claimant wishes to participate in the debtor's reorganization or else the claim will be discharged); *see also* Fed. R. Bank. P. 3003(c)(2) ("[a]ny creditor . . . whose claim or interest is not scheduled or scheduled as disputed, contingent, or unliquidated shall file a proof of claim or interest within the time prescribed by subdivision (c)(3) of this rule; any creditor who fails to do so shall not be treated as a creditor with respect to such claim for the purposes of voting and distribution."). Alternatively, Petitioner could have attempted to retain his claims during the Bankruptcy Case by requesting a modification or objecting to any of the proposed plans of reorganization. *See* 11 U.S.C. § 1128 ("A party in interest may object to confirmation of a plan."). However, even with counsel, Petitioner did not take any such actions to protect his claims and sat on them for more than a year after the petition filing date and nine months after the Bankruptcy Court's confirmation of the Plan. *In re U.S. Airways Group, Inc.*, 369 F.3d 806, 809-10 (holding that the plaintiff extinguished its claim because it "sat idly by" without seeking a stay of, or the prevention of, a confirmation order of a reorganization plan).

Respondents raised the discharge in bankruptcy in their motion to dismiss and established that it applies to the claims now asserted by Petitioner. The Circuit Court found that Respondents

received a discharge in bankruptcy pursuant to the confirmed Plan, which is entitled *res judicata* effect over claims that were brought, could have, or should have been brought, prior to confirmation. Additionally, accepting Petitioner's allegations in the complaint as true, the Circuit Court found that Petitioner, as an unknown creditor, received adequate notice of Respondents' Bankruptcy Case through national and local newspaper publications[8] and, further, that Petitioner's claims, arising from pre-confirmation conduct, are barred by the Discharge Injunction entered by the Bankruptcy Court. Plaintiff sat on his claims for more than a year after the petition date, and more than nine months after Respondents' Plan was confirmed. He cannot use West Virginia judicial system to now collect on the alleged claims, which are barred by the Discharge Injunction and sections 524(a)(1)-(2) and 1141(d)(1)(A) of the Bankruptcy Code.

VI. CONCLUSION

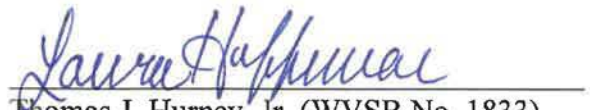
Based on the foregoing facts, authorities, and the arguments made in the Respondents' Brief, Respondents respectfully request that this Honorable Court affirm the Circuit Court's Order, granting Respondents' motion to dismiss Petitioner's complaint for lack of subject matter jurisdiction under Rule 12(b)(1) and for failure to state a claim upon which relief can be granted under Rule 12(b)(6).

Respectfully submitted this 10th day of March, 2022.

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

[8] Regardless of the requisite notice, any suggestion by Petitioner that he was somehow not aware of Respondents' Bankruptcy Case holds no water given that he had privileges to and practiced medicine at Thomas Hospital. (A.R. at 3 ¶ 7.)

By Counsel



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
No. 21-0843

A. KARIM KATRIB, M.D.,

Petitioner,

v.

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

Respondents.

CERTIFICATE OF SERVICE

I, Laura A. Hoffman, hereby certify that true and correct copies of the foregoing ***Response Brief of Respondents Herbert J. Thomas Memorial Hospital Association and Thomas Health System, Inc.*** were served upon the following by depositing a true copy thereof in the United States mail, postage prepaid, addressed as follows, on this the 10th day of March, 2022:

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