No. 17-30982

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA, EX REL, RONALD BIAS,
PLAINTIFF – APPELLANT,

v.

TANGIPAHOA PARISH SCHOOL BOARD,
DEFENDANT – APPELLEE.

On Appeal from the United States District Court
For the Eastern District of Louisiana 2:12-cv-2202

BRIEF OF AMICI CURIAE NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS AND NATIONAL CONSUMER BANKRUPTCY RIGHTS CENTER IN SUPPORT OF APPELLANT AND SEEKING REVERSAL OF THE DISTRICT COURT'S DECISION

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April 18, 2018

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Bias, Ronald: Appellant, Pro se.

Boudreaux, Danielle Ann: Appellee Counsel of Record

Hammonds, Robert L.: Appellee Counsel of Record.

Hammonds, Sills, Adkins & Guice, LLP: Law Firm of Appellee Counsels of Record

National Association of Consumer Bankruptcy Attorneys: Amicus Curiae

National Consumer Bankruptcy Rights Center: Amicus Curiae

Tangipahoa Parish School Board: Appellee

Tara Twomey: Amici Curiae Counsel of Record

Pursuant to Fed. R. App. P. 26.1 and 5th Cir. R. 28.2, undersigned counsel further certifies that Amici Curiae are both nonprofit corporations and that neither entity has a parent corporation or stockholders.

This day of May 24, 2018.

s/ Tara Twomey
Tara Twomey, Esq.
Attorney for Amici Curiae

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STATEMENT OF INTEREST OF AMICI CURIAE

NCBRC is a nonprofit organization dedicated to preserving the bankruptcy rights of consumer debtors and protecting the bankruptcy system's integrity. The Bankruptcy Code grants financially distressed debtors rights that are critical to the bankruptcy system's operation. Yet consumer debtors with limited financial resources and minimal exposure to that system often are ill-equipped to protect their rights in the appellate process. NCBRC files *amicus curiae* briefs in systemically-important cases to ensure that courts have a full understanding of the applicable bankruptcy law, the case, and its implications for consumer debtors.

NACBA is also a nonprofit organization of approximately 3,000 consumer bankruptcy attorneys nationwide. NACBA advocates nationally on issues that cannot adequately be addressed by individual member attorneys. It is the only national association of attorneys organized for the specific purpose of protecting the rights of consumer bankruptcy debtors.

NCBRC, NACBA and its membership have a vital interest in the outcome of this case. The current application of judicial estoppel in the Fifth Circuit, as evidenced by the decision below, is contrary to both the Bankruptcy Code and Bankruptcy Rules, making it difficult for NACBA attorneys to advise their clients about the disclosure of legal claims. It also results in a manifest injustice. Honest debtors are barred from any recovery on valid causes of action, while defendant tortfeasors obtain a free pass – for

no justifiable reason at all. This Court's ruling will help clarify when, if ever, the strong medicine of judicial estoppel should prevent honest debtors, from seeking recovery on their causes of action

AUTHORSHIP AND FUNDING OF AMICUS BRIEF

Pursuant to Fed. R. App. P. 29(c)(5), no counsel for a party authored this brief in whole or in part, and no person or entity other than NCBRC, NACBA, its members, and its counsel made any monetary contribution toward the preparation or submission of this brief.

SUMMARY OF ARGUMENT

Neither the Bankruptcy Code nor the Bankruptcy Rules require a chapter 13 debtor to amend his bankruptcy schedules to reflect property acquired after a bankruptcy petition has been filed. The exception to this general rules applies only to certain property, such as inheritances and insurance proceeds, acquired within 180 days of the filing of the petition; this limited category of property acquired post-petition must be reflected on an amended list of assets. According to the Code and Rules, schedules need not be amended to reflect post-petition acquisition of other property such as wages or causes of action. The District Court below erroneously concluded that the debtor's failure to amend his bankruptcy schedules to reflect a post-petition cause of action necessarily required the application of judicial estoppel. It does not.

Judicial estoppel is a potent remedy applied only when a litigant has taken clearly inconsistent positions in order to gain an unfair advantage in the judicial system. The District Court erroneously imputed to Mr. Bias an ongoing "continuous duty" to report post-petition changes in assets during a chapter 13 bankruptcy, despite the complete lack of any such requirement within the Bankruptcy Code or Rules. Further, the District Court held that failing to amend his schedules necessarily reflected a motive to conceal assets, and therefore judicial estoppel applied. Application of judicial estoppel in this manner effectively creates a *per se* rule that

bars debtors from pursuing any post-petition claims, regardless of whether disclosure would have had impact on the previous case.

The District Court relied on this Court's decision in *Flugence v. Axis Surplus Ins. Co.* (*In re Flugence*), 738 F.3d 126 (5th Cir. 2013). That case is distinguishable. There, the court mentioned, but declined to wrangle with a potential conflict in the code between section 1306, which vests post-petition acquired property in the estate, and section 1327, which vests post-confirmation property in the debtor. The *Flugence* court bypassed further enquiry because debtor Flugence's plan explicitly directed that estate assets would not revest in the debtor until discharge, making it incumbent upon the debtor to disclose post-confirmation assets. The confirmation order in Bias directed that all property of the estate was to revest in the debtor at the time of the confirmation. It follows that Bias was under no statutory or enforceable duty to disclose post-confirmation assets. The cause of action in Bias is not property of the estate based on the vesting provision of section 1327.

However, *amici* urge that Court to clarify the *Flugence* decision, which conflates an ongoing duty to amend original schedules to correct inaccuracies with non-existent supplementation declarations of post-confirmation assets. Bankruptcy courts in the Fifth Circuit have interpreted *Flugence* as placing reporting burdens upon debtors that are not grounded in the law.

Moreover, based on *Flugence*, courts have held that failure to amend schedules automatically means that the debtor is dishonest such that judicial estoppel necessarily applies. The result is a situation that gives defendant tortfeasors a "get out of jail free card" by allowing them to defeat any legitimate claim through the improper use of judicial estoppel. Without making affirmatively inconsistent representations, or violating any other disclosure requirement in bankruptcy court, the plaintiff in this case has not taken any position that warrants the application of judicial estoppel.

In the end, the invocation of judicial estoppel here is based on nothing more than a misunderstanding of the Bankruptcy Code and Rules. Its application does nothing to protect the integrity of the judicial process, but only serves to give a windfall to a defendant tortfeasor, while depriving an aggrieved party his day in court. As a result, this Court should reverse the decision below.

STATUTORY FRAMEWORK

This case involves the application of the Bankruptcy Code, Bankruptcy Rules, and equitable principles of judicial estoppel. So that the Court may better understand how to apply judicial estoppel principles in a bankruptcy context, a brief overview of the relevant statutory framework is provided below.

Bankruptcy: Bankruptcy law reflects a balancing act in which Congress has established the rules for adjusting debtor-creditor relationships. The two main purposes of bankruptcy are to provide a fresh start to the debtor and to facilitate the fair and orderly repayment of creditors to the extent possible. *See Burlingham v. Crouse*, 228 U.S. 459, 473 (1913). Individuals seeking bankruptcy relief generally seek liquidation under chapter 7 of the Bankruptcy Code or propose a plan for repayment of a portion of their debt under chapter 13.

Chapter 13: Chapter 13 permits an individual debtor with a source of regular income to receive a discharge of certain debts after completing a bankruptcy plan that meets the Code's requirements. At the outset of the case, the Bankruptcy Code instructs debtors to file various schedules identifying assets, liabilities, income, expenses, and exemptions. 11 U.S.C. § 521(a)(1); Fed. R. Bankr. P. 1007 (describing lists, schedules, statements, and other documents that must be filed). Chapter 13 debtors must also file a debt adjustment plan, also known as a chapter 13 plan. 11 U.S.C. § 1321. The chapter 13 plan, if confirmed, is the blueprint for adjusting debtor-creditor relationships.

There are generally four tests that the chapter 13 plan must satisfy: the best interest of the creditors test, the feasibility test, the disposable income test, and the good faith test. The bankruptcy court must confirm chapter 13 plans that comply with these tests and other requirements of the Code. 11 U.S.C. §§ 1322, 1325. Debtors

make payments under confirmed plans for the benefit of the debtors' secured and/or unsecured creditors. Upon completion of payments under the plan debtors receive a discharge of all debts provided for by the plan, with limited exceptions. 11 U.S.C. § 1328(a).

The text of the Bankruptcy Code strongly supports the Congressional preference for chapter 13. Chapter 13 offers significant advantages over chapter 7 to debtors and creditors alike. Because creditors are paid out of the debtor's future earnings, the debtor is able to keep existing assets, *see* 11 U.S.C. § 1306(b), and protect those assets from liquidation. Creditors also benefit. By law, the confirmed chapter 13 plan must give them at least as much as they would receive under a chapter 7 liquidation. *Id.* §1325(a)(4), (5). And, in practice creditors often receive more under chapter 13, particularly where a debtor has regular income but no assets subject to liquidation. Because chapter 13 is often less disruptive to debtors and can provide greater relief to creditors, Congress has expressed a strong policy of encouraging debtors to take advantage of chapter 13 where possible and has avoided penalizing debtors for choosing chapter 13. *See Perry v. Commerce Loan Co.,* 383 U.S. 392, 395 (1966); H.R. Rep. No. 103- 835, at 57 (1994); *see also* 11 U.S.C §§ 348(f), 1307, 1328 (permitting a debtor to convert a chapter 13 case to chapter 7 at any time, limiting the property of the estate in converted cases, and expanding discharge).

In this case, Mr. Bias filed a chapter 13 bankruptcy on May 22, 2008 [R.4965]. He completed his chapter 13 plan and received a discharge on July 18, 2013 [R.4965].

Property of the Estate: Critical to effectuating the dual goals of the Bankruptcy Code is the concept of the bankruptcy estate. The bankruptcy estate is created upon commencement of the case, and consists of "all legal or equitable interests of the debtor in property as of the commencement of the case"—that is debtor's pre-petition assets. 11 U.S.C. § 541(a). Some property is specifically excluded from becoming property of the estate, 11 U.S.C. § 541(b), and other property initially considered part of the bankruptcy estate may be removed from the estate through the exemption process. *See* 11 U.S.C. § 522(d); *Taylor v. Freeland & Kronz*, 503 U.S. 638, 642 (1992) (Bankruptcy Code "allows the debtor to prevent the distribution of certain property by claiming it as exempt"). Certain property may also be added to the bankruptcy estate after the commencement of the case. For example, property acquired by inheritance by the debtor within 180 days of the filing of the petition may become property of the estate. *See* 11 U.S.C. § 541(a)(5). In addition, in chapter 13, earnings and property acquired during the case are considered property of the estate. 11 U.S.C. § 1306. ***Unless otherwise provided in a confirmed plan, a chapter 13 debtor remains in possession and***

control of all property of the estate,*[1] *including causes of action and terms of settlement. *See* 11 U.S.C. § 1306(b); *Slater v. U.S. Steel Corp.*, 871 F.3d 1174, 1180 (11th Cir. 2017) (en banc); *Wilson v. Dollar Gen. Corp.*, 717 F.3d 337 (4th Cir. 2013).

In order for bankruptcy to work as intended, the debtor has a duty to disclose all pre-petition assets on the schedules filed with the court. 11 U.S.C. § 521(a)(1); Fed. R. Bankr. P. 1007. However, the Bankruptcy Rules identify only limited circumstances in which the debtor is required to amend his schedules to include property acquired post-petition. Specifically, amended schedules are necessary when "the debtor acquires or becomes entitled to acquire any interest in property" pursuant to section 541(a)(5) of the Code. Fed. R. Bankr. P. 1007(h). The property covered under section 541(a)(5) is a discrete category of property interests including inheritances, divorce settlements, and insurance proceeds, to which the debtor becomes entitled within 180 days of the petition's filing date. 11 U.S.C. § 541(a)(5). But, neither the Bankruptcy Code nor the Bankruptcy Rules require amendment of the debtor's schedules to reflect property entering the estate pursuant to section 1306, such as post-petition wages and other assets.

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[1] In a chapter 7 case, the trustee controls the property of the estate. 11 U.S.C. § 704.

Question Presented

With this statutory framework in mind and the following facts, the question in this case can be more squarely presented to this Court. In this case, Mr. Bias filed a chapter 13 bankruptcy on May 22, 2008, in the Bankruptcy Court for the Eastern District of Virginia. [R.4965]. He filed a chapter 13 plan that was confirmed on July 23, 2008. [R.4965]. There appears to be no question that Mr. Bias' schedules were accurate at the time they were filed, and that Mr. Bias obtained no property post-petition covered by section 541(a)(5). At some point after confirmation, but prior to discharge, an employment-related cause of action arose. That cause of action is not property described in section 541(a)(5). Mr. Bias filed a case in federal district court based on this cause of action on September 5, 2012. [R.4965]. He did not amend his bankruptcy schedules to reflect this cause of action. The questions are whether Mr. Bias had an obligation to amend his bankruptcy schedules to identify this cause of action, and if the failure to amend his schedules prevents him from pursuing the cause of action.

ARGUMENT

I. The Trial Court Erred By Requiring Heightened Disclosures By Chapter 13 Debtors

The application of judicial estoppel should be viewed against the background of a Chapter 13 debtor's duties, therefore, it is important first to set the record straight on what those duties are. *See Vehicle Mkt. Research, Inc. v.*

Mitchell Int'l, Inc., 767 F.3d 987, 989 (10th Cir. 2014) ("If there were grounds for judicial estoppel, it would have to be based on a duty by [debtor] to amend his bankruptcy pleadings"); *Prudencio v. Chenega Integrated Sys., Inc.,* 2008 U.S. Dist. LEXIS 68957, *6 (W.D. Okla. Sept. 10, 2008) ("Absent a duty to supplement her schedules, it unclear what possible basis could exist for invoking judicial estoppel.").

Except for a limited category of property, chapter 13 debtors are not required by the Bankruptcy Code or the Bankruptcy Rules to amend their schedules if the estate acquires new property during the pendency of a chapter 13 bankruptcy. The absence of such a requirement reflects the policies behind chapter 13 and the practicalities of chapter 13 bankruptcies. Some courts, such as the trial court here, have sown confusion on this issue by overlooking, or flatly misconstruing, the Bankruptcy Code and Bankruptcy Rules.

A. Bankruptcy Rules Require Amended Schedules Only In Limited Circumstances, But Generally Not When Chapter 13 Debtors Acquire Property Post-Petition.

A Chapter 13 debtor does not have "a free-standing duty to disclose the acquisition of any property interest after the confirmation of his plan under Chapter 13. Neither the Bankruptcy Code nor the Bankruptcy Rules mention such a duty." *In re Waldron*, 536 F.3d 1239, 1246 (11th Cir. 2008); *see also Cusano v. Klein*, 264 F.3d 936, 947 (9th Cir. 2001) ("It is true that, generally, a debtor has no duty to

schedule a cause of action that did not accrue prior to bankruptcy."). This is hardly a loophole or drafting oversight. "If Congress or the Bankruptcy Rule drafters had intended to impose a broader duty of ongoing disclosure, either could have expressly so provided." *In re Adair*, 253 B.R. 85, 90 (B.A.P. 9th Cir. 2000).

Rather than creating such a broad duty, the Bankruptcy Rules expressly define the limited circumstances when amendment is required. Specifically, amended schedules are only required when "the debtor acquires or becomes entitled to acquire any interest in property" pursuant to section 541(a)(5) of the Code. Fed. R. Bankr. P. 1007(h). The property covered under section 541(a)(5) is a discrete category, covering fairly unusual, one-time events—inheritances, divorce settlements, and insurance proceeds, to which the debtor becomes entitled within 180 days of the petition's filing date. 11 U.S.C. § 541(a)(5); *In re Woodson*, 839 F.2d 610, 617 (9th Cir. 1988).

Notably, Rule 1007(h) does not require amendment to reflect property entering the estate pursuant to section 1306, such as post-petition wages and other assets. *See Adair*, 253 B.R. at 90; *In re Batten,* 351 B.R. 256, 259 (Bankr. S.D. Ga. 2006) ("a debtor is under no obligation to disclose the post confirmation acquired asset unless the property is of the type covered by F.R.B.P. 1007(h)"). As a result, common sense, reflected in the canon *expressio unius est exclusion alterius*, dictates that acquisition of the enumerated types of property require amendment and that the acquisition of other types of property do not. *See Arizona v. U.S.*, 132 S. Ct. 2492, 2520 (2012)

(Scalia, J., concurring in part and dissenting in part); *see also In re Dow Corning Corp*., 263 B.R. 544, 546 (Bankr. E.D. Mich. 2001) (applying the canon to Fed. R. Bankr. P.).

If debtors had such a broad disclosure duty, then Bankruptcy Rule 1007(h) and other bankruptcy procedures would be meaningless. For example, where the debtor switches from chapter 13 to chapter 7 after confirmation of a chapter 13 plan, Bankruptcy Rule 1019(5)(C), requires the debtor the file a schedule of property acquired after the petition but before conversion of the case to chapter 7. This rule would be entirely unnecessary if chapter 13 debtors already had a duty, prior to conversion, to amend their schedules as they acquired this property. *Compare also* 11 U.S.C. § 521(f) (requiring debtor to provide updated income information via tax returns, but only upon request of the court, trustee, or other party in interest); Fed. R. Civ. P. 26(e) (specifically providing for supplemental disclosures).

There are limited circumstances when a debtor must amend the schedules of assets to reflect post-petition developments. Under Rule 1007(h), those circumstances do not include the post-petition acquisition of a legal claim.

B. Heightened Disclosure Requirements in Chapter 13 Proceedings Are Impractical

There is good reason for the Bankruptcy Rules to limit the occasions when amendment is required. Not only do such amendments provide little utility, but it would be overly burdensome to furnish them during a lengthy chapter 13 proceeding.

Bankruptcy schedules serve an important role at commencement of a bankruptcy case, but they are not meant to provide real-time financial information. Their purpose is simply to give "inquiry notice to affected parties to seek further detail" about a particular item if desired. *Cusano*, 264 F.3d at 946-7; *see also Payne v. Wood*, 775 F.2d 202, 206 (7th Cir. 1985); *Adair*, 253 B.R. at 90-91. In chapter 13, the scheduled information guides whether a proposed repayment plan can overcome two tests for confirmation: the best interests of the creditors test and the disposable income test. 11 U.S.C. §§ 1325(a)(4). 1325(b). Once those tests have been passed, and a plan confirmed, then the asset and income schedules have served their purpose.

An asset's primary function in chapter 13 is in the application of the "best interests of the creditors" test, which simply juxtaposes the case with a hypothetical one under chapter 7. Under a chapter 13 plan, creditors must be paid at least as much as they would under chapter 7. *See* 11 U.S.C. § 1325(a)(4). That is, the minimum distribution to chapter 13 creditors is at least the amount that they would have realized if the debtor's non-exempt property was liquidated and the proceeds distributed to creditors in a chapter 7. This test is based on assets of the chapter 7 estate, which by definition excludes most post-petition property. *See* 8 Collier on Bankruptcy ¶ 1325.02[d] at 1325-22 - 23 (16th ed.). The Bankruptcy Code does not contemplate using post-petition assets (except those specified in section 541(a)(5)) in the chapter 13 "best interest of the creditors" test because that would penalize chapter 13 debtors

and incentivize chapter 7 filings. Further, the accrual of a cause of action post-petition in this case would not have affected the chapter 13 plan or distribution to creditors.

Second, because of the specific role played by a debtor's assets in chapter 13, amendments to disclose post-petition legal claims serve little function. ***Unlike in chapter 7, chapter 13 debtors remain in possession and control of property of the estate throughout the bankruptcy case.*** *See* 11 U.S.C. § 1306(b). More specifically, the chapter 13 debtor has standing to control legal claims and their settlement . *Slater v. U.S. Steel Corp.*, 871 F.3d 1174, 1180 (11th Cir. 2017) (en banc); *Wilson v. Dollar Gen. Corp.*, 717 F.3d 337 (4th Cir. 2013). Further, unlike bankruptcies in chapter 7 where creditors may be paid from the liquidation of a debtor's assets, chapter 13 plans are typically funded by the "future earnings or other future income of the debtor." *Compare* 11 U.S.C. § 704(a)(1) (requiring Chapter 7 trustee to "reduce to money the property of the estate") *and* 11 U.S.C. § 1322(a)(1), (d). The plan payments are calculated based on the debtor's "projected disposable income," which is generally based on the debtor's pre-petition income and expenses. *See* 11 U.S.C. §§ 101(10A); 1322(d); 1325(b).

Keeping in mind the specific role that assets play in chapter 13, the existing Bankruptcy Rules reflect the impracticality of requiring a chapter 13 debtor to amend schedules when the estate receives new assets. "[O]bviously, such a requirement would be unworkable, since the debtor's schedules would have to be amended to

reflect each paycheck or acquisition of property, as well as every expenditure." *See* 8 Collier on Bankruptcy ¶ 1306.01 at 1306-3 (16th ed.). Such heightened disclosure would also lead to the "absurd result that a Chapter 13 debtor could be required…to continuously modify the confirmed plan if the debtor owns an asset that appreciates after confirmation of each confirmed plan." In re *Forbes*, 215 B.R. 183, 190 (B.A.P. 8th Cir. 1997) (quoting Lundin, Keith M., Chapter 13 Bankruptcy, vol. 2, § 6.44 at 6-131 to 132). This infeasibility is especially striking when considering the length of a chapter 13 case, which generally lasts for three to five years. *See* 11 U.S.C. § 1322(d).

The impracticality of on-going disclosure cannot be resolved simply by limiting the amendment requirement to the acquisition of "major" assets. Such a rule would create confusion over whether post-petition assets are substantial enough to warrant amended schedules. Neither the Code nor the rules would provide any guidance on that point because they do not contemplate disclosure in the first instance.

C. The District Court Relied on Distinguishable Case Law and Erred in Finding that Debtors Have a Continuing Duty To Update Schedules Where Property Vests in the Debtor.

At the very least, the District Court misconstrued the relevant statutory law and rules. The trial court noted that "[i]t 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." D. Ct. Opinion at 6, [R.4963], citing *In re Coastal Plains Inc*., 179 F.3d, 197, 207-08 (5th Cir. 1999). *Coastal Plains*

based this duty on 11 U.S.C. §521(1), now § 521(a)(1), which does indeed require the debtor to affirmatively disclose all the debtor's assets at the time of the petition, including contingent and unliquidated claims in his schedules. However, the trial court went on to assert that debtors "*remain* under a duty to disclose potential assets even when it is unclear whether those assets will be part of the bankruptcy…". For this ongoing duty proposition, the court cites to *U.S. v. Beard*, 913 F.2d 193, 197 (5th Cir. 1990), a case which is both factually distinguishable and completely silent on any Bankruptcy Code section or rules relevant to the instant case.

In *Beard*, a criminal fraud and perjury case, Beard pled guilty to falsifying a response in his Statement of Financial Affairs filed in his bankruptcy case. *Id*. at 193. The sole issue before the court was whether Beard had received an appropriate sentence. Underlying the case was Beard's receipt of a post-petition check for $175,000 for services in a case initially filed under chapter 11, but later converted to a chapter 7. *See In re Beard*, No. 87-10720 (Bankr. M.D. La. March 3, 1988), Docket #66 (Order to Covert Case from Chapter 11 to Chapter 7). Though Beard filed amended schedules and disclosures, he still omitted his earlier receipt of the check. Thus, his amended schedules were not accurate at the time they were filed. Additionally, because the funds may have been payment of a pre-petition account receivable that would have been property of his chapter 7 estate, they were required to be disclosed. *See* 11 U.S.C. § 541(a)(1), (a)(6).

In re Flugence, which the district court found to be binding precedent, is also distinguishable. 738 F.3d 126 (5th Cir. 2013). The *Flugence* court noted that '[i]t may be uncertain whether a debtor must disclose assets post-confirmation." *Id*. at 129. Acknowledging the potential conflict between section 1306, which brings property acquired post-petition into the estate, and section 1327, which vests property after confirmation in the debtor, the *Flugence* court sidestepped resolving the ambiguity because in that case, the debtor's chapter 13 plan explicitly did not revest property of the estate in the debtor. *Id*. at 130.

In this case, the debtor's plan differs materially from the one in *Flugence*. Here, according to the debtor's plan, property of the estate does vest in the debtor. This squarely sets up the conflict that this Court avoided in *Flugence*. *See also Murphy v. O'Donnell (In re Murphy)*, 474 F.3d 143, 154 (4th Cir. 2007) (Fourth Circuit, where Mr. Bias' bankruptcy was filed, also declining to answer the question). *Amici* agree with debtor on this point, but will not repeat debtor's arguments here. We note, however, that the district court did not consider the distinction or ambiguity when deciding whether to apply the principles of judicial estoppel.

D. This Court should not expand *Flugence* and instead should clarify the application of judicial estoppel to disclosure of assets acquired post-petition by a chapter 13 debtor.

While this Court could and should limit the expansion of *Flugence* by

finding the cause of action is not property of the estate based on the vesting provision of section 1327, the better course would be to clarify this Court's own decision in *Flugence* and its application in chapter 13 cases. The *Flugence* decision and those that follow it conflate the ongoing duty to amend the *original* schedules to correct inaccuracies with non-existent supplementation requirements for property acquired during the life of a chapter 13 plan. As recently described by the Tenth Circuit, the "continuing duty to disclose" is limited to those situations where "a debtor [] does not disclose pre-petition claims at the time of petition." *Mitchell*, 767 F.3d at 998. Indeed, until recently, the "continuing duty" has traditionally been cited in cases where affirmatively false or inaccurate schedules had originally been filed. *See, e.g., Coastal Plains,* 179 F.3d at 208.

A series of misguided rulings in the Fifth Circuit imputing a continuous duty to report post-petition assets is causing a pile-up of erroneous decisions, all unmoored from the Bankruptcy Code and Bankruptcy Rules. The *Flugence* court relied upon a line of Fifth Circuit cases involving only pre-petition assets that were inaccurately disclosed from the onset. *See Coastal Plains*, 179 F.3d at 202-3; *In re Superior Crewboats, Inc*. 374 F.3d 330, 333 (5th Cir. 2004); *Kane v Nat'l Union Fire Ins. Co*., 535 F.3d 380, 383 (5th Cir. 2008); *Love v. Tyson Foods, Inc.*, 677 F.3d 258, 260-1 (5th Cir. 2012); *Jethroe v. Omnova Solutions, Inc.*, 412 F.3d 598, 599 (5th Cir. 2005). None of these cases stand for the proposition that in a chapter 13 case post-petition

fluctuations in estate property required supplementation. There is no basis in the Bankruptcy Code or the rules to support an extension of disclosure duties to cover all post-petition events.

II. Judicial Estoppel Is Inappropriate Against Debtors Who Neither Adopt Inconsistent Positions in A Prior Bankruptcy Case, Nor Have Any Motive To Conceal Assets

"Judicial estoppel is an extraordinary remed[y] to be invoked when a party's inconsistent behavior will otherwise result in a miscarriage of justice. It is not meant to be a technical defense for litigants seeking to derail potentially meritorious claims*."* *Ryan Operations G.P. v. Santiam-Midwest Lumber Co*., 81 F.3d 355 (3d Cir. 1996) (internal quotation marks and citations omitted). The district court itself observed that "[T]he Supreme Court has refused to establish inflexible prerequisite or an exhaustive formula for determining applicability of judicial estoppel…." Citing *Reed vs City of Arlington*, 650 F.3d 571, 574 (5th Cir. 2011) (en banc). Further, this Court has acknowledged that "[T]here is no per se rule estopping any party who fails to disclose potential claims to a bankruptcy court," *U.S. ex rel. Long v. GSDMIdea City, L.L.C.*, 798 F.3d 265, 271 (5th Cir. 2015). *Long* recognizes that judicial estoppel is an equitable doctrine, and that "trial courts are not required to apply it in every instance that they determine its elements have been met." *Id*. at p 272. *See also Ergo Science, Inc. v Martin*, 73 F.3d 595, 598 (5th Cir. 1996).

In determining whether the application of judicial estoppel is appropriate, a

court must evaluate whether "(1) the party against whom judicial estoppel is sought has asserted a legal position which is plainly inconsistent with a prior position; (2) a court accepted the prior position; and (3) the party did not act inadvertently", *Reed*, at p. 575 (citations omitted). But while judicial estoppel is an equitable doctrine, designed to protect the integrity of the judiciary (*New Hampshire v. Maine*, 532 U.S. 742, 749 (2001)), the Fifth Circuit has begun using the doctrine as a per se rule as a perfunctory bludgeon with which to punish dishonest and honest debtors alike. The court makes no attempt to cloak this approach, because it has indeed become regular practice in the circuit case law. *See Jethroe*, 412 F.3d at 600; *Coastal Plains*, 179 F.3d 197 (5th Cir. 1999); *Kane v. Nat'l Union Fire Ins. Co***.**, 535 F.3d 380 (5th Cir. 2008); *Reed v. City of Arlington*, 650 F.3d 571, 574 (5th Cir. 2011) (en banc); *Love*, 677 F.3d at 261; *Flugence,* 738 F.3d at 132; *Allen,* 813 F.3d at 570. Factually, none of these cases are analogous to the instant matter.

In *Jethroe*, plaintiff filed an EEOC claim *prior* to filing for Chapter 13 bankruptcy, then affirmatively disclosed on her schedules that she had no contingent or unliquidated claims pending. Her bankruptcy case was closed because she had failed to comply with an agreed order. The debtor in *Browning* neglected to disclose his intention to sue a bankruptcy creditor for causing the bankruptcy. In *Kane*, plaintiffs filed a personal injury suit *prior* to filing Chapter 7 bankruptcy, and, while that suit was pending in state court, declined to affirmatively disclose it on their

bankruptcy petition. *Reed* was awarded a judgment of over $1 million in a Family Medical Leave Act (FMLA) against his former employer *prior* to filing for Chapter 7 bankruptcy, and failed to disclose the judgment on his bankruptcy schedules. Plaintiff Love filed his EEOC claim within a month of filing for Chapter 13 bankruptcy, but failed to disclose it prior to confirmation; Love never argued inadvertence. Despite a confirmation plan that explicitly stated that debtor Flugence's post-confirmation property vested in the bankruptcy estate (and not in the debtor), Flugence filed a personal injury lawsuit post-confirmation and failed to disclose it to the court. In *Allen*, the plaintiffs filed a personal injury suit concurrently with Chapter 13 bankruptcy, and though filing three subsequent amendments to the Chapter 13 plan, neglected to disclose the potential claim. The Allens' case was not discharged but closed due to their failure to complete a financial management course.

The trial court below, which applied judicial estoppel based on a misreading of a Chapter 13 debtor's disclosure duties, erred in its application of these elements.

A. The "Inconsistent Statement" Prong of Judicial Estoppel Should Not be Inferred From A Debtor's Silence, Absent a Clear And Certain Disclosure Requirement

Judicial estoppel has traditionally been applied to protect the integrity of the court by preventing inconsistent court determinations deriving from a party's clearly inconsistent positions. *See New Hampshire*, 532 U.S. at 749-50. The doctrine's incarnation in this Circuit looks considerably different from what the *New Hampshire*

court envisioned. Rather than requiring that a plaintiff make an inconsistent position under oath in a prior proceeding, the Fifth Circuit is willing to *impute* an inconsistent statement from a chapter 13 bankruptcy debtor's silence on their post-confirmation schedules, despite the fact that chapter 13 debtors are not statutorily required to make such declarations or at a minimum where the case law requiring disclosure is uncertain.

The circuit's case law is simple in its general construction of the concept that if a debtor has an ongoing duty to disclose (acquisition of post-confirmation assets), then their silence on the matter is tantamount to an inconsistent statement, for the purpose of satisfying the first prong of judicial estoppel. "The continuing duty to disclose is a long-standing gloss required by our case law." *Flugence*, 738 F.3d at 130 n.1. "Whether a particular asset should be available to satisfy creditors is often a contested issue, and the debtor's duty to disclose assets--even where he has a colorable theory for why those assets should be shielded from creditors--allows that issue to be decided as part of the orderly bankruptcy process." *Flugence*, 738 F.3d at 130. The problem with this assertion is also simple—if there is no codified continuing duty to disclose, it is clear error to impute inconsistent statements to debtors who are not defying their legal obligations. This transparency with respect to pre-petition assets may be essential to an "orderly bankruptcy process," but in casting this wide net that extends to future assets, the courts run afoul of the Bankruptcy Code, place an unwarranted

burden on debtors, and leave the doors open for a handy windfall for defendant tortfeasors. *See Slater v. U.S. Steel Corp*., 820 F.3d 1193, 1236 (11th Cir. 2016) (Tjoflat, J., special concurrence) (criticizing the 11th Circuit's approach to judicial estoppel in the bankruptcy context), overruled by 871 F.3d 1174 (11th Cir. 2017)(*en banc*) (overruling prior case law including *de facto per se* rule and employing a totality of the circumstances test).

It is factually significant that both Bias and his attorney had a good faith belief that there was no ongoing duty to disclose. Bias' own statement reveals that his bankruptcy attorney did not advise Bias to inform the attorney or the court of any lawsuit. Indeed, in the Fourth Circuit where Mr. Bias filed his chapter 13 bankruptcy, the Court of Appeals has not indicated whether chapter 13 debtors must amend their schedules to include assets acquired post-petition. If the Code and Rules themselves direct an opposite result, it does not stretch the supposition too thin that both a bankruptcy attorney and his client might harbor a good faith belief that the non-disclosure was permissible. At the very least, Bias' subjective belief deserved some examination by the District Court. The broad application of the self-evident motivation rule renders such nuanced enquiry moot.

Thus, despite the Supreme Court's admonishment against inflexible formulas for applying judicial estoppel, *Flugence* and the string of cases upon which it relies, have together created a precise formula. If a legal claim does not appear specifically

on the debtor's schedules, that omission will be interpreted as an inconsistent statement, automatically triggering the application of judicial estoppel. Such a result is at utter odds with the circuit's own interpretations of judicial estoppel as an equitable doctrine that is designed to "protect the integrity of the courts, not to punish adversaries or protect litigants" *In re Coastal Plains*, 179 F. 3d at 213. The Fifth Circuit formula as currently applied by bankruptcy courts is neither equitable nor flexible, and empowers courts to make discretionary decisions that run afoul of established law. *See Law v. Siegel*, 134 S. Ct. 1188, 1195 (2014) (equitable powers may not be exercised in contravention of the Code).

B. The "Inadvertence" Prong of Judicial Estoppel Should Not be Self-Evident Absent Demonstration of Debtor's Motive to Conceal Assets

In the district court's sweeping haste to relieve Defendants of the burden of defending Bias' underlying claim on its merits, its discussion sped straight through prong one of the judicial estoppel enquiry before deciding it was satisfied with such zeal; there was no reason to take an even cursory pass at the remaining two prongs. This is problematic, because the court's approach to the "inadvertence" inquiry becomes as narrow and inflexible as its approach to "inconsistent statements."

Just as a debtor's silence creates a per se finding of inconsistency, a debtor's failure to disclose a post-confirmation legal claim creates a per se finding of a motive to conceal. If a chapter 13 debtor does not disclose the potential claim—even where neither the statute nor the rule require that he do so—that failure to act will be

interpreted as an ulterior motive, satisfying the "inadvertence" prong, judicially estopping the debtor from pursuing even the most meritorious outside claim. "We have previously noted that the 'motivation sub-element is almost always met if a debtor fails to disclose a claim or possible claim to the bankruptcy court' because the 'potential financial benefit resulting from the nondisclosure', makes the motivation in this context self-evident." *Allen v C&H Distributors, LLC*, 813 F.3d 566, 574 (5th Cir. 2015), citing *Love v. Tyson Foods, Inc.*, 677 F.3d 258, at p. 262 (5th Cir. 2012), (quoting *Thompson v. Sanderson Farms, Inc.,* No. 3:04-CV-837-WHB-JCS, 2006 WL 7089989, at *4, 2006 U.S. Dist. LEXIS 48409, at *12-13 (S.D. Miss. May 31, 2006)).

In its desperation to prevent bankruptcy debtors from reaping hypothetical windfalls, the Fifth Circuit courts have deposited a veritable jackpot into the laps of tortfeasors looking for a virtually effortless escape from potential payouts. The *Bias* court handily adopted the "self-evident" rule, completely ignored the lack of statutory duty to disclose, and dismissed Bias' case without ever arriving at an analysis of the second two prongs of judicial estoppel.

In order to further shield the self-evident rule from the sharp blade of logic, the Fifth Circuit has made clear that a debtor need not be aware of a requirement to disclose potential legal claims in their favor, but only aware of the facts *giving rise* to such a claim. *Jethroe*, 412 F.3d at 600, citing *Coastal Plains*, 179 F.3d at 211-12. In essence, it would be difficult for any bankruptcy debtor to not be slapped with the

label of dishonesty. This is true even *if* 1) the debtor did not know they had to disclose a potential legal claim, 2) the Bankruptcy Code did not require them to disclose such a claim, and 3) they were not aware of the latent existence of a potential legal claim. According to the district court, a debtor could be stripped of his right to relief so long as the court finds that the debtor was aware of the facts that might give rise to a speculative and unliquidated claim. Such decisions set a dangerous precedent and invite judicial overreach.

Fifth Circuit precedent in its application of judicial estoppel in chapter 13 cases is neither equitable nor flexible. Its self-evident rule causes it to snag countless honest debtors in a web designed to prevent their access to legitimate legal relief, granting a windfall to defendant tortfeasors.

CONCLUSION

For the reasons stated above, *amicus curiae* asks that this court to reverse the decision of the District Court below dismissing Mr. Bias' claim on the basis of judicial estoppel.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing corrected brief with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system on May 24, 2018. All participants that are registered as CM/ECF users will receive service via appellate CM/ECF system. Further, a true copy of the brief was also served by first class mail, postage prepaid, to:

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) and 5th Cir. R. 29.3 because this brief contains 6,487 words, excluding parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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