No. 16-11440-GG

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

KELLIE INGRAM, et al.,
Plaintiffs/Appellants,

– v. –

AAA COOPER TRANSPORTATION, INC.,
Defendant/Appellee.

On Appeal from the United States District Court
For the Southern District of Georgia
Docket No. 1:14-cv-00142-JRH-BKE

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS IN SUPPORT OF APPELLANTS AND SEEKING REVERSAL OF THE DISTRICT COURT'S DECISION

NATIONAL ASSOC. OF CONSUMER
BANKRUPTCY ATTORNEYS, *AMICUS CURIAE*
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June 16, 2016

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to FRAP 26.1 and Eleventh Circuit Local Rule 26.1-2, Amicus Curiae, the National Association of Consumer Bankruptcy Attorneys, makes the following disclosure:

1) The following parties have an interest in the outcome of this case:

- AAA Cooper Transportation, Inc. (Defendant/Appellee)
- Bristol, Steven P. (Appellee's counsel)
- Graves, Jason R. (Appellant's counsel)
- Hall, Hon. J. Randal (U.S. District Judge, S.D. Ga.)
- Heath, J. Erik (Amicus counsel)
- Ingram, Kellie (Deceased Plaintiff/Appellant)
- Ingram, Mark (Plaintiff/Appellant)
- Moulton, Scott H. (Appellee's counsel)
- National Association of Consumer Bankruptcy Attorneys (Amicus curiae)
- Rhodes, Joseph T. (Appellee's counsel)
- Shepard, Stephen E. (Appellee's counsel)

2) Is party/amicus a publicly held corporation or other publicly held entity?

NO

3) Does party/amicus have any parent corporations? **NO**

4) Is 10% or more of the stock of party/amicus owned by a publicly held corporation or other publicly held entity? **NO**

5) Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? **NO**

6) Does this case arise out of a bankruptcy proceeding? **NO**.

This 16th day of June, 2016.

/s/ Jon Erik Heath
J. Erik Heath
Ga. Bar No. 940564
Attorney for Amicus Curiae

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STATEMENT OF INTEREST OF AMICUS CURIAE

Incorporated in 1992, the National Association of Consumer Bankruptcy Attorneys (NACBA) is a non–profit organization consisting of approximately 3,000 consumer bankruptcy attorneys nationwide.

NACBA's corporate purposes include education of the bankruptcy bar and the community at large on the uses and misuses of the consumer bankruptcy process. Additionally, 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. NACBA has filed *amicus curiae* briefs in various cases seeking to protect the rights of consumer bankruptcy debtors. *See, e.g., Harris v. Viegelahn*, 135 S. Ct. 1829 (2015); *Schwab v. Reilly*, 560 U.S. 770 (2010); *Whaley v. Tennyson*, 611 F.3d 873 (11th Cir. 2010).

NACBA and its membership have a vital interest in the outcome of this case. NACBA member attorneys represent individuals in a large portion of all chapter 13 cases filed. These debtors, and their attorneys, must be able to rely on the text of the Bankruptcy Code and rules when responding to post-petition events in a pending case. This reliance is undermined by recent court decisions on judicial estoppel issues, like the one below, that muddle bankruptcy amendment requirements without reference to bankruptcy procedural rules. This Court's ruling

will clarify disclosure requirements, while determining the ability of honest consumer debtors, including those represented by NACBA members, to pursue otherwise meritorious claims that potentially benefit debtors and creditors alike.

CONSENT

Plaintiffs/Appellants have consented to the filing of NACBA's brief. AAA Cooper Transportation, Inc., the Defendant/Appellee, has not consented.

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 NACBA, its members, and its counsel made any monetary contribution toward the preparation or submission of this brief.

STATEMENT OF THE ISSUES

I. Whether Chapter 13 debtors have a free-standing duty to amend their bankruptcy schedules to reflect the post-petition acquisition of a legal claim.

II. Whether judicial estoppel is appropriately applied against former Chapter 13 debtors who attempt to amend their bankruptcy schedules despite the lack of a requirement to do so.

SUMMARY OF ARGUMENT

Judicial estoppel is strong medicine, to be applied only when a litigant has taken clearly inconsistent positions in order to gain an unfair advantage in the judicial system. The legal claims in this case fall squarely outside this doctrine because, except for certain specific kinds of assets, Chapter 13 debtors are not required to amend schedules which were accurate when filed to reflect post-filing changes in their financial situation. As this Circuit has already noted, there is no "free-standing duty" in the Bankruptcy Code or Rules to report post-petition changes in assets during a Chapter 13 proceeding. Without making affirmatively inconsistent representations, or violating any other disclosure requirement in bankruptcy court, the plaintiffs in this case simply have not taken any inconsistent position that warrants application of judicial estoppel.

The absence of such a disclosure requirement in the previous bankruptcy

case is hardly a loophole. Instead, it reflects the practicalities of Chapter 13 practice. Therefore, it cannot be said that the plaintiffs in this case have attempted to take advantage of the judicial system.

In the end, the invocation of judicial estoppel here is based on nothing more than a misconstruction of the bankruptcy 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 aggrieved parties their day in court. As a result, the District Court erred by dismissing the action.

ARGUMENT

The strong medicine of judicial estoppel "has long been detached from its moorings in equity." *Slater v. U.S. Steel Corp.*, — F.3d —, 2016 U.S. App. LEXIS 3225, *116 (11th Cir. 2016) (Tjoflat, J., concurring). Recent jurisprudence has indeed demonstrated that "its application produces at-least-inequitable results, if not manifestly unjust ones." *Id*. at *150. These unjust results are marked by the complete "striking [of] a meritorious claim," in favor of giving a defendant tortfeasor a "pure windfall" – all without any countervailing protections to judicial integrity. *Id*. at *124-125.

The instant case magnifies these concerns recently voiced by Judge Tjoflat when he called for *en banc* review of the judicial estoppel doctrine. There is generally no affirmative duty for Chapter 13 debtors to amend bankruptcy

schedules to disclose post-petition assets. Nevertheless, savvy tortfeasor defendants have recently gained traction in obtaining a "free pass" for their actions in cases such as this one based on the false premise that there is such a duty.

Fortunately, as discussed *infra* at 15, this Court can clarify this particularly harsh application of judicial estoppel without an *en banc* panel. It should take this opportunity to do so.

I. Chapter 13 Debtors Are Generally Not Required To Amend Their Schedules To Reflect Post-Petition Events.

Because the application of judicial estoppel should be viewed against the background of a Chapter 13 debtor's disclosure duties, it is important first to set the record straight on what those duties are. *See Period Homes, Ltd. v. Wallick*, 275 Ga. 486, 487 (2002) ("judicial estoppel is appropriate… [only if the debtor] was required to list his cause of action [] on his schedule of assets"); *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 Mr. Tagliapietra 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.").

Chapter 13 debtors are not required to amend their schedules as the estate acquires new property during the three- to five-year pendency of the bankruptcy. The absence of such a requirement reflects the practicalities of Chapter 13 bankruptcies. The lack of a statutory duty was even clear in this Circuit until a 2010 decision created an intra-circuit split on the issue, misconstruing this established practice and procedure.

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." *Waldron v. Brown (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." *Vasuez v. 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 assets.[1] *See Vasuez*, 253 B.R. at 90; *Batten v. Cardwell (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, "[c]ommon sense, reflected in the canon *expressio unius est exclusio alterius*, suggests that the specification of [one provision] implies" the exclusion of others. *Arizona v. United States*, 132 S. Ct. 2492, 2520

[1] Two complementary provisions in the Bankruptcy Code define estate property in Chapter 13 cases. Section 541, which is generally applicable to chapters 7, 11, 12, and 13, 11 U.S.C. § 103(a), covers pre-petition property and the limited post-petition property enumerated in subparagraph (a), *see* 11 U.S.C. § 541. Section 1306, which is only applicable to Chapter 13 proceedings, 11 U.S.C. § 103(i), covers post-petition earnings and assets, *see* 11 U.S.C. § 1306.

(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 other bankruptcy procedures would be meaningless. An example arises in the context of Chapter 7 conversions. When a debtor converts from Chapter 13 to Chapter 7, the Code allows the debtor to retain post-petition property by expressly excluding such property from the estate, unless the conversion was done in bad faith. 11 U.S.C. § 348(f); *see also Harris v. Viegelahn*, — U.S. —, 135 S. Ct. 1829, 1837 (2015). All forms of post-petition acquisitions fall under the scope of this protection, such as post-petition increases in home equity, *see In re Bobroff*, 766 F2d 797 (3d Cir. 1985), and wages that have not been distributed to creditors, *Harris*, 135 S. Ct. at 1838-9. This broad protection of post-petition property was specifically created because "to hold otherwise would create a serious disincentive to chapter 13 filings." *See* 140 Cong. Rec. H. 10,770 (October 4, 1994) (citing *Bobroff*). The Rules directly address whether schedules should be amended at conversion to reflect these post-petition acquisitions. *See* Fed. R. Bankr. P. 1019(5)(C). 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.

The Code itself also has a procedure that, when invoked, requires further affirmative disclosures by the debtor. Under Section 521(f), a Chapter 13 debtor may be required to produce annual income and expense statements at "the request of the court, the United States trustee, or any party in interest." 11 U.S.C. § 521(f); *see also In re Nance*, 371 B.R. 358, 371 (Bankr. S.D. Ill. 2007); *In re Grunauer*, 2010 Bankr. LEXIS 1716 (Bankr. E.D. Va. June 8, 2010). This procedure "allow[s] interested parties to monitor a debtor's financial situation during the pendency of the bankruptcy case and to seek modification… if changes in that situation occur." *Nance*, 371 B.R. at 371. Even though changes in a debtor's situation could affect projected disposable income, and be relevant to the feasibility and amount of plan payments, Congress placed the burden of requesting this heightened disclosure on parties other than the debtor. 11 U.S.C. § 521(f).[2] Section 521(f) disclosures would also be superfluous if debtors already had free-standing disclosure obligations.

The tort claim in this case does not fall under either of the above categories requiring amendment. As a post-petition tort, it is not 541(a)(5) property, and the record shows no order requiring heightened disclosures under Section 521(f). The confirmation order spelled out no additional disclosure requirements. (JA. 26-7.)

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[2] It is also worth noting that plan modification itself is an entirely permissive procedure. *See* 11 U.S.C. § 1329(a).

In this case, there was no duty for Appellants to file amended schedules upon acquisition of their personal injury claims.

In sum, there are only limited circumstances when a debtor must amend schedules 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 Would Be 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 protracted Chapter 13 proceeding.

Bankruptcy schedules serve an important role at commencement of a bankruptcy petition, but they are not meant to provide real-time financial information as the case progresses. 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); *Vasuez*, 253 B.R. at 90-91. In Chapter 13 cases, the scheduled information guides whether a proposed repayment plan can overcome two initial hurdles: the "disposable income" test and the "best interests of the creditors" test. Once those

tests have been passed, and a plan confirmed, then the asset and income schedules have served their purpose.

First, because of the specific role played by a debtor's assets in Chapter 13 proceedings, amendments to disclose post-petition legal claims serve little function. Unlike bankruptcies in Chapters 7 or 11, where creditors may be paid from the liquidation of a debtor's assets, *see* 11 U.S.C. § 704(a)(1) (requiring Chapter 7 trustee to "reduce to money the property of the estate"), Chapter 13 repayment plans are typically funded solely by the "future earnings or other future income of the debtor." *See* 11 U.S.C. § 1322(a)(1), (d); *see also Brown v. Gore*, 742 F.3d 1309, 1315-1316 (11th Cir. 2014) (describing this distinction between chapters). The plan payments are typically calculated based on the debtor's "projected disposable income" during the applicable commitment period of three- to five years. *See* 11 U.S.C. §§ 1322(d); 1325(d).

The term "projected disposable income" is a term of art, and fully defining it can be unnecessarily complicated for this case. *See* 11 U.S.C. §§ 1325(b)(2); 101(10A); *Hamilton v. Lanning*, 560 U.S. 505, 509-24 (2010). Suffice to say, if a new legal claim has any effect on the debtor's repayment plan, then at a minimum, it must first be liquidated before the expiration of the five-year cap on the commitment period. *See e.g.*, *In re Hall*, 442 B.R. 754, 762 (Bankr. D. Idaho 2010) (counting part of a lump-sum recovery as income); *In re Black*, 292 B.R. 693, 701

(B.A.P. 10th Cir. 2003) (modified repayment plan cannot exceed five years after due date of the first payment); 11 U.S.C. § 1329(c). For many post-petition torts, especially those occurring later in the bankruptcy process such as this one, it is highly unlikely that the debtors will receive any recovery on the claim before the five-year mark requires case closure. Unlike Chapter 7 cases, which can be held open or reopened to liquidate such claims, Chapter 13 cases are governed by this strict five-year limitation. (*See e.g.*, JA , 37-1:7 (bankruptcy court in this case could not reopen matter to distribute claim to creditors).) Further, even upon liquidation, some courts do not apply new "projected disposable income" calculations when modifying plan payments. *See, e.g., In re Forbes*, 215 B.R. 183, 192 (B.A.P. 8th Cir. 1997). Thus, in the end, a debtor's recovery on a post-petition legal claim may have only a minimal, or even no, impact on the debtor's repayment plan.

An asset's primary function in a Chapter 13 case is not to pay creditors. *See Brown*, 742 F.3d at 1316. Instead, the asset helps guide the "best interests of the creditors" test, which simply juxtaposes the case with a hypothetical liquidation under Chapter 7. This test allows confirmation of a plan only if the present value of the debtor's proposed repayment plan is "not less than the amount that would be paid" to creditors under the hypothetical liquidation of assets in a Chapter 7. *See* 11 U.S.C. § 1325(a)(4); *In re Valone*, 784 F.3d 1398, 1404 (11th Cir. 2015) (referring

to the test as the "liquidation test"). This hypothetical liquidation looks at assets that a Chapter 7 estate would have, which by definition excludes postpetition property. *See* 8 Collier on Bankruptcy ¶ 1325.02[d] at 1325-22 - 23 (16th ed.); *see also* 11 U.S.C. § 541 (defining estate property in a Chapter 7). Thus, for example, even in a state where cash cannot be claimed as exempt, it is clear that each post-petition paycheck is not subject to this test. The test is not even applicable to subsequent plan modifications. *See Hollytex Carpet Mills v. Tedford*, 691 F.2d 392, 393 (8th Cir. 1982); *In re McAllister*, 510 B.R. 409, 416 (Bankr. N.D. Ga. 2014) (reapplying the test, but noting that the petition date is the operative date for the calculation). A post-petition acquisition (except for property specified in Section 541(a)(5)) is therefore wholly irrelevant for purposes of the "best interests of the creditors" test.

Argument in other judicial estoppel cases sometimes focuses on the irrelevant question of whether the post-petition legal claim is property of the estate. The court below even apparently rested its analysis on this issue. (*See* JA 45:8.) But whether such property is part of the estate is beside the point. Post-petition property may enter the estate, and its inclusion serves various purposes, most notably giving it the protection of the automatic stay, *see* 11 U.S.C. § 362(a)(2) – (4); *Security Bank of Marshalltown v. Neiman*, 1 F.3d 687, 691 (8th Cir. 1993), but also enabling the court to enter income deduction orders, 11 U.S.C. § 1325(c).

However, as shown above, the fact that the property belongs to the estate does not mean that it must be scheduled or that its liquidated value is automatically available for plan payments. Two competing illustrations of estate property highlight that distinction. On one hand, a claim for lost wages, which would have been devoted to plan payments anyway, may quintessentially be available for distribution if liquidated during the case. On the other hand, a tort recovery by the debtor to compensate for a permanent loss, where the damages awarded include a component to provide for medical care extending beyond the term of the plan, may be entirely outside the reach of creditors – even though it is estate property. In short, whether the liquidation of a legal claim should affect plan payments is a different, and much more complicated question, than whether it is property of the estate.

Keeping in mind the specific role that assets play in Chapter 13 proceedings, the 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." 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." *Forbes*, 215 B.R. at 190 (quoting Lundin, Keith M., Chapter 13 Bankruptcy, vol. 2, § 6.44 at 6-131 to 132). This infeasibility is especially striking when considering the protracted length of a chapter 13 proceeding, which generally lasts for three- to five-years. *See* 11 U.S.C. § 1322(d).

The impracticality of heightened disclosures cannot be resolved simply by limiting them 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 even contemplate such disclosure, except as required by Section 521(f).

Schedules are important at the outset of a Chapter 13 bankruptcy for purposes of determining whether a plan should be confirmed. A broad requirement that debtors update them as their bankruptcy case progresses over several years would serve little value, while working to the detriment of the Chapter 13 process.

C. This Court Should Rely On Its *Waldron* Precedent Both To Reinforce The Text Of The Bankruptcy Code And Rules, And Also To Resolve An Intra-Circuit Conflict.

This Court has already determined that Chapter 13 debtors do not have a "free-standing duty" to amend schedules to disclose post-petition property acquisitions. *See Waldron*, 536 F.3d at 1246. However, this analysis in *Waldron*

has subsequently become muddled by opinions in this and lower courts. Especially in light of Judge Tjoflat's recent criticism of the harshness of judicial estoppel in this Circuit, this Court should take this opportunity to reinforce its precedent in *Waldron*, and by doing so, reinforce the text of the Bankruptcy Code and rules.

The trial court's decision in this case exemplifies how *Waldron* has been misapplied in this Circuit. For instance, the trial court erroneously cites *Burnes v. Pemco Aeroplex, Inc.*, for the proposition that bankruptcy debtors have an affirmative obligation to amend their schedules to reflect assets acquired post-petition. (JA 45:9 (citing 291 F.3d 1282, 1286 (11th Cir. 2002).) However, this quote is out of context. The *Burnes* case did not involve whether a debtor was required to amend schedules, but instead involved a debtor who filed false schedules after "the bankruptcy court ordered [him] to file amended or updated schedules." *See Burnes*, 291 F.3d at 1284. The "continuing" duty invoked in *Burnes* was the noncontroversial duty that a debtor must amend schedules that were inaccurate as filed. *Id* at 1286.

In 2008, the Eleventh Circuit had expressly repudiated the trial court's expansive reading of its own precedent in *Burnes*. The *Waldron* Court ruled that a 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." *See Waldron*,

536 F.3d at 1246.[3] The *Waldron* Court further clarified that the "precedents in *Burnes*, *De Leon*, and *Ajaka* do not address that issue" – completely rejecting the trial court's reading of *Burnes*. *Id* (citing *Burnes*; *De Leon v. Comcar Industries, Inc.*, 321 F.3d 1289 (11th Cir. 2003); *Ajaka v. BrooksAmerica Mortgage Corp.*, 453 F.3d 1339 (11th Cir. 2006)).

The *Waldron* case itself is largely consistent with the above procedural framework of Chapter 13 bankruptcy. In *Waldron*, the Chapter 13 debtors were involved in a post-petition automobile collision. The bankruptcy court apparently did not expect the debtors to amend their schedules to reflect the potential legal claim, but did separately order that "any *settlement* must be disclosed by an amendment of the debtors' schedule of assets." *Waldron*, 536 F.3d at 1241 (emphasis added).[4] On appeal, the *Waldron* Court's analysis was well-supported by thorough discussion of the Bankruptcy Code and rules. This analysis provides three important lessons:

1. Legal claims arising postpetition are property of the Chapter 13 bankruptcy estate. *Id* at 1242 (citing 11 U.S.C. § 1306(a));

[3] The *Waldron* case itself involved a situation where the debtors were required to amend their schedules by separate order of the bankruptcy court. Clearly, the bankruptcy court has the authority to order such amendment, *see* Fed. R. Bankr. P. 1009, and if the court exercises that power, then the debtors have a duty to provide full and accurate disclosures in response, *see Waldron*, 536 F.3d at 1246.

[4] It is both commonplace and practical for the bankruptcy court only to be concerned about final settlement (as opposed to accrual of the potential claim) because the unliquidated claim provides no value to a Chapter 13 estate, whereas the settlement could arguably affect disposable income. *See supra*, at 11.

2. Notwithstanding this status as estate property, Chapter 13 debtors do not have "a free-standing duty to disclose" it. *Id* at 1246 (citing Fed. R. Bankr. P. 1007(h)); and

3. The bankruptcy court nevertheless "has the discretion, under Rule 1009, to require" such amendment, if it so desires. *Id*.

This thorough analysis of the Bankruptcy Code and rules was likely guided by the posture of *Waldron*, which was not a judicial estoppel case, but arose as an appeal from a bankruptcy decision, and was presumably briefed by bankruptcy practitioners.

Despite these clear lessons from *Waldron*, courts later cited the case for completely opposite propositions in the context of judicial estoppel – without input from the bankruptcy bar. The first Eleventh Circuit case to do so was *Robinson v. Tyson Foods, Inc.*, 595 F.3d 1269 (11th Cir. 2010). *Robinson* involved an employment discrimination claim that arose after the plaintiff had filed a Chapter 13 bankruptcy petition. *Id*. at 1272. Completely consistent with bankruptcy procedure, Robinson did not amend her schedules to include the potential legal claim. Nevertheless, the *Robinson* Court concluded that "a Chapter 13 debtor has a statutory duty to disclose changes in assets." *Id*. at 1274. The Court did not cite any text within the Bankruptcy Code to support this "statutory duty," but only cited to "the established law of this circuit," including *Burnes*, *De Leon*, and *Waldron*. *Id*. Citing the "prior precedent rule," the *Robinson* Court apparently felt

constrained by these cases to find the existence of a statutory duty, *id*., even though *Waldron* expressly decided that one did not exist, and expressly rejected both *Burnes* and *De Leon* as standing for that proposition.

It is unclear how *Robinson* extrapolated this rule from *Waldron*, when the case stated the exact opposite, but *Robinson* created an intra-circuit split of authority when it did so. Especially after the split, the properly-supported reasoning in *Waldron* disappeared from jurisprudence, and courts began misapplying *Waldron*, or citing directly to *Robinson*, to justify dismissing many potentially meritorious claims brought by Chapter 13 debtors who had done nothing wrong. *See e.g.*, *D'Antignac v. Deere & Co*., 604 F. App'x 875 (11th Cir. 2015) (per curiam); *Copeland v. Birmingham Nursing & Rehab. Ctr., LLC*, 2015 WL 4068647 (N.D. Ala. July 1, 2015); *Brown v. Winn-Dixie Stores, Inc.*, 2015 WL 3448614 (S.D. Ga. May 20, 2015); *In re Tyson Foods*, 732 F.Supp.2d. 1363 (M.D. Ga. 2010) (dismissing 12 opt-in class members in a Fair Labor Standards Act case after they did not amend their Chapter 13 petitions to disclose the class action lawsuit).

To be sure, this confusion has been further sewn by decisions in other jurisdictions. For instance, the Fifth Circuit recently reached an erroneous decision that was similar to *Robinson* in analysis. *See In re Flugence*, 738 F.3d 126 (5th Cir. 2013). The *Flugence* Court found that Chapter 13 debtors must amend

schedules to disclose post-petition legal claims, not based on any language in the Bankruptcy Code or rules, but based solely on "continuous duty" language from prior cases involving pre-petition claims. At no point did the *Flugence* court acknowledge the existing amendment requirements of Rule 1007(h), or the specific procedure for invoking heightened disclosures under Section 521(f).[5] The *Flugence* Court also apparently did not realize that it was creating burdensome new disclosure requirements out of whole cloth.

Georgia state courts have similarly conflated some of these principles to misapply bankruptcy procedure. For instance, in *Wolfork v. Tackett*, 273 Ga. 328 (2001), the court noted that the Chapter 13 estate "includes property acquired during the pendency of the proceedings." *Id* at 329. Without much analysis, the *Wolfork* Court assumed that the property's inclusion in the estate necessitated amended schedules, *id.*, which as described *supra* at 13, is an erroneous assumption. Even the Georgia Supreme Court has retreated from *Wolfork*. In 2002, the court partially overruled *Wolfork* when it realized that "a debtor under Chapters 7 or 11 is under no statutory duty to amend it schedule of assets." *Period Homes*, 275 Ga. at 503-04. Based on this language in *Period Homes*, it is likely

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[5] It is quite possible that the Fifth Circuit could have benefitted from better briefing on these matters. As in many of these judicial estoppel cases, the *Flugence* debtor was apparently represented by personal injury lawyers who did not even raise these bankruptcy procedural issues in their briefs. *See generally* Brief for Appellee, *In re Flugence*, No. 13-30073 (5th Cir. Apr. 15, 2013).

that the court would overrule *Wolfork* entirely if finally provided with the above clarification of Chapter 13 procedure.

The effects of *Robinson*, and cases like it, have created a "free pass" for defendant tortfeasors, allowing them to dismiss on a technicality almost any lawsuit brought against them by a Chapter 13 bankruptcy debtor. Because no rule requires amendment by Chapter 13 debtors to reflect post-petition legal claims, it is unlikely that they would have filed such amendment. Yet, by the time the bankruptcy case is over, and the tortfeasor invokes judicial estoppel, it is often considered too late for a debtor to go back and file the amendment, which was never required in the first place. *See e.g.*, *Burnes*, 291 F.3d at 1288. A defendant served with a lawsuit only needs to conduct a PACER search to find out if it can avail itself of this fortuitous "free pass." When it does, Chapter 13 debtors and creditors alike are all automatically losing any potential recovery on these legal claims.

This Court should disapprove of *Robinson* to the extent it conflicts with *Waldron* in this crucial way. *See Walker v. Mortham*, 158 F.3d 1177, 1188-89 (11th Cir. 1998) (adopting the "earliest case" rule to govern intra-circuit splits in the Eleventh Circuit). As laid out in this brief, *Waldron* was correct that there is no "free-standing" duty for Chapter 13 debtors to amend their schedules based solely on the acquisition of a post-petition legal claim, and that principle should be

reaffirmed. The cases invoking judicial estoppel based on the erroneous assumption that there is such a duty have created the sort of manifestly unjust results – if not worse – than the ones cited by Judge Tjoflat in his call for review of the entire judicial estoppel doctrine in this Circuit.

II. The District Court's Application of Judicial Estoppel Is Contrary To Georgia And Federal Principles.

"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). Although the elements of the doctrine are not "reducible to any general formulation," three factors are often considered in guiding its application. *New Hampshire v. Maine*, 532 U.S. 742, 750-751 (2001). Those factors include: (1) "a party's later position must be 'clearly inconsistent' with its earlier position," (2) the prior court accepted the party's inconsistent position; and (3) "whether the party seeking to assert an

inconsistent position would derive advantage of impose an unfair detriment on the opposing party if not estopped." *Id*.[6] None of these factors is present here.

A. A Chapter 13 Debtor Does Not Adopt "Clearly Inconsistent" Positions About A Post-petition Claim That Did Not Require Amendment.

Judicial estoppel is only appropriate in those cases when "a party's later position [is] 'clearly inconsistent' with its earlier position." *New Hampshire*, 532 U.S. at 751; *see also Period Homes*, 486 Ga. at 488. The "clearly inconsistent" standard traditionally bars two affirmative, irreconcilable positions. *Compare New Hampshire*, 532 U.S. at 747-8 (the court "cannot interpret 'Middle of the River'… to mean two different things."), *with Cleveland v. Policy Mgmt. Systems*, 526 U.S. 795, 802-3 (1999) (despite their ostensible inconsistencies, "there are too many situations in which an SSDI claim and an ADA claim can comfortably exist side by side").

Courts have traditionally inferred an inconsistency in the bankruptcy context when a debtor fails to disclose a legal claim, *in violation of an affirmative duty* to do so. *See e.g.*, *Barger v. City of Cartersville*, 348 F.3d 1289, 1294-95 (11th Cir.

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[6] As the trial court pointed out, "[b]ecause this is a diversity case, the application of the doctrine of judicial estoppel is governed by state law." *Original Appalachian Artworks, Inc. v. S. Diamond Associates, Inc.*, 44 F.3d 925, 930 (11th Cir. 1995). However, with some minor variations, Georgia law on judicial estoppel largely mirrors federal law. *IBF Participating Income Fund v. Dillard-Winecoff, LLC*, 275 Ga. 765, 766-767 (2002).

2003) (finding an inconsistent statement where debtor concealed a pre-petition claim from her schedules, in direct violation of statutory disclosure duties); *Burnes*, 291 F.3d at 1284 (debtor amended schedules by court order, but omitted claim from them). However, as detailed above, it is a misconception that the Chapter 13 debtor has an affirmative duty to disclose newly acquired assets, such as legal claims.

Without an affirmative duty of disclosure in the prior bankruptcy, there is no reason to infer inconsistency from a debtor's silence. *See Mitchell*, 767 F.3d at 999; *see also Allison v. Ticor Title Ins. Co.*, 979 F.2d 1187, 1193-4 (7th Cir. 1993) (bankruptcy creditor's prior failure to object was not adoption of a formal position). In *Mitchell*, the Chapter 7 debtor initially valued his company's stock at $0.00, which may have been accurate at commencement of the action, but the debtor did not later amend his schedules to reflect subsequent appreciation of the stock when the company filed a $4 million lawsuit. *Id.* at 988. The Tenth Circuit, citing the lack of a clear requirement for a debtor to amend schedules to report the new appreciated value of the property, refused to find any inconsistent statements from the debtor's bankruptcy case and resisted applying judicial estoppel to his claims. *Id.* at 997-999. *Mitchell* also begs comparison to the conversion context, where a former Chapter 13 debtor is clearly entitled to receive post-petition property upon conversion to Chapter 7, even though the debtor is expressly not

required to schedule that property. *See Harris*, 135 S. Ct. at 1838-9; Fed. R. Bankr. P. 1019(5)(C)(i). In either scenario, there is simply no reason to infer inconsistency from a debtor's permissible silence.

Similarly, here, there was no requirement for Plaintiffs to amend their bankruptcy schedules. Without such a requirement, or other affirmative misstatement, it makes little sense to infer that the debtors represented to the bankruptcy court that the instant legal claim does not exist.

B. The Georgia Judicial Estoppel Doctrine Permits A Party To Cure A Purported Prior Inconsistency.

Appellants principally argue that judicial estoppel should not apply to them because they attempted to reopen their underlying bankruptcy case. (Appellant's Br., 15-16.) While there are other convincing grounds to withhold judicial estoppel in these cases, Appellant's main argument is sound.

The primary distinction between the Georgia and federal versions of the judicial estoppel doctrine is the ability to correct the purported prior inconsistency. *Compare Rowan v. George H. Green Oil, Inc.*, 257 Ga. App. 774, 775-776 (2002), *with Burnes*, 291 F.3d at 1288. Under Georgia law, "a party like the plaintiff in this case can avoid the application of judicial estoppel simply by filing… a motion to reopen the debtor's bankruptcy case to declare the omitted claim or cause of action." *Harper v. GMAC Mortg. Corp.*, 245 Ga. App. 729, 732 (2000). No

authority from Georgia has ever required the debtor to be successful in his or her motion.

The debtors in this case met that instruction by filing a motion to reopen the bankruptcy case. The fact that the underlying bankruptcy case could not be reopened on account of the five-year rule only illustrates that an amended asset schedule would have served little function.

C. Because Chapter 13 Debtors Have No Motive To Conceal Post-Petition Assets, They Derive No Unfair Advantage From Pursuing Such Claims.

Judicial estoppel is not appropriate against a debtor who has no motive for concealing assets. *See Barger*, 348 F.3d at 1295. As described in Part I.B. above, the mere acquisition of a post-petition asset does not affect a Chapter 13 debtor's plan that has already been confirmed. By the time the asset has been acquired, the "disposable income" and "best interests of the creditors" tests have already been applied. Nor can the asset be liquidated by the Chapter 13 bankruptcy estate.

In short, a Chapter 13 debtor receives no benefit or unfair advantage by concealing a post-petition asset. *Cf. De Leon*, 321 F.3d at 1291-92 (motive exists to conceal pre-petition asset, which could affect Chapter 13 plan calculations). Applying judicial estoppel against a debtor who had no motive to create inconsistent positions is therefore wholly inappropriate.

D. Applying Judicial Estoppel To Post-Bankruptcy Claims Would Give Defendant Tortfeasors A Windfall Without Strengthening The Integrity Of The Judicial Process.

"[C]ourts have uniformly recognized that [the purpose of judicial estoppel] is to protect the integrity of the judicial process." *New Hampshire*, 532 U.S. at 749. The integrity of the judicial process, while certainly important, is not undermined, or even threatened, here. *Slater*, 2016 U.S. App. LEXIS 3225, at *124-125 (Tjoflat, J., concurring).

Judge Tjoflat is not the only one to recognize how detached judicial estoppel has become from its roots. In a 2013 decision, the Ninth Circuit also cautioned against overly harsh application of judicial estoppel against bankruptcy debtors. *See Quin v. Cnty. Of Kauai Dep't of Transp.*, 733 F.3d 267, 277 (9th Cir. 2013). In *Quin*, the debtor moved to reopen her Chapter 7 bankruptcy case after initially failing to disclose a pre-petition legal claim in the schedules. Finding that these actions could be consistent with honest mistake, the Court noted that estopping the claim would "do nothing to protect the integrity of the courts." *Id.* at 276. The court further explained the bad policy that judicial estoppel would promote in that context:

> Perversely, the only "winner" in this scenario is the alleged bad actor in the estopped lawsuit. If Defendant here did, in fact, discriminate against Plaintiff, it will not have to pay the consequences of its actions, for the entirely unrelated reason that Plaintiff happened to file for bankruptcy and, possibly due to inadvertence,

> happened to omit the claim from her initial schedules. Further, because the application of judicial estoppel does not look to the nature of the underlying claim, the alleged bad actor could be someone who clearly does not warrant a windfall (e.g., someone who physically assaulted the plaintiff and badly injured him or her). It seems hard to justify a policy that takes money from innocent third-party creditors and gives it, for example, to a violent criminal.

Id. at 275-6.

The policy implications of this case are identical. There is no reason for the law to punish otherwise compliant bankruptcy debtors by barring their meritorious claims, depriving debtors and creditors alike from any chance at recovery, and simultaneously giving windfalls to undeserving tortfeasors. There is no countervailing benefit to judicial integrity to support such a lopsided outcome. The recent cases applying judicial estoppel in these circumstances turn the doctrine's policy on its head, and mutate the doctrine into an unwarranted technical defense for savvy litigants.

CONCLUSION

For the reasons stated above, *amicus curiae* asks this court to reverse the decision of the District Court of the Southern District of Georgia below.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) because this brief contains 6,518 words, excluding parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This filing complies with Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14-point type.

3. This brief has been scanned for viruses pursuant to Rule 27(h)(2).

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system on June 16, 2016. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

I further certify, pursuant to 11th Cir. R. 31-3 and Fed. R. App. P. 25(a)(2)(B), that on June 16, 2016, I have dispatched one originally signed brief and six copies to a third-party commercial carrier for delivery to the clerk within three days.

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