No. _____

In The
Supreme Court of the United States

ESTATE OF ARLENE TOWNSEND, ESTATE OF ELVIRA NUNZIATA, ESTATE OF JAMES HENRY JONES, ESTATE OF JOSEPH WEBB, ESTATE OF OPAL LEE SASSER, ESTATE OF JUANITA JACKSON,

Petitioners,

v.

STEVEN M. BERMAN, ESQ., AND SHUMAKER, LOOP & KENDRICK, LLP,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Bankruptcy Code burdens professionals retained by a bankruptcy estate pursuant to 11 U.S.C. § 327 to demonstrate the absence of any conflicts of interest, by placing an affirmative duty upon the professional to disclose "all of the person's connections with the debtor, creditors, [and] any other party in interest." FED.R.BANKR.P. 2014.

Here, the Bankruptcy Court decided that a bankruptcy trustee's general and special litigation counsel had no duty to disclose their representation of nursing home landlords and owners sued by the bankruptcy estate's largest creditors in connection with the triggering events for the bankruptcy petition. The Bankruptcy Court decided to permit no discovery on the matter, and likewise refused to hold a hearing on the matter. The U.S. District Court and the Court of Appeals upheld these decisions.

This being a matter of first impression in this Court, the question presented is:

> Can bankruptcy courts effectively shift the burden as to 11 U.S.C. § 327 employment, absolving bankruptcy professionals from the burden of complete disclosure of connections to the bankruptcy estate, and correspondingly placing the burden of investigating bankruptcy professionals' connections with the bankruptcy estate upon the trustee and parties to the bankruptcy?

PARTIES TO THE PROCEEDINGS

All parties are listed in the caption.

RELATED CASES

In re Fundamental Long Term Care, Inc., No. 11-bk-22258, United States Bankruptcy Court for the Middle District of Florida. Memorandum Opinion and Order entered August 21, 2019.

In re Fundamental Long Term Care, Inc.: Estate of Arlene Townsend, Estate of Elvira Nunziata, Estate of James Henry Jones, Estate of Joseph Webb, Estate of Opal Lee Sasser, Estate of Juanita Jackson. v. Shumaker Loop & Kendrick, LLP, No. 19-cv-2176, United States District Court for the Middle District of Florida. Order entered February 27, 2020.

In re Fundamental Long Term Care, Inc., No. 11-bk-22258, United States Bankruptcy Court for the Middle District of Florida. Memorandum Opinion and Order entered April 16, 2020.

In re Fundamental Long Term Care, Inc.: Estate of Arlene Townsend, Estate of Elvira Nunziata, Estate of James Henry Jones, Estate of Joseph Webb, Estate of Opal Lee Sasser, Estate of Juanita Jackson. v. Shumaker Loop & Kendrick, LLP, No. 20-cv-00956, United States District Court for the Middle District of Florida. Order entered January 22, 2021.

RELATED CASES—Continued

In re Fundamental Long Term Care, Inc.: Estate of Arlene Townsend, Estate of Elvira Nunziata, Estate of James Henry Jones, Estate of Joseph Webb, Estate of Opal Lee Sasser, Estate of Juanita Jackson. v. Steven M. Berman, Esq., Shumaker Loop & Kendrick, LLP, No. 21-10587, United States Court of Appeals for the Eleventh Circuit. Opinion entered September 18, 2023 (rehearing denied November 14, 2023).

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The opinion of the Court of Appeals is reported at 81 F.4th 1264 (11th Cir. 2023) and is found at Appendix, App., *infra*, 3-143. The Court of Appeals' order denying Petitioners' timely petition for rehearing and rehearing *en banc* was entered November 14, 2023, and is found at App., *infra*, 1-2. The opinion of the United States District Court for the Middle District of Florida is unpublished, but is reported at 2021 WL 222779 (M.D. Fla. Jan. 22, 2021) and is found at App., *infra*, 144-160. The opinion of the United States Bankruptcy Court for the Middle District of Florida is reported at 614 B.R. 753 (Bankr. M.D. Fla. 2020) and is found at App., *infra*, 161-187. This last opinion was entered following a remand from an opinion of the United States District Court for the Middle District of Florida, which is also unpublished, but is reported at 2020 WL 954982 (M.D. Fla. Feb. 27, 2020) and is found at App., *infra*, 188-220. The initial United States Bankruptcy Court for the Middle District of Florida's order denying Petitioners' motion to disqualify *Nunc Pro Tunc* is reported at 605 B.R. 249 (Bankr.M.D.Fla. 2019), and is found at App., *infra*, 221-250.

JURISDICTION

Petitioners seek review of the decision of the United States Court of Appeals for the Eleventh Circuit entered on September 18, 2023. Timely petitions for rehearing and rehearing *en banc* were denied

November 14, 2023. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are reproduced in the appendix to this petition at App., *infra*, 262-263.

STATEMENT OF THE CASE

FED.R.BANKR.P. 2014 burdens the professional-applicant for employment by a bankruptcy estate with disclosing "all of the person's connections with the debtor, creditors, [and] any other party in interest," and otherwise demonstrating, per 11 U.S.C. § 327(a), the applicant's disinterestedness. The U.S. Bankruptcy Court for the Middle District of Florida effectively shifted this burden, placing it upon the other parties to the bankruptcy to demonstrate the applicant's ***lack*** of disinterestedness, ***and*** did so without the benefit of discovery or hearing. The U.S. District Court for the Middle District of Florida and the U.S. Court of Appeals for the Eleventh Circuit has endorsed this shift of burden. This is a matter of first impression in this Court.

Petitioners are the probate estates ("Probate Estates") of six deceased nursing home residents, and are

creditors of the corporate debtor in bankruptcy below. The corporate debtor, Fundamental Long Term Care, Inc. ("FLTCI"), is the subject of an involuntary bankruptcy petition filed on December 5, 2011 by the Probate Estates. Respondents Steven M. Berman, Esq., and Shumaker, Loop & Kendrick, LLP ("Shumaker") were both general and special litigation counsel for the bankruptcy trustee below, Bethann Scharrer, Esq.

A. Factual Background

1. Summary Background

One of the probate estates, that of Juanita Jackson, obtained a judgment in a wrongful death action on July 22, 2010 for Juanita Jackson's injuries sustained at Auburndale Oaks Health Care Center, a nursing home. This judgment adjudged $55 million against corporate owner Trans Health, Inc. ("THI"), and an identical $55 million judgment against Trans Health Management, Inc. ("THMI"). In a post-judgment motion, the Jackson Estate obtained a default amended judgment on September 13, 2011, making recently-created Fundamental Long Term Care, Inc. ("FLTCI") liable for the total $110 million award. However, the award was uncollectable from THI, THMI, or FLTCI, due to what has been characterized in the lower courts as a "bust-out" scheme, one designed and executed in March 2006 to avoid paying such judgments. Pursuant to this scheme, the assets of THI and THMI were "sold" to newly-created Fundamental Long Term Care Holdings ("FLTCH"), and other parties, while the

practically valueless stock of THMI was transferred to FLTCI, *i.e.*, the liabilities were separated from the assets of a previously integrated conglomerate. The course of all the associated litigation, including that in bankruptcy, is amply and ably set forth in summary in the Court of Appeals' Opinion below, and a rendition thereof is unnecessary for this Court to make a determination on the propriety for certiorari.

2. Respondents' Involvement With Entities Implicated In The Bankruptcy

On June 1, 2012, the bankruptcy trustee applied for authority to employ Shumaker as special litigation counsel to assist the bankruptcy estate, later upgraded to general counsel. In order to serve as counsel for the bankruptcy trustee, and pursuant to FED.R.BANKR.P. 2014, Respondent Steven Berman, Esq., a partner at Respondent Shumaker, Loop & Kendrick, swore in a Declaration of Disinterestedness filed June 1, 2012, that Shumaker,

> does not have any connection to or any interest materially adverse to the Debtor . . . except as further disclosed herein. . . . No member of the Firm presently represents or otherwise works . . . on any matter, whether such representation is related or unrelated to the Debtor of the estate(sic).

In late 2017, the Probate Estates brought to the attention of the trustee's late general counsel, Alan Watkins, Esq., that Shumaker represented an entity,

Health Care REIT, Inc. n/k/a Welltower, Inc. ("HCN"), and that this representation bore on Shumaker's disinterestedness. HCN had been at one time a defendant in an action filed by an estate of the Probate Estates, which with such action served in turn as a triggering event for this bankruptcy. Thereafter Respondent Steven Berman filed a Supplemental Disclosure in the Bankruptcy Court on May 4, 2018, wherein, for the first time, Shumaker acknowledged its current and historic representation of HCN. Shumaker described HCN as "one of Shumaker's oldest current and active clients" and represented that Shumaker had functioned as its "outside general counsel."

This Supplemental Disclosure represented that, from June 30, 2005 through December 28, 2012, HCN was the real property owner of Auburndale Oaks Health Care Center, located in Polk County, Florida. In fact, Auburndale Oaks Health Care Center is the location wherein six Probate Estates' decedents resided, and whereat injuries occurred leading to the personal injury actions and eventual bankruptcy of FLTCI.

Additionally, during the relevant time period of personal injury, other entities—Lyric Healthcare, LLC and its subsidiary Lyric Healthcare Holdings, III, Inc. (collectively, "Lyric")—directly operated as managers the Auburndale Oaks and Andorra Woods Healthcare Centers (the latter another nursing home implicated in the personal injury suits triggering FLTCI's bankruptcy).

Lyric had a relationship with HCN imputable to Shumaker. HCN's relationship with Lyric included a Master Lease Agreement with Lyric Healthcare Holdings, III, Inc. This agreement contained several "affirmative covenants" elevating HCN to a position above that of a passive landlord, including requirements that Lyric Healthcare Holdings, III provide Quarterly Financial Statements, and facility budgets to HCN, as well as provide HCN with written notice related to inspections of its nursing homes and other matters regarding continued nursing home licensing. This agreement provided HCN with significant security interests, including a beneficial security interest in the facility licenses, and in the residency contracts with the residents. Indeed, under this agreement Lyric was only conditionally able to change the form of its "Agreements with Residents" without first seeking written consent from HCN.

This Lyric Master Lease Agreement designated Respondent Shumaker, Loop & Kendrick LLP as agent to receive the various Lyric notices to HCN, and an attorney of Respondent Shumaker, Loop & Kendrick LLP was identified as the preparer of the lease agreement. As such, the Probate Estates maintain that Respondent Shumaker, Loop & Kendrick LLP should have disclosed both its connections to HCN, and to Lyric, in the Declaration of Disinterestedness of June 1, 2012, and that Shumaker should have been well aware of the requirement to do so.

Nonetheless, the Supplemental Disclosure actually failed to disclose Respondent Shumaker, Loop &

Kendrick LLP's connections to Lyric. In addition to the above, before and after 2006 Respondent Shumaker, Loop & Kendrick LLP completed refinancing work for Lyric, performed other professional work, and was recompensed for the same. In 2010, Respondent Shumaker, Loop & Kendrick LLP collected $30,408.00 as another professional fee from Lyric. In 2012, Lyric III again paid Shumaker for licensing work.

B. Course Of Proceedings

On June 4, 2018—one month after Respondent Steven Berman's Supplemental Disclosure—the Probate Estates filed a Motion to Disqualify Shumaker *Nunc Pro Tunc* and for Disgorgement in the U.S. Bankruptcy Court for the U.S. Bankruptcy Court for Middle District of Florida, alleging *inter alia* that Shumaker had failed in the duty prescribed by 11 U.S.C. § 327(a) and FED.R.BANKR.P. 2014, of complete disclosure of connections vis-à-vis the FLTCI bankruptcy estate. Additionally, the Probate Estates alleged that Shumaker had an interest materially adverse to that of the Probate Estates, to which Shumaker actually owed fiduciary duties. During the long course of litigation and appeal that followed on this contested matter, no discovery was ever conducted or permitted, nor was presentation of evidence ever permitted. Aside from the single oral argument held by the U.S. Court of Appeals for the Eleventh Circuit on March 9, 2022, no hearing was ever held.

Upon filing the Motion to Disqualify Shumaker *Nunc Pro Tunc* and for Disgorgement, the Probate Estates sought to pursue discovery regarding this contested matter, via a motion filed in the Bankruptcy Court on June 4, 2018. Whereupon Shumaker filed an emergency motion to stay discovery on the contested matter. On January 31, 2019, the Bankruptcy Court entered an order staying discovery. On August 21, 2019, the Bankruptcy Court abruptly entered a Memorandum Opinion and Order, denying in full the Motion to Disqualify Shumaker *Nunc Pro Tunc* and for Disgorgement. App., *infra*, 221-250. This Order contained no identified findings of fact or conclusions of law, and neither presentation of evidence nor hearing was allowed.

On appeal, the U.S. District Court for the Middle District of Florida entered an Order on February 27, 2020, stating,

> [t]he Bankruptcy Court's ruling * * * is VACATED, and the matter is REMANDED to the Bankruptcy Court to determine, * * * if there was an unintentional, negligent ***and/or inadvertent*** nondisclosure by Shumaker.

App., *infra*, 219-220 (emphasis added).

Subsequently, on remand to the Bankruptcy Court, on March 5, 2020, the Probate Estates sought leave from that court to conduct discovery regarding the issues identified by the U.S. District Court in its remand. Denying leave for discovery the same day, the Bankruptcy Court again abruptly entered a

Memorandum Opinion and Order on Remand from Appeal, without hearing, stating:

> The Court has considered the record on remand and finds that Shumaker ***inadvertently and*** non-negligently failed to disclose all of its connections with the Debtor, creditors, or other interested parties in this case. The Court further finds that no sanctions are warranted because the connections did not create a disqualifying conflict of interest, the nondisclosures were inadvertent, the connections were not material, Shumaker corrected the inadvertent nondisclosures, and Shumaker's representation of the Trustee greatly benefited the bankruptcy estate.

App., *infra*, 186 (emphasis added).

Again, the Bankruptcy Court simply ruled without taking any evidence, permitting discovery, or holding a hearing for argument—despite the remand's directive to determine "if there was an unintentional, negligent and/or inadvertent nondisclosure by Shumaker." The Bankruptcy Court did not explicate how Shumaker had inadvertently but non-negligently failed in its disclosures. In effect, the Bankruptcy Court absolved bankruptcy professionals in circumstances such as these, from the need for complete disclosure.

Given this perfunctory treatment in the Bankruptcy Court, on a second appeal to the U.S. District Court for the Middle District of Florida, on August 31, 2020, the Probate Estates filed a Motion to Supplement the Record on Appeal in that court, requesting

leave to supplement the record with a "Closing Checklist," independently discovered by the Probate Estates. With this Closing Checklist, the Probate Estates sought to establish that HCN held an indirect ownership interest in the Lyric operators of the Auburndale Oaks Health Care Center, making Shumaker's service as counsel for the bankruptcy trustee tantamount to a conflict of interest. Further, such suggested Shumaker's knowledge and intent with regard to the multiple failures to disclose its pertinent connections vis-à-vis HCN and Lyric.

On September 25, 2020, the U.S. District Court for the Middle District of Florida denied the motion for supplementation. App., *infra*, 251-256. In denying the motion, that court commented, "Shumaker does not dispute that it represented HCN, or that HCN was the landlord ***and*** owner of Lyric at one time"—such a state of affairs finding making any supplementation superfluous. App., *infra*, 255 (emphasis added). If HCN was the owner of Lyric, a clear conflict of interest existed. Yet, subsequently, on January 22, 2021, the U.S. District Court for the Middle District entered an Order affirming the Bankruptcy Court's latest Order denying disqualification, and again declining to hold a hearing. App., *infra*, 144-160.

The Probate Estates appealed this Order to the U.S. Court of Appeals for the Eleventh Circuit. Notably, ***in that court*** Shumaker took the position that the comment by the U.S. District Court for the Middle District of Florida—that "Shumaker does not dispute that it represented HCN, or that HCN was the landlord and

owner of Lyric at one time"—was scrivener's error. Given that this comment overtly buttressed the U.S. District Court's decision not to permit evidentiary supplementation, the Probate Estates argued in response that Shumaker was judicially estopped from taking this position.

On March 9, 2022, an oral argument in front of the Court of Appeals on the issue of Shumaker disqualification finally occurred. At argument, Respondent Steven Berman again characterized the "Shumaker does not dispute"-comment, as scrivener's error—yet cited no determination in the U.S. District Court for the Middle District of Florida in this regard. On September 18, 2023, a three judge panel of the Court for the Eleventh Circuit entered a lengthy Opinion affirming the U.S. District Court.

Despite the length of its Opinion, the Court of Appeals cursorily dismissed without explanation how or why judicial estoppel would not be applicable to the statement that "HCN was the landlord and owner of Lyric at one time." At the same time, the Court of Appeals did not make clear whether it believed this statement to be scrivener's error or not. Despite the undisputed evidence of the connections between HCN and Lyric, HCN's own connections with the bankruptcy, and any issue of judicial estoppel; the Court of Appeals considered Shumaker to have represented only a completely independent and detached landlord, with no relationship to the bankruptcy. The Court of Appeals held that Shumaker's representation of the landlord—landlord of a nursing home at the heart of

FLTCI's bankruptcy—did not *per se* create a conflict of interest, ***nor*** did Shumaker violate a duty to disclose its representation of HCN.

> We therefore hold that Shumaker was not disqualified from representing the Trustee of the Debtor's (FLTCI's) estate by virtue of its prepetition representation of HCN or HCN's connections with Lyric, HQM, or any of the other entities Wilkes has identified as rendering Shumaker disqualified. And we find nothing relating to Shumaker's post-petition representation of HCN that disqualified Shumaker from representing the Trustee. Shumaker's representation of HCN did not lessen the value of the bankruptcy estate, create a dispute between the bankruptcy estate and HCN, or create a circumstance that could be considered a bias against the bankruptcy estate. We therefore affirm the District Court's order as it relates to Shumaker's alleged disqualification under § 327(a).

App., *infra*, 138-139. The Probate Estates maintain that these holdings constitute error as a matter of law.

The Court of Appeals did not make clear whether a bankruptcy professional in the circumstance such as Shumaker found itself, has a duty, pursuant to FED.R.BANKR.P. 2014, of complete disclosure of all connections with debtors, creditors, or other parties, *e.g.*, whether Shumaker had a duty to disclose its representation of HCN. In effect, the lower court holdings signify that Shumaker had no such duty, as no court explained how a failure to disclose could be

inadvertent but non-negligent. Notwithstanding HCN's position as landlord of the nursing homes at the heart of the bankruptcy and HCN's status as a defendant in some of the underlying nursing home cases, it was not incumbent upon Shumaker to disclose its representation of HCN.

According to the Court of Appeals, as HCN was eventually dismissed from the underlying nursing home lawsuits, there existed no duty to disclose its representation of HCN, even though such lawsuits lay at the heart of the bankruptcy. App., *infra*, 140-141. Yet, this dismissal occurred pursuant to an agreed order filed in the trial court to dismiss without prejudice, rather than a determination on the merits. App., *infra*, 157-261.

The Court of Appeals further agreed with the Bankruptcy and U.S. District Courts: The fact that Shumaker had constructed, and was intertwined within, the master-tenant relationship between its long-standing client HCN and Lyric, a nursing home operating entity at the heart of the bankruptcy, was not a fact needful to effectuate full disclosure.

On October 10, 2023, the Probate Estates petitioned for rehearing or rehearing *en banc*. On November 14, 2023 the Court of Appeals for the Eleventh Circuit denied rehearing and rehearing *en banc*. App., *infra*, 1-2. This Petition for a Writ of Certiorari to the Court of Appeals for the Eleventh Circuit follows.

REASONS FOR GRANTING THE PETITION

A. The Decision Below Condones And Encourages The Withholding Of Full Disclosure Of Bankruptcy Professionals' Connections With Debtors, Creditors, Or Other Parties In Interest, In Violation of FED.R.BANKR.P. 2014.

Universally, U.S. courts sitting in bankruptcy have unfailingly admonished bankruptcy professionals to err on the side of caution in making disclosures of connections bearing upon disinterestedness, *i.e.*, to over-disclose rather than under-disclose. The term "connections" as used by the Bankruptcy Code is broad, and is strictly construed for purposes of Bankruptcy Rule 2014. *Balco Equities Ltd. v. Cohen, Estis and Ass'n* (*In re Balco Equities Ltd.*), 345 B.R. 87, 112 (Bankr.S.D.N.Y.2006) ("Failure to disclose direct or indirect relations to, connections with, or interest in the debtor violate . . . [s]ection 327(a) and Bankruptcy Rule 2014."). Persons to be employed "'must disclose all facts that bear on [their] disinterestedness and cannot usurp the court's function by choosing, *ipse dixit*, which connections impact disinterestedness and which do not. The existence of an arguable conflict must be disclosed if only to be explained away. . . .'" *In re C & C Demo, Inc.*, 273 B.R. 502, 507 (Bankr. E.D.Tex.2001) (quoting *In re Granite Partners, L.P.*, 219 B.R. 22, 35 (Bankr.S.D.N.Y.1998)). Professional disqualification and denial of compensation can be imposed for the failure to disclose, regardless of the consequences of the non-disclosure. *See Matter of C.F. Holding Corp.*, 164

B.R. 799, 806 (Bankr.D.Conn. 1994) (citing *In re Futuronics Corp.*, 655 F.2d 463 (2d Cir. 1981)).

Here, Shumaker had connections with HCN and Lyric, but did not disclose the former connection to the Bankruptcy Court for six years, and the latter connection not at all. So future applicants for bankruptcy estate employment are left to ponder whether Shumaker had held any duty to disclose these connections at all, thereby encouraging professional applicants to question whether their disclosure obligations really go that far. The Plaintiff Estates believe this to be a matter of first impression in this Court, on the relevant statutes and federal bankruptcy rules.

Clearly, the lower courts did not consider Shumaker to have been negligent in its failure to disclose its connections. However, the lower courts have created an anomalous holding, in their treatment of a finding of fact—the existence of negligence in disclosure, declaring the failure to disclose "inadvertent"—thereby condoning and encouraging less than the full disclosure required under FED.R.BANKR.P. 2014. In contrast, other bankruptcy courts have stated, "[n]egligent ***or*** inadvertent omissions 'do not vitiate the failure to disclose.'" *In re Park-Helena Corp.*, 63 F.3d 877, 881 (9th Cir. 1995) (emphasis added) (quoting *In re Maui 14K, Ltd.*, 133 B.R. 657, 660 (Bankr.D.Haw.1991)). Shumaker has taken the position that it never occurred to them that disclosure of the HCN connections was required. Upon it being pointed out, Shumaker immediately disclosed. Yet, good faith, whether present here or not, has not traditionally been the test for

bankruptcy employment. Rather, because the requirements of FED.R.BANKR.P. 2014 are mandatory, the issue is whether it ***should have*** ***occurred to Shumaker*** that they had a duty to disclose their representation of HCN. *See Halbert v. Yousif*, 225 B.R. 336, 345-46 (E.D. Mich. 1998).

Simply put, there is either a duty to disclose a particular connection, or there is not. If there is no such duty, then the failure to disclose is not an "inadvertent" failure; it is not a failure at all. On the other hand, aside from a *de minimis* clerical error, if there exists a duty to disclose, the failure so to do necessarily constitutes, at the very least, negligence.

B. The Decision Below Effectively Shifts The Burden Regarding Disclosing Bankruptcy Professionals' Conflicts Of Interest From The Bankruptcy Professional Applicant To The Parties.

The lower courts effectively placed a burden of demonstrating Shumaker's conflicts of interest upon the Probate Estates. Yet, U.S. courts sitting in bankruptcy have been universally clear in specifying that compliance with FED.R.BANKR.P. 2014 is the responsibility and burden of the bankruptcy professional alone. *See, e.g.*, *In re Huddleston*, 120 B.R. 399, 400-01 (Bankr.E.D.Tex. 1990) (quoting *In re: Peoples Sav. Corp.*, 114 B.R. 151, 154 (Bankr. N.D.Ill. 1990)). In determining whether a bankruptcy professional's affidavit of disinterestedness contains adequate disclosures,

the initial burden of proof is upon the affiant. *In re Cleveland Trinidad Paving Co.*, 218 B.R. 385, 389 (Bankr. N.D. Ohio 1998). The affiant is obligated to prove that a full, candid, and complete disclosure of facts relevant to determining eligibility for bankruptcy estate employment. *Id.* The adequacy of disclosure cannot be judged by whether other parties made inquiry. *In re Matco Electronics Group, Inc.*, 383 B.R. 848, 853-54 (Bankr.N.D.N.Y. 2008) (denying professionals fees, for failure to fully disclose connections).

> FED.R.BANKR.P. 2014 is not intended to condone a game of cat and mouse where the professional seeking appointment provides only enough disclosure to whet the appetite of the [United States Trustee], the court or [other parties], and then the burden shifts to those entities to make inquiry in an effort to expand the disclosure.

Id. "Coy or incomplete disclosures which leave the court to ferret out pertinent information from other sources are not sufficient." *In re Saturley*, 131 B.R. 509, 517 (Bankr.D.Me.1991). As the court in *In re Leslie Fay Companies, Inc.*, 175 B.R. 525 (Bankr.S.D.N.Y. 1994) stated, "[s]o important is the duty of disclosure that the failure to disclose relevant connections is an independent basis for the disallowance of fees or even disqualification." *Id.* at 533. Subsequent disclosures, made after other parties unveiled the professional's connections to the court, do not cure a failure to disclose from the outset. *In re Universal Bldg. Products*, 486 B.R. 650, 664 (Bankr.D.Del. 2010).

Here, the Court of Appeals effectively relieved Shumaker of the duty of plainly establishing its disinterestedness on the record. Indeed, the Court of Appeals, in a footnote, indicated that it was uncertain as to whether Shumaker had a conflict of interest, or even committed a fraud on the U.S. District Court. The Plaintiff Estates believe this to be a matter of first impression in this Court, on the relevant statutes and federal bankruptcy rules.

> If the statement that Wilkes points to was not a scrivener's error, Shumaker abused the judicial process because its statement was flatly contrary to the position it previously took in the Bankruptcy Court and in the District Court on appeal.

App., *infra*, 137. Again, the Court of Appeals did not make clear whether it believed the "Shumaker does not dispute"-comment to have been scrivener's error or not, effectively relieving Shumaker of the burden. On the other hand, the Court of Appeals faulted the Probate Estates for not "getting to the bottom" of whether HCN owned the Lyric nursing homes.

> If the Probate Estates had moved the District Court to reconsider, we have no doubt the District Court would have gotten to the bottom of the apparent inconsistency—created by the "Shumaker does not dispute" statement.

App., *infra*, 135.

Thus, in addition to shifting the burden off the bankruptcy professional to a creditor on an issue of the

former's disinterestedness, the Court of Appeals' treatment flies in the face of the duty of courts sitting in bankruptcy regarding professional fee applications. Even in the absence of an objection, the bankruptcy court has an independent duty to review fee applications to protect the estate "lest overreaching . . . professionals drain it of wealth which by right should inure to the benefit of unsecured creditors." *In re Busy Beaver Bldg. Ctrs., Inc.*, 19 F.3d 833, 844 (3d Cir.1994); *accord In re Spanjer Bros., Inc.*, 191 B.R. 738, 747 (Bankr.N.D.Ill.1996); *In re Poseidon Pools of America, Inc.*, 180 B.R. at 728; *In re Ferkauf, Inc.*, 42 B.R. 852, 853 (Bankr.S.D.N.Y.1984) (Bankruptcy Court is "duty bound thoroughly to review fee applications, *sua sponte* . . . "), *aff'd*, 56 B.R. 774 (S.D.N.Y.1985). In sum, as the applicant always bears the burden of proof on its claim for compensation, *In re Beverly Mfg. Corp.*, 841 F.2d 365, 371 (11th Cir.1988); *In re Spanjer Bros., Inc.*, 191 B.R. at 747; *In re Bolton*, 43 B.R. 598, 600 (Bankr.E.D.N.Y.1984), it is up to the bankruptcy courts—not the creditors or other parties—to affirmatively police this burden.

C. The Decision Below Undermines Faith In The Integrity Of The Bankruptcy System.

The Bankruptcy Court made two ironic comments in its Opinion and Order of April 16, 2020, denying the Probate Estates' motion to disqualify Shumaker.

> HCN was never a target of any potential litigation by the Trustee, and was never discussed by the Trustee or the Probate Estates' attorneys.

App., *infra*, 177.

> The Probate Estates did not provide any authority for their position that HCN, as landlord, was liable to the Probate Estates for the actions of the nursing home operators.

App., *infra*, 183.

The former comment constitutes a tacit admission. Shumaker was employed for the purpose of assisting the bankruptcy trustee in litigation, logically to include selection of targets for recouping bankruptcy estate funds. It would have been Shumaker's duty as bankruptcy counsel to explore HCN as a possible target for funds for the bankruptcy estate. HCN being Shumaker's client, it is easy to see why Shumaker would not so explore and would never "discuss" this potentiality.

The latter comment also misses the point. It ignores the possibility that HCN could have been liable to the Probate Estates, and even more crucially, to FLTCI directly, and that it would have been up to the bankruptcy trustee and her counsel to at least consider the possibility. They obviously did not. Shumaker was employed to assist the bankruptcy trustee in engendering theories of possible joint liability with other parties, including landlords, for the debts of the bankruptcy estate.

The federal institution of bankruptcy relies upon its integrity, for public confidence in its fundamental fairness, to include a rigorous policing such that insiders are not seen to manipulate the Bankruptcy Code's provisions to privilege themselves. *See In re CNC Payroll, Inc.*, 491 B.R. 454, 456 (Bankr.S.D.Tex. 2013) (duties of Chapter 7 trustee being of such great import in preserving the integrity and efficiency of bankruptcy system, accusations or appearances of impropriety by trustees should be investigated by the courts in order to uphold public confidence in the integrity of bankruptcy system). "Defective disclosure is not a minor matter. It goes to the heart of the integrity of the bankruptcy system. . . ." *In re B.E.S. Concrete Prods., Inc.*, 93 B.R. 228, 236-38 (Bankr.E.D.Cal.1988). The course of proceedings below threatens this integrity and public confidence. The Plaintiff Estates believe this to be a matter of first impression in this Court, on the relevant statutes and federal bankruptcy rules.

Despite the fact that Shumaker was tardy by six years in disclosing its relationship to the admitted landlord of the nursing homes at the heart of this bankruptcy, the courts below took absolutely no steps to bring all the facts to light which might have had a bearing on Shumaker's disinterestedness. Put bluntly, they inadvertently ran interference for Shumaker, taking no evidence, allowing no discovery, and, save for oral argument in the Court of Appeals, holding no hearings otherwise. The courts below simply treated the Probate Estates as gadflies.

Per FED.R.BANKR.P. 7026, FED.R.CIV.P. 26 on discovery applies in adversary proceedings, "unless the [bankruptcy] court directs otherwise." FED.R.BANKR.P. 9014. This application is the same for contested matters. *In re Szadkowski*, 198 B.R. 140, 141 (Bankr.D.Md. 1996). Bankruptcy courts "directing otherwise" has most typically been invoked to ***expand*** discovery, rather than used to squelch it. *See, e.g.*, *Matter of M4 Enterprises, Inc.*, 190 B.R. 471, 476 (Bankr.N.D.Ga. 1995) (given that an allegation of partisanship had been levelled against the bankruptcy trustee, thereby threatening the proceeding with an "aura of impropriety," prompted allowing open-air discovery conducted pursuant to FED.R.BANKR.P. 2004 over the more limited discovery available under Federal Rules of Civil Procedure).

Regarding the refusal of the bankruptcy and U.S. District Courts to hold hearings on the contested matter—and in specific reference to the "Shumaker does not dispute"-comment—the Court of Appeals commented in footnote,

> [w]e assume that at such a hearing, Shumaker would introduce the documents establishing HCN's ownership of the real estate, and its leases with those owning and operating the nursing homes, into evidence.

App., *infra*, 136.

This comment is doubtless true. By the same token, it would have been equally most assured that the Probate Estates would have marshalled all information

they had, using whatever tools afforded them, to question whether Shumaker was more intertwined than the latter revealed, and, in any event, why Shumaker had not made its HCN disclosure much sooner.

CONCLUSION

The petition for a writ of certiorari should be granted. Subsequent to grant, this Court should vacate the Order of the Court of Appeals for the Eleventh Circuit, and remand this case with instructions to the lower courts to afford the Probate Estates discovery and hearing, and reinstate the burden upon Shumaker for complete disclosure of all of Shumaker's connections with the debtor, creditors, and parties-in-interest to the bankruptcy.

Respectfully submitted,

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