No. 17-_____

In The
Supreme Court of the United States

BRENT NICHOLSON, et al.,

Petitioners,

v.

THRIFTY PAYLESS, INC., and
RITE AID CORPORATION,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Courts of appeals are divided on the question presented in this case and left open in *New Hampshire v. Maine*; whether a debtor who has inadvertently failed to disclose the existence of a potential claim in a bankruptcy petition should be estopped from litigating that claim because she is attributed a presumption of deceit where she had knowledge of the facts that gave rise to the undisclosed claim without regard to her subjective intent.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6 Petitioners NMP Concord II, LLC; San Pablo Cruise, LLC; Oakley Dokley, LLC; Holy Rose, LLC; Sunnyboy, LLC; Full to the Brem, LLC; High Ho Silver-Dale, LLC; Whateverett, LLC; The Right Angleles, LLC; No One to Blaine, LLC; and Poulsbo Holdings, LLC disclose they are limited liability companies with no parent corporation(s) and that no publicly held corporation owns 10 percent or more of their stock.

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The Ninth Circuit's order summarily affirming the district court is unpublished and appears at App. 1-10. The Ninth Circuit's order denying Nicholson's petition for rehearing *en banc* is unpublished and appears at App. 48. The district court's order granting defendant's motion for summary judgment and order are unpublished and appear at App. 11. The district court's order granting defendant's motion for attorney's fees is unpublished and appears at App. 34. The district court's order denying plaintiff's motion for reconsideration is unpublished and appears at App. 46.

JURISDICTION

The Ninth Circuit entered its order affirming the district court on June 29, 2017. App. 1-10. A timely petition for rehearing *en banc* was denied by the Ninth Circuit on August 25, 2017. App. 48-49. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

11 U.S.C. § 521(a)(1)(b) provides in relevant part:

> The debtor shall file . . . (i) a schedule of assets and liabilities.

11 U.S.C. § 521(a)(1)(b)(i).

FED. R. BANKR. P. 1009(a) provides a general right to amend:

> A voluntary petition, list, schedule, or statement may be amended by the debtor as a matter of course at any time before the case is closed.

FED. R. BANKR. P. 1009(a).

11 U.S.C. § 350(b) provides in relevant part:

> A case may be reopened in the court in which such case was closed to administer assets, to accord relief to the debtor, or for other cause.

11 U.S.C. § 350(b).

STATEMENT OF THE CASE

This case presents a square circuit split on an important and increasingly frequent recurring question regarding the viability of a plaintiff's meritorious cause of action and the intersection of bankruptcy and its effect on that claim that has remained an open question in need of clarification after this Court's decision in *New Hampshire v. Maine*, 532 U.S. 742, 121 S. Ct. 1808, 149 L. Ed. 2d 968 (2001) on the doctrine of judicial estoppel.

When *New Hampshire v. Maine* was decided, the issue of judicial estoppel was rarely litigated. There has since been a flurry of cases[1] throughout the circuits

[1] As detailed in Section IV, below, judicial estoppel was the subject of just 206 cases from 1988 through 2003. That number

where savvy defendants have sought to dispose of litigation on the merits where a plaintiff has filed a bankruptcy and have failed to disclose or adequately disclose the existence of the claim.

This Court set forth factors to be considered in the application of judicial estoppel on a straightforward boundary dispute where New Hampshire took a position in litigation against Maine that was the directly opposite position New Hampshire had taken decades earlier disputing the same boundary. *New Hampshire v. Maine*, 532 U.S. 742, 749-50 (2001). The case was a model case for judicial estoppel warranting application to bar New Hampshire from taking a position that contradicted the very position it has succeed upon in the litigation years earlier. Allowing the state to take an adverse position after it succeeded on the first inconsistent position would call into question the "integrity of the judicial process [and judicial estoppel is intended to prohibit] parties from deliberately changing positions according to the exigencies of the moment." *New Hampshire*, 532 U.S. at 749-50.

When analyzing factors to be considered before application of the doctrine, however, the Court created an exception to its application where an inconsistent position taken by a litigant was mistaken or inadvertent: "We do not question that it may be appropriate to resist

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more than doubled during 2004-2006. But in the past decade the doctrine has been the subject of nearly 18,000 opinions in the federal courts.

application of judicial estoppel 'when a party's prior position was based on inadvertence or mistake.'" *Id.* 532 U.S. at 753.

There is a substantial and entrenched five to six split in the circuits over interpretation of what this Court's exception for "inadvertence or mistake" requires for application of the doctrine when a litigant has inconsistently disclosed the existence of a claim in a bankruptcy.

Five circuits[2] will consider evidence of a debtor's subjective intent with regard to inconsistent disclosures—and if evidence of inadvertence exists she will not be barred from pursuing that claim against a bad-actor. But in six circuits,[3] that debtor will be estopped from doing so because her knowledge of the claim and failure to disclose it satisfies a presumption of deceit without regard to evidence of her subjective mistake or inadvertence.

The split should be resolved in favor of the five circuits examining a debtor's subjective intent to mislead the court "because that question is separate from and not answered by whether the plaintiff voluntarily, as

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[2] As set forth in detail below in Section II, Courts that review the totality of the circumstances and apply the common understanding of inadvertence and mistake include the Fourth, Sixth, Seventh, Ninth, and most recently the Eleventh Circuit.

[3] The six circuits that infer deceit based upon a debtor's knowledge of the events giving rise to a claim and her failure to disclose it in her bankruptcy include the First, Third, Fifth, Eighth, Tenth, and District of Columbia Circuit court of appeals.

opposed to inadvertently, omitted assets." *Slater v. U.S. Steel Corporation*, 871 F.3d 1174 (11th Cir. 2017). To presume, otherwise then is irreconcilable with this Court's exception in *New Hampshire*.

Barring a debtor from pursuing claims on the basis of judicial estoppel is an extraordinary remedy that provides a windfall to the defendant through dismissal of the litigation and punishes not just the debtor, but her creditors as well—creditors who would otherwise be entitled to a portion of the recovery from the suit.

The circuits applying a presumption of deceit justify the punitive results and effect on creditors because, they argue, the result deters or incentivizes debtors to provide full and complete disclosures in future bankruptcies. But those justifications fail to recognize a lay person's understanding of the contingent nature of a claim and when it may be legally deemed an asset. Few debtors are familiar with what may be common understanding for legal practitioners that a right to pursue a cause of action and potentially recover damages exists upon the date of injury. In reality, and as the facts in the various cases throughout the circuits exhibit—debtors rarely believe a right to pursue a cause of action is an asset requiring disclosure until there is an agreement or a court order making it so.[4] The potential recovery of a lawsuit is ambiguous

[4] In fact, many of the debtors claim they informed their counsel of the existence of the claim and relied upon the knowledge and advice of counsel. *See, e.g.*, *Queen v. TA Operating, LLC*, 734 F.3d 1081 (10th Cir. 2013). Yet, these courts ignore the subjective

until it is certain as surely all litigators have experienced. It makes sense then that a court should look beyond a plaintiff's omission in determining whether the plaintiff intended to misuse the judicial process. *Slater*, 871 F.3d at 1186.

Neither will deterrence ensure necessary disclosure because "[o]missions frequently occur" in the scheduling of debtor's assets, and "inconsistent statements made under oath are ubiquitous in litigation. . . ." *Slater v. U.S. Steel Corporation*, 820 F.3d 1193, 1250 (11th Cir. 2016), *rehearing en banc granted, opinion vacated*, August 30, 2016.

In contradiction of its own precedent, the Ninth Circuit panel in this case expanded judicial estoppel to apply not only to Nicholson, who was responsible for the inconsistent disclosures in his bankruptcy, but it extended the doctrine to bar the meritorious claims of the innocent LLCs he managed, on the erroneous conclusion they have privity with Nicholson.

Brett Nicholson was a preferred developer building Rite Aid pharmacies. Nicholson filed a personal chapter 11 Bankruptcy on April 22, 2010, due in part to Rite Aid Corporation's termination of leases and guarantees with limited liability companies managed by Mr. Nicholson to develop the pharmacies. *See* App. 2.

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evidence of inadvertence and infer intent to conceal when there is none.

The bulk of Nicholson's assets and liabilities were tied up in the various LLCs. App. 12.

Nicholson initially disclosed his interest[5] in six LLCs in his schedules. Those LLC's subsequently pursued causes of action against Rite Aid. When Nicholson disclosed the interests, he reported that the six LLCs had a current value of $0.00, explaining each of the entities was "completely underwater based on the value of the property and the amount of secured debt." *Id.*[6] At issue, however, was Nicholson's failure to *initially* disclose the existence of four other LLCs.[7] *Id.* The district court asserted: "Plaintiffs have not attempted to explain why they failed to disclose [the LLCs] or why they failed to disclose the potential claims [the LLCs] had against Rite Aid," but the district court recognized that all ten of the LLCs in question were ultimately disclosed in the bankruptcy through the "Periodic Report." *Id.* The Periodic Report disclosed the names of the businesses, Nicholson's interest in the LLCs, and the potential claims that each business had against Rite Aid. *See, e.g.*, App. 13-14.[8]

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[5] Debtors are obligated to list all personal interests in their bankruptcy schedules, which includes all membership interests in business entities. While the business entities do not become property of the estate themselves, the debtor's interest in the business becomes property of the estate.

[6] Defendants did not provide evidence that the valuation analysis was defective at the time it was made.

[7] San Pablo Cruise, Oakley Dokely, Holy Rose, or Sunnyboy.

[8] For defendant Holy Rose, LLC, for example, Nicholson disclosed his 85 percent interest and stated: "Brent Nicholson lost control of this property in 2009. This entity will be filing a lawsuit

The Periodic Disclosures were also expressly referenced in the plan's Disclosure Statement issued to all creditors who would decide whether to accept or reject the debtor's proposed plan before it was confirmed. App. 14.[9] The proposed plan also expressly referenced the potential forthcoming litigation.[10]

Nicholson's creditors approved the proposed plan, which was confirmed on August 8, 2011, months after the corrected disclosures. *See, e.g.*, App. 15. After plan confirmation, the Trustee was monitoring the LLCs' litigation to recover for the benefit of the creditors. *See, e.g.*, App. 20-21.

Applying judicial estoppel to bar Nicholson and the LLC's claims against Rite Aid, the district court disregarded Nicholson's claims that any initial failure to disclose his interest in the four entities was inadvertent because he ultimately self-corrected and disclosed the existence of the four LLCs and their

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against Rite Aid Corporation for Breach of Contract." Notably, his timely disclosed interests in the first six entities with potential claims against Rite Aid were listed in the same fashion.

[9] Although the four LLCs were not expressly listed in the plan, the plan provided that unexempted assets, which necessarily included the four previously undisclosed business interests because they did not appear on the scheduled exemptions, would be transferred to the Liquidation Trust.

[10] "One or more of these entities may have contingent litigation claims against . . . Rite Aid, which may or may not be prosecuted after confirmation. In the event the Reorganized Debtors do commence such litigation and the Liquidation Trustee abandons the estate's direct claims against . . . Rite Aid, then 10% of any recovery will be paid to the Liquidation Trust."

potential causes of action before the plan was confirmed. Without considering Nicholson's subjective intent,[11] the district court found the subsequent disclosures were inadequate because the assets were not included on his initial schedules. *See, e.g.*, App. 18.

The district court further disregarded Nicholson's assertion that he received no advantage from the inconsistent disclosure because the trustee responsible for liquidating Nicholson's assets for the benefit of creditors was aware of the potential claims of all ten entities.[12] The district court contradictorily concluded the only inference possible was that the Judge was persuaded that the LLCs had no viable claims." *Id.* at 21.

Finally, although the LLCs were not debtors in the bankruptcy and were not parties to Nicholson's alleged inconsistent disclosures, the district court found they stood in privity to Nicholson to justify application of the doctrine to bar the LLCs' claims against Rite Aid.

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[11] Nicholson's bankruptcy counsel provided a detailed declaration regarding common practice supporting the valuation. App. 15, 19-20. The district court also failed to recognize that Nicholson's previously disclosed assets were derivative interests in businesses and those businesses had potential litigation claims. Instead, the court treated the entities' claims as though they were direct claims belonging to Nicholson. This was error, because where a debtor owns a business interest, that interest may have potential claims of value, but the entity's value is usually net of assets and liabilities. *See, e.g.*, App. 19-20.

[12] "There is some indication that the Liquidating Trustee had additional information regarding the existence and nature of the claims, but it is unclear what the Liquidating Trustee was told." App. 20-21.

App. 23-24. In a subsequent order, the district court granted, in part, Defendant's motion for attorney's fees, and found fees against the Plaintiff LLCs and also against Nicholson personally.[13] App. 42-45.

The panel's affirmance on these issues is inconsistent with the Ninth Circuit's own precedent in *Ah Quin v. County of Kauai Dept. of Transp.*, 733 F.3d 267 (9th Cir. 2013), because it neglected to analyze corrective measures taken by Nicholson to remedy initial failures to disclose and did not consider the evidence in the light most favorable to Nicholson. An omitted asset from a bankruptcy schedule is not the kind of changed position in accord with the exigencies of the moment that judicial estoppel was intended to prevent, and its application in this context does nothing to protect the bankruptcy process. On the contrary, the windfall provided to the defendant Rite Aid in this case came at the expense of the innocent non-debtor businesses in addition to all the parties in bankruptcy court—the creditors, the trustees, and the debtor.

REASONS FOR GRANTING THE PETITION

This case presents a critical issue of importance regarding the viability of a debtor's meritorious litigation claims when a debtor has pursued remedies under

[13] The finding was erroneous because Nicholson was not a party to the contracts and did not pursue causes of action against Defendants that would have entitled him to fees had he prevailed. The Ninth Circuit remanded on this ground.

the bankruptcy laws and inadvertently failed to disclose the existence of the claim as an asset.

This Court's decision in *New Hampshire v. Maine* created an exception to the doctrine of judicial estoppel based upon mistake: "[I]t may be appropriate to resist application of judicial estoppel when a party's prior position was based on inadvertence or mistake." *New Hampshire*, 532 U.S. at 753 (internal citations omitted).

An entrenched and substantial conflict among the courts of appeals has since developed over the analysis required to determine if "a party's prior position was based on inadvertence or mistake." The conclusion is so critical, however, that it makes the difference between a debtor who will be able to pursue a valid cause of action and return value to her estate and one who will not. Debtors in five circuits benefit from an analysis of their subjective intent—but debtors in six circuits are presumed to have deceived the courts without any consideration of their actual intent or evidence of mistake.

The application of the doctrine based upon a presumption of deceit has extraordinary consequences on the debtor and her creditors, resulting in a windfall provided only to the alleged bad actor. These decisions cannot be squared with the equitable doctrine as intended and the exception set forth by this Court in *New Hampshire v. Maine*:

> Just as equity frowns upon a plaintiff's pursuit of a claim that he intentionally concealed

> in bankruptcy proceedings, equity cannot condone a defendant's avoidance of liability through a doctrine premised upon intentional misconduct without establishing such misconduct.

Slater, 871 F.3d at 1188.

I. *New Hampshire v. Maine* Recognized Judicial Estoppel Ought Not Apply Where the Inconsistent Disclosure was Inadvertent or Mistaken.

In *New Hampshire v. Maine*, 532 U.S. 742 (2001), this Court analyzed the doctrine of judicial estoppel recognizing it was a rule that "generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase." *New Hampshire*, 532 U.S. at 749 (internal citations omitted).

This Court recognized the inequity of allowing a party to change its position based upon its circumstance, particularly at the detriment of a party who acquiesced as a result of the first position taken:

> [W]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him.

Id. at 749 (citing *Davis v. Wakelee*, 156 U.S. 680, 689, 15 S. Ct. 555, 39 L. Ed. 578 (1895).

The purpose of the doctrine is "to protect the integrity of the judicial process." *Id*. Recognizing that circumstances where it is appropriately invoked are not reducible to any general formulation or principle,[14] this Court highlighted several factors that inform the decision:

"First, a party's later position must be 'clearly inconsistent' with its earlier position." *Id.* at 750 (internal citations omitted).

Second, courts inquire whether the party succeeded in persuading a court to accept the party's earlier position (because judicial acceptance of the later position would evince that either the first or second court was misled). *Id.*

With regard to the second factor, the Court reasoned: "Absent success in a prior proceeding, a party's later inconsistent position introduces no risk of inconsistent court determinations, and thus poses little threat to judicial integrity." *Id.* at 750-51.

Third, courts consider whether the party seeking to assert an inconsistent position would derive an

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[14] The Court recognized that by "enumerating these factors, we do not establish inflexible prerequisites or an exhaustive formula for determining the applicability of judicial estoppel." *New Hampshire*, 532 U.S. at 751.

unfair advantage or impose an unfair detriment to the opposing party if not estopped. *Id.* at 751.

The Court made clear there was an exception to application of the doctrine where an inconsistent position was mistaken: "We do not question that it may be appropriate to resist application of judicial estoppel 'when a party's prior position was based on inadvertence or mistake.' " *Id.* at 753. The Court next inquired as to whether New Hampshire's prior position could have been inadvertent.

Applying judicial estoppel based upon New Hampshire's clearly inconsistent statements in two litigation matters on the same subject, the Court found evidence in the record contradicted any claim of inadvertence or mistake: "The pleadings [in the earlier case] show that New Hampshire did engage in 'a searching historical inquiry' into the [subject of the dispute]." *New Hampshire*, 532 U.S. at 753.

Despite the Court's clear exception to the application of judicial estoppel and its warning that the doctrine should not be applied with "inflexible prerequisites," six circuits have instead applied the three factors narrowly in the bankruptcy context.

Those circuits, as set forth in detail below, ignore the issue of inadvertence and ask only whether the debtor knew about the potential claim when she filed her bankruptcy and failed to disclose that claim. The rationale in these circuits is irreconcilable with *New Hampshire v. Maine* and expands the doctrine of judicial estoppel in a way it was never intended.

II. There is an Entrenched Five to Six Conflict in the Circuits on Whether Subjective Intent of Inadvertence or Mistake is Relevant to the Application of Judicial Estoppel.

The circuit courts of appeals are evenly split regarding the element of mistake or inadvertence as applied to judicial estoppel addressed by *New Hampshire v. Maine*, in cases involving inconsistent bankruptcy disclosures. Five circuits hold that subjective intent of motive to conceal and gain advantage is required to determine inadvertence or mistake, and six circuits hold that lack of mistake or inadvertence is presumed where the debtor has knowledge of the existence of the claim, yet fails to disclose it without regard to debtor's actual intent.

A. Five Circuits Hold That an Inquiry into the Subjective Intent of the Debtor is Required.

Five circuits—the Fourth, Sixth, Seventh, Ninth, and most recently, the Eleventh—have issued opinions on the issue that each consider the totality of the circumstances and apply the plain meaning of the terms "mistake and inadvertence" when evaluating a debtor's subjective intent to conceal or to make a mockery of the judicial system.

The most recent circuit to address the issue was the Eleventh Circuit in its opinion in *Slater v. U.S. Steel*, 871 F.3d 1174 (11th Cir. 2017). The circuit

reaffirmed its precedent that a district court could apply judicial estoppel to bar a plaintiff's civil claim if it finds the plaintiff *intended* to make a mockery of the judicial system—it overruled its prior precedent that permitted a district court to infer intent to misuse the courts without considering the individual plaintiff and the circumstances surrounding the nondisclosure. *Slater*, 871 F.3d at 1176. The Eleventh Circuit explained:

> We hold today that when determining whether a plaintiff who failed to disclose a civil lawsuit in bankruptcy filings intended to make a mockery of the judicial system, a district court should consider all the facts and circumstances of the case. The court should look to factors such as the plaintiff's level of sophistication, his explanation for the omission, whether he subsequently corrected the disclosures, and any action taken by the bankruptcy court concerning the nondisclosure. We acknowledge that in this scenario the plaintiff acted voluntarily, in the sense that he knew of his civil claim when completing the disclosure forms. But voluntariness alone does not necessarily establish a calculated attempt to undermine the judicial process.

Id. at 1176-77. In so holding, the Eleventh Circuit reversed its precedent to align itself with this Court's opinion in *New Hampshire*, and departed from the circuits attributing a presumption of deceit finding a failure to disclose is "inadvertent" only when the debtor

either lacks knowledge of the undisclosed claims or has no motive for their concealment. *Id.* at 1189.

The *Slater* Court recognized the impossibility for a plaintiff to establish inadvertence where attributed a presumption of deceit:

> No plaintiff who omitted civil claims from bankruptcy disclosures will be able to show that he acted inadvertently because . . . the plaintiff always will have knowledge of his pending civil claim and a potential motive to conceal it due to the very nature of bankruptcy. The Supreme Court has told us that judicial estoppel must not be applied to an inadvertent inconsistency, *New Hampshire*, 532 U.S. at 753, 121 S. Ct. 1808, yet under our precedent inadvertence places no meaningful limit on the doctrine's application.

Slater, 871 F.3d at 1189.

The Eleventh Circuit's decision on Slater was consistent with at least four other circuit courts. The Seventh Circuit—as set forth in *Spaine v. Cmty. Contacts, Inc.*, 756 F.3d 542, 548 (7th Cir. 2014)—reversed application of judicial estoppel because the civil defendant "needed to show more than an initial nondisclosure on a bankruptcy schedule." The Seventh Circuit reasoned that if there was "undisputed evidence" that the debtor intentionally concealed her claim, the court would affirm application of judicial estoppel. Instead, it found "the district court overlooked Spaine's testimony about her oral disclosure during the bankruptcy." The circuit recognized:

> Honest mistakes and oversights are not unheard of [in bankruptcy]. That's one reason why trustees meet with debtors. The disclosures are not necessarily final on this issue. The bankruptcy code explicitly provides for further investigation into the debtor's financial affairs, 11 U.S.C. §§ 341, 704(a)(4), and contemplates amendments to the debtor's initial schedules[.]

Spaine, 756 F.3d at 548. *See also Biesek v. Soo Line R.R. Co.*, 440 F.3d 410 (7th Cir. 2006), recognizing that the application of judicial estoppel has the effect of landing another blow on the creditors. Instead of using such a blunt tool, the Seventh Circuit reasoned if a debtor was intentionally concealing assets, other tools existed to penalize the debtor—like denial of discharge—that were more appropriate then applying judicial estoppel and "vaporizing assets that could be used for the creditors' benefit." *Id.*

Similarly, the Sixth Circuit in *Javery v. Lucent Technologies*, 741 F.3d 686 (6th Cir. 2014) reflected its position:

> [J]udicial estoppel does not apply where the prior inconsistent position occurred because of mistake or inadvertence. Failure to disclose a claim in a bankruptcy proceeding may also be excused where the debtor lacks a motive to conceal the claim, or where the debtor does not act in bad faith.

Id. at 698 (internal citations omitted) (concluding that "any omission was almost certainly due to carelessness

or inadvertent errors as opposed to intentional, strategic concealment or impermissible gamesmanship.").[15] *See also Eubanks v. CBSK Fin. Grp., Inc.*, 385 F.3d 894, 899 (6th Cir. 2004) (reversing the district court's application of judicial estoppel where plaintiffs omitted the claim because defendant "provide[d] no additional evidence that Plaintiffs demonstrated fraudulent intentions towards the court").

The Sixth Circuit called for restraint and "urged courts to apply judicial estoppel with caution to avoid impinging on the truth-seeking function of the court." *Id.*

The Fourth Circuit also applies an analysis of the totality of the circumstances before inferring a debtor had the requisite intent to conceal. *Skrzecz v. Gibson Island Corp.*, CIV.A. RDB-13-1796, 2014 WL 3400614, at *6 (D. Md. July 11, 2014) (following *Whitten v. Fred's Inc.*, 601 F.3d 231, 242 (4th Cir. 2010)[16] to find that "the Fourth Circuit has analyzed the issue of intent in terms of whether there is evidence of bad faith" and holding under the totality of the circumstances there

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[15] The Sixth Circuit also applied a *de novo* standard to review the district court's application of judicial estoppel, despite noting that the majority of circuits apply an abuse of discretion standard and calling into question the continuing viability of the standard. The court explained the Supreme Court did not instruct that an abuse of discretion standard was appropriate in *N.H. v. Maine* and absent "a more definitive statement from the Supreme Court, this Court is bound by its own precedent." *Javery v. Lucent Technologies*, 741 F.3d 686, 697 (6th Cir. 2014).

[16] Abrogated in part on other grounds by *Vance v. Ball State Univ.*, ___ U.S. ___, 133 S. Ct. 2434, 2443, 186 L. Ed. 2d 565 (2013).

is insufficient basis to infer that debtor acted intentionally by failing to disclose the existence of her claim).

In 2013, the Ninth Circuit issued its decision clarifying the effect of judicial estoppel on inadvertent nondisclosure in bankruptcy in *Ah Quin v. County of Kauai Dept. of Transp.*, 733 F.3d 267, 276 (9th Cir. 2013). In its opinion, the Ninth Circuit rejected the "presumption of deceit" set forth by its sister circuits where the debtor has reopened the bankruptcy proceedings and corrected the initial error explaining that "plaintiff's knowledge of the pending claim and the universal motive to conceal a potential asset" do not establish that the debtor harbored subjective intent to conceal:

> In these circumstances, rather than applying a presumption of deceit, judicial estoppel requires an inquiry into whether the plaintiff's bankruptcy filing was, in fact, inadvertent or mistaken, as those terms are commonly understood. Courts must determine whether the omission occurred by accident or was made without intent to conceal. The relevant inquiry is not limited to the plaintiff's knowledge of the pending claim and the universal motive to conceal a potential asset—though those are certainly factors. The relevant inquiry is, more broadly, the plaintiff's subjective intent when filling out and signing the bankruptcy schedules.

Ah Quin, 733 F.3d at 276-77.

B. Six circuits hold an intent to deceive exists whenever a plaintiff omits a civil claim as an asset in bankruptcy.

At least six[17] other circuits have endorsed the inference that a plaintiff who omitted a claim in her bankruptcy schedules necessarily intended to manipulate the judicial system. The First, Third, Fifth, Eighth, Tenth, and District of Columbia Circuits effectively treat the fact of the debtor's omission as establishing the requisite intent to make a mockery of the system thus warranting application of judicial estoppel. *See, e.g.*, *Slater*, 871 F.3d at 1180 (describing the effect of the rationale).

These circuits apply a presumption of deceit and disregard a debtor's subjective evidence of inadvertence or mistake if the debtor has knowledge of the existence of a claim or a potential claim and yet fails to disclose it on her bankruptcy schedules. These courts justify the extraordinary remedy as an incentive or warning for future debtors to provide truthful disclosures of their assets. *See, e.g.*, *Moses v. Howard University Hosp.*, 606 F.3d 789 (D.C. Cir. 2010).

The Eighth Circuit most recently held that debtors have an obligation to report lawsuits filed during the life of a chapter 13 plan and that failure to do so

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[17] In addition, the Second Circuit appears to follow the line of reasoning in the Fifth Circuit in *BPP Illinois, LLC v. Royal Bank of Scotland Grp. PLC*, 859 F.3d 188, 192 (2d Cir. 2017) (citing *In re Coastal Plains*, 179 F.3d 197, 207-08 (5th Cir. 1999). The Second Circuit does not address the inadvertence or mistake exception.

will justify application of judicial estoppel. *Jones v. Bob Evans Farms, Inc.*, 811 F.3d 1030 (8th Cir. 2016). Employing little analysis, the court disregarded the debtor's claim that his failure to disclose was inadvertent and that he did not intend to mislead the court. The court relied upon the Fifth Circuit's analysis holding that "[a] debtor's failure to satisfy its statutory disclosure duty is 'inadvertent' only when, in general, the debtor either lacks knowledge of the undisclosed claims or has no motive for their concealment." *Jones v. Bob Evans Farms, Inc.*, 811 F.3d 1030 (8th Cir. 2016) (citing *In re Coastal Plains, Inc.*, 179 F.3d 197, 210 (5th Cir. 1999)). The court concluded the debtor "had knowledge of his claims while his bankruptcy case was pending[,] and has a motive to conceal his employment discrimination claims from the court" and so his failure to disclose was intentional and the application of judicial estoppel to bar his claims appropriate. *Id.* at 1034.

The Tenth Circuit in *Queen v. TA Operating, LLC*, 734 F.3d 1081 (10th Cir. 2013) affirmed the lower court's application of judicial estoppel disregarding the debtors' claim of inadvertence and explanation that they disclosed the lawsuit to their bankruptcy attorney and intended for it to be included in their schedules "because the record shows that the Queens had knowledge of the claim and a motive to conceal it in their bankruptcy proceedings." *Id.* at 1084. The opinion tracked the Tenth Circuit's decision in *Eastman v. Union Pac. R.R. Co.*, 493 F.3d 1151, 1157-60 (10th Cir. 2007) that provided "a client is bound by the acts of her attorney and the remedy for bad legal advice rests on malpractice litigation." *Eastman v. Union Pac. R.R. Co.*,

493 F.3d 1151, 1157 (10th Cir. 2007) (applying the presumption of deceit: "Where a debtor has both knowledge of the claims and a motive to conceal them, courts routinely, albeit at times *sub silentio*, infer deliberate manipulations.").

The Fifth Circuit in its opinion in *Flugence v. Axis Surplus Ins.*, 738 F.3d 126 (5th Cir. 2013) applied the same disregard for the debtor's evidence of inadvertence for failure to disclose a claim that developed years into her chapter 13 Plan. *Id.* at 129. The debtor filed her chapter 13 bankruptcy in 2004, and in 2007 before her plan was confirmed the debtor was injured in a car accident. *Id.* She hired an attorney to pursue her personal injury claim and her plan was confirmed. She ultimately received a discharge in 2008 and she had not disclosed the existence of the claim. *Id.* The debtor offered evidence of inadvertence explaining she did not have a potential cause of action when she sought bankruptcy protection, and she relied upon her attorney's advice regarding her requirement to disclose "and because of the flux in the law at the time regarding a debtor's duty to disclose." *Id.* The *Flugence* Court acknowledged "[i]t may be uncertain whether a debtor must disclose assets post-confirmation[,]" but even so, "our decisions have settled that debtors have a duty to disclose to the bankruptcy code notwithstanding uncertainty." *Id.* at 130. *See also In re Superior Crewboats, Inc.*, 374 F.3d 330, 335-36 (5th Cir. 2004) (concluding that judicial estoppel applied because plaintiffs knowingly omitted civil claim from bankruptcy disclosures).

These circuits find application of judicial estoppel to be appropriate even where no advantage is gained from the failure to disclose—making clear that the determinative issue is the debtor's knowledge of a claim and her failure to disclose it. *See, e.g.*, *Guay v. Burack*, 677 F.3d 10, 18-20 (1st Cir. 2012) (acknowledging that debtors did not gain an unfair advantage, disregarding debtors' evidence of inadvertence, and holding that because debtors had knowledge of the undisclosed claims even where they had no motive for their concealment "did not require consideration of that exception."). In a statement that cannot be squared with this Court's opinion in *New Hampshire*, the First Circuit explained it did not recognize an inadvertence exception "and have noted that deliberate dishonesty is not a prerequisite to application of judicial estoppel." *Id.* at 20, n. 7 (citing *Schomaker v. United States*, 334 Fed.Appx. 336, 340 (1st Cir. 2009).

The Third Circuit is aligned with these courts and holds that bad faith intent to conceal is inferred by presumption. *See, e.g.*, *Krystal Cadillac-Oldsmobile GMC Truck, Inc. v. Gen. Motors Corp.*, 337 F.3d 314, 321 (3d Cir. 2003); *Oneida Motor Freight, Inc. v. United Jersey Bank*, 848 F.2d 414, 416-18 (3d Cir. 1988).

The District of Columbia Circuit Court of Appeals also subscribes to the rationale in this line of cases explaining that a presumption of deceit is appropriate to discourage debtors from disclosing correctly only when challenged by an adversary and to incentivize debtors to provide the bankruptcy courts with truthful

disclosures at the outset. *Moses v. Howard University Hosp.*, 606 F.3d 789, 800 (D.C. Cir. 2010).

III. The Panel's Opinion in This Case Conflicts with Ninth Circuit Precedent and Expands Judicial Estoppel to Affect Innocent Third Party Entities.

Through affirming, the panel in this case departed from its own precedent in the Ninth Circuit set forth in *Ah Quin v. County of Kauai Dept. of Transp.*, 733 F.3d 267, 271 (9th Cir. 2013). In *Ah Quin*, the Ninth Circuit rejected the "narrow" interpretation of inadvertence because it was "too stringent" where there is evidence of inadvertence or mistake in the record. *Id.* at 272. It departed from the "basic default rule" and instead adopted "the ordinary understanding of 'mistake' and 'inadvertence' in this context." Rejecting the presumption of deceit, the Court explained:

> In these circumstances, rather than applying a presumption of deceit, judicial estoppel requires an inquiry into whether the plaintiff's bankruptcy filing was, in fact, inadvertent or mistaken, as those terms are commonly understood. Courts must determine whether the omission occurred by accident or was made without intent to conceal. The relevant inquiry is not limited to the plaintiff's knowledge of the pending claim and the universal motive to conceal a potential asset—though those are certainly factors. The relevant inquiry is, more broadly, the plaintiff's

> subjective intent when filling out and signing the bankruptcy schedules. *Id.* at 276-77.

The court continued: "[W]e differ from the test articulated by most of our sister circuits—whether the plaintiff knew of the claims and had a motive to conceal them." *Ah Quin* further explained: "If Plaintiff's bankruptcy omission was mistaken the application of judicial estoppel in this case would do nothing to protect the integrity of the courts, would enure to the benefit only of an alleged bad actor, and would eliminate any prospect that the Plaintiff's unsecured creditors might have of recovering." *Id.* at 276.

Under *Ah Quin*, if there is evidence in the record that debtor's failure to disclose the existence of an asset may have been inadvertent, then debtor should be provided the opportunity to present evidence of his subjective intent before being judicially estopped. *Id.* at 276-77:

> [W]here, as here, the plaintiff-debtor . . . corrects her initial error, and allows the bankruptcy court to re-process the bankruptcy with the full and correct information, a *presumption* of deceit no longer comports with *New Hampshire*. . . .
>
> Although the plaintiff-debtor initially took inconsistent positions, the bankruptcy court ultimately *did not accept* the initial position. . . .
>
> Moreover, the plaintiff-debtor *did not obtain an unfair advantage*. Indeed, the plaintiff-debtor obtained no advantage at all, because

> he or she did not obtain any benefit whatsoever in the bankruptcy proceedings.

Ah Quin, 733 F.3d at 273-74 (emphasis in original; internal citations omitted).

Despite such evidence in this record, Nicholson was not given this opportunity. The panel opinion instead relied upon the presumption of deceit rule: "If a plaintiff-debtor omits a pending (or soon-to-be-filed) lawsuit from the bankruptcy schedules and obtains a discharge (or plan confirmation), judicial estoppel bars the action." App. 3 (citing the rule applied and disregarding evidence that contradicted assertion that debtor offered no explanation).

The panel erroneously concluded that "[b]ecause the bankruptcy court confirmed the plan based on an incomplete scheduling of assets and knowledge of potential lawsuits . . . the district court did not abuse its discretion." App. 3.

Nicholson never had the chance to offer much explanation. Well before Defendant claimed inconsistent disclosures as the basis for judicial estoppel, Nicholson remedied his initial failure to disclose by disclosing the business interests and their potential causes of action and the proposed plan provided creditors would have access to recovery from the proceeds of litigation for all his businesses (including the four that were initially undisclosed). This evidence was not considered by the panel.

The panel affirms a decision on summary judgment that does not construe the facts and inferences in the light most favorable to Nicholson. It ignores the factual record that establishes Nicholson corrected those mistakes months *before* plan confirmation and before the doctrine of judicial estoppel and inconsistent disclosures were ever raised. Sophisticated creditors supported and confirmed the plan that expressly incorporated knowledge of the potential lawsuits and knowledge of those remaining businesses, and the Trustee was vigilantly supervising the progress of the litigation, which had thus far been successful. Not only did the proposed plan and disclosure statement reference the LLCs' claims and provide for the Liquidation Trust to receive a portion of the proceeds, but Nicholson's bankruptcy remained open for the very purpose of receiving and distributing proceeds for that litigation, enabling the Trustee and creditors to insure recovery and apportionment of proceeds was proper. A fact the district court got wrong, and the panel repeated.

Because Nicholson remedied the problem, and creditors would benefit despite his initial failure to disclose, "the plaintiff-debtor *did not obtain an unfair advantage*. Indeed, the plaintiff-debtor obtained no advantage at all, because he or she did not obtain any benefit whatsoever in the bankruptcy proceedings." *See, e.g.*, *Ah Quin*, 733 F.3d at 273-74.

The panel in its affirmance, without reference to the district court's erroneous application of collateral estoppel affirmed the district court's application of

privity between Nicholson and the LLCs to judicially estop the LLCs and to bar their claims against Rite Aid as a result of Nicholson's inconsistent disclosure. *See generally*, App. 1-8.

This is an extraordinarily harsh result to befall innocent non-debtor entities like the LLCs. Such broad expansion of judicial estoppel conflicts with the Ninth Circuit precedent and expands the doctrine's application when other circuits are contracting it. *See, e.g.*, *Slater*, 820 F.3d 1193 (11th Cir. 2016) ("[o]missions frequently occur" in the scheduling of debtor's assets, and "inconsistent statements made under oath are ubiquitous in litigation. . . ."). *Id.* at 1238. *The Slater* Court further explained application of the doctrine "undermines [the district court's] own integrity in the eyes of the public and implies that the Bankruptcy Court is either unwilling or incapable of overseeing debtor compliance with the law." *Id.* at 1250.

The panel opinion of affirmance extends judicial estoppel far beyond what it was intended to do and instead punishes innocent third party non-debtor entities with valid claims. All that a savvy defendant need do on these facts is scan bankruptcy records for evidence that any individual with an ownership of a business interest has filed a bankruptcy, and if it can find any inconsistency in the debtor's disclosures it stands a good chance of relying on this case to dismiss the matter and get out of jail free without more.

IV. This Case Presents the Ideal Opportunity to Clarify A Question Answered Inconsistently Throughout the Circuits that is Central to the Viability of a Meritorious Claim when a Plaintiff Has Filed Bankruptcy.

This case presents the Court opportunity to address an issue of central importance regarding the effect of a bankruptcy debtor's inadvertent failure to disclose a potential claim in his bankruptcy and the application of judicial estoppel to bar the claim against a wrong-doer in later litigation.

Until this Court's decision in *New Hampshire v. Maine*, the doctrine of judicial estoppel was disfavored.[18] Now it is applied by Defendants to defeat meritorious litigation whenever an inconsistency in a plaintiff's bankruptcy case might be uncovered.

Indeed, the issue of judicial estoppel has required significantly increasing expenditure of judicial resources in the past decade. Judicial estoppel was essentially a non-issue for the courts between 1988 and the end of 2003—federal courts issued only 206 opinions addressing judicial estoppel in sixteen years.[19]

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[18] The District of Columbia Circuit read *New Hampshire v. Maine* to speak "approvingly of judicial estoppel" where it was disfavored before this Court's decision was issued in 2001. *Moses v. Howard University Hosp.*, 606 F.3d 789, 798 (D.C. Cir. 2010).

[19] Counsel for Petitioner conducted searches on November 17, 2017, on the U.S. Government Publishing Officer for Court Opinions, located at https://www.gpo.gov/fdsys/search/home.action, last visited November 17, 2017. The searches consisted of advanced searches conducted using date periods and searching the

This number doubled over the following two years resulting in 598 opinions issued during 2004 and 2005. The issue really got traction thereafter, and during the ten-year period between 2006 and 2016 there were 17,561 opinions issued throughout the federal courts addressing the issue. In 2017 alone, there had already been 1,344 opinions issued throughout the federal courts on judicial estoppel through November 16, 2017.

The practical and economic importance of the question presented, and the need for uniformity among the circuits in respect to this central intersection of bankruptcy and its effect on meritorious causes of action, warrants immediate review. As is set cited above, there is ongoing uncertainty in the law. This case is a prime example of the uncertainty in the law of the applicability of judicial estoppel in cases where inadvertence or mistake is supported by the record.

The five to six split in the courts of appeals cited above involve pure issues of law on which authority is split. At present debtors in five circuits are entitled to present evidence of inadvertence in their inconsistent bankruptcy disclosures to resist application of judicial estoppel. Those circuit courts recognize that "[o]missions frequently occur" in the scheduling of debtor's assets, and "inconsistent statements made under oath are ubiquitous in litigation. . . ." *Slater v. U.S. Steel*, 820 F.3d at 1238.

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selected collections of "United States Courts Opinions" for the full-text search terms "judicial estoppel."

Yet, in six circuit courts debtors' subjective or actual inadvertence or mistake is immaterial because those circuits apply a presumption of deceit where a debtor knew of a claim, but failed to disclose it in her bankruptcy effectively barring the debtor's valid claims and rewarding the bad actor at the detriment of all parties related to the debtor's bankruptcy, including the creditors.

Those courts apply judicial estoppel to bar a subsequent litigation claim to incentivize debtors in other bankruptcy cases to disclose fully and honestly. But these cases fail to achieve that goal where a failure to disclose was actually inadvertent. "That justification is a very awkward fit for the doctrine of judicial estoppel. . . . [I]t is odd to punish a present litigant merely in order to discourage inconsistent positions by future litigants." *Ah Quin*, 733 F.3d at 275.

As applied in six of the eleven circuits to consider the issue, the doctrine "undermines the court's own integrity in the eyes of the public and implies that the Bankruptcy Court is either unwilling or incapable of overseeing debtor compliance with the law[.]" *Slater v. U.S. Steel*, 820 F.3d at 1250.

Judicial estoppel is intended to "protect the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment." *New Hampshire v. Maine*, 532 U.S. 742, 749-50, 121 S. Ct. 1808, 149 L. Ed. 2d 968 (2001). An omitted asset from a bankruptcy schedule is not the kind of changed position in accord with the

exigencies of the moment that judicial estoppel was intended to prevent, and its application in this context does nothing to protect the bankruptcy process. On the contrary, the windfall provided to the defendant in this case comes at the expense of the innocent non-debtor businesses in addition to all the parties in bankruptcy court—the creditors, the trustees, and the debtor.

This Court's review is essential to enable the courts of appeals to resolve this important question relating to bankruptcy law, affirmative litigation, and its benefit to debtors, creditors, and to the judicial system.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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