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Division II
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IN THE WASHINGTON STATE COURT OF APPEALS, DIVISION II

YEN-VY VAN,
Plaintiff/Appellant,

v.

ASSOCIATED ENVIRONMENTAL GROUP, LLC. & MICHAEL
CHUN.,
Defendants/Respondents.

APPEAL FROM THE THURSTON COUNTY SUPERIOR COURT
Honorable Carol Murphy, Judge

OPENING BRIEF OF APPELLANT

JACKSON MILLIKAN
WSBA No. 47786
2540 Kaiser Rd. NW
Olympia, WA 98502
(360) 866-3556
Attorney for Appellant

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1. INTRODUCTION

This appeal began pro se. Because of a miscommunication with the trial court, Appellant Van believed it necessary to designate the entire record. Because this appeal is from a grant of summary judgment, RAP 9.12 confines appellate “consider[ation]” to that which was “called to the attention of the trial court.”

May it please the Court, rather than designate a redundant package of supplemental clerk’s papers, the briefing will make reference only to RAP 9.12-compliant pages within the clerk’s papers as designated by Ms. Van, unless ordered otherwise. Arguably, the Order Granting Motion of Defendants for Summary Judgment did call the entire record to the trial court’s attention. CP at 671.

Respondents prevailed at summary judgment by asserting the doctrine of judicial estoppel as a bar to Ms. Van’s allegation of securities fraud and related claims. The trial court held that because Ms. Van’s Chapter 13 bankruptcy filings listed neither her potential to accrue future ownership interest in Associated Environmental Group (“AEG”), nor her later-acquired legal claims, she could not subsequently seek compensation. RP 27:11-29:7. For purposes of summary judgment, the trial court assumed Ms. Van’s ownership claim was valid. RP 16:17-22, 17:-11, 19:5.

After thoughtful consideration, the trial court felt bound by such precedent as this Court’s decisions in Cunningham v. Reliable Concrete, and related cases. 126 Wn. App. 222 (2005); RP 19:17, 28:11, 24.

However, the unique facts of the case caused the trial court concern “about the equities” involved. RP 28:7.

2. ASSIGNMENTS OF ERROR

1. The trial court erred in holding that precedent bound and compelled its decision to apply judicial estoppel.

2. The trial court erred in holding judicial estoppel core factors were met and in failing to properly weigh additional considerations.

3. The trial court erred by misapplying the ‘most favorable light’ view of facts on summary judgment as to the nature of Ms. Van’s claim.

4. The trial court erred to the extent its ruling was based on acceptance of AEG’s argument that Ms. Van had no standing to pursue her claim, which AEG argued is now trapped in the bankruptcy estate.

3. STATEMENT OF THE CASE

Contractual Background.

In the case below, Plaintiff/Appellant, Yen-Vy Van, claimed membership in Defendant/Respondent company, AEG, for which she worked as a managing partner. CP at 158-166. Ms. Van is a geologist and hydrogeologist, Washington State license number 128. Defendant/Appellant Michael Chun was a founding member of AEG and continues to own the majority interest. All claims alleged against AEG were also alleged against Chun. “AEG” will hereinafter designate both.

The case arises from the offering and execution of an alleged security known as the Unit Grant and Sale Agreement (“UGSA”), signed by both

parties on May 7, 2008. CP at 167-174. Ms. Van described the UGSA as annual accrual of pledged ownership interest and future vestment of her shares, the future vestment being a means to delay tax consequences of ownership (i.e. “back end compensation”). CP at 555-56, 558. Ms. Van alleged fraudulent offering, and subsequent breach, of the UGSA. CP at 163-64.

The First Amended Limited Liability Company Agreement of AEG (“Operating Agreement”) was also contemporaneously executed. CP at 175-78 (in pertinent part); 225-49 (full document). The Operating Agreement is relevant because it supplies terms by which AEG might repurchase membership shares accrued under the UGSA. CP at 177-78. Ms. Van alleged the Operating Agreement was breached contemporaneously with the UGSA. CP at 162-63.

Bankruptcy and Procedural Background

When the housing market downturn decimated Ms. Van’s husband’s painting business, the marital community petitioned for Chapter 13 bankruptcy on March 13, 2009. CP at 488, 557. Ms. Van’s bankruptcy counsel was James H. Magee. CP at 487. Magee decided not to schedule Ms. Van’s right to future vestment in AEG. CP at 209-10, 573-78. Magee was later sanctioned for omitting assets from another client’s bankruptcy schedule. CP at 579.

In May of 2009, the bankruptcy court confirmed Ms. Van’s bankruptcy plan. CP at 490, 502-03. Ms. Van testified during her deposition that she

informed AEG of the bankruptcy as required by the Operating Agreement. CP at 206, 398. AEG has acknowledged this exchange. CP at 609, RP 25:21. Ms. Van also testified that AEG informed her the accrued ownership units would vest in the future and were not of any marketable value until vestment. CP at 205, 207-08, 396-97.

Ms. Van resigned from AEG in March of 2013. CP at 252. Ms. Van retained attorney Klaus Snyder to inquire about compensation for the membership interest she believed had been accruing under the UGSA. CP 411. On July 11, 2013, AEG's attorney sent Snyder a letter stating in relevant part, "had Ms. Van received and ownership interest in AEG before filing for bankruptcy, ...this asset would have been potentially available to her creditors." CP at 413.

On April 2, 2014, the bankruptcy court discharged the debtors. The matter was closed on June 4. CP at 496-97. Ms. Van contacted undersigned counsel in the Fall of 2015 as a final effort to assess her rights. The case was filed on February 16, 2016, less than one month before statutes of limitation would have run. CP 556-57. On August 19, 2016, the complaint was amended to include a securities fraud claim. CP at 158.

On December 9, 2016, AEG filed its initial motion for summary judgment on the theory that judicial estoppel bars recovery of Ms. Van's ownership value because her interest had not been scheduled in bankruptcy. CP at 259. The motion prompted undersigned counsel to seek the expertise of a reputable bankruptcy attorney. VR 14:8-21. Bankruptcy attorney,

Marc Stern, notified Ms. Van that sanctions had been imposed on her previous attorney, Magee. VR 14:12.

Ms. Van immediately moved for a stay in the trial court and hired Marc Stern to reopen the bankruptcy. CP at 279-303. The bankruptcy court ordered reopening on December 30, 2016. CP at 311. Before the trial court could hear Ms. Van's motion for a stay, AEG agreed to, and the court ordered, a stay pending resolution of the reopened bankruptcy issues. CP at 307.

AEG then moved the bankruptcy court, again on the theory of judicial estoppel and lack of standing, to vacate the reopening. CP at 585-601. The bankruptcy court heard oral argument on February 23, 2017. CP at 605-615. At the oral argument, AEG admitted Ms. Van's claim of ownership had "vested while her Chapter 13 was open." CP at 610-11.

The bankruptcy court held that reopening was not proper in a Chapter 13 (though common in Chapter 7) bankruptcy case that has been "closed for a few years." CP 612-13. The bankruptcy court declined to rule on any of AEG's arguments, but the judge offered "[AEG]...some sort of comfort order about the automatic stay...." CP at 614.

On April 11, 2017, AEG filed its Supplemental Brief in Support of Motion for Summary Judgment and the Supplemental Declaration of Michael Chun. CP at 432-438; 386-431. Ms. Van's Amended Brief opposing summary judgment was filed April 28. CP at 555-616. The trial

court dismissed the action on judicial estoppel grounds at the hearing of May 26, 2017.

Factual Background

AEG performs environmental services including environmental consultation and analysis and remediation of contaminated soil, inter alia. This includes such tasks as decommissioning and removing underground storage tanks, and submitting subsurface reports to the state for approval. CP at 211.

In 2006, Ms. Van was provided a written Offer of Employment. CP at 217. The offer included “Ownership opportunity after one calendar year of employment.” Ms. Van accepted the offer and, after the probationary 2007, she and AEG entered the UGSA and Operating Agreement. CP at 168-74, 218-49. The parties agree the tax burden of ownership accrual under the UGSA was not feasible for Ms. Van. CP at 212, 404-05. AEG claims the UGSA was never in force and alleges Ms. Van annually waived each year’s membership accrual because of the tax burden. CP at 212-13.

Ms. Van testified and declared that she never waived the UGSA but rather AEG pledged the ownership interest with delayed tax implications, as it “would not vest until sometime in the future.” CP at 404-05, 556-57, 573. Such arrangements are common in various industries. CP at 556 n. 1.

Ms. Van understood that her expertise and credentials, along with her “sweat equity” would suffice to open her capital account in lieu of a cash investment, in accordance with Section 3.1 of the Operating

Agreement: “Each of the Members shall make contributions to the capital of the company, in the form of cash, property, or services, as shall be determined by mutual agreement of the Members.” CP at 226, 399-403. When AEG repudiated the UGSA, Ms. Van attempted to negotiate then eventually filed the underlying action, which was barred by judicial estoppel. CP at 671.

4. SUMMARY OF ARGUMENTS

AEG has turned the equitable doctrine of judicial estoppel on its head. AEG offered a security interest without intending to honor it upon maturation. Ms. Van disclosed the security to her bankruptcy attorney and disclosed the bankruptcy to AEG.

Years after bankruptcy confirmation, Ms. Van left AEG and AEG took the position that Ms. Van possessed no interest in the company. Later, AEG asserted the opposite position -that Ms. Van *had* a valuable ownership in AEG- in both the United States Bankruptcy Court and the Thurston County Superior Court. Had Ms. Van survived summary judgment, AEG would have then reverted back to asserting Ms. Van never had an asset.

Ms. Van never changed her position, always explaining to whomever would listen that AEG promised her “back end” compensation. Though her bankruptcy attorney made the poor decision to omit the pledged future interest in her Chapter 13 schedules, the interest need not have been included.

Because the pledged future interest could not have been liquidated by the trustee, its omission from the confirmed bankruptcy did not legally result in acceptance by the bankruptcy court. The later acquired legal claims accrued too late for the bankruptcy estate to claim them. Nonetheless, Ms. Van did the right thing, reopening her bankruptcy just to make sure MaGee's omissions could be addressed. The bankruptcy court showed no interest and reclosed her case without any action.

Ms. Van did not benefit by MaGee's omission, which was mistaken and inadvertent. The integrity of the judicial system was not in any way affronted by the omission. Finally, AEG did not incur any detriment but rather enjoyed a delay in owning up to its obligations under the UGSA.

5. ARGUMENTS

5.1 Standard of review.

The Court reviews summary judgment "de novo, engaging in the same inquiry as the trial court." Arkison v. Ethan Allen, Inc., 160 Wn.2d 535, 538 (2007). However, the Court reviews "a trial court's decision to apply the equitable doctrine of judicial estoppel for abuse of discretion." Id. "A trial court abuses its discretion when it bases its decision on untenable or unreasonable grounds." Harris v. Fortin, 183 Wn. App. 522, 527 (2014).

Despite applicability of the abuse of discretion standard, the Court should also engage in de novo review of the record. "Where, as here, summary judgment of dismissal is granted based on judicial estoppel, [courts] engage in de novo review of the record to determine if there are no

genuine issues of material fact and the moving party is entitled to judgment as a matter of law.” Haslett v. Planck, 140 Wn. App. 660, 665 (2007).

5.2 The trial court was neither “bound” nor “compelled” by precedent to apply judicial estoppel.

The trial court expressed “hesitation” in applying judicial estoppel, because it was “quite concerned about the equities in this case.” RP 28:6-7. Nonetheless, the court believed that, “based upon the authorities, ...it must apply judicial estoppel.” RP 28:11. However, the doctrine “is not appropriate in every circumstance..., and judicial estoppel ‘is not to be applied inflexibly.’” Haslett v. Planck, 140 Wn. App. 660, 666 (2007) (quoting Miller v. Campbell, 137 Wn. App. 762, 771 (2007)).¹

The word ‘shall’ is not used by courts determining whether the doctrine was properly applied. “Courts *may* generally apply judicial estoppel to debtors who fail to list a potential legal claim among their assets during bankruptcy proceedings and then later ‘pursue the claims after the bankruptcy discharge.’” Arkison v. Ethan Allen, Inc., 160 Wn.2d 535, 539 (2007) (Emphasis added) (quoting Bartley-Williams v. Kendall, 134 Wn. App. 95, 98 (2006)). However, the judicial estoppel “factors are not an “exhaustive formula” and “[a]dditional considerations” may guide a court's decision.” Id.

¹ Ms. Van recognizes this may not constitute error because it lies within the discretion of the trial court, however it may inform the analysis as to the errors constituting clear abuses of discretion set forth infra. Moreover, at least one trial court ruling has been reversed and remanded for rigid, as opposed to “case-by-case,” application of judicial estoppel. See Arp v. Riley, 192 Wn. App. 85, 59 (2015) (discussed infra). Also, the Haslett trial court was held to have abused its discretion by assuming itself “constrained by the case law...” 140 Wn. App. at 667 (discussed infra).

“[J]udicial estoppel *can* be used....” Miller v. Campbell, 164 Wn.2d 529, 540 (2008) (emphasis added). However, no case states it *must* be used. “Indeed, courts must apply judicial estoppel at their own discretion; they are not bound to apply it but rather must determine on a case-by-case basis if applying the doctrine is appropriate.” Arp v. Riley, 192 Wn. App. 85, 92 (2015). Where, as here, “a party lacks knowledge or has no motive to conceal the claims,” judicial estoppel is not to be applied. Id. at 93 (quoting Miller v. Campbell, 137 Wn. App. 762, 771, *aff’d* on other grounds, 164 Wn.2d 529, 192 P.3d 352 (2008) (affirming the result reached by Court of Appeals but applying a different analysis because of the substitution of the trustee)).

In Arp, even though Mr. Arp breached the terms of his Chapter 13 confirmation order by not amending his schedule to include his personal injury lawsuit, the Court reversed summary judgment. Id. at 100. Under the ‘abuse of discretion’ standard, the Court found the record did “not show that the trial court exercised discretion to decide if allowing Arp to pursue his claim would affront the integrity of the judicial process.” Id.

Here, the court expressly stated it was “concerned about the equities” and that “it seems somewhat contradictory that Ms. Van can’t say one thing in the bankruptcy proceedings and say a different thing in this court, whereas it seems like Associated Environmental Group is doing just that or will be doing just that.” RP 28:14-18. By finding that “the Court

must apply judicial estoppel,” despite its misgivings, the court failed to exercise its discretion as required. RP 28:11.²

Federal authorities are often cited as well. See e.g. Cunningham v. Reliable Concrete, 126 Wn. App. 222, 227 (2005) (surveying Supreme Court and federal circuit opinions). In Ah Quin v. County of Kauai DOT, the Ninth Circuit held the “district court’s belief that it was bound to preclude Plaintiff from bringing her...claim is mistaken and fundamentally at odds with equitable principles.” 733 F.3d 267, 272 (9th Cir. 2013) (though it does appear that federal courts apply de novo review).

In this case, equitable principles required the trial court exercise its discretion instead of strictly applying estoppel. The court’s hesitation was justified but it did not realize it had the option of acting in accordance with said hesitation. On this basis alone, the Court should remand for the trial court to analyze the arguments with the knowledge that it has discretion and can weigh its equitable concerns in reaching a decision. However, the following arguments justify remand for trial on the merits.

5.3 Judicial estoppel elements were not met and are not even elements but “core factors.”

As a threshold matter, judicial estoppel is neither as rigid as AEG described it nor as the trial court considered it. “Although judicial estoppel is ‘probably not reducible to any general formulation of principle,...several factors typically inform the decision whether to apply the doctrine in a

² The trial court in Haslett made a similar misstatement: “a debtor’s ‘attempt to go back and sort of redo things does not undo the doctrine.’” Haslett v. Planck, 140 Wn. App. 660, 667 (2007).

particular case.” Ah Quin v. Cty. of Kauai DOT, 733 F.3d 267, 270 (9th Cir. 2013).

The factors are not “inflexible prerequisites or an exhaustive formula for determining the applicability of judicial estoppel. Additional considerations may inform the doctrine's application in specific factual contexts.” New Hampshire v. Maine, 532 U.S. 742, 751 (2001). Ms. Van asserted various of these ‘additional considerations’ below, but they were not given much weight (though plenty of lamentation). As discussed in Section 5.2, the trial court had unrealized discretion to act in accord with its stated concerns about “the balance of equities.” Id. These ‘additional considerations’ will be woven into the arguments that follow and discussed briefly at Section 5.4, *infra*.

Citing Arkison, AEG mischaracterized judicial estoppel below by arguing for mandatory application where “elements are shown.” CP at 266 (citing Arkison, 160 Wn.2d 535, 538-39 (2007)). However, the heading in AEG’s summary judgment brief is not what the quoted opinion truly says. Factors and additional considerations -not “elements”- comprise the doctrine. “Three core factors guide a trial court's determination of whether to apply the judicial estoppel doctrine.” Arkison v. Ethan Allen, Inc., 160 Wn.2d 535, 539 (2007).

- (1) whether “a party's later position” is “‘clearly inconsistent’ with its earlier position”;
- (2) whether “judicial acceptance of an inconsistent position in a later proceeding would create ‘the perception that either the first or the second court was misled’”; and
- (3) “whether the party seeking to assert an inconsistent position

would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.”

Arkison v. Ethan Allen, Inc., 160 Wn.2d 535, 538-39 (2007) (quoting New Hampshire v. Maine, 532 U.S. 742, 750-51 (2001) (quoting United States v. Hook, 195 F.3d 299, 306 (7th Cir 1999); Edwards v. Aetna Life Ins. Co., 690 F.2d 595, 599 (6th Cir. 1982)).

Because the arguments below are based on a large and complex case universe, it is useful to reiterate a fundamental fact here. There are two potential bases for application of judicial estoppel: (i) the 2008 pledged future vestment of ownership units embodied in the UGSA and (ii) the accrual of legal claims triggered by AEG’s 2013-2015 repudiation of the UGSA.

5.3.1 Ms. Van’s positions: inconsistent? Clearly so?

Ms. Van’s position has never changed. She has always consistently asserted ‘I have been pledged ownership accrual to vest in the distant future.’ CP at 396, 573-74. Assuming arguendo that, despite the unwavering factual consistency of Ms. Van’s one and only assertion, the bankruptcy schedule omission nonetheless rendered her positions legally inconsistent, the remaining question is whether her positions were clearly or less-than-clearly inconsistent.

Clear inconsistency usually means “nondisclosure of a claim as an asset in bankruptcy proceedings.” Harris v. Fortin, 183 Wn. App. 522, 528 (2014). On the other hand, mere ‘unclear’ inconsistency results when “a party discloses an asset in bankruptcy court but undervalues that asset” and

later “seeks to recover a higher sum....” Id. Finally, “...to give rise to an estoppel, the positions must be not merely different, but so inconsistent that one necessarily excludes the other.” DeVeny v. Hadaller, 139 Wn. App. 605, 622-23 (2007). “The positions taken must be diametrically opposed to one another.” Kellar v. Estate of Kellar, 172 Wn. App. 562, 581 (2012).

Looking only at Ms. Van’s bankruptcy schedules, it might be easy to conclude that her later claims were clearly inconsistent. However, Ms. Van’s disclosure to bankruptcy counsel MaGee may affect the analysis. CP at 208, 210. AEG successfully argued that “the buck doesn’t stop with her attorney. The buck stops with her, because she is the one that signed the schedules.” RP 10:8-11.

AEG pointed to Cunningham v. Reliable Concrete as the final word on the matter of attorney disclosure. 126 Wn. App. 222, 234-35 (2005); RP 22:24-23:1-13. However in Cunningham, this Court made clear that “[b]laming the attorney” to avoid judicial estoppel was not efficacious “on this record.” Id. at 235. Ms. Van’s trial court record is quite distinguishable from that in Cunningham.

For one thing, Ms. Van’s bankruptcy attorney is now known to have “recklessly misrepresented the law” in at least one other instance during the same era. In re Carlson, 650 Fed.Appx. 307 (9th Cir. 2016); CP at 578-83. Mr. MaGee “improperly advised his client to conceal certain tort claims in her [Chapter 13] bankruptcy.” Id.; CP at 582. Mr. MaGee apparently rationalized the omission by bootstrapping a “lost income” recovery of

“\$850” into an income nullity, somehow arriving at the determination that “in essence, ...the award of a judgment totaling \$48,150.92 did not amount to a change in...circumstances” necessitating amendment of the bankruptcy schedule. Id.

It is easy to see how Mr. MaGee’s unique reasoning in In re Carlson, applied to a monetary judgment in-hand, might be even more likely to result in omission of Ms. Van’s amorphous pledge. Far from having been in possession of a judgment at the time of her 2009 consultation with Mr. MaGee, Ms. Van can only hope for a future judicial determination -perhaps in 2018- that she ever even had anything of value. If she did not, then certainly Mr. MaGee was correct in omitting the pledge.

Either way, Ms. Van had never asserted anything other than an interest described by AEG as “back end compensation” to which “there was no value assigned.” CP at 208, 396, 573. Even if Ms. Van’s disclosure to solely MaGee is legally ruled an omission, omitting a non-existent interest on the basis that it will only accrue in the very distant future (if at all) does not ‘necessarily exclude’ the other later assertion that now -in that very distant future- the interest exists. The two assertions are not diametrically opposed.

The existence of a reportable claim in Cunningham was clear as day. Cunningham had suffered a tangible, painful, workplace injury with symptomology developing over a matter of years. Cunningham, 126 Wn. App. 222, 225-26. Before filing for bankruptcy, he had previously filed an

L&I claim based upon said injury and asserted it as a counterclaim in a collections action. Id.

The existence of a reportable claim of Ms. Van was clear as mud. Ms. Van had been pledged annual accrual and future vestment of ownership in AEG. CP at 573-74. Ms. Van and AEG had executed the securities less than one year before Ms. Van filed for bankruptcy. CP at 159, 167-78, 212-13, 218-51, 556-57, 573. Therefore, there were “questions as to what the asset was on the date of filing and whether it was an asset at all.” CP at 577.³

This Court held “it is undisputed that Cunningham had a personal injury claim....” Cunningham, 126 Wn. App. 222, 228. It can hardly be said that Ms. Van undisputedly had a claim. Indeed, whether she has a claim is the fundamental issue Ms. Van wishes to have adjudicated on the merits below. See e.g. RP 17:3-5 (arguing Cunningham is distinguishable because Ms. Van’s case contains an “inherent rolled-in question as to whether there was a claim.”). Apparently the bankruptcy court also did not find Ms. Van’s claim undisputed, choosing to “abstain” on the basis that it did not “think there’s any way [the claim] benefits the creditors.” CP at 613.

The credibility of Mr. Cunningham was also highly suspect. “Eleven days after the discharge, Cunningham commenced [his] personal injury action....” Cunningham, 126 Wn. App. 222, 226. Ms. Van logically never believed a lawsuit would be necessary because she had only been

³ AEG shares are not traded on the stock market and a member may only liquidate in the event of death, dissociation or retirement. CP at 239.

pledged membership less than one year prior. Any pledged interest would logically vest far in the distant future because the Operating Agreement only provided for payment to a “Retiring, Disassociated, or Deceased Member.” CP at 177.⁴

Cunningham’s credibility was directly questioned by this Court, which noted that “the bankruptcy trustee does not share [the same] recollection” Cunningham asserted. Cunningham, 126 Wn. App. 222, 228. It also appears that Cunningham may have blurred the semantic line between his L&I claim, his collections action counterclaim, and his personal injury lawsuit in communicating with the trustee. Id.

Ms. Van had no tangible asset or injury. She has never asserted anything other than a pledged interest to vest in the distant future. When learned bankruptcy counsel, Marc Stern, revealed the character of Mr. MaGee’s professional conduct and related sanctions, Ms. Van once again did the right thing. She immediately sought to amend her bankruptcy schedule. CP at 291-98, 555-58, 611.

Moreover, Ms. Van’s trustee chose not to even attend the reopened bankruptcy hearings, whereas Cunningham’s trustee “[u]pon learning of Cunningham’s claim....re-opened the bankruptcy case and revoked her previously filed report of no distribution.” Cunningham, 126 Wn. App. 222,

⁴ To be sure, AEG also had the absolute right to repurchase Ms. Van’ interest as a result of her bankruptcy filing. CP at 222. However, AEG has admitted it knew of the bankruptcy and, had a repurchase occurred, Ms. Van would not have found herself in litigation. RP 25:4-23; CP at 609.

226. Perhaps Ms. Van's trustee saw no benefit in forcing Ms. Van into death, dissociation or retirement just to liquidate her share of AEG.

Because the nature of Ms. Van's potential asset or claim is amorphous, and likely had a zero value at confirmation, its omission should not be considered clearly inconsistent. It is more analogous -especially when considered in light of 'additional considerations' like MaGee's sanctions- to the 'unclear' inconsistency cases where the bankruptcy petition was "incorrectly completed." Baldwin v. Silver, 147 Wn. App. 531, 537 (2008).

The 'additional considerations' under this core factor also should be weighed. The dark backstory is AEG's blatant inconsistency, not only between two courts, but within a single brief and the same hearing, had Ms. Van prevailed at summary judgment (the same appearance sharing both summary judgment and pretrial conference purposes). RP 15:21-16:16. CP at 263, 432-38, 555-61, 565-66. The trial court recognized this additional consideration; namely, that AEG's repeated contradictory positions were turning judicial estoppel on its head. RP 28:12-18.

5.3.2 Judicial acceptance by the bankruptcy court may not have occurred AND acceptance by the trial court would not have created a perception that Ms. Van had been misleading the bankruptcy court.

5.3.2.1 Acceptance

The threshold issue is whether the bankruptcy court accepted, or even had the legal authority to accept, any position of Ms. Van, when her latent claim or putative asset could only accrue post-petition, and when she

filed under Chapter 13. The sub-issues are whether the UGSA gave Ms. Van a prepetition asset, whether AEG's later repudiation of the UGSA gave rise to a reportable post-petition claim, or both. CP at 411. For prepetition claims, acceptance by the bankruptcy court is held to be implicit only in 'no asset' cases.

A bankruptcy court "implicitly accept[s]" a debtor's position where the debtor had a prepetition claim, "failed to disclose that claim in the bankruptcy schedules," and the bankruptcy "case was closed as a 'no asset' case." Cunningham, 126 Wn. App. 222, 231 (discussing Johnson v. Si-Cor Inc., 107 Wn. App. 902 (2001)). While Ms. Van did sign the UGSA in May of 2008, the accrual of pledged interest for future vestment would not even begin until the end of that year. CP 219, 224. Ms. Van's case was closed after satisfaction of a payment plan, not as a 'no asset' case. CP at 427-28. Therefore, if there was acceptance, it was not implicit.

Acceptance is also detected by looking at whether the bankruptcy plan would have changed. It cannot be said that the "bankruptcy court necessarily 'accepted' the debtor's prior position by confirming the chapter 13 plan, when there is no showing that the undisclosed claim would have affected the payments to creditors." Haslett v. Planck, 140 Wn. App. 660, 667 (2007). See also CP at 611-14.

Robert Johnson filed for Chapter 13 bankruptcy and broke a tooth on a McDonalds sandwich a few weeks later. Johnson v. Si-Cor Inc., 107 Wn. App. 902, 904 (2001). In Johnson, Division 3 of this Court interpreted

11 U.S.C. §541(a)(5) (which enumerates the types of property that must be included in the estate when acquired within 180 days after filing) to have required Johnson disclose “property that a Chapter 7 trustee may liquidate for the benefit of the debtor's general unsecured creditors....” 107 Wn. App. at 911.

Section 541(a)(5) covers inheritance, community property, and insurance benefits, but not post-petition legal claims. Therefore, “other property acquired by the debtor after the commencement of a Chapter 13 case may be retained by the debtor and would not be available for distribution to unsecured creditors in the event of Chapter 7 liquidation.” Johnson, 107 Wn. App, 902, 911.

Thus, the Court seems to have formulated a litmus test for what must be disclosed (and therefore may be ‘accepted’) post-petition. This Court noted that Chapter 13 bankruptcy omissions might be amenable to judicial estoppel only “[u]nder the right circumstances....” Id. at 909. The test: “As part of the Chapter 13 plan confirmation process, the debtor may be required to represent to the court what unsecured creditors theoretically would have received under a Chapter 7 liquidation.” Id.⁵ In Haslett v. Planck, this Court drew the line where “failure to disclose a claim affects the liquidation analysis by the bankruptcy court....” 140 Wn. App. 660, 668 (2007). No theoretical effect equals no acceptance.

⁵ Stated another way, “[n]or has the bankruptcy court necessarily ‘accepted’ the debtor's prior position by confirming the chapter 13 plan, when there is no showing that the undisclosed claim would have affected the payments to creditors.” Haslett v. Planck, 140 Wn. App. 660, 667 (2007). See also CP at 611-14

Ms. Van acquired a 2008 promise of potential future vestment, and AEG's conduct between 2013 and 2015 gave rise to her later legal claims. The former, as discussed supra, could only have been liquidated and distributed by forcing Ms. Van to die, dissociate, or retire from AEG. CP at 235-41. Come what may, any future vestment might be in a successful AEG, or even a bankrupt one, resulting in either an asset or a liability, neither of which could be valued monetarily until vestment.

Ms. Van's later claims against AEG also pass the 'theoretical effects' test (and if not, they nevertheless accrued far beyond 180-day time limit). MaGee's disclosure, though the best practice, would not have changed a thing. When Ms. Van realized MaGee probably should have listed the UGSA in her schedules, and that she perhaps should have divulged her 2015 lawsuit, she immediately reopened her bankruptcy case. CP at 291.

Upon reopening, the bankruptcy court appeared to agree that Ms. Van had passed the theoretical Chapter 7 'liquidation test,' stating "[u]nfortunately, all of that rubric, which at least benefits the creditors in theory, doesn't work in Chapter 13. ...I don't think I have any particular interest in this because I don't think there's any way this benefits the creditors." CP at 612-613. The bankruptcy court even re-closed Ms. Van's case before the expiration of time allotted for her trustee to get involved. CP at 613-14.

Assuming Ms. Van’s pledged future interest under the UGSA began to accrue on schedule per the UGSA, her omission did not constitute acceptance by the bankruptcy court as a matter of law. CP at 219. Per the UGSA, on December 31, 2008, AEG should have begun to pledge the first “50 units” to Ms. Van for vestment upon any distant future occurrence listed in Article VIII of the Operating Agreement (retirement, dissociation or death). CP at 219, 239. The UGSA is discussed in greater detail under Section 5.5, *infra*.

In 2009, there was no monetary value assigned to the pledged future interest and the Operating Agreement only allowed for vestment upon then-unfathomable retirement, dissociation or death. CP at 573-74. Thus, as with the later lawsuit, the ‘liquidation test’ applied to the pledged ownership would result in no benefit to creditors. As such, the omission of the putative interest from Ms. Van’s schedules could not legally result in ‘acceptance’ of a position inconsistent with her later claims.

5.3.2.2 Perception of Misleading the Courts

The precedent indicates judicial estoppel is avoidable by the right-headed debtor, but the exact requisite mental state is elusive. Cunningham conclusively states, “intent to mislead is not an element of judicial estoppel.” 126 Wn. App. at 234. Yet, “[i]f incompatible positions are based not on chicanery, but only on inadvertence or mistake, judicial estoppel does not apply.” Milton H. Greene Archives, Inc. v. Marilyn

Monroe Ltd. Liab. Co., 692 F.3d 983, 994 (9th Cir. 2012) (quoting Johnson v. Oregon, 141 F.3d 1361, 1369 (9th Cir. 1998).

Courts often state their goal is preventing debtors from playing “fast and loose” with the judicial system. See e.g. Haslett, 140 Wn. App. 660, 665 (2007) (quoting Hamilton v. State Farm Fire & Cas. Co., 270 F.3d 778, 782 (9th Cir. 2001)). Still other opinions find the “purposes of the doctrine are to preserve respect for judicial proceedings without the necessity of resort to the perjury statutes...and to avoid...duplicity...” Seattle-First Nat'l Bank v. Marshall, 31 Wn. App. 339, 343 (1982). The Ninth Circuit has all but implied an intent element: “Judicial estoppel seeks to prevent the deliberate manipulation of the courts...” Helfand v. Gerson, 105 F.3d 530, 536 (9th Cir. 1997) (citations omitted).

It is also common for appellate courts to espouse some variation of the phrase, “it may be appropriate to resist application of judicial estoppel ‘when a party’s prior position was based on inadvertence or mistake.’” New Hampshire v. Maine, 532 U.S. 742, 753 (2001) (quoting John S. Clark Co. v. Faggert & Frieden, P. C., 65 F.3d 26, 29 (CA4 1995)). ‘Inadvertence’ has been broken down into two disjunctive requirements, that the debtor either “lacks knowledge of the undisclosed claims or has no motive for their concealment.” McFarling v. Evaneski, 141 Wn. App. 400, 405 (2007).

It is difficult to reconcile the lack of an ‘intent to mislead’ requirement with the exculpatory effect of mistaken or inadvertent deception. This Court has provided the most succinct guidance: “Although

judicial estoppel may not apply in cases of simple error or inadvertence, deliberate or intentional manipulation, which can be inferred from the record, mandates such a ruling.” Skinner v. Holgate, 141 Wn. App. 840, 853-54 (2007).

Nothing in the record tends to suggest any deliberate manipulation, intentional or reckless chicanery, perjury, or playing fast and loose with the courts. Ms. Van omitted her theoretical security interest by mistake and her later legal claims without knowledge or even hope that they would one day accrue. CP at 159-62, 208-10.

Mr. Cunningham had a tangible, painful injury with flaring over two years. Cunningham v. Reliable Concrete, 126 Wn. App. 222, 225 (2005). Previous to his omissive chicanery, Mr. Cunningham had filed an L&I claim and a counterclaim based upon the same injury. Id. at 226. He also waited until “[e]leven days after the discharge” to file his claim and appears to have made oral claims of which the “trustee [did] not share...recollection.” Id. at 226, 229. Plus, Cunningham had the gall to allow his bankruptcy closed with a “no asset” discharge while sitting on his valuable lawsuit. Id. at 229. Ms. Van still is unsure what -if any- asset she possesses.

In Skinner v. Holgate, Mr. Skinner “attempt[ed] to sanitize his failure to list” real property and vested business interests with the ludicrous claim that he lacked any paper that would put him on notice of his own substantial holdings. 141 Wn. App. 840, 854-55 (2007). “Skinner is a

professional businessman,” whereas Ms. Van is a scientist without any business acumen. Id. at 843. Skinner had been in years of negotiation to purchase the Capitol Theater, had entered a partnership to do so, had contracted a lease option on the building, and had pocketed substantial earnings from the theater and another property he claimed not to know he owned. Id. at 843-46.

Skinner omitted five different, already existing, prepetition, valuable, reportable claims or assets from his bankruptcy schedules and “testified under oath that he had no assets, claims or income....” Id. at 845. “Meanwhile,” he kept on seeking compensation for his real estate interests. Id. Ms. Van may or may not have accrued unmarketable future potential interest in AEG prepetition. She has never asserted otherwise.

Skinner’s eventual lawsuit had to be “discovered” by the trustee, who “promptly” made it a “part of the bankruptcy estate.” Id. at 846. Immediately upon learning from Mr. Stern that her former bankruptcy attorney had been sanctioned for omitting reportable assets, Ms. Van took the initiative to reopen her bankruptcy. CP at 556-58, 571-83.

Ms. Van never possessed any tangible property interest, or even a vested membership interest, and she always told anyone who would listen exactly what she thought she possessed. CP at 161, 207-09, 573-74. When asked, under oath, did she “ever inform the bankruptcy court of this allegedly valuable asset,” Ms. Van replied “yes.” CP at 208. When asked, “where?” she replied, “In Tacoma, at my attorney’s office.” CP at 208.

Finally, Skinner thumbed his nose at the integrity of the judicial system by claiming he “did not know that he had some interest...” Skinner, 141 Wn. App. 840, 850. Such blatantly feigned ignorance is shameful and neither a part of Ms. Van’s record nor of her life as a master of multiple fields of geology, as an immigrant who achieved her scientific mastery by also mastering a second language, and as a quintessential American citizen with enormous respect for the judiciary. The only truly Skinneresque conduct in the record is that of AEG, having lured Ms. Van with an illusory promise or fraudulent security, denying its existence in trial court, swearing to its existence in bankruptcy court and at summary judgment, then poised to again deny its existence at trial (and even in the latter part of the hearing below, which was to serve as a pretrial conference if summary judgment had been denied). RP 15:13-16:16, 28:13-25; CP at 610:3-8.

Without elaborating on the dizzying factual complexities of In re Corey, which had been “litigated vigorously for nearly two decades in various bankruptcy proceedings and in the state courts of Hawaii,” it is clear that even an affirmative contradiction -as opposed to a mere omission- may be forgiven. 892 F.2d 829, 831 (9th Cir. 1989). Ms. Corey had believed herself the fee simple owner of one Silversword Inn because a businessman and friend, Ellis, had appeared to sell it to her. Id. at 832. However, Ellis knew that under Hawaii laws, some apparent conveyances legally amount to mere mortgages. Id.

When Ellis realized Ms. Corey had contracted to sell the Silversword, he killed the deal by convincing Ms. Corey he had never truly sold her a fee simple interest under Hawaiian laws. Id. When the Silversword's prospective buyers sued Ms. Corey for specific performance, she affirmatively asserted inability "to transfer title to the Inn because she was not its owner." Id.

Though not asserted in the bankruptcy context, Ms. Corey's contradictions bear a striking resemblance to those of Ms. Van. Because Ms. Corey was convinced she did not possess full ownership of the Silversword, there was no indication she played "'fast and loose' with the judicial system." Id. at 836. Similarly, AEG convinced Ms. Van that she did not possess vested interest in the company. CP at 207-10. AEG, specifically Mr. Chun, had convinced Ms. Van that he was a friend and would use his business acumen for their mutual benefit. CP at 505-08. As with Ms. Van's lawsuit, "Corey's change of position was occasioned by her realization that Ellis was not her friend and had duped her." Id.

The mistaken nature of Ms. Van's omission is evident in the lengthy discussion of her then-bankruptcy counsel's professional shortcomings, *supra* at Section 5.3.1. It is further evident in learned bankruptcy counsel, Mr. Stern, having sounded the alarm bell and Ms. Van having immediately sought to rectify her mistake. CP at 571-83. Even further supporting the mistakeness of the omission, AEG's oral and written representations created an amorphous contrivance fraught with uncertainty, the contours of

which Ms. Van seeks to settle by adjudication in the trial court. Thus, the issue of whether Ms. Van had a reportable asset is rolled into the merits she hopes will be adjudged at a trial on remand.

Having signed the UGSA and Operating Agreement less than one year before her bankruptcy filing, Ms. Van was motivated only to grow AEG into a reputable firm. CP at 160. Having previously completed her probationary year, Ms. Van was poised for a bright future with the company, whose fate would thereafter be inextricably tied to her own. CP at 202.

The vestment-triggering provisions of the Operating Agreement - namely retirement, dissociation or death- were far too theoretical and distant to have motivated a bankruptcy omission.⁶ Though MaGee should have included the theoretical interest in the bankruptcy schedule, from Ms. Van's standpoint it would have been tantamount to listing one's foot because it may someday be damaged in a car accident and subject of a personal injury claim. Because Ms. Van'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 Plaintiff's unsecured creditors might have."⁷ Ah Quin v. Cty. of Kauai DOT, 733 F.3d 267, 276 (9th Cir. 2013).

⁶ According to Ah Quin, any presumed motive to deceive is rebutted by reopening. 733 F.3d at 272. Ms. Van finds no case discussing the impact of a reopening followed by a lack of interest and sua sponte reclosing.

⁷ Mr. Stern suggested to the bankruptcy court that "a supplemental distribution to creditors" might have been possible, to which Judge Lynch replied, "Well, that's a creative thought...." CP at 613.

5.3.3 No unfair advantage or detriment resulted.

The third core factor is ““whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.”” Urbick v. Spencer Law Firm LLC, 192 Wn. App. 483, 489 (2016) (quoting Arkison v. Ethan Allen, Inc., 160 Wn.2d 535, 538-39 (2007) (internal quotation marks omitted) (quoting New Hampshire v. Maine, 532 U.S. 742, 750-51 (2001)). The cases rely on common sense conceptions of fairness, advantage, and detriment in applying this core factor to any given fact pattern.

In Harris v. Fortin, Harris listed a \$400,000.00 promissory note as uncollectable in Chapter 7 bankruptcy and testified as to the insolvency of the promisor. 183 Wn. App. 522, 525 (2014). Harris then sued for the full amount and, during the pendency of the litigation, amended the bankruptcy schedules without listing the claim. Id. Though this Court appeared likely to uphold estoppel on the first two core factors alone, it added that without estoppel “Harris would reap a benefit by retaining the asset that otherwise would have been discharged in bankruptcy.” Id. at 530.

Unlike Harris, Ms. Van had no promise of value at the time of her bankruptcy filing and her legal claims accrued years after confirmation. Even when Ms. Van attempted to reopen the bankruptcy, Judge Lynch saw no “way [the later legal claim] benefits the creditors.” CP at 613. Indeed, Ms. Van’s post-petition legal claim would not have been liquidated in Chapter 13 and her pledged security interest under the UGSA was not

marketable at the inception of the bankruptcy or at any relevant time thereafter.

AEG's trial court briefing shed no light on the detriment it might face. AEG argued that "Disclosure by Ms. Van to the Bankruptcy Trustee of a [sic] claimed ownership Units in AEG would have had drastic consequences to Michael Chun and his company, compelling a far different outcome." CP at 269. This suggests that AEG benefitted from Ms. Van's mistaken omission, not from the equities under judicial estoppel. It reads like a sigh of relief.

AEG continues in apparent gratitude for Ms. Van's mistaken omission, noting that had she properly disclosed her pledged interest "Mr. Chun would have been put in the position of having to negotiate repurchase of her interests in order to avoid potential receivership and/or court-ordered liquidation." CP at 269. If anything, AEG will have benefitted by the delay caused by MaGee's poor choices, as it prepares to face trial or honor its obligations.

At oral argument AEG admitted it knew of Ms. Van's bankruptcy filing, yet had no "inkling that it was going to involve...AEG." RP 25:5-7 (See also CP at 609). Yet the UGSA gives AEG the "Right of Repurchase" of Ms. Van's interest, irrespective of any conduct of the trustee. CP at 222. The only logical conclusion is that AEG enjoyed but did not exercise the right of repurchase.

AEG seems to find detriment in the fiction that, had the trustee been aware of Ms. Van's pledged interest, "Van would have been automatically dissociated as an owner, and Chun could have either challenged the claim on the merits or settled with the Trustee for cash." CP at 436. Fortunately, Ms. Van now hopes the Court will afford her the opportunity to present AEG these same beneficial options on remand.

5.4 Additional Considerations

The core factors discussed above "are not an exhaustive formula and additional considerations may guide a court's decision." Kellar v. Estate of Kellar, 172 Wn. App. 562, 580 (2012) (citing Arkison, 160 Wn.2d 535, 539). Courts have occasionally listed six additional considerations.

- (1) The inconsistent position first asserted must have been successfully maintained;
- (2) a judgment must have been rendered;
- (3) the positions must be clearly inconsistent;
- (4) the parties and questions must be the same;
- (5) the party claiming estoppel must have been misled and have changed his position;
- (6) it must appear unjust to one party to permit the other to change.

Id. (quoting Markley v. Markley, 31 Wn.2d 605, 614-15 (1948)).

However, the overlap of this list with the core factors makes its application somewhat redundant. Fortunately, at least one court seems to have gone beyond the list, analyzing the "unique nature" of the debtor's claim." Miller v. Campbell, 137 Wn. App. 762, 773 (2007). Miller was briefed below, though not in the context of 'additional considerations.' CP at 567. The unique nature of Ms. Van's pledged future interest is thoroughly set forth supra, and should weigh in favor of reversal.

Another additional equitable consideration is Ms. Van's chance of being made whole. The Ah Quin opinion found it "perverse..." that a situation could arise where "the only 'winner'" would be "the alleged bad actor...." Ah Quin, 733 F.3d 267, 275. Unfortunately, estoppel in this case would affect the same perverse result. For the reasons discussed throughout this brief, Ms. Van's pledged future interest was not necessarily the type of 'thing' that "a Chapter 7 trustee could liquidate." CP at 577. Therefore, its omission might not rise to the level of professional negligence. As such, Ms. Van might not recover against her bankruptcy counsel and AEG would escape with impunity.

5.5 Summary judgment standard: favorable light.

The trial court properly recognized that, at summary judgment, "[a]ll facts are considered in the light most favorable to the nonmoving party." Skinner v. Holgate, 141 Wn. App. 840, 847 (2007). However, the court seemed to believe that its duty to view the facts favorably to Ms. Van ultimately caused the unfavorable result. RP 7:5-8, 16:17-17:12, 19:2-17.

The trial court repeatedly circled back to some variation on the statement, "the Court must assume at summary judgment that the claims underlying this lawsuit...have validity...." RP 7:5-8. However, it appears that the trial court's rigid conception of claim validity did not include the factual contours always consistently asserted by Ms. Van.

Rather, the court seemed concerned Ms. Van believed herself able to "turn the switch off and on, as it were, as to whether it is a vested claim

or not.”⁸ RP 17:13-16. This assumption is error. Ms. Van has always asserted, and the trial court was bound to accept, that AEG promised to tally more ownership units each year in her capital account. This promise appears in both the UGSA and Article IV of the Operating Agreement. CP 218-25, 229.

Taken in a light most favorable to Ms. Van, her valid claim was to vest in the distant future as a means to delay tax liability for executive compensation. CP at 573-74. The genuine factual issues of “back end compensation” facilitated by a pledged, unregistered, security interest should have defeated summary judgment. CP at 396, 573. Following is a summary of the two documents AEG utilized in convincing Ms. Van that she possessed only a pledge for future vestment.

The UGSA.

The Unit Grant and Sale Agreement (“UGSA”) was drafted specifically for Ms. Van and Mr. Chun. Ms. Van’s name appears throughout the document, and she is designated “Grantee” in the first paragraph. CP at 218. The UGSA, Section I(a) states that each year Ms. Van remains “in good standing...AEG shall grant” membership. CP at 218. The same clause imbues Chun with the caprice of “sole and subjective opinion.” This caprice supplied the context for supplementation by oral agreement, as with the ‘back end compensation’ plan. CP at 396. It

⁸ This light switch concern is applicable only to Ms. Van’s initial interest and not her lawsuit, the latter of which was not required to be listed under Chapter 13, but was nonetheless reported to the bankruptcy court in good faith. See Section 5.3.2.1 supra (discussing 11 U.S.C. §541(a)(5)).

supported Mr. Chun's representation that the shares "could be worth a dime, \$10, \$10,000. He could decree any value...to each unit." CP at 207.

The INTRODUCTION clause explains that AEG intended Ms. Van to become a member with increased ownership over time. CP at 218. Again, subjective terms such as "AEG believes" Ms. Van has "the potential," and "perform...in a satisfactory manner," are peppered throughout. CP at 218. Paragraph I(a) also ensures Ms. Van can never obtain a controlling interest in AEG, rendering her investment "consideration in the risk capital of [AEG] with the expectation of some valuable benefit to [Ms. Van] where [she] does not receive the right to exercise practical and actual control over the managerial decisions of the venture," for purposes of RCW 21.20.005(17)(a), which defines security.

Consistent with Chun's assertion that 'back end' compensation was possible because of his plenary discretion over the actual value of AEG's units, the final sentence of Article III reads, "The Manager a[s] designated in the [Operating Agreement] shall have the authority to grant discounts to this value as he or she deems appropriate." CP at 207, 219. Under IV(b), AEG then attempts to shift the burden of registering its own securities onto Ms. Van. CP at 221. Contrary to all securities laws, AEG concludes paragraph b with "AEG is under no obligation to register the Units or to make available any such exemption."

Clause IV(c) acknowledges there was much discussion between the parties before they signed the documents. CP at 221. These discussions

gave rise to various statements regarding ‘back end’ compensation, which will be admissible under ER 801(d)(i), (iii), and (iv) on remand. CP at 221, 396. Though AEG never issued certificates, clause IV(d) contains a boilerplate statement acknowledging the possibility of a ‘back end’ arrangement through “PLEDGED” security interest. CP at 221. This clause also makes the units irrelevant to the bankruptcy as they could not be liquidated except by AEG electing to repurchase them under clause VI(a)(iii). As discussed in Section 5.3.3, *supra*, AEG knew of Ms. Van’s bankruptcy and waived repurchase. CP at 222; RP 25:5.

The remainder of Article IV deals with taxes. It requires that Ms. Van report her security interest for tax purposes and warns that AEG will withhold such amounts as are necessary. CP at 222. With the foregoing ‘back end’ pledged security interest, there would be no immediate tax consequences under this section. CP at 207, 396, 573-74.

Article V restricts transfer of Ms. Van’s shares. CP at 222. Under the terms of clauses V(a) and VI(a), a bankruptcy trustee would have needed to somehow force Ms. Van to resign, die, be fired, or breach the UGSA by attempting to sell the units to a third party, in order to liquidate her ownership for the benefit of creditors. CP at 222. After Ms. Van notified AEG of her bankruptcy, AEG would have then needed to notify Ms. Van - and perhaps her trustee- that it would exercise the right of repurchase within 180 days. CP at 223. This never happened.

The Operating Agreement.

On the same day the parties executed the UGSA, they also reorganized AEG using the First Amended Limited Liability Company Agreement (“Operating Agreement”). CP at 225. Ms. Van, the only other signatory, was the basis for the pluralized, “members.” This section concludes with acknowledgement that Ms. Van and Mr. Chun had exchanged “valuable consideration,” forming a binding contract. CP at 225.

ARTICLE III explains the process by which Ms. Van became a member. CP at 226. Section 3.1 allowed that AEG open Ms. Van’s capital account based on her contribution of “services.” CP at 226. Mr. Chun denoted this method “sweat equity.” CP at 396. Section 3.2 gave Mr. Chun, by a majority vote of himself, the plenary power to make Ms. Van a member. CP at 227.

The ‘back end compensation’ concept was further supported by ARTICLE IV, which references both Yen-Vy Van and the UGSA. CP at 229. Section 4.2, along with Mr. Chun’s oral representations, educated Ms. Van that “the Company elect[ed] not to issue individual certificates of LLC ownership” just then, but would do so as back end compensation “at a future time.” CP at 229. Section 5.5(a) designates Mr. Chun as General Manager, with “full and complete authority, power and discretion to manage and control the business....” CP at 230. Section 5.6, designating Chun the “Tax Matters Partner” confirmed that Ms. Van was the non-tax matters partner,

portraying Chun as able to delay Ms. Van's tax liability by his 'back end' compensation plan. CP at 233.

ARTICLE VI details the processes that should have taken place when Ms. Van resigned from AEG. CP at 235. Ms. Van's resignation should have triggered dissolution, which could be avoided by Mr. Chun. Section 6.3 gave Mr. Chun the option to "avoid dissolution and...continue the Company business under its present name..., provided [he] elect to liquidate the interest of [Ms. Van] and cause the Company to make the payment [underlying this litigation and] specified in Article VIII." CP at 235.

The trial court seemed to find that the validity of Ms. Van's claim, as presumed under summary judgment, triggered mandatory application of judicial estoppel. Yet, as demonstrated by the UGSA and Operating Agreement, Ms. Van's valid claim was not initially an asset the trustee could have liquidated. Only upon Ms. Van's resignation, many years after the bankruptcy plan was confirmed, did the valid claim become vested with monetary value. Therefore, the logical fallacy -that the favorable light to which Ms. Van was entitled was also fatal to her case- need not be embraced.

5.6 Ms. Van has standing to pursue her claim.

It is unclear from the record whether the trial court accepted AEG's argument that Ms. Van's claim is trapped in the bankruptcy estate, depriving Ms. Van of "standing to prosecute it." RP 9:12; CP at 265, 267-68. If so,

this was error because, unlike a Chapter 7 bankruptcy, “in a Chapter 13 plan, property reverts in the debtor. It doesn’t remain...” in the estate. CP at 612.

Chapter 7 allows a debtor to make a clean break from his financial past, but at a steep price: prompt liquidation of the debtor’s assets. When a debtor files a Chapter 7 petition, his assets, with specified exemptions, are immediately transferred to a bankruptcy estate.

... Proceedings under Chapter 13 can benefit debtors and creditors alike. Debtors are allowed to retain their assets, commonly their home or car. And creditors, entitled to a Chapter 13 debtor’s “disposable” postpetition income, §1325(b)(1), usually collect more under a Chapter 13 plan than they would have received under a Chapter 7 liquidation.

Harris v. Viegelahn, 135 S. Ct. 1829, 1835 (2015).

In Arp v. Riley, as here, the debtor filed a lawsuit alleging claims that arose after Chapter 13 confirmation. 192 Wn. App. 85, 90 (2015). The trial court in Arp erroneously concluded that the post-confirmation claim “remained an asset of the bankruptcy estate” and never “revested with Mr. Arp....” Id. at 95. Division 1 of this Court looked to the Ninth Circuit interpretation of 11 U.S.C. §1327(b), holding the statute “vests property of the bankruptcy estate in the debtor upon plan confirmation unless the debtor chooses differently in the [Chapter 13] plan.” Id. (citing Cal. Franchise Tax Bd. v. Kendall (In re Jones), 657 F.3d 921, 928 (9th Cir. 2011)).

The bankruptcy court seemed to agree that Ms. Van’s interest in AEG had ‘revested’ at confirmation. Judge Lynch stated,

This issue comes up in Chapter 7s on a fairly regular basis. A claim is not disclosed. Sometime later, the claim is being pursued. ...The defendant raises the judicial estoppel defense. Oftentimes, the debtor goes back into a Chapter 7 case, reveals it. ...And the trustee then gets involved in the case and can pursue the claim.

Unfortunately, all of that rubric, which at least benefits a creditor, in theory, doesn't work in a Chapter 13.

Thus, if the trial court did accept AEG's argument that Ms. Van's interest can only be pursued by her trustee, such a finding would constitute reversible error. The Court should remand for trial.

6. Conclusion

Ms. Van was misled by both AEG and bankruptcy counsel MaGee. She has never wavered in her position. The nature of both Ms. Van's putative asset and later legal claim render them inconsequential to the bankruptcy discharge analysis. Therefore, the bankruptcy court never accepted MaGee's omission as a matter of law. Ms. Van has done nothing to affront the integrity of the judicial system, to detriment her creditors, or to benefit herself by deceit. "Perversely, the only "winner" in this scenario is the alleged bad actor in the estopped lawsuit." Ah Quin v. Cty. of Kauai DOT, 733 F.3d 267, 275 (9th Cir. 2013).

Ms. Van respectfully requests the Court reverse the application of judicial estoppel and remand her case for an immediate bench trial. If this request is not granted, Ms. Van hopes the Court will at least remand for the trial court to apply judicial estoppel in a manner considerate of its discretionary authority.

I, Jackson Millikan, respectfully submit, and swear under penalty of perjury by Washington State law, that I have electronically served, this brief on this 13th day of November, 2017,


Jackson Millikan WSB# 47786

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