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No. 50426-0-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

YEN-VY VAN

Appellant,

v.

ASSOCIATED ENVIRONMENTAL GROUP, LLC and MICHAEL
CHUN

Respondents,

RESPONDENTS' BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

I. INTRODUCTION	1
II. RESTATEMENT OF THE ISSUES	3
1. Whether Van was required to disclose in her bankruptcy schedules any ownership interest she claimed in AEG, without regard to the market value of such claims?.....	3
2. Whether, upon the filing of her bankruptcy petition, Van lost all ownership rights in and standing to pursue, her claims to equity in AEG?	3
3. Whether the trial court correctly rejected Van’s argument that her alleged equity in AEG was not reportable in the bankruptcy schedules because such rights had not yet “vested”?	3
4. Whether Van’s nondisclosure of the alleged equity in AEG on her bankruptcy schedules was clearly inconsistent with her later claims to a valuable asset?	3
5. Whether, by granting Van’s discharge in bankruptcy, the bankruptcy court accepted Van’s position that she claimed no valuable interest in AEG?	4
6. Whether, for purpose of judicial estoppel, Van’s non- disclosure of the alleged asset in her bankruptcy allowed her to derive an unfair advantage over her creditors and AEG?	4
7. Whether, for purposes of judicial estoppel, allowing Van to pursue her Superior Court lawsuit would cause an unfair detriment to AEG and Chun?.....	4

8.	Whether the trial court correctly found that Van’s 2017 ex parte reopening of her bankruptcy and amendment of her bankruptcy schedules was ineffective to give her either ownership of her claim or standing to pursue it?.....	4
III.	RESPONDENTS’ STATEMENT OF THE CASE	4
IV.	ARGUMENT.....	10
A.	Standard of review	10
B.	The trial court correctly dismissed Van’s lawsuit as being barred by judicial estoppel.....	11
	1. Van never acquired any ownership interest in AEG. Even if she had, with the filing of her bankruptcy, she lost ownership of her claim, together with any standing to prosecute it.....	12
	2. Van’s claimed interest in AEG was the type of asset she was required to report on her bankruptcy schedules.....	13
	3. The trial court correctly held that all of the elements of judicial estoppel were satisfied as a matter of law.....	17
V.	CONCLUSION.....	28

TABLE OF AUTHORITIES

Cases

<i>Ah Quin v. County of Kauai Dept. of Transp.</i> , 733 F.3d 267 (2013).....	25, 26, 27
<i>In re Allen</i> , 226 B.R. 857, 863-64 (Bankr. N.D. Ill. 1998)	14, 15
<i>Arkison v. Ethan Allen, Inc.</i> , 160 Wn.2d 535, 538-39, 160 P.3d 13 (2007).....	12, 14, 17, 20
<i>Arp v. Riley</i> , 192 Wn. App. 85, 366 P.3d 946 (2015).....	24, 25, 27
<i>Baldwin v. Silver</i> , 147 Wn. App. 531, 536-537, 196 P.3d 170 (2008).....	18
<i>Barber v. Bankers Life & Cas. Co.</i> , 81 Wn.2d 140, 142, 500 P.2d 88 (1972).....	10
<i>Bartley v. Kendall</i> , 134 Wn. App. 95, 98-99, 138 P.2d 1103 (2006).....	11
<i>Burnes v. Pemco Aeroplex, Inc.</i> , 291 F.3d 1282, 1288 (11 th Cir. 2002).....	27
<i>Coastal Plains, Inc.</i> , 179 F.3d 197, 208 (5th Cir.1999).....	12
<i>Cunningham v. Reliable Concrete Pumping, Inc.</i> , 126 Wn. App. 222, 230, 108 P.3d 147 (2005).....	14, 17, 18, 19
<i>First Nat'l Bank v. Lasater</i> , 196 U.S. 115, 118-19, 25 S. Ct. 206, 49 L.Ed. 408 (1905)	17
<i>Harris v. Fortin</i> , 183 Wn. App. 522, 333 P.3d 556 (2014)	19, 20

<i>Haslett v. Planck</i> , 140 Wn. App. 660, 166 P.3d 866 (2007)	23, 24, 27
<i>Highline Sch. Dist. No. 401 v. Port of Seattle</i> , 87 Wn.2d 6, 15, 548 P.2d 1085 (1976).....	10
<i>Ingram v. Thompson</i> , 141 Wn. App. 287, 169 P.3d 832 (2007)	20
<i>Johnson v. Si-Cor, Inc.</i> , 107 Wn. App. 902, 906, 28 P.3d 832 (2001).....	11, 22, 23, 27
<i>Kee v. Evergreen Professional Recoveries, Inc.</i> , 2009 WL 2578982 (W.D. Wash. 2009).....	12
<i>Linklater v. Johnson</i> , 53 Wn. App. 567, 570, 768 P.2d 1020 (1989).....	16
<i>Mahoney v. Shinpoch</i> , 107 Wn.2d 679, 683, 732 P.2d 510 (1987).....	10
<i>In re Marriage of Harrington</i> , 85 Wn. App. 613, 625, 935 P.2d 1357 (1997)	15
<i>McFarling v. Evaneski</i> , 141 Wn. App. 400, 171 P.3d 497 (2007).....	12, 17
<i>Seattle-First Nat'l Bank v. Marshall</i> , 31 Wn. App. 339, 343, 641 P.2d 1194 (1982).....	11
<i>Shirkey v. Leake</i> , 715 F.2d 859, 863 (4 th Cir. 1983)	14
<i>Skinner v. Holgate</i> , 141 Wn. App. 840, 173 P.3d 300 (2007).....	12, 17
<i>In re Smith</i> , 640 F.2d 888, 892 (7th Cir.1981).....	16
<i>Tignor v. Parkinson</i> , 729 F.2d 977, 980 (4th Cir.1984).....	13

Wilson v. Steinbach,
98 Wn.2d 434, 437, 656 P.2d 1030 (1982).....11

Statutes/Rules

11 U.S.C. § 522(b)(1)12, 13
11 U.S.C. § 541.....16
11 U.S.C. § 541 (a)12
11 U.S.C. § 541(a)(1).....13
11 U.S.C. § 554(d).....17
Fed. R. Bankr. P. 1007(b); 9009; 100813

Other Authorities

Black’s Law Dictionary (5th Ed.)29

I. INTRODUCTION

Appellant Yen-Vy Van (“Van”) filed the lawsuit below on February 16, 2016 seeking damages, costs and attorneys’ fees, alleging that she was the owner of units in Respondent Associate Environmental Group (“AEG”), pursuant to written contracts signed in 2008. In 2009, Van filed a petition for Chapter 13 bankruptcy, not listing any claim to ownership units in AEG on her asset schedules. During the approximately six and one-half years she was employed with AEG, Van received a generous salary, with benefits and regular raises. She resigned her employment on March 1, 2013, with the Chapter 13 proceedings still open, demanding in June 2013 that AEG pay her for her alleged ownership interest in the company. In April 2014, the bankruptcy trustee filed his final report and account, and the bankruptcy case was closed. She filed the lawsuit below in 2016.

The trial court correctly held that Van’s lawsuit was barred by judicial estoppel. Van’s ex parte reopening of her bankruptcy case and amendment of her schedules in 2017 – more than eight (8) years after her bankruptcy filing – was ineffective to confer on her either ownership of the claim or standing to pursue it. The Bankruptcy Court granted AEG’s motion to re-close the bankruptcy proceeding, with the trustee taking no action to either pursue or abandon the claim.

It is AEG's position that Van never acquired ownership rights in AEG in the first place. However, construing the disputed facts in a light most favorable to Van, had she been granted the right to elect to receive ownership units upon termination of her employment as she alleges, such interest would have been vested and mature when she filed her bankruptcy petition. Upon Van's filing of her petition, the alleged asset became part of her bankruptcy estate. She lost all rights to the claim, until and unless the bankruptcy trustee took some action to either pursue or abandon it which has not occurred.

In summary, the trial court correctly held that the doctrine of judicial estoppel bars Van's lawsuit as a matter of law. She took clearly inconsistent positions in the Superior and Bankruptcy Courts such that allowing her to prosecute her lawsuit at this late date would give her an unfair advantage over both AEG and her creditors. Perhaps most glaringly, Van avoids any meaningful discussion of the extreme prejudice that would be suffered by AEG if she were allowed to pursue her Superior Court lawsuit. Had Van actually been a member of the LLC, her membership status would have automatically terminated per the terms of the contracts and she would have lost her job. To prevent the appointment of a receiver or worse yet, a forced liquidation of the company, Chun would likely have had to negotiate a purchase or settlement of her ownership interest with the bankruptcy trustee. In the final analysis, if Van truly believed she owned the valuable asset she now asserts, she had a choice to make

in March 2009 when she filed her bankruptcy petition: either (1) report the alleged ownership interest, become dissociated from the company and lose her employment per the contracts or (2) continue to enjoy her steady, generous paycheck with raises and benefits, as she did for the next several years. Simple logic dictates that Chun, his company (and probably the bankruptcy trustee and Van's creditors) are in a far different circumstance now than they would have been had her claims been legitimate and had she appropriately disclosed them. Van cannot have her cake and eat it too. The trial court did not err in dismissing her lawsuit. The trial court's grant of summary judgment should be affirmed.

II. RESTATEMENT OF THE ISSUES

1. Whether Van was required to disclose in her bankruptcy schedules any ownership interest she claimed in AEG, without regard to the market value of such claims?
2. Whether, upon the filing of her bankruptcy petition, Van lost all ownership rights in and standing to pursue, her claims to equity in AEG?
3. Whether the trial court correctly rejected Van's argument that her alleged equity in AEG was not reportable in the bankruptcy schedules because such rights had not yet "vested"?
4. Whether Van's nondisclosure of the alleged equity in AEG on her bankruptcy schedules was clearly inconsistent with her later claims to a valuable asset?

5. Whether, by granting Van's discharge in bankruptcy, the bankruptcy court accepted Van's position that she claimed no valuable interest in AEG?

6. Whether, for purpose of judicial estoppel, Van's non-disclosure of the alleged asset in her bankruptcy allowed her to derive an unfair advantage over her creditors and AEG?

7. Whether, for purposes of judicial estoppel, allowing Van to pursue her Superior Court lawsuit would cause an unfair detriment to AEG and Chun?

8. Whether the trial court correctly found that Van's 2017 ex parte reopening of her bankruptcy and amendment of her bankruptcy schedules was ineffective to give her either ownership of her claim or standing to pursue it?

III. RESPONDENTS' STATEMENT OF THE CASE

Respondent Michael Chun ("Chun") is the 100% owner of all units of AEG.¹ Appellant Van began her employment as a hydrologist with Respondent AEG in 2006, pursuant to an October 31, 2006 written offer of employment, letter, which summarizes the proposed salary and benefit package, including;

¹ Van asserts she worked "as a managing partner" of AEG. This characterization is incorrect. AEG has never been a partnership, and Van never had any management responsibilities. She goes on to state that Chun owns "the majority interest" in AEG. This assertion is incorrect as well. Chun is and was, at all material times, the sole manager and sole owner of all units in AEG. CP 211.

“ownership opportunity after one calendar year of employment.” CP 217. Van’s one year anniversary date of employment was in November 2007. CP 393. On May 7, 2008, with things progressing satisfactorily, she and Chun executed a Unit Grant and Sale Agreement (“UGSA”) CP 218 and a First Amended Limited Liability Company Agreement (“LLC Agreement”) CP 225. The mutual intent of the parties was to allow Van to earn equity in AEG while also enabling her to buy additional ownership units.² CP 212. Van testified in her deposition, “My understanding was that I was essentially awarded 50 units, five percent right off the bat.” CP 394.

Chun and Van met at the end of 2008 to discuss Chun’s anticipated initial transfer of 50 AEG units to Van. CP 90, 399. Chun recalls that Van specifically asked Chun not to make this grant, because doing so would trigger income tax liability to her that she could not afford to pay relative to taxable income having no immediate cash value to her. CP 90-91. Chun proposed having AEG give Van a bonus to assist with the tax payment. However, she requested that she instead receive a raise in her salary, which Chun granted. CP 91. Despite there being no evidence of

² The UGSA provides in Section I(a) and II provide that beginning on December 1, 2008 and on December 31st of each year thereafter through 2016, Van was to receive outright 50 units of ownership in year one. Starting in year two and for each year thereafter, Van was to receive 25 units and was to have the opportunity to purchase 25 more units, up to a potential total acquisition of 450 out of 1000 total units. Section IV(e) discloses that receipt of ownership units would be taxable income, on which Van was required to report and pay taxes. CP 218, 222.

any formal grant of units, Van now alleges (inconsistent with her deposition testimony) that Chun *verbally* agreed that she would receive all of the accrued units – plus the money to pay the tax on them – at such time as she quit her employment with AEG as “a monetary back-end compensation amount.” CP 400. AEG denies any such agreement.

At the end of 2009 and for each subsequent year of her employment, Van and Chun had similar versions of the 2008 discussion. Each year, Chun again offered a grant of ownership units pursuant to the UGSA schedule. According to Chun, Van declined the grant of ownership units each year, citing the same reasons. Each year, she would instead ask for a raise in salary, which Chun granted each time.³ These were significant salary increases, ranging from three to ten percent annually at a time when, due to the economic recession, most businesses were cutting employee costs. As part of the negotiations, AEG granted Van a variety of non-salary employee benefits, which included having AEG pay all of her personal vehicle expenses and also all of her and her family’s health care insurance premiums. CP 91.

³ An actual transfer of units to Van would have required company resolutions and restructuring of the company’s system of payment compensation, as well as payroll and tax accounting. These things never occurred. Payroll deductions reflecting the value of units were not made, and Van was never given a W-2 showing the grant or any other documents indicating that she received units in AEG. Further, as a unit holder, Van would have received a Schedule K-1 form each year. Van was never given K-1, never received any distribution of profit, and was never required to make a capital call to cover losses or add additional working capital to the company. CP 92.

On March 10, 2009, represented by an attorney named James Magee, Van filed a Chapter 13 bankruptcy petition, listing no claim of ownership in AEG in her asset schedules. CP 250-51.

Had Van been an actual member of the LLC, her bankruptcy would have triggered a number of serious consequences under the UGSA and LLC Agreement. Sec. VI(a) of the UGSA gives AEG the right to repurchase Van's units in the event of the latter's bankruptcy:

For the purposes of this Section, a 'Repurchase Event' shall mean an occurrence of one of the following . . . **(iii) bankruptcy by Grantee, which shall be deemed to have occurred as of the date on which voluntary or involuntary petition in bankruptcy is filed with a Court of competent jurisdiction . . . Upon the occurrence of a purchase Event, the Company shall have the right (but not an obligation) to purchase all or any portion of the Units of Grantee, as of the Date of the Repurchase Event at a cost established using the methodology prescribed in Section III of this Agreement.**⁴

Further, Sec. 6.5(e) of the LLC Agreement triggered repurchase rights of the member's units by the company in the event a member filed for bankruptcy:

. . . In the event that [any member commences voluntary proceedings in bankruptcy] the other Members shall have the option to purchase from him or her, or his or her successor in interest all, but not less than all, interest owned by such Member prior to subsequent to the occurrence of the event described herein. . . . Such purchase shall be made at the price and on the other terms and conditions set forth in Articles VII and VIII below.⁵

⁴ CP 222-23. Emphasis added.

⁵ CP 235-36.

Section 6.6 of the LLC Agreement provides for automatic retirement and dissociation of a member from the Limited Liability Company in the event of such member's bankruptcy. CP 237.

Other than informing Chun of her bankruptcy, Van did not take any action under the UGSA or the LLC Agreement; rather, she went on for the next several years collecting her steady paycheck, raises and employee benefits. Yet she testified in her deposition:

Q. At the time you filed a bankruptcy petition in March 10, 2009, you considered at that time that you owned a valuable property interest in the company. Correct?

A. I did.⁶

With her bankruptcy still pending, Van resigned employment with AEG per a letter to Chun dated March 13, 2013. CP 252. She retained a different attorney, Mr. Klaus Snyder, who sent AEG a June 3, 2013 letter demanding that AEG compensate Van for her alleged ownership interest in the company. AEG's counsel replied on July 11, 2013, denying the buyout demand, and specifically alerting Mr. Snyder to the fact that Van did not list her alleged asset in her bankruptcy schedules. CP 411. Van did not amend her bankruptcy schedules, although with the bankruptcy open she could have done so as a matter of right. On June 4, 2014, the trustee filed his final report and Van's Chapter 13 case was closed. CP 496-97.

⁶ CP 406.

On August 19, 2016, Van filed suit in Thurston County Superior Court against AEG and Chun seeking to recover the value of her alleged ownership interest in AEG, plus costs and attorneys' fees. CP 8. On August 19, 2016, after first obtaining leave from the court, Van filed a First Amended Complaint adding a new claim for "Misrepresentation and Securities Fraud." CP 158. On December 9, 2016, AEG filed a Motion for Summary Judgment Dismissing Amended Complaint and for Attorney Fees and Costs, with a hearing date set for January 20, 2017. Van hired bankruptcy counsel, who obtained in the U.S. Bankruptcy Court on December 30, 2016 an Ex Parte Order Reopening Case to Allow Filing of Amended Schedules A/B and C to include the alleged claims of ownership in AEG. CP 311, 428.

In response to the bankruptcy order, on January 11, 2017 Van and AEG entered in the Superior Court a Stipulated Order Staying Litigation Pending Reopened Bankruptcy of Plaintiff. CP 331. On January 19, 2017, AEG filed a motion in the Bankruptcy Court for orders (1) vacating the ex parte order reopening bankruptcy and (2) granting relief from stay. CP 585. On February 24, 2017, U.S. Bankruptcy Judge Brian D. Lynch entered an Order Lifting Stay and Closing Case, providing:

. . . [I]t is hereby **ORDERED** that the above-captioned Bankruptcy shall be and is hereby closed. It is further **ORDERED** that the automatic stay is not and did not come into effect upon reopening.

CP 554. The bankruptcy trustee never appeared or took any action in response to the Bankruptcy Court motion, and specifically did not take any action to either pursue or abandon the alleged asset.

AEG then proceeded with its summary judgment motion in Superior Court, and on May 26, 2017, the Hon. Carol Murphy entered an Order Granting Motion of Defendants for Summary Judgment, Dismissing Amended Complaint. The order denied AEG's request for attorneys' fees and costs. CP 678-79. Van appeals.

IV. ARGUMENT

A. Standard of review.

This Court reviews a trial court's application of judicial estoppel to the facts of a case for abuse of discretion. *Arkison v. Ethan Allen, Inc.*, 160 Wn.2d 535, 538, 160 P.3d 13 (2007). This Court reviews a summary judgment order de novo, engaging in the same inquiry as the trial court. *Highline Sch. Dist. No. 401 v. Port of Seattle*, 87 Wn.2d 6, 15, 548 P.2d 1085 (1976); *Mahoney v. Shinpoch*, 107 Wn.2d 679, 683, 732 P.2d 510 (1987). Summary judgment is proper if the record demonstrates "there is no genuine issue as to any material fact" and "the moving party is entitled to judgment as a matter of law." The Court construes all evidence and reasonable inferences therefrom in the light most favorable to the nonmoving party. *Barber v. Bankers Life & Cas. Co.*, 81 Wn.2d 140, 142,

500 P.2d 88 (1972); *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982).

B. The trial court correctly dismissed Van’s lawsuit as being barred by judicial estoppel.

Judicial estoppel is “an equitable doctrine that precludes a party from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position.” *Bartley v. Kendall*, 134 Wn. App. 95, 98-99, 138 P.2d 1103 (2006). The doctrine aims to “preserve respect for judicial proceedings without the necessity of resort to the perjury statutes; to bar as evidence statements by a party which would be contrary to sworn testimony the party has given in prior judicial proceedings; and to avoid inconsistency, duplicity, and waste of time.” *Johnson v. Si-Cor, Inc.*, 107 Wn. App. 902, 906, 28 P.3d 832 (2001) (quoting *Seattle-First Nat’l Bank v. Marshall*, 31 Wn. App. 339, 343, 641 P.2d 1194 (1982)).

Judicial estoppel applies when the following elements are shown:

- (1) a party asserts a position that is “clearly inconsistent” with an earlier position;
- (2) judicial acceptance of the inconsistent position would indicate that either the first or second court was misled; and
- (3) “the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party.’ ”

Arkison, 160 Wn.2d at 538-39. Washington courts have been aggressive in applying judicial estoppel to prevent bankruptcy debtors from attempting to defraud creditors in bankruptcy by hiding state court lawsuits, whose proceeds could pay such creditors. *See, e.g., Skinner v. Holgate*, 141 Wn. App. 840, 173 P.3d 300 (2007); *McFarling v. Evaniski*, 141 Wn. App. 400, 171 P.3d 497 (2007). *See also, Kee v. Evergreen Professional Recoveries, Inc.*, 2009 WL 2578982 (W.D. Wash. 2009).

This is because:

“the integrity of the bankruptcy system depends on full and honest disclosure by debtors of all of their assets. The courts will not permit a debtor to obtain relief from the bankruptcy court by representing that no claims exist and then subsequently to assert those claims for his own benefit in a separate proceeding. The interests of both the creditors, who plan their actions in the bankruptcy proceeding on the basis of information supplied in the disclosure statements, and the bankruptcy court, which must decide whether to approve the plan of reorganization on the same basis, are impaired when the disclosure provided by the debtor is incomplete.”

In re Coastal Plains, Inc., 179 F.3d 197, 208 (5th Cir.1999).

1. Van never acquired any ownership interest in AEG. Even if she had, with the filing of her bankruptcy, she lost ownership of her claim, together with any standing to prosecute it.

When a debtor files a petition for bankruptcy, an “estate” is created. 11 U.S.C. § 541(a). All legal or equitable interest in the debtor's property at the time of filing becomes the property of the bankruptcy estate unless it is subject to an exemption. 11 U.S.C. § 522(b)(1), §

541(a)(1). A petitioner must prepare Bankruptcy Schedules as prescribed by the Official Bankruptcy Court Forms, and execute her petition under penalty of perjury. Fed. R. Bankr.P. 1007(b); 9009; 1008. It is AEG's position that Van never acquired any interest in AEG in the absence of any formal action by Chun to transfer the units. However, whatever interest she may have possessed in AEG automatically became part of her bankruptcy estate upon the filing of her petition. Such property interest remains in the bankruptcy estate until the bankruptcy trustee takes some action to either pursue the asset or to abandon it. Such action on the part of the trustee never occurred.

2. Van's claimed interest in AEG was the type of asset she was required to report on her bankruptcy schedules.

Van testified under oath that she believed she possessed valuable ownership rights in AEG as of March 10, 2009 when she filed her bankruptcy petition. She had an absolute duty to disclose the alleged asset in her schedules. When a bankruptcy is filed, the debtor is required to include "*all* legal or equitable interests . . . in property as of the *commencement* of the case." 11 U.S.C. § 541(a)(1).⁷ This 'includes... all property of the debtor, even that needed for a fresh start.' *Tignor v. Parkinson*, 729 F.2d 977, 980 (4th Cir.1984). It includes all kinds of

⁷ Italics added.

tangible or intangible property, *Shirkey v. Leake*, 715 F.2d 859, 863 (4th Cir. 1983), as well as contingent and unliquidated claims, *Arkison*, 160 Wn.2d at 539 n.1. It includes all possible causes of action, “even if the likelihood of success is unknown.” *Cunningham v. Reliable Concrete Pumping, Inc.*, 126 Wn. App. 222, 230, 108 P.3d 147 (2005). Stock option agreements – the contractual right to purchase shares of stock at a given price – are property interests that become property of the estate the commencement of the bankruptcy case. *In re Allen*, 226 B. R. 857, 863-64 (Bankr. N.D. Ill. 1998).

Van attaches a variety of labels to attempt to characterize her alleged interest in AEG as something other than a reportable asset. She refers to it variously as an “annual accrual of pledged ownership interest;”⁸ “pledged . . . ownership interest with delayed tax implications;”⁹ “pledged future interest;”¹⁰ “pledged future vestment of ownership units;”¹¹ etc. She goes on to argue a fictitious concept called “back-end compensation,” characterizing the asset as worth little or nothing until she quit her employment with AEG, at which point the asset would have become “vested.” Upon such “vesting” after termination of her employment the asset had value and was therefore reportable – the

⁸ Brief of Appellant, P.3.

⁹ Brief of Appellant, P.6.

¹⁰ Brief of Appellant, P. 8.

¹¹ Brief of Appellant, P. 13.

argument goes. There is no factual, legal or logical support for such arguments.

Van's various descriptions describe an interest most closely resembling a stock option. If one applies this analogy, under Washington law the "option" was already vested when she filed her bankruptcy petition. This is fatal to Van's "back-end compensation" argument. Under Washington case law, when the option-holder has the absolute right to exercise an option at any time by payment of the option price, the option is considered vested and matured. *See In re Marriage of Harrington*, 85 Wn. App. 613, 625, 935 P.2d 1357 (1997).¹² If an option cannot be exercised until some future date, but the option-holder has the absolute right to exercise the option on that future date, the option is considered vested but unmatured. *Id.* If the option cannot be exercised until some future date, and if the exercise of the option is contingent upon a future event, the option is unvested. *Id.* at 625-26.

In re Allen, supra, is instructive. There the debtor had several sets of options, some of which were exercisable before the filing of the petition some of which became exercisable after the filing of the bankruptcy petition. *Allen*, 226 B.R. at 859. The debtor argued that those options that became exercisable after the petition date should not be included within

¹² As amended on reconsideration, May 5, 1997.

the bankruptcy estate because the exercisability of those options was contingent upon his continued employment, making the options (once they were exercisable) exempt post-petition earnings pursuant to 11 U.S.C. § 541. *Id.* at 861. The Bankruptcy Court rejected the debtor's argument, holding that a stock option agreement – the contractual right to purchase shares of stock at a given price – is an interest in property that becomes property of the bankruptcy estate at the commencement of the case. *Id.* at 862-66.

The legal principles applicable to prepetition stock options directly apply to the type of alleged future interest Van describes. Beginning in 2008, she had the absolute contractual right to not only accept units of ownership in AEG, but also to purchase more. Even if one assumes hypothetically there was a verbal agreement that she could wait until termination of her employment to accept the units (which AEG categorically denies), the alleged asset was both vested and matured at the time Van filed her petition.

Consequently, because she failed to report the asset, her cause of action remains exclusively in the bankruptcy estate. All rights of action in which the debtor has an interest become property of the estate under 11 U.S.C. § 541; *See In re Smith*, 640 F.2d 888, 892 (7th Cir.1981). *Linklater v. Johnson*, 53 Wn. App. 567, 570, 768 P.2d 1020 (1989). The bankruptcy

estate – under the broad powers of the trustee - owns all of the debtor's property rights and causes of action, even those that were never disclosed.

When the Trustee is unaware of an accrued right of action and, as a consequence, it is neither abandoned nor administered in the bankruptcy nor the subject of a court order, it remains the property of the Estate. See 11 U.S.C. § 554(d); *First Nat'l Bank v. Lasater*, 196 U. S. 115, 118-19, 25 S. Ct. 206, 49 L. Ed. 408 (1905).

3. The trial court correctly held that all elements of judicial estoppel were satisfied as a matter of law.

All three of the “core factors” referenced in *Arkison* that guide the Court's application of judicial estoppel are satisfied here:

Assertion by party of inconsistent positions.

Regarding the first factor, Washington law is clear that it is inconsistent to fail to disclose a potential lawsuit in a bankruptcy proceeding, and then attempt to pursue the suit after discharge. See *McFarling v. Evaniski*, 141 Wn. App. 400, 171 P.3d 497 (2007) (debtor who did not disclose personal injury claim in bankruptcy schedules was judicially estopped from later bringing claim); *Skinner v. Holgate*, 141 Wn. App. 840, 173 P.3d 300 (2007) (judicial estoppel imposed against debtor who failed to disclose potential claim to bankruptcy court); *Cunningham*, 126 Wn. App. at 222 (applying judicial estoppel to bar

debtor who did not disclose potential cause of action for personal injury in bankruptcy from bringing claim). Van's current assertion that she has vested rights to ownership in AEG is clearly inconsistent with the position she took in her bankruptcy schedules before the bankruptcy court.

Van can make no credible claim that her nondisclosure was excused due to mitigating circumstances or excusable neglect. She testified in her deposition that she believed she had a valuable property interest at the time she filed for bankruptcy, and asserts that she in fact disclosed the ownership claim to her first bankruptcy attorney, James Magee. She now claims that her nondisclosure was caused by Magee's negligence. However, verbal disclosure to her attorney alone can have no legal significance. Even oral disclosure of a claim to the bankruptcy trustee is not enough. See, *Cunningham*, 126 Wn. App. at 229; *Baldwin v. Silver* 147 Wn. App. 531, 536-537, 196 P.3d 170 (2008). Moreover, she is the one who signed the schedules under penalty of perjury, not Magee. Finally, any attempt to blame her first attorney is negated by the July 11, 2013 letter from AEG's counsel to Van's second attorney, Mr. Snyder, reminding him (and Van) that the asset had not been disclosed. CP 411. Van could have amended her schedules as a matter of right at that point because her bankruptcy case was still open. She did not.

The Bankruptcy Court was misled by Van's nondisclosure when it granted her a discharge in bankruptcy.

Van misled the bankruptcy court. Her subjective intent is irrelevant. A Bankruptcy Court is deemed to have "accepted" a litigant's inconsistent position when that court discharges the debtor's debt without knowledge of the pre-petition cause of action. *Cunningham*, 126 Wn. App. at 231.

Van misreads *Harris v. Fortin*, 183 Wn. App. 522, 333 P.3d 556 (2014). Harris was a Chapter 7 debtor who listed a \$400,000 promissory note from Fortin as having zero value, and testified under oath that Fortin was insolvent. The trustee found no available property for distribution, and in December 2010 the bankruptcy court discharged Harris' debts. *Id.* at 557-58. Fortin sued Harris in State Court approximately 9 months later. Part of the relief requested was judgment on the \$400,000 note. In January 2012, Harris filed an amended schedule with the Bankruptcy Court, still listing the promissory note as valueless and uncollectible. The trial court granted Fortin's motion for summary judgment and dismissed the action based on judicial estoppel. *Id.*

On appeal, in analyzing whether *Harris* had taken "clearly inconsistent" positions, Division II of the Court of Appeals identified two general factual scenarios: (1) nondisclosure of the claim as an asset, and

(2) disclosure of the asset, but with undervaluation thereof. Based on Harris's facts, the court went on to identify a third "clearly inconsistent" scenario, where Harris disclosed the promissory note, but falsely represented to the court that it had no value. As the court stated:

Unlike the debtor in [*Ingram v. Thompson*, 141 Wn. App. 287, 169 P.3d 832 (2007)] Harris did not state that the amount recoverable was unknown. Rather, he affirmatively told the court that the promissory note had no value and that he personally knew that Fortin was not able to pay the debt owed on the note.

...

We conclude that Harris took a 'clearly inconsistent' position and, thus, the ["clearly inconsistent"] factor is met.

Harris, 183 Wn. App. At 529-30.¹³

Van cites *Harris* for the premise that "[u]nlike Harris, Ms. Van had no promise of value at the time of her bankruptcy filing and her legal claims occurred years after confirmation."¹⁴ However, *Harris* is authority for AEG's position, not Van's. The *Harris* court's finding of clearly inconsistent positions did not hinge on Harris' good faith undervaluation of the asset, but rather upon his lying about the value. Thus, he fell into the third factual scenario identified by the court. Van falls into the first category, complete nondisclosure. Van's nondisclosure in the Bankruptcy

¹³ The court further went on to hold that the second and third *Arkison* judicial estoppel factors were met, given that bankruptcy trustee was implicitly misled into closing the bankruptcy as a no asset case, and finding that if not judicially estopped from asserting the inconsistent position, Harris would gain an unfair advantage or impose an unfair detriment on Fortin.

¹⁴ Brief of Appellant, P. 29.

Court was therefore clearly inconsistent through later pursuit of the asset in State Court as matter of law for purposes of applying judicial estoppel.

Van's inconsistent positions allow her to derive an unfair advantage or impose an unfair detriment on AEG.

Under all possible scenarios, allowing Van to take inconsistent positions in the two courts allows her an unfair advantage and operates to the prejudice of (1) Chun and AEG, (2) the bankruptcy trustee; and (3) Van's creditors whose claims were discharged or compromised in bankruptcy. Disclosure by Van to the bankruptcy trustee of a claimed ownership Units in AEG would have had drastic consequences to Chun and his company, compelling a far different outcome. If there was any merit that Van had substantial equity – perhaps into the hundreds of thousands of dollars – in AEG at the time she filed her bankruptcy petition, the trustee had the right and the duty to marshal such asset for the benefit of her creditors. Van's interests in AEG would have automatically ceased, under the UGSA and LLC Agreement and 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. Allowance of substantial claims to pass through bankruptcy without any accountability to the bankruptcy court would by definition work a fraud on

her creditors, who presumably agreed to a Chapter 13 plan based upon the sworn financial information they were given.

Van cites a number of cases for the proposition that courts should adopt a flexible approach in applying the doctrine of judicial estoppel. However, those cases are inapposite because they typically involve post-petition actions on the part of the debtor and bankruptcy trustee that alleviate an unfair advantage to the debtor and prejudice to the defendants and/or creditors.

For example, in *Johnson v. Si-Cor, Inc.*, 107 Wn. App. 902, 28 P.3d 832 (2001), Johnson filed a petition for Chapter 13 relief. The following month, he sustained a personal injury. He did not tell the trustee of his potential claim, nor did he amend his schedules to list the potential claim. The bankruptcy was converted to a Chapter 7, and two years later the proceeding was closed as a “no asset” case. *Id.* at 833. Thereafter, Johnson filed his personal injury lawsuit, which the trial court dismissed on summary judgment based on a strict application of judicial estoppel. *Id.* at 834. On appeal, the dismissal was reversed because of a lack of “evidence in this record” that Johnson received a benefit or that Johnson's position was adopted by the bankruptcy court. *Id.* The key factor was that Johnson's personal injury claim arose after he had filed his petition. The

court, in its analysis, pointed out that the result would be different if the personal injury claim had arisen prior to the petition:

A Chapter 7 debtor, for instance, could well be precluded from pursuing an undisclosed prepetition, personal injury lawsuit, if the debtor's case was closed as a "no asset" case. By not disclosing the asset, the debtor keeps an asset that may have created a dividend for the debtor's unsecured creditors. By closing the case as a "no asset" case, the court implicitly accepts the debtor's position, as stated in the debtor's bankruptcy schedules, that the liquidation of the debtor's nonexempt assets would not create a dividend for unsecured creditors.

Id. at 909. The court concluded that under the bankruptcy law, Johnson was not obligated to report his personal injury claim because it arose after his petition was filed. *Id.* at 910-12. The court held that judicial estoppel would apply if there was "evidence in this record" that a party's prior inconsistent position "was adopted by the court." *Id.* at 904. However, it had not been.

In *Haslett v. Planck*, 140 Wn. App. 660, 166 P.3d 866 (2007), Haslett was injured *before* his Chapter 13 bankruptcy filing in a collision for which Planck was at fault. Haslett filed a bankruptcy petition with schedules that did not show the personal injury claim, and the Bankruptcy Court entered an order confirming his Chapter 13 plan in 2004. Haslett sued Planck in Superior Court for his personal injuries in 2006. In response to Planck's motion for summary judgement based on judicial estoppel, Haslett amended his bankruptcy schedules to include the

personal injury claim and entered into a stipulation with the bankruptcy trustee providing that all non-exempt proceeds from his personal injury action would be committed to the funding of the Chapter 13 plan. *Id.* at 663. The Superior Court nevertheless granted Planck's motion for summary judgment, strictly applying the elements of judicial estoppel, noting that Haslett's amendment of his bankruptcy schedule was not appropriate to "undo the doctrine." *Id.* at 664.

Division III of the Court of Appeals reversed, holding that in a Chapter 13 bankruptcy proceeding, in which the debtor remains in possession of a previously unscheduled claim, it is appropriate for a debtor to amend his bankruptcy schedules to include the claim. *Id.* at 667. The court pointed out that unlike in a Chapter 7 bankruptcy, Haslett did not necessarily gain an advantage by failing to disclose his unliquidated claim. *Id.* The court further held that the Bankruptcy Court had not necessarily "accepted" the debtor's prior position confirming the Chapter 13 plan, when there was no showing that the undisclosed claim would have affected the payments to creditors. *Id.*

Haslett does not support Van's position. Unlike Van, Mr. Haslett took prompt and timely action with the bankruptcy trustee to include his lawsuit in his bankruptcy estate, to be managed by the trustee such that there was no demonstrable prejudice to any creditors or any third parties.

Arp v. Riley, 192 Wn. App. 85, 366 P.3d 946 (2015), also a Chapter 13 case, similarly is authority for AEG's position, not Van's. *Arp* involved a personal injury plaintiff's failure to disclose an injury claim arising out of an accident that occurred *after* the bankruptcy court confirmed his Chapter 13 plan. After an in-depth analysis of how the various circuits apply judicial estoppel in cases of claims arising after confirmation of the Chapter 13 plan, Division One of the Court of Appeals held that (1) *Arp* did not have a statutory duty to disclose the claim and (2) he had standing to pursue it because it arose after confirmation of his Chapter 13 plan. The basis of the court's conclusion was the fact that "[t]he Bankruptcy Court had already entered a confirmation order vesting in *Arp* ownership of assets, 92 Wn. App. at 100-101. The Court concluded that although *Arp* nevertheless had a statutory duty to disclose the claim, the elements of judicial estoppel did not exist as a matter of law warranting dismissal of his suit against the defendants. The court remanded the case to the trial court to make findings in this regard. *Id.*, at 101. Simply put, *Arp* is not authority for Van's position because *Arp*'s personal injury claim arose post-petition.

In *Ah Quin v. County of Kauai Dept. of Transp.*, 733 F.3d 267 (9th Cir. 2013), the Ninth Circuit Court of Appeals accepted the debtor's position that omission of her pending racial discrimination lawsuit from

her Chapter 7 asset schedule was “mistaken” or “inadvertent,” and set aside the lower court’s order of summary judgment dismissal, based on the particular chronology of the case. Ah Quin’s civil discrimination suit was set for April 2010 trial. She had received a Chapter 7 bankruptcy discharge order in September 2009, which the defendant did not find out about until December 2009, at that point the Federal District Court vacated the trial date and all deadlines, and set the case for a status conference. In January 2010, Ah Quin moved to reopen her bankruptcy case to amend her asset schedules. In April 2010, the District Court granted summary judgment dismissing her civil suit based upon a strict application of judicial estoppel. Subsequently, in June 2010, the bankruptcy trustee formally abandoned the plaintiff’s civil suit as an asset of the bankruptcy estate, and closed Ah Quin’s re-opened case. *Id.* at 269-70.

The Ninth Circuit Court of Appeals reversed the District Court’s judicial estoppel dismissal on the basis that the timing of Ah Quin’s reopening of her bankruptcy proceedings and filing amended schedules did not give her an unfair advantage over the defendant in its ability to defend the civil suit:

[T]he plaintiff-debtor *did not obtain an unfair advantage*. Indeed, the plaintiff-debtor obtained no advantage at all, because [she] did not obtain any benefit whatsoever in the bankruptcy proceedings.

Id. at 274. The Court drew a distinction between the facts before it –

where *Ah Quin* achieved no unfair advantage by her amended bankruptcy filings – and situations where full and timely bankruptcy disclosure would have made a significant difference to the creditors, quoting *Burnes v. Pemco Aeroplex, Inc.*, 291 F.3d 1282, 1288 (11th Cir. 2002):¹⁵

The success of all bankruptcy laws requires a debtor's full and honest disclosure. Allowing [the debtor] to back-up, re-open the bankruptcy case, and amend his bankruptcy filings, only after his omission has been challenged by an adversary, suggests that a debtor should consider disclosing potential assets only if he is caught concealing them. This so-called remedy would only diminish the necessary incentive to provide the bankruptcy court with a truthful disclosure of a debtor's assets.¹⁶

In summary, while the holding in *Ah Quin* reflects the trend toward a less rigid and more balanced application of judicial estoppel where an honest mistake causes no real prejudice to creditors or potential debtors of a bankruptcy estate, it does not support Van's position before this Court. As is illustrated by *Johnson, Haslett, Arp* and similar cases, the key query in avoiding the harsh result of the judicial estoppel doctrine is whether the debtor made an appropriate effort to make timely disclosure of the asset in a manner which enabled the bankruptcy trustee to avoid unfair advantage on the part of the debtor and unfair prejudice to creditors and other adverse parties. Van cannot portray herself as being on the same footing as *Ah Quin*, because her attempted reopening of her bankruptcy and late

¹⁵ Overruled on other grounds

¹⁶ *Ah Quin*, 733 F.3d 267 at 274.

disclosure of the asset – several years after the fact and only in response to AEG’s summary judgment motion – was prejudicial as to timing, as well as being insufficient to motivate or enable the trustee to take meaningful or timely action to avoid prejudice to AEG. Van’s claim therefore remains in her bankruptcy estate and she cannot prove it.

V. CONCLUSION

In conclusion, the trial court correctly applied the doctrine of judicial estoppel to dismiss Van’s lawsuit. The entire premise of Van’s claims defies logic and probability. The whole purpose for Van’s annual accrual of ownership units would have been to incentivize her to remain with AEG by granting her an ever-increasing ownership stake that would become more valuable as the company grew. In the nearly five years between the execution of the UGSA and LLC Agreements and Van’s resignation, Van assumed no management responsibility, assumed no financial risk, contributed no capital, all the while enjoying an ever-increasing risk-free employee package of salary and benefits, even through an economic recession. The consideration for this package of salary and benefits was Van’s fulfilling her employment duties as a hydrogeologist. But Van wants more: she wants a substantial share of equity in the corporation, despite having taken no risk and having provided no new consideration for same. The whole premise of her case is as illogical as it

is overreaching. No company owner in his or her right mind would ever agree to an arrangement giving a key employee an annual increasing incentive to cease employment and then take part of the company with them, while contributing no capital and assuming no risk.

However, as far-fetched as Van's allegations are, this Court is required to construe the facts and reasonable inferences therefrom in Van's favor. The above observations are not intended to invite debate over disputed facts, but are intended to provide context to a fundamental factor in this case, which Van avoids any discussion of in her briefing: the extreme unfair advantage Van would achieve and extreme prejudice that would be suffered by Chun and AEG were Van allowed to pursue her Superior Court lawsuit.

By definition, the asset Van claimed in her lawsuit had to have existed as of the date she filed her bankruptcy. In the parties' late 2008 and subsequent annual meetings, Van was offered the unconditional right to receive a contractually agreed amount of units and also to buy additional units per the UGSA. Van's various descriptions of the asset she thought she was getting most closely fits the definition of a stock option, which is defined by Black's Law Dictionary (5th Ed.) as "the right to purchase a specified number of shares of stock for a specified price at specified times, usually granted to management and key employees." She unconditionally

had the pre-petition right to both receive the agreed units and to purchase more units. Van's "vesting" argument therefore fails under Washington law.

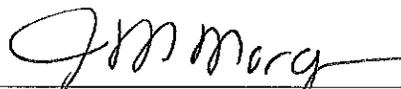
Consequently, upon the filing of her petition Van both (1) had the obligation to report the alleged asset and (2) lost standing to pursue it. Thereafter, all of the elements of judicial estoppel are met. Her failure to disclose the asset is "clearly inconsistent" with her later filing suit to recover thereon. The bankruptcy court "accepted" the nondisclosure when it granted her a discharge in bankruptcy. She cannot feign ignorance as to the consequences of her omission. In July 2013, with her bankruptcy still open, and with the benefit of new counsel, Van had the nondisclosure issues specifically brought to her and her counsel's attention. She chose not to amend her bankruptcy filing at such time, although with the bankruptcy still open, she could have done so as a matter of right. Had she done so at that juncture, the trustee could have either chosen to pursue the asset or abandon it. However, the trustee was never given the opportunity to undertake either course of action.

As a result of Van's nondisclosure and failure to take corrective action, allowing her to proceed with her lawsuit at this late stage would clearly give her an unfair advantage over the Respondents, and would result in extreme prejudice to them. Had timely disclosure of the asset

been made in 2009, Chun would have been able to make the decision as to whether to disassociate Van from employment with AEG, and negotiate a resolution of her claims with the trustee, probably by paying a sum of money for the benefit of Van's creditors. Alternatively, the trustee could have abandoned the asset, with Chun being alerted to Van's claims and allegations, and having the opportunity to defend himself and his company against same. However, Van kept her allegations to herself in order to enjoy the benefits of both continued remunerative employment and discharge of her debts. Her ex parte reopening of her bankruptcy in 2017 was ineffective to either give her ownership of her claim or standing to pursue it, when the bankruptcy was re-closed without the trustee taking any action to either formally pursue or abandon the alleged asset. In conclusion, the facts of this case amount to a classic instance for the application of judicial estoppel. The trial court did not err, and this Court should affirm the summary judgment dismissing Van's lawsuit.

DATED this 13 day of December, 2017.

WORTH LAW GROUP, P.S.



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Attorney for Respondents

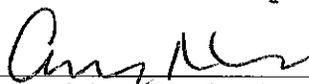
CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and am competent to be a witness herein.

On the date given below, I caused to be served the foregoing document on the following persons and in the manner listed below.

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DATED this 13th day of December, 2017.



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