SO ORDERED,

Judge Neil P. Olack
United States Bankruptcy Judge
Date Signed: October 27, 2014

The Order of the Court is set forth below. The docket reflects the date entered.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF MISSISSIPPI

IN RE:

STACY HOWARD AND STEPHANIE HOWARD, **CASE NO. 00-51897-NPO**

DEBTORS. **CHAPTER 13**

FINA OIL AND CHEMICAL COMPANY; MURPHY OIL U.S.A. INC.; VINTAGE PETROLEUM, INC. (NOW VINTAGE PETROLEUM, LLC); CHAMPLIN PETROLEUM COMPANY; EXXON CORPORATION; KERR-MCGEE OIL & GAS CORPORATION N/K/A ANADARKO US OFFSHORE CORPORATION, A FORMER AFFILIATE OF ORYX ENERGY CORPORATION; TXO PRODUCTION; PLACID OIL COMPANY; AMOCO PRODUCTION CO; UNION OIL COMPANY OF CALIFORNIA; PHILLIPS PETROLEUM COMPANY; CONOCO, INC.; BASS ENTERPRISES PRODUCTION COMPANY; ARCO OIL AND GAS COMPANY; MOBIL OIL EXPLORATION & PRODUCING SOUTHEAST, INC.; INEXCO OIL COMPANY; AND OXY USA INC. **PLAINTIFFS**

CONQUEST EXPLORATION COMPANY; CHEVRON U.S.A. INC.; CHEVRON

CORPORATION; TEXACO INC.;
FOUR STAR OIL & GAS COMPANY;
SHELL WESTERN E&P, INC.; AND
MOON-HINES-TIGRETT OPERATING
COMPANY, INC. **INTERVENOR PLAINTIFFS**

VS. **ADV. PROC. NO. 14-05009-NPO**

STEPHANIE HOWARD **DEFENDANT**

MEMORANDUM OPINION AND ORDER: (1) GRANTING THE PLAINTIFFS' SUMMARY JUDGMENT MOTION AND (2) DENYING THE DEBTOR'S SUMMARY JUDGMENT MOTION

This matter came before the Court[1] for hearing on September 3, 2014 (the "Hearing") on the Plaintiffs' Motion for Summary Judgment (the "Plaintiffs' Summary Judgment Motion") (Adv. Dkt. 45)[2] filed by Fina Oil and Chemical Company; Murphy Oil U.S.A. Inc.; Vintage Petroleum, Inc. (now Vintage Petroleum, LLC); Champlin Petroleum Company; Exxon Corporation; Kerr-McGee Oil & Gas Corporation n/k/a Anadarko US Offshore Corporation, a Former Affiliate of Oryx Energy Corporation; TXO Production; Placid Oil Company; Amoco Production Company; Union Oil Company of California; Phillips Petroleum Company; Conoco, Inc.; Bass Enterprises Production Company; ARCO Oil and Gas Company; Mobil Oil Exploration & Producing Southeast, Inc.; Inexco Oil Company; and OXY USA Inc. (collectively, the "Reynolds Plaintiffs"); the Joinder of Conquest Exploration Company in the Motion for Summary Judgment Filed by Fina Oil and Chemical Company, et al. (the "Conquest

[1] The above-styled adversary proceeding (the "Adversary") and the above-styled bankruptcy case (the "Bankruptcy Case") were transferred from the Honorable Katharine M. Samson, United States Bankruptcy Judge, Southern District of Mississippi to the Honorable Neil P. Olack, United States Bankruptcy Judge, Southern District of Mississippi on June 11, 2014.

[2] Citations to the record are as follows: (1) citations to docket entries in the Adversary are cited as "(Adv. Dkt. ___)"; and (2) citations to docket entries in the Bankruptcy Case are cited as "(Bankr. Dkt. ___)".

MSJ Joinder") (Adv. Dkt. 47) filed by Conquest Exploration Company ("Conquest"); the Joinder of Chevron U.S.A. Inc., Chevron Corporation, Texaco Inc., Four Star Oil & Gas Company, and Shell Western E&P, Inc. in Motion for Summary Judgment Filed by Fina Oil and Chemical Company, et al (the "Chevron/Shell MSJ Joinder") (Adv. Dkt. 48) filed by Chevron U.S.A. Inc., Chevron Corporation, Texaco Inc., Four Star Oil & Gas Company, and Shell Western E&P, Inc. (collectively, "Chevron/Shell"); the Joinder of Moon-Hines-Tigrett Operating Company, Inc. in Motion for Summary Judgment Filed by Plaintiffs Fina Oil and Chemical Company, et al. (the "Moon-Hines-Tigrett MSJ Joinder") (Adv. Dkt. 52) filed by Moon-Hines-Tigrett Operating Company, Inc. ("Moon-Hines-Tigrett");[3] the Motion for Summary Judgment (the "Debtor's Summary Judgment Motion") (Adv. Dkt. 49) filed by Stephanie Howard (the "Debtor");[4] the Brief in Support of Motion for Summary Judgment (Adv. Dkt. 50) filed by the Debtor; the Plaintiffs' Response in Opposition to the Debtor's Motion for Summary Judgment (Adv. Dkt. 57) filed by the Reynolds Plaintiffs; the Joinder of Conquest Exploration Company in the Response in Opposition to the Debtor's Motion for Summary Judgment Filed by Fina Oil and Chemical Company, et al. (Adv. Dkt. 58) filed by Conquest; the Joinder of Chevron U.S.A. Inc., Chevron Corporation, Texaco Inc., Four Star Oil & Gas Company, and Shell Western E&P, Inc. in Plaintiffs' Response in Opposition to the Debtor's Motion for Summary Judgment (Adv. Dkt.

[3] The Conquest MSJ Joinder, the Chevron/Shell MSJ Joinder, and the Moon-Hines-Tigrett MSJ Joinder all join in and request the same relief as the Plaintiffs' Summary Judgment Motion. For clarity and brevity, the Court will refer to the Conquest MSJ Joinder, the Chevron/Shell MSJ Joinder, the Moon-Hines-Tigrett MSJ Joinder, and the Plaintiffs' Summary Judgment Motion collectively as the "Plaintiffs' Summary Judgment Motion." In addition, the Court will refer to the Reynolds Plaintiffs, Conquest, Chevron/Shell, and Moon-Hines-Tigrett collectively as the "Plaintiffs."

[4] The Bankruptcy Case was commenced by joint debtors, Stephanie Howard and Stacy Howard ("Stacy Howard"), but the Court refers only to Stephanie Howard as the "Debtor" because Stacy Howard is now deceased. Together, the Debtor and Stacy Howard are referred to as the "Debtors."

59) filed by Chevron/Shell; the Response in Opposition to Plaintiffs' Motion for Summary Judgment (Adv. Dkt. 60) filed by the Debtor; the Joinder of Moon-Hines-Tigrett Operating Company, Inc. in Plaintiffs' Response in Opposition to the Debtor's Motion for Summary Judgment (Adv. Dkt. 61) filed by Moon-Hines-Tigrett; the Plaintiffs' Reply to Debtor's Response in Opposition to Plaintiffs' Motion for Summary Judgment (Adv. Dkt. 64) filed by the Reynolds Plaintiffs; the Joinder of Chevron U.S.A. Inc., Chevron Corporation, Texaco Inc., Four Star Oil & Gas Company, and Shell Western E&P, Inc. in Plaintiffs' Reply to Debtor's Response in Opposition to Plaintiffs' Motion for Summary Judgment (Adv. Dkt. 65) filed by Chevron/Shell; the Joinder of Conquest Exploration Company in the Reply to Debtor's Response in Opposition to Motion for Summary Judgment Filed by Fina Oil and Chemical Company, et al. (Adv. Dkt. 66) filed by Conquest; Defendant's Reply to Plaintiffs' Response in Opposition to Defendant's Motion for Summary Judgment (Adv. Dkt. 67) filed by the Debtor; the Joinder of Moon-Hines-Tigrett Operating Company, Inc. in Plaintiffs' Reply to Debtor's Response in Opposition to Plaintiffs' Motion for Summary Judgment (Adv. Dkt. 68) filed by Moon-Hines-Tigrett; the Plaintiffs' Correction and Supplement to Their Motion for Summary Judgment (Adv. Dkt. 77) filed by the Reynolds Plaintiffs; the Plaintiffs' Rule 8018-9 Submission of Supplemental Authority (Adv. Dkt. 78) filed by the Reynolds Plaintiffs; and the Defendants' Response to Plaintiffs' Rule 8018-9 Submission of Supplemental Authority (Adv. Dkt. 79) filed by the Debtor in the Adversary. Being fully advised in the premises, the Court finds that the Plaintiffs' Summary Judgment Motion should be granted, and the Debtor's Summary Judgment Motion should be denied. Specifically, the Court finds as follows:

Jurisdiction

The Court has jurisdiction over the parties to and the subject matter of this case pursuant to 28 U.S.C. § 1334. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A) and (O). Notice of the Plaintiffs' Summary Judgment Motion and the Debtor's Summary Judgment Motion was proper under the circumstances.

Facts[5]

In making its determination of the facts, the Court must consider the Plaintiffs' Summary Judgment Motion and the Debtor's Summary Judgment Motion independently and view the evidence and inferences in the light most favorable to the nonmoving party. *Amerisure Ins. Co. v. Navigators Ins. Co.*, 611 F.3d 299, 304 (5th Cir. 2010). Given that standard, the Court finds that there are no genuine issues with respect to the following facts set forth in the Plaintiffs' Summary Judgment Motion and the Debtor's Summary Judgment Motion unless otherwise noted.

1. In 1991, the Debtor's father, Gerald Donald ("Donald"), acquired real property located in Wayne County, Mississippi (the "Subject Property") from a bank that had foreclosed on the Subject Property.

[5] The following constitutes the findings of fact and conclusions of law of the Court pursuant to Federal Rule of Bankruptcy Procedure 7052.

2. In 1996 and 1998, Donald filed two (2) nearly-identical lawsuits[6] against several parties, including the Plaintiffs, seeking damages related to the contamination of the Subject Property from the disposal of radioactive materials and other hazardous substances.

3. On May 5, 2000, the Debtors filed a petition for relief (Adv. Dkt. 45, Ex. 11) pursuant to chapter 13 of the United States Bankruptcy Code (the "Code"). On August 7, 2000, the Debtors filed statements and schedules regarding their income, expenses, and creditors (the "Statements and Schedules") (Adv. Dkt. 45, Ex. 22). At that time, the Debtors did not disclose any information relating to the Subject Property, the Circuit Court Lawsuit, or the District Court Lawsuit in the Statements or Schedules.[7]

4. On November 6, 2000, the Court entered the Order Confirming Plan, Awarding Fees, and Adjudicating Related Matters (the "Confirmation Order") (Adv. Dkt. 45, Ex. 15) confirming the Debtors' chapter 13 plan.

5. Donald died on January 15, 2001. The Debtor was Donald's sole heir and beneficiary. (Adv. Dkt. 45, Ex. 17 at 25).

6. On January 29, 2001, the Court entered an Agreed Order Increasing Plan Payments (Adv. Dkt. 45, Ex. 16) increasing the Debtors' chapter 13 plan payments to $151.00 per month.

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[6] The first lawsuit, now titled *Stephanie Howard, Executrix of the Estate of Gerald Donald v. Fina Oil and Chemical Company, et al*., No. 5-97-55 (the "Circuit Court Lawsuit"), was filed on May 17, 1996 in the Circuit Court of Hinds County, Mississippi and subsequently transferred to the Circuit Court of Wayne County, Mississippi (the "Circuit Court"). The second lawsuit, now titled *Stephanie Howard, Executrix of the Estate of Gerald Donald v. Marvin Lewis Davis et al.*, No. 2:98-CV-15-KS-MTP (the "District Court Lawsuit"), was filed on January 20, 1998 in the United States District for the Southern District of Mississippi (the "District Court").

[7] The Plaintiffs do not allege, nor does the Court hold, that the Debtors had a duty to disclose any information regarding the Subject Property, the Circuit Court Lawsuit, or the District Court Lawsuit when they filed their original Statements and Schedules because Donald was living at the time.

7. On February 1, 2001, the Debtor filed the Petition for Probate of Will and Letters Testamentary (Adv. Dkt. 45, Ex. 17 at 8) in the Chancery Court for the Second Judicial District of Jones County, Mississippi (the "Chancery Court") and was appointed the executrix of Donald's estate pursuant to the Chancery Court's Order Admitting Will to Probate and Granting Letters Testamentary (*Id.* at 24-26).

8. On February 6, 2001, this Court entered an Amended Order to Employer to Deduct from Wages (Adv. Dkt. 45, Ex. 20) in the Bankruptcy Case directing the employer of one of the Debtors to deduct $151.00 from his or her earnings per month to pay the amount into the Court for distribution to creditors.

9. The Debtor filed the Motion to Substitute Plaintiffs (Adv. Dkt. 1, Ex. 7) in the Circuit Court on March 29, 2001. On April 6, 2001, the Debtor, in her capacity as the executrix of Donald's estate, was substituted for Donald as the plaintiff in the Circuit Court Lawsuit (Adv. Dkt. 1, Ex. 10).

10. This Court then entered another Amended Order to Employer to Deduct from Wages (Adv. Dkt. 45, Ex. 21) on September 4, 2001 increasing the amount to be deducted from one of the Debtors' earnings to $162.00 per month.

11. On August 21, 2002, the Debtor, as executrix of Donald's estate, filed the Plaintiff's Motion to Enforce Settlement Agreement, and/or for Settlement Status Conference, and for Costs, Attorney's Fees and Sanctions and Proposed Order (the "Motion to Enforce Settlement Agreement") (Adv. Dkt. 77, Ex. 1) and the Memorandum in Support of Plaintiff's Motion to Enforce Settlement Agreement, and/or for Settlement Status Conference, and for Costs, Attorney's Fees and Sanctions and Proposed Order (Adv. Dkt. 77, Ex. 2) in the Circuit

Court. The Debtor alleged that she and the defendants in the Circuit Court Lawsuit agreed to a settlement on February 25, 2002 that included a payment of $380,000.00. (*Id.* at 4-5).

12. On February 18, 2005, the Debtor, in her capacity as the executrix of Donald's estate, was substituted for Donald as the plaintiff in the District Court Lawsuit (Adv. Dkt. 1, Ex. 11).[8]

13. On August 10, 2005, J.C. Bell, the standing chapter 13 trustee (the "Trustee"), filed the Final Report and Account (the "Final Report") (Bankr. Dkt. 42). On August 15, 2005, the Court entered the Discharge of Debtor After Completion of Chapter 13 Plan (the "Discharge Order") (Bankr. Dkt. 43) and the Final Decree/Order Closing Case (Bankr. Dkt. 44).

14. On December 12, 2005, the Circuit Court issued a Memorandum Opinion (Adv. Dkt. 1, Ex. 12) directing the Debtor to either exhaust her administrative clean-up remedies with the Mississippi Commission on Environmental Quality ("MCEQ"), which has the exclusive authority over such matters, or proceed with the Circuit Court Lawsuit without being allowed to seek damages for the possible clean-up of the Subject Property. The Debtor then filed the Petition and Request for Hearing (Adv. Dkt. 1, Ex. 5) with the MCEQ on January 9, 2006 (the "MCEQ Litigation").[9]

15. On December 8, 2011, the Chancery Court entered the Order Baring [sic] Claims, Waiving First and Final Accounting, Distributing Assets, Discharging Executrix and Closing Estate (Adv. Dkt. 50, Ex. 9) closing Donald's estate, discharging the Debtor as executrix of the estate, and distributing the estate's assets.

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[8] According to the Order substituting the Debtor as plaintiff in the District Court Lawsuit, the Debtor filed the motion to substitute in May 2004. (Adv. Dkt. 1, Ex. 11 at 1-2).

[9] The Debtor subsequently filed an Amended Petition and Request for Hearing (Adv. Dkt. 1, Ex. 6) on March 24, 2011 adding the Plaintiffs as defendants.

16. The Plaintiffs discovered the existence of the Bankruptcy Case in July 2013. Soon thereafter, the Plaintiffs raised the defense of judicial estoppel in the Circuit Court Lawsuit, the District Court Lawsuit, and the MCEQ Litigation (collectively, the "Related Proceedings"). According to the Debtor and the Plaintiffs, all of the Related Proceedings are currently stayed.

17. On September 24, 2013, the Debtor filed the Motion to Vacate Final Decree and to Re-open Case to Amend Schedules and State [sic] of Financial Affairs (the "Motion to Reopen") (Bankr. Dkt. 50) requesting the Court to reopen the Bankruptcy Case so that the Statements and Schedules could be amended "to disclose Mrs. Howard's interest in civil actions (one in the Circuit Court of Wayne County, Mississippi and one in Federal District Court, Southern District of Mississippi) to recover damages resulting from property contamination." On November 25, 2013, the Court entered the Order Vacating Final Decree and Re-Opening Proceeding (the "Order Reopening Case") (Bankr. Dkt. 61) granting the Motion to Reopen. As of the date of this Opinion, the Debtor has not amended her Statements and Schedules despite that such amendment was the sole purpose of the Court's Order Reopening Case.[10]

[10] The Debtor requested in the Motion to Reopen that the Court reopen the Bankruptcy Case to "allow the Trustee to amend the relevant schedules and state [sic] of financial affairs." (Bankr. Dkt. 50 at 2). However, the Order Reopening Case, which was also prepared by the Debtor, does not specify who is to amend the Statements and Schedules, but only provides that the Bankruptcy Case is "re-opened to allow the amendment of relevant schedules and state [sic] of financial affairs." (Bankr. Dkt. 61 at 1). Both the Motion to Reopen and the Debtor's proposed Order Reopening Case were noticed out and no objections were filed as to either. Under the Code and the Federal Rules of Bankruptcy Procedure, it is a debtor's duty to provide accurate bankruptcy statements and schedules, not a trustee's. *See* 11 U.S.C. § 521(a)(1); FED. R. BANKR. P. 1007(b); *see also Browning Mfg. v. Mims (In re Coastal Plains, Inc.)*, 179 F.3d 197, 207-08 (5th Cir. 1999). Moreover, the Debtor acknowledged at the Hearing that, assuming she had a duty to disclose, it was her responsibility to amend the Statements and Schedules after the Court's Order Reopening Case. For these reasons, the Court finds that it was the Debtor's responsibility, and not the Trustee's, to amend the Statements and Schedules once the Court reopened the Bankruptcy Case.

18. On February 12, 2014, the Reynolds Plaintiffs initiated the Adversary by filing the Complaint for Declaratory Judgment (the "Adversary Complaint") (Adv. Dkt. 1). In the Adversary Complaint, the Reynolds Plaintiffs argue that because the Debtor never disclosed her inheritance of the Subject Property or the Related Proceedings to the Court or Trustee during the pendency of the Bankruptcy Case, she should be judicially estopped from pursuing her claims in the Related Proceedings. On February 20, 2014, Conquest filed the Motion to Intervene by Conquest Exploration Company (Adv. Dkt. 6). On February 24, 2014, Moon-Hines-Tigrett filed the Motion to Intervene by Moon-Hines-Tigrett Operating Company, Inc. (Adv. Dkt. 11). On March 7, 2014, Chevron/Shell filed the Motion to Intervene by Chevron U.S.A., Inc., Chevron Corporation, Texaco, Inc., Four Star Oil & Gas Company, and Shell Western E&P, Inc. (Adv. Dkt. 15). On March 19, 2014, the Court entered an Agreed Order (Adv. Dkt. 32) between the Debtor and the Plaintiffs granting the motions to intervene filed by Conquest, Moon-Hines-Tigrett and Chevron/Shell.

19. On May 1, 2014, the Reynolds Plaintiffs filed the Plaintiffs' Summary Judgment Motion, Conquest filed the Conquest MSJ Joinder, Chevron/Shell filed the Chevron/Shell MSJ Joinder, Moon-Hines-Tigrett filed the Moon-Hines-Tigrett MSJ Joinder, and the Debtor filed the Debtor's Summary Judgment Motion. At the Hearing, Jeffery P. Reynolds argued on behalf of the Plaintiffs, and Sean S. Cassidy argued on behalf of the Debtor.

Discussion

A. Summary Judgment Standard

Under Rule 56 of the Federal Rules of Civil Procedure, made applicable to the Adversary by Rule 7056 of the Federal Rules of Bankruptcy Procedure, summary judgment is appropriate when, viewing the evidence in the light most favorable to the nonmoving party, the pleadings,

depositions, answers to interrogatories, admissions, and affidavits show there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. FED. R. CIV. P. 56; *see Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). Summary Judgment is not disfavored, but rather an important process through which parties can obtain a "just, speedy and inexpensive determination of every action." *Celotex*, 477 U.S. at 327 (citations omitted). When, as here, both parties have filed motions for summary judgment, the Court must rule on each motion on an individual and separate basis. *Shaw Constructors v. ICF Kaiser Eng'rs, Inc.*, 395 F.3d 533, 538-39 & n.8 (5th Cir. 2004). To this end, the Court will address the Plaintiffs' Summary Judgment Motion first.

B. Plaintiffs' Summary Judgment Motion

In the Plaintiffs' Summary Judgment Motion, the Plaintiffs request the Court to enter a declaratory judgment enjoining the Debtor from pursuing her claims against the Plaintiffs in the Related Proceedings. The Plaintiffs argue that the Debtor should be judicially estopped from pursuing her claims because the Debtor did not disclose the Subject Property and the Related Proceedings in the Bankruptcy Case. The Debtor, on the other hand, argues that judicial estoppel should not apply because she did not have a duty to disclose the Subject Property or the Related Proceedings. The Debtor also argues that in the event she did have a duty to disclose, her failure to do so was inadvertent because the law on a chapter 13 debtor's post-confirmation duty to disclose was unsettled during the pendency of the Bankruptcy Case.

1. Elements of Judicial Estoppel

Judicial estoppel is an equitable doctrine designed to protect the integrity of the judicial process. *New Hampshire v. Maine*, 532 U.S. 742, 749-50 (2001). A court has the discretion to

invoke the doctrine to prevent a party from asserting inconsistent claims in legal proceedings. *Reed v. City of Arlington*, 650 F.3d 571, 573-74 (5th Cir. 2011) (en banc). Judicial estoppel is not controlled by "inflexible prerequisites or an exhaustive formula for determining [its] applicability." *New Hampshire*, 532 U.S. at 751. Instead, "numerous considerations may inform the doctrine's application in specific factual contexts." *Love v. Tyson Foods, Inc.*, 677 F.3d 258, 261 (5th Cir. 2012). Nevertheless, the Fifth Circuit Court of Appeals has provided three primary elements for a court to consider when determining whether to apply judicial estoppel in the bankruptcy context: "(1) [t]he party against whom it is sought has asserted a legal position that is plainly inconsistent with a prior position; (2) a court accepted the prior position; and (3) the party did not act inadvertently." *Flugence v. Axis Surplus Ins. Co. (In re Flugence)*, 738 F.3d 126, 129 (5th Cir. 2013) (citation omitted). Further, the Fifth Circuit has held that "[j]udicial estoppel is particularly appropriate where . . . a party fails to disclose an asset to a bankruptcy court, but then pursues a claim in a separate tribunal based on that undisclosed asset." *Jethroe v. Omnova Solutions, Inc.*, 412 F.3d 598, 600 (5th Cir. 2005). The Court will now turn to the Adversary and assess: (1) whether the Debtor asserted inconsistent legal positions; (2) whether the Court accepted the Debtor's prior position; and (3) whether the Debtor acted inadvertently.

2. Judicial Estoppel's Application to the Debtor

a. Whether the Debtor Asserted Inconsistent Legal Positions

A debtor's omission of a potential cause of action in his or her bankruptcy schedules is "tantamount to a representation that no such claim existed." *Superior Crewboats, Inc. v. Primary P & I Underwriters (In re Superior Crewboats, Inc.)*, 374 F.3d 330, 335 (5th Cir. 2004). Consequently, a debtor who does not disclose a potential cause of action, but then attempts to pursue the undisclosed cause of action asserts inconsistent legal positions. *Jethroe*, 412 F.3d at

600. The Debtor argues that she did not have a duty to disclose the Subject Property or the Related Proceedings because she did not obtain an interest in either until after the Bankruptcy Case was closed. *But see supra* note 10 and accompanying text. The Debtor also claims that in the event she did obtain an interest in the Subject Property or the Related Proceedings during the pendency of the Bankruptcy Case, she did not have a duty to disclose that interest because the law regarding a chapter 13 debtor's post-confirmation duty to disclose was unsettled at the time. If the Debtor did not have a duty to disclose the Subject Property and the Related Proceedings, then her failure to disclose was not tantamount to a representation that she had no claim. *In re Flugence*, 738 F.3d at 129. Therefore, the Court must first determine whether the Debtor had a duty to disclose the Subject Property and the Related Proceedings in the Bankruptcy Case before it can decide whether the Debtor's pursuit of her claims in the Related Proceedings constitutes an inconsistent legal position.

A debtor has an express, affirmative duty to disclose all assets, including contingent and unliquidated claims. *In re Coastal Plains, Inc.*, 179 F.3d at 207-08. It is well settled in the Fifth Circuit that chapter 13 debtors have a continuing duty to disclose post-petition causes of action. *In re Flugence*, 738 F.3d at 129 (citing *In re Coastal Plains, Inc.*, 179 F.3d at 207-08). This disclosure requirement pertains to potential causes of action as well. *Love*, 677 F.3d at 261 (citation omitted). The Debtor argues that she did not have an interest in the Subject Property or the Related Proceedings until December 2011 when Donald's estate was closed and the assets of the estate were distributed. She claims that her only connection with the Subject Property and the Related Proceedings prior to December 2011 was in her capacity as the executrix of the estate and not as an individual.

In the absence of controlling federal law, property interests are defined by state law. *Simpson v. Penner (In re Simpson)*, 36 F.3d 450, 452 (5th Cir. 1994) (citing *Barnhill v. Johnson*, 503 U.S. 393, 393 (1992)). Specifically, bankruptcy courts have turned to state law to determine when exactly a property interest transfers through bequest, devise, or inheritance. *See Bunch v. Hopkins Savs. Bank (In re Bunch)*, 249 B.R. 667, 669-70 (Bankr. D. Md. 2000); *In re McNeill*, 193 B.R. 654, 659 (Bankr. E.D.N.Y. 1996); *see also In re Chenoweth*, 3 F.3d 1111, 1113 (7th Cir. 1993). Under Mississippi law, a deceased's real property vests immediately at death in his or her heirs or devisees. *McRight v. McRight (Estate of McRight)*, 766 So.2d 48, 49 (Miss. Ct. App. 2000) (citing *Beach v. State*, 173 So. 429, 430 (Miss. 1937)); *see also Turner v. Estate of Hightower*, 417 So. 2d 919, 922 (Miss. 1982). Further, claims relating to bequeathed real property pass to a beneficiary along with the real property. *See Stanley v. Cromwell (Estate of Wright)*, 829 So. 2d 1274, 1277-78 (Miss. Ct. App. 2002) (holding that when real property passes to a beneficiary under a will, absent language to the contrary, claims in an already-filed lawsuit related to the real property pass to the beneficiary as well).

In the case at bar, it is undisputed that the Debtor was the sole beneficiary of Donald's estate, which included the Subject Property. Therefore, under Mississippi law, the Debtor's interests in the Subject Property, the Circuit Court Lawsuit, and the District Court Lawsuit vested immediately upon Donald's death on January 15, 2001 and not when Donald's estate was closed in December 2011. *See Estate of McRight*, 766 So. 2d at 49; *Estate of Wright*, 829 So. 2d at 1277-78. Moreover, the Court finds the Debtor's argument on this issue somewhat disingenuous as she was the both the executrix and the sole heir and beneficiary of Donald's estate. If it were true that a property interest vests in a beneficiary only when a deceased's estate is closed, a

person who is both the executrix and a beneficiary of an estate could delay the closing of the estate for ulterior purposes.

The Debtor asserts that even if she acquired interests in the Subject Property and the Related Proceedings during the pendency of her Bankruptcy Case, she was not required to disclose the property or claims because her interests accrued after her chapter 13 plan was confirmed. The Debtor contends that there was a considerable debate regarding a chapter 13 debtor's duty to disclose claims that accrue post-confirmation, and, thus, the Debtor was uncertain whether she needed to disclose her interests in the Subject Property and the Related Proceedings to the Court. This debate is based on the perceived conflict between 11 U.S.C. §§ 1306 and 1327.[11] Section 1306(a)(1) provides that "[p]roperty of the estate includes, in addition to the property [normally constituting property of the estate under § 541,] all property . . . the debtor acquires after the commencement of the case but before the case is closed, dismissed, or converted . . . , whichever occurs first." 11 U.S.C. § 1306(a)(1). Section 1327(b), on the other hand, provides that "[e]xcept as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor." 11 U.S.C. § 1327(b). As a result, there could be confusion as to whether a cause of action acquired by a debtor post-confirmation but prior to closure, conversion, or dismissal is "property of the estate" under § 1306(a)(1) or property that is "vest[ed] . . . in the debtor" under § 1327(b). The Fifth Circuit discussed this "possible conflict" and the resulting uncertainty but stated that:

[11] Hereinafter, all code sections refer to the Code found at title 11 of the United States Code unless otherwise noted.

> [O]ur decisions have settled that debtors have a duty to disclose to the bankruptcy court notwithstanding uncertainty. The reason for the rule is obvious: Whether a particular asset should be available to satisfy creditors is often a contested issue, and the debtor's duty to disclose assets – even where he has a colorable theory for why those assets should be shielded from creditors – allows that issue to be decided as part of the orderly bankruptcy process.

In re Flugence, 738 F.3d at 129-30 (footnote omitted). Therefore, the possible conflict between § 1306(a) and § 1327(b) has no bearing on a chapter 13 debtor's duty to disclose. Whether an asset is "property of the estate" is not the determining factor as to whether a debtor must disclose that asset. A chapter 13 debtor has a continuing duty to disclose assets acquired after confirmation so that each asset's status as property of the estate can be decided through the orderly bankruptcy process.[12] *See In re Aycock*, No. 10-80516, 2014 WL 1047803, at *3 (Bankr. W.D. La. Mar. 18, 2014) ("*Flugence* therefore sets forth the binding precedent that the debtor in Chapter 13 has a continuing duty to disclose the post-confirmation acquired asset so that its status as property of or outside the estate may be determined by the Bankruptcy Court.").

The Debtor contends that despite the holding in *Flugence*, her failure to disclose her interests in the Subject Property and the Related Proceedings should be excused because the period within which she allegedly breached her duty to disclose occurred before the Fifth Circuit's issuance of the *Flugence* decision. The Fifth Circuit, however, stated in *Flugence* that its past decisions, which predated the Debtor's Bankruptcy Case, established that debtors have a duty to disclose notwithstanding uncertainty. *In re Flugence*, 738 F.3d at 130 (citing *United*

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[12] Related to the statutory conflict argument, the Debtor asserts that she did not have a duty to disclose assets accrued post-confirmation because the language of the Confirmation Order defined the parameters of the bankruptcy estate. Assuming *arguendo* that the language of the Confirmation Order defined the scope of bankruptcy estate throughout the duration of the Bankruptcy Case, the Court rejects this argument because the duty to disclose an asset is not determined by whether that asset is property of the bankruptcy estate. *In re Flugence*, 738 F.3d at 129-30.

States v. Beard, 913 F.2d 193, 197 (5th Cir. 1990)). Therefore, the Debtor had an affirmative duty to disclose the Subject Property and the Related Proceedings to the Bankruptcy Court irrespective of the *Flugence* decision. It is undisputed that the Debtor's interests in the Subject Property, the Circuit Court Lawsuit, and the District Court Lawsuit vested on January 15, 2001 and that the Debtor never notified the Court about any of those interests.[13] As a result, the Debtor impliedly represented that she had no such claims in the Related Proceedings. *In re Flugence*, 738 F.3d at 130.[14] This representation is plainly inconsistent with the Debtor's later assertions of her claims in the Related Proceedings.[15] *Id.* For these reasons, the Court finds that there is no genuine issue of material fact as to whether the Debtor asserted inconsistent legal positions, and, thus, the first element of judicial estoppel is satisfied.

b. Whether the Court Accepted the Debtor's Prior Position

Judicial acceptance "does not require a formal judgment, rather, it only requires that the first court adopted the position urged by the party, either as a preliminary matter or as part of a

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[13] There may have been other inherited assets or claims the Debtor should have disclosed as well. The Debtor, however, never amended her Statements and Schedules to disclose any assets or claims she inherited from Donald's estate. *But see supra* note 10 and accompanying text.

[14] The ongoing duty to disclose "pertains to potential causes of action as well." *Love*, 677 F.3d at 261 (citation omitted). Thus, although the MCEQ Litigation was not initiated until after the Bankruptcy Case was closed, the Debtor's non-disclosure of the causes of action related to the contamination of the Subject Property also constituted an implicit representation that she did not have the claims she is currently pursuing in the MCEQ Litigation. *See In re Coastal Plains, Inc.*, 179 F.3d at 208 (quoting another source) ("The debtor need not know all the facts or even the legal basis for the cause of action; rather, if the debtor has enough information . . . to suggest that it may have a possible cause of action, then that is a 'known' cause of action such that it must be disclosed.").

[15] The Debtor's implicit representation that she had no claims in the Related Proceedings is also inconsistent with her later position that the Bankruptcy Case should be reopened so that her Statements and Schedules could be amended to disclose her interests in the Circuit Court Lawsuit and the District Court Lawsuit. *See supra* note 10 and accompanying text.

final disposition." *Superior Crewboats, Inc.*, 374 F.3d at 335 (internal quotation marks omitted) (citing *In re Coastal Plains, Inc.*, 179 F.3d at 206). Here, the Court "accepted the Debtor's prior position" when it entered the Agreed Order Increasing Plan Payments modifying the payments to be made under the Debtor's confirmed chapter 13 plan. Had the Court been aware of the Subject Property or the Related Proceedings, it may have altered the plan. *See In re Flugence*, 738 F.3d at 130. The Court also "accepted the Debtor's prior position" when it entered a discharge of the Debtor's debts, thereby adopting her position that she had no interest in the Subject Property or the Related Proceedings. *See Combs v. CitiFinancial, Inc.*, No. 5:13CV3291, 2014 WL 4387312, at *4 (W.D. La. Sept. 3, 2014) ("[T]he Bankruptcy Court most clearly accepted and relied upon Plaintiffs' prior representation (i.e. that they did not possess any causes of action against Defendant) when it issued a final order of discharge."); *Tubbs v. Huntington Ingalls, Inc.*, No. 1:06CV834HSO-JMR, 2011 WL 3891877, at *6 (S.D. Miss. Aug. 29, 2011) ("This Court concludes that, by granting Plaintiff a discharge based upon completion of her Chapter 13 Plan, the Bankruptcy Court relied, at least in part, on Plaintiff's bankruptcy schedules."). Hence, the Court finds that there is no genuine issue of material fact as to the Court's acceptance of the Debtor's implicit representation that she did not have any claims in the Related Proceedings. As a result, the second element of judicial estoppel is satisfied.

c. Whether the Debtor Acted Inadvertently

A debtor's failure to satisfy his or her duty to disclose is "inadvertent" only when "the debtor either lacks knowledge of the undisclosed claims or has no motive for their concealment." *Love*, 677 F.3d at 262 (citing *In re Coastal Plains*, 179 F.3d at 210). As to the motive sub-element of inadvertence, the Plaintiffs assert that the Debtor's motive in not disclosing her interests in the Subject Property or the Related Proceedings was the prospect of keeping any

recovery for herself and, thus, reaping a windfall at the expense of her creditors. The Fifth Circuit has recognized that "[t]he motivation sub-element is almost always met if a debtor fails to disclose a claim or possible claim to the bankruptcy court. Motivation in this context is self-evident because of potential financial benefit resulting from the nondisclosure." *Love*, 677 F.3d at 262 (quoting *Thompson v. Sanderson Farms, Inc.*, No. 3:04CV837-WHB-JCS, 2006 WL 7089989, at *3-4 (S.D. Miss. May 31, 2006)). According to the Final Report filed in the Bankruptcy Case, the Debtor paid zero percent (0%) to unsecured creditors. Thus, the inference of a motive to conceal is applicable to the Debtor. *See Anderson v. Entergy Operations, Inc.*, No. 5:11CV103-DPJ-FKB, 2012 WL 5400059, at *4 (S.D. Miss. Nov. 5, 2012) (noting that a debtor had the motive to conceal when the nondisclosure would minimize the repayment of unsecured debt); *Jethroe*, 412 F.3d at 601 (same). Since the Plaintiffs presented this motivation to conceal, the burden of proof shifts to the Debtor to show that her failure to disclose the Subject Property and the Related Proceedings was inadvertent. *Love*, 677 F.3d at 262.

As to the knowledge sub-element of inadvertence, the Debtor argues that her failure to disclose was inadvertent because she was unaware of her duty to disclose the Subject Property and the Related Proceedings to the Court. Specifically, she asserts that she was not aware that her connection to the Subject Property and the Related Proceedings required disclosure, especially considering the unsettled nature of the law on a chapter 13 debtor's post-confirmation duty to disclose. The Fifth Circuit, however, has stated that a debtor's lack of awareness of a duty to disclose is irrelevant. *In re Flugence*, 738 F.3d at 130 (citing *Jethroe*, 412 F.3d at 601 n.4). Instead, the lack of knowledge that is relevant for "inadvertence" is whether a debtor lacked knowledge of the facts giving rise to his or her possible claims. *In re Flugence*, 738 F.3d at 130

(citing *Jethroe*, 412 F.3d at 601). Thus, the question here is whether the Debtor knew of the facts giving rise to her claims in the Related Proceedings when she breached her duty to disclose.

As the Plaintiffs point out, it is apparent the Debtor knew of the facts giving rise to her claims in the Related Proceedings during the pendency of the Bankruptcy Case. Prior to the Court's Discharge Order, the Debtor: (1) filed the Motion to Substitute Plaintiffs (Adv. Dkt. 1, Ex. 7) in the Circuit Court Lawsuit; (2) was substituted as the plaintiff, in her capacity as the executrix of Donald's estate, in the Circuit Court Lawsuit (Adv. Dkt. 1, Ex. 10); (3) filed the Motion to Enforce Settlement Agreement (Adv. Dkt. 77, Ex. 1) in the Circuit Court Lawsuit; (4) filed a motion to substitute in the District Court Lawsuit (*See* Adv. Dkt. 1, Ex. 11 at 2); and (5) was substituted as the plaintiff, in her capacity as the executrix of Donald's estate, in the District Court Lawsuit (Adv. Dkt. 1, Ex. 11). In addition, Donald responded to an interrogatory question in the Circuit Court Lawsuit on June 24, 2000 by listing the Debtor as a person with discoverable information or knowledge of relevant facts regarding how any contaminants became deposited on the Subject Property (Adv. Dkt. 1, Ex. 13 & 14).

This evidence supports a finding that the Debtor has not been forthcoming with the Court. The Debtor had an ongoing duty to disclose potential claims acquired during the pendency of the Bankruptcy Case. The concurrence of the Bankruptcy Case and the Debtor's active role in the Related Proceedings evidence the Debtor's knowledge of the underlying facts of the Related Proceedings while she had the duty to disclose the Subject Property and the Related Proceedings to the Court. *See Anderson*, 2012 WL 5400059, at *4; *Jethroe*, 412 F.3d at 600. Even now, as of the date of this Opinion, the Debtor has not amended the Statements and Schedules to reflect her interests in the Subject Property and the Related Proceedings. *See supra* note 10 and accompanying text.

In response to the Plaintiffs' Summary Judgment Motion, the Debtor has failed to either set forth any viable argument or otherwise create a fact issue concerning whether she acted inadvertently. Her only argument for inadvertence is that she was unaware of her duty to disclose the Subject Property and the Related Proceedings, a defense the Fifth Circuit has rejected repeatedly. *In re Flugence*, 738 F.3d at 131. Therefore, the Court finds that there is no genuine issue of material fact as to the Debtor's advertence in not disclosing her interests in the Subject Property and the Related Proceedings. For these reasons, the third element of judicial estoppel is satisfied.

d. Judicial Estoppel as an Equitable Remedy

Although the three elements of judicial estoppel provided by the Fifth Circuit are satisfied, the Debtor argues that the Court should exercise its discretion and find that the Debtor should not be judicially estopped from pursuing her claims in the Related Proceedings. In support, the Debtor again laments her confusion of the law requiring disclosure and also states that the "[a]pplication of judicial estoppel in this matter would . . . allow titans of the oil and gas industry to escape liability without a trial for contaminating the Subject Property with toxic materials – a most inequitable result." (Adv. Dkt. 60, at 23).

Judicial estoppel is an equitable remedy that may be applied "flexibly to achieve substantial justice." *Reed*, 650 F.3d at 576 (citing *New Hampshire*, 532 U.S. at 750). "The challenge is to fashion a remedy that does not do inequity by punishing the innocent." *Id.* (citation omitted). The Fifth Circuit has stated that "judicial estoppel must be applied [in a bankruptcy scenario] in such a way as to deter dishonest debtors, whose failure to fully and honestly disclose all their assets undermines the integrity of the bankruptcy system, while protecting the rights of creditors to an equitable distribution of the assets of the debtor's estate."

Reed, 650 F.3d at 574. Viewing the instant case through that lens, the Court, after considering the totality of the circumstances, finds that judicial estoppel should be applied to the Debtor.[16]

The Debtor's interests in the Subject Property, the Circuit Court Lawsuit, and the District Court Lawsuit vested on January 15, 2001, the date Donald died. *See supra* Part B.2.a. This occurred less than three (3) months after her chapter 13 plan was confirmed. Despite her ongoing duty to disclose assets and potential claims during the pendency of the Bankruptcy Case, the Debtor did not inform the Court about any of these interests although her case lasted more than four additional years. During this period, the Debtor was represented by three (3) different sets of counsel: one in the Bankruptcy Case; one in the Related Proceedings; and one in the probate proceedings before the Chancery Court. After completing her chapter 13 plan payments, in which she paid zero percent (0%) to unsecured creditors, the Debtor received a discharge on August 15, 2005. More than eight (8) years later, and only after the Plaintiffs brought her non-disclosure to light by raising judicial estoppel as a defense in the Related Proceedings, the Debtor filed the Motion to Reopen in September 2013 requesting the Court to reopen the Bankruptcy Case so that the Statements and Schedules could be amended "to disclose Mrs. Howard's interest in civil actions (one in the Circuit Court of Wayne County, Mississippi and one in Federal District Court, Southern District of Mississippi) to recover damages resulting from property contamination." (Bankr. Dkt. 50, at 1). Although the Court granted the Motion to Reopen in November 2013 "to allow the amendment of relevant schedules and state of financial affairs," the Debtor has not amended her Statements and Schedules. (Bankr. Dkt. 61, at 1). Under these circumstances, the Court finds that the application of judicial estoppel would not "do inequity by punishing the innocent." *Reed*, 650 F.3d at 576 (citation omitted).

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[16] The Court, however, does not find that judicial estoppel should apply to the Trustee for reasons explained later in this Opinion.

As the Court has previously stated, the undisputed material facts of this case show: (1) the Debtor's pursuit of her claims in the Related Proceedings constitutes a legal position that is plainly inconsistent with her prior position that no such claims existed; (2) the Court accepted the Debtor's prior position when it entered the Agreed Order Increasing Plan Payments without knowledge of the Subject Property and the Related Proceedings and when it entered the Discharge Order; and (3) the Debtor did not act inadvertently. "[T]he integrity of the bankruptcy system depends on full and honest disclosure by debtors of all of their assets." *Love*, 677 F.3d at 261. For these reasons, the Debtor, as a matter of law, should be judicially estopped from pursuing her claims in the Related Proceedings. *See New Hampshire*, 532 U.S. at 749-50 (The purpose of judicial estoppel "is to protect the integrity of the judicial process."). The Court, therefore, finds that the Plaintiffs' Summary Judgment Motion should be granted.

3. Judicial Estoppel's Application to the Trustee

Now that the Court has decided the Debtor should be judicially estopped from pursuing her claims in the Related Proceedings, the Court will address whether judicial estoppel should apply to the Trustee as well. In *Reed*, the Fifth Circuit affirmed the lower court's application of judicial estoppel to a non-disclosing debtor in a chapter 7 bankruptcy case and stated the "general rule that, absent unusual circumstances, an innocent trustee can pursue for the benefit of creditors a judgment or cause of action that the debtor fails to disclose in bankruptcy." 650 F.3d at 573. To hold otherwise, would "thwart one of the core goals of the bankruptcy system – obtaining a maximum and equitable distribution for creditors – by unnecessarily 'vaporizing' the assets effectively belonging to innocent creditors." *Id.* at 576 (citation omitted). In *Flugence*, the Fifth Circuit applied the general rule stated in *Reed* to a trustee in a chapter 13 bankruptcy case. *See In re Flugence*, 738 F.3d at 131-32. The facts here are similar and allow the Trustee to

pursue the Debtor's claims in the Related Proceedings. In addition, both the Debtor and the Plaintiffs conceded at the Hearing that judicial estoppel should not apply to the Trustee.

The Court accordingly finds that the Trustee, consistent with *Reed* and *Flugence*, should not be judicially estopped from pursuing the Debtor's claims in the Related Proceedings for the benefit of the Debtor's creditors. Furthermore, in the event the Trustee pursues the Debtor's claims and obtains a recovery, any funds that remain after the distribution to any creditors and the payment of the Trustee's statutory fees should be refunded to the Plaintiff(s) who paid such funds and not to the Debtor. *See Jackson v. Goins Underkofler Crawford & Langdon L.L.P. (In re Jackson)*, No. 13-20504, 2014 WL 2800812, at *3 (5th Cir. June 20, 2014) (unpublished) (affirming bankruptcy court's finding that any recovery exceeding the amount of the creditors' claims would not go to the debtor); *Reed*, 650 F.3d 571 (affirming the lower court's decision that "[a]ny remaining funds after distribution would be refunded" to the defendant in the Family Medical Leave Act lawsuit).

C. Debtor's Summary Judgment Motion

In the Debtor's Summary Judgment Motion, the Debtor requests the Court to enter a declaratory judgment stating that: (1) she had no duty to disclose her connection to the Subject Property or the Related Proceedings; (2) the elements of judicial estoppel are not satisfied; and/or (3) in the event the elements of judicial estoppel are satisfied, judicial estoppel should not be applied in this specific situation for equitable reasons. As previously discussed, the Court finds that, based on the undisputed material facts, the Debtor did have a duty to disclose and should be judicially estopped from pursuing her claims in the Related Proceedings as a matter of law. Therefore, the Debtor's Summary Judgment Motion should be denied.

D. Debtor's Statements and Schedules

In November 2013, the Court reopened the Bankruptcy Case for the sole purpose of "allow[ing] the amendment of relevant schedules and state of financial affairs." (Bankr. Dkt. 61, at 1). Despite the Court's Order Reopening Case, the Statements and Schedules have not been amended to, as the Debtor explained in the Motion to Reopen, "disclose Mrs. Howard's interest in civil actions (one in the Circuit Court of Wayne County, Mississippi and one in Federal District Court, Southern District of Mississippi) to recover damages resulting from property contamination." (Bankr. Dkt. 50 at 1). As previously discussed, the Court holds that the Debtor had a duty to disclose her interests in the Subject Property and the Related Proceedings. *See supra* Part B.2.a. Therefore, the Court, pursuant to its inherent powers, finds that the Debtor should amend her Statements and Schedules to disclose her interests in the Subject Property and the Related Proceedings within fourteen (14) days of the date of this Opinion. *See* 11 U.S.C. §§ 105; 521(1), (3).

Conclusion

For the above and foregoing reasons, the Court finds that a declaratory judgment should be entered holding that the Debtor should be judicially estopped from pursuing her claims in the Related Proceedings. The Trustee, on the other hand, should not be judicially estopped from pursuing the Debtor's claims in the Related Proceedings for the benefit of the Debtor's creditors. Further, in the event the Trustee pursues the Debtor's claims and obtains a recovery, any funds that remain after the distribution to any creditors and the payment of the Trustee's statutory fees should be refunded to the Plaintiff(s) who paid such funds. The Court, therefore, concludes that the Plaintiffs' Summary Judgment Motion should be granted and the Debtor's Summary Judgment Motion should be denied. In addition, the Court finds that the Debtor should amend

her Statements and Schedules to disclose her interests in the Subject Property and the Related Proceedings. The Court will issue a separate final judgment consistent with this Opinion.

##END OF ORDER##