No. 15-2068

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

JERRY D. JONES,
Appellant,

– v. –

BOB EVANS FARMS, INC., et al.,
Appellees.

On Appeal from the United States District Court
For the Western District of Missouri
Docket No. 4:13-cv-00974-ODS

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS IN SUPPORT OF APPELLANT AND SEEKING REVERSAL OF THE DISTRICT COURT'S DECISION

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August 10, 2015

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Jones v. Bob Evans Farms, Inc., et al., No. 15-2058

Pursuant to FRAP 26.1 and Eighth Circuit Local Rule 26.1A, Amicus Curiae, the National Association of Consumer Bankruptcy Attorneys, makes the following disclosure:

1) Is party/amicus a publicly held corporation or other publicly held entity? **NO**

2) Does party/amicus have any parent corporations? **NO**

3) Is 10% or more of the stock of party/amicus owned by a publicly held corporation or other publicly held entity? **NO**

4) Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? **NO**

This 10th day of August, 2015.

/s/ Tara Twomey
Tara Twomey, Esq.
Attorney for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Legislative Materials

Other Authorities

STATEMENT OF INTEREST OF AMICUS CURIAE

Incorporated in 1992, the National Association of Consumer Bankruptcy Attorneys (NACBA) is a non–profit organization consisting of approximately 3000 consumer bankruptcy attorneys nationwide. NACBA's corporate purposes include education of the bankruptcy bar and the community at large on the uses and misuses of the consumer bankruptcy process. It is the only national association of attorneys organized for the specific purpose of protecting the rights of consumer bankruptcy debtors. NACBA has filed *amicus curiae* briefs in various cases seeking to protect the rights of consumer bankruptcy debtors. *See, e.g., Schwab v. Reilly*, 560 U.S. 770 (2010); *Running v. Miller*, 778 F.3d 711 (8th Cir. 2015); *In re Abdul-Rahim*, 720 F.3d 710 (8th Cir. 2013).

NACBA and its membership have a vital interest in the outcome of this case. NACBA member attorneys represent individuals in a large portion of all chapter 13 cases filed. These debtors, and their attorneys, must be able to rely on the text of the Bankruptcy Code and rules when assessing whether post-petition events warrant amended schedules in a pending case. This reliance is undermined by recent court decisions on judicial estoppel issues, like the one below, that muddle bankruptcy amendment requirements without reference to bankruptcy procedural rules. This Court's ruling will clarify disclosure requirements, while determining the ability of honest consumer debtors, including those represented by NACBA members, to be made whole for tortious acts committed against them during the bankruptcy process.

AUTHORSHIP AND FUNDING OF AMICUS BRIEF

Pursuant to Fed. R. App. P. 29(c)(5), no counsel for a party authored this brief in whole or in part, and no person or entity other than NACBA, its members, and its counsel made any monetary contribution toward the preparation or submission of this brief.

CONSENT

This brief is being filed with the consent of the parties.

SUMMARY OF ARGUMENT

Judicial estoppel is strong medicine, to be applied only when a litigant has taken clearly inconsistent positions in order to gain an unfair advantage in the judicial system. The legal claim in this case falls squarely outside this doctrine because, except for certain specific kinds of assets, Chapter 13 debtors are not required to amend schedules which were accurate when filed to reflect post-filing changes in their financial situation. There is no general obligation in the Bankruptcy Code or Rules to report post-petition changes in assets, income or expenses. Without making affirmatively inconsistent representations, or violating any other disclosure requirement in bankruptcy court, the plaintiff in this case simply has not taken any inconsistent position that warrants application of judicial estoppel.

The absence of such a disclosure requirement in the previous bankruptcy case is hardly a loophole. Instead, it reflects the practicalities of Chapter 13 practice. Therefore, it cannot be said that the plaintiff in this case has attempted to take advantage of the judicial system.

In the end, the invocation of judicial estoppel here is based on nothing more than a misconstruction of the bankruptcy rules. Its application does nothing to protect the integrity of the judicial process, but only serves to give a windfall to a defendant tortfeasor, while depriving an aggrieved party his day in court. As a result, the District Court erred by dismissing the action.[1]

ARGUMENT

I. The Trial Court Erred By Requiring Heightened Disclosures By Chapter 13 Debtors.

Because any application of judicial estoppel should be viewed against the background of a Chapter 13 debtor's duties, it is important first to set the record

[1] Because this appeal involves the legal question of a bankruptcy debtor's disclosure duties, the trial court's decision should be reviewed *de novo*. *See United States v. Templeton*, 378 F.3d 845, 849 (8th Cir. 2004). Even in the unlikely event that the standard of review is abuse of discretion, the trial court nonetheless abused that discretion by basing its decision on erroneous interpretations of bankruptcy law. *See Koon v. United States*, 518 U.S. 81, 100 (1996) ("The abuse of discretion standard includes review to determine that the discretion was not guided by erroneous legal conclusions.").

straight on what those duties are. *See Vehicle Mkt. Research, Inc. v. Mitchell Int'l, Inc.*, 767 F.3d 987, 989 (10th Cir. 2014) ("If there were grounds for judicial estoppel, it would have to be based on a duty by Mr. Tagliapietra to amend his bankruptcy pleadings"); *Prudencio v. Chenega Integrated Sys., Inc.*, 2008 U.S. Dist. LEXIS 68957, *6 (W.D. Okla. Sept. 10, 2008) ("Absent a duty to supplement her schedules, it unclear what possible basis could exist for invoking judicial estoppel.").

Chapter 13 debtors are not required to amend their schedules as the estate acquires new property during the three- to five-year pendency of the bankruptcy. The absence of such a requirement reflects the practicalities of Chapter 13 bankruptcies. Some courts, such as the trial court here, have sown confusion on this issue by overlooking, or flatly misconstruing, this established practice and procedure.

A. Bankruptcy Rules Require Amended Schedules Only In Limited Circumstances, But Generally Not When Chapter 13 Debtors Acquire Property Post-Petition.

A Chapter 13 debtor does not have "a free-standing duty to disclose the acquisition of any property interest after the confirmation of his plan under Chapter 13. Neither the Bankruptcy Code nor the Bankruptcy Rules mention such a duty." *In re Waldron*, 536 F.3d 1239, 1246 (11th Cir. 2008); *see also Cusano v. Klein*, 264 F.3d 936, 947 (9th Cir. 2001) ("It is true that, generally, a debtor has no duty to schedule a cause of action that did not accrue prior to bankruptcy."). This is hardly a loophole or drafting oversight. "If Congress or the Bankruptcy Rule drafters had intended to impose a broader duty of ongoing disclosure, either could have expressly so provided." *In re Adair*, 253 B.R. 85, 90 (B.A.P. 9th Cir. 2000).

Rather than creating such a broad duty, the Bankruptcy Rules expressly define the limited circumstances when amendment is required. Specifically, amended schedules are only required when "the debtor acquires or becomes entitled to acquire any interest in property" pursuant to Section 541(a)(5) of the Code. Fed. R. Bankr. P. 1007(h). The property covered under Section 541(a)(5) is a discrete category, covering fairly unusual, one-time events -- inheritances, divorce settlements, and insurance proceeds, to which the debtor becomes entitled within 180 days of the petition's filing date. 11 U.S.C. § 541(a)(5); *In re Woodson*, 839 F.2d 610, 617 (9th Cir. 1988).

Notably, Rule 1007(h) does not require amendment to reflect property entering the estate pursuant to Section 1306, such as post-petition wages and assets.[2] *See Adair*, 253 B.R. at 90; *In re Batten*, 351 B.R. 256, 259 (Bankr. S.D.

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[2] Two complementary provisions in the Bankruptcy Code define estate property in Chapter 13 cases. Section 541, which is generally applicable to chapters 7, 11, 12, and 13, 11 U.S.C. § 103(a), covers pre-petition property and the limited post-petition property enumerated in subparagraph (a), *see* 11 U.S.C. § 541. Section 1306, which is only applicable to Chapter 13 proceedings, 11 U.S.C. § 103(i), covers post-petition earnings and assets, *see* 11 U.S.C. § 1306, and is discussed in more detail in I.B. below.

Ga. 2006) ("a debtor is under no obligation to disclose the post confirmation acquired asset unless the property is of the type covered by F.R.B.P. 1007(h)"); *In re Padula*, 2015 Bankr. LEXIS 1450, *12 n. 6 (Bankr. E.D. Va. Apr. 27, 2015). As a result, "[c]ommon sense, reflected in the canon *expressio unius est exclusio alterius*, suggests that the specification of [one provision] implies" the exclusion of others. *Arizona v. United States*, 132 S. Ct. 2492, 2520 (2012) (Scalia, J., concurring in part and dissenting in part); *see also In re Dow Corning Corp.,* 263 B.R. 544, 546 (Bankr. E.D. Mich. 2001) (applying the canon to Fed. R. Bankr. P.).

If debtors had such a broad disclosure duty, then other bankruptcy procedures would be meaningless. An example arises in the context of Chapter 7 conversions. When a debtor converts from Chapter 13 to Chapter 7, the Code allows the debtor to retain post-petition property by expressly excluding such property from the estate, unless the conversion was done in bad faith. 11 U.S.C. § 348(f); *see also Harris v. Viegelahn*, — U.S. —, 135 S. Ct. 1829, 1837 (2015). All forms of post-petition acquisitions fall under the scope of this protection, such as post-petition increases in home equity, *see In re Bobroff*, 766 F2d 797 (3d Cir. 1985), and wages that have not been distributed to creditors, *Harris*, 135 S. Ct. at 1838-9. This broad protection of post-petition property was specifically created because "to hold otherwise would create a serious disincentive to chapter 13 filings." *See* 140 Cong. Rec. H. 10,770 (October 4, 1994) (citing *Bobroff*). The

Rules directly address whether schedules should be amended at conversion to reflect these post-petition acquisitions. *See* Fed. R. Bankr. P. 1019(5)(C). This rule would be entirely unnecessary if debtors already had a duty, prior to conversion, to amend their schedules as they acquired this property.

The Code itself also has a procedure that, when invoked, requires further affirmative disclosures by the debtor. Under Section 521(f), a Chapter 13 debtor may be required to produce annual income and expense statements at "the request of the court, the United States trustee, or any party in interest." 11 U.S.C. § 521(f); *see also In re Nance*, 371 B.R. 358, 371 (Bankr. S.D. Ill. 2007); *In re Grunauer*, 2010 Bankr. LEXIS 1716 (Bankr. E.D. Va. 2010). This procedure "allow[s] interested parties to monitor a debtor's financial situation during the pendency of the bankruptcy case and to seek modification… if changes in that situation occur." *Nance*, 371 B.R. at 371. Even though changes in a debtor's situation could affect projected disposable income, and be relevant to the feasibility and amount of plan payments, Congress placed the burden of requesting this heightened disclosure on parties other than the debtor. 11 U.S.C. § 521(f).[3] Section 521(f) disclosures would also be superfluous if debtors already had ongoing disclosure obligations.

The progression of Plaintiff's Chapter 13 proceeding reflects these realities of bankruptcy practice. In its confirmation order, the bankruptcy court spelled out

[3] It is also worth noting that plan modification itself is an entirely permissive procedure. *See* 11 U.S.C. § 1329(a).

the requirements for supplementation. The order was consistent with Rule 1007(h), and notably did not require formal amendment upon acquisition of a contingent legal claim, but only required the debtor to inform the trustee if and when the claim "affect[ed] disposable income." *See* Order Confirming Chapter 13 Plan, *In re Jones*, Case No. 09-44777-abf13, Doc. 32, ¶ 6 (Bankr. W.D. Mo. Sep. 30, 2009).

In sum, there are only limited circumstances when a debtor must amend schedules to reflect post-petition developments. Under Rule 1007(h), those circumstances do not include the post-petition acquisition of a legal claim.

B. Heightened Disclosure Requirements In Chapter 13 Proceedings Would Be Impractical.

There is good reason for the Bankruptcy Rules to limit the occasions when amendment is required. Not only do such amendments provide little utility, but it would be overly burdensome to furnish them during a protracted Chapter 13 proceeding.

Bankruptcy schedules serve an important role at commencement of a bankruptcy petition, but they are not meant to provide real-time financial information as the case progresses. Their purpose is simply to give "inquiry notice to affected parties to seek further detail" about a particular item if desired. *Cusano*, 264 F.3d at 946-7; *see also Payne v. Wood*, 775 F.2d 202, 206 (7th Cir.

1985); *Adair*, 253 B.R. at 90-91. In Chapter 13 cases, the scheduled information guides whether a proposed repayment plan can overcome two initial hurdles: the "best interests of the creditors" test and the "disposable income" test. Once those tests have been passed, and a plan confirmed, then the asset and income schedules have served their purpose.

An asset's primary function in a Chapter 13 case is to be considered under the "best interests of the creditors" test, which simply juxtaposes the case with a hypothetical one under Chapter 7. This test allows confirmation of a plan only if the present value of the debtor's proposed repayment plan is "not less than the amount that would be paid" to creditors under the hypothetical liquidation of assets in a Chapter 7. *See* 11 U.S.C. § 1325(a)(4). This hypothetical liquidation looks at assets that a Chapter 7 estate would have, which by definition excludes post-petition property. *See* 8 Collier on Bankruptcy ¶ 1325.02[d] at 1325-22 - 23 (16th ed.); *see also* 11 U.S.C. § 541 (defining estate property in a Chapter 7). Thus, for example, even in a state where cash cannot be claimed as exempt, it is clear that each post-petition paycheck is not subject to this test. The test is not even applicable to subsequent plan modifications. *See Hollytex Carpet Mills v. Tedford*, 691 F.2d 392, 393 (8th Cir. 1982); *In re Forbes*, 215 B.R. 183, 188-190 (B.A.P. 8th Cir. 1997). A post-petition acquisition (except for property specified in

Section 541(a)(5)) is therefore wholly irrelevant for purposes of the "best interests of the creditors" test.

Second, because of the specific role played by a debtor's assets in Chapter 13 proceedings, amendments to disclose post-petition legal claims serve little function. Unlike bankruptcies in Chapters 7 or 11, where creditors may be paid from the liquidation of a debtor's assets, *see* 11 U.S.C. § 704(a)(1) (requiring Chapter 7 trustee to "reduce to money the property of the estate"), Chapter 13 repayment plans are typically funded solely by the "future earnings or other future income of the debtor." *See* 11 U.S.C. § 1322(a)(1), (d); *see also EEOC v. Apria Healthcare Group*, 222 F.R.D. 608, 613 n. 3 (E.D. Mo. 2004). The plan payments are typically calculated based on the debtor's "projected disposable income" during the applicable commitment period of three- to five years. *See* 11 U.S.C. §§ 1322(d); 1325(d).

The term "projected disposable income" is a term of art, and fully defining it can be unnecessarily complicated for this case. *See* 11 U.S.C. §§ 1325(b)(2); 101(10A); *Hamilton v. Lanning*, 560 U.S. 505, 509-24 (2010). Suffice to say, if a new legal claim has any effect on the debtor's repayment plan, then at a minimum, it must first be liquidated before the expiration of the five-year cap on the commitment period. *See e.g.*, *In re Hall*, 442 B.R. 754, 762 (Bankr. D. Idaho 2010) (counting part of a lump-sum recovery as income); *In re Black*, 292 B.R.

693, 701 (B.A.P. 10th Cir. 2003) (modified repayment plan cannot exceed five years after due date of the first payment); 11 U.S.C. § 1329(c). Even upon liquidation, some courts do not apply new "projected disposable income" calculations when modifying plan payments. *See, e.g., Forbes*, 215 B.R. at 192. Thus, in the end, a debtor's recovery on a post-petition legal claim may have only a minimal impact on the debtor's repayment plan.

Argument in similar cases sometimes focuses on the irrelevant question of whether the post-petition legal claim is property of the estate. *See* Brief for Appellee at 8-9, *Van Horn v. Martin*, No. 2015-1710 (8th Cir. Jul. 22, 2015). Whether the property is part of the estate is beside the point. Post-petition property may enter the estate, and its inclusion serves various purposes, most notably giving it the protection of the automatic stay, *see* 11 U.S.C. § 362(a)(2) – (4); *Security Bank of Marshalltown v. Neiman*, 1 F.3d 687, 691 (8th Cir. 1993), but also enabling the court to enter income deduction orders, 11 U.S.C. § 1325(c).

However, as shown above, the fact that the property belongs to the estate does not mean that it must be scheduled or that it is automatically available for plan payments. Two competing illustrations of estate property highlight that distinction. On one hand, a claim for lost wages, which would have been devoted to plan payments anyway, may quintessentially be available for distribution if liquidated during the case. On the other hand, a tort recovery by the debtor to compensate for a permanent loss, where the damages awarded include a component to provide for medical care extending beyond the term of the plan, may be entirely outside the reach of creditors. In short, whether a legal claim should affect plan payments is a different, and much more complicated question, than whether it is property of the estate.

Keeping in mind the specific role that assets play in Chapter 13 proceedings, the rules reflect the impracticality of requiring a Chapter 13 debtor to amend schedules when the estate receives new assets. "[O]bviously, such a requirement would be unworkable, since the debtor's schedules would have to be amended to reflect each paycheck or acquisition of property, as well as every expenditure." 8 Collier on Bankruptcy ¶ 1306.01 at 1306-3 (16th ed.). Such heightened disclosure would also lead to the "absurd result that a Chapter 13 debtor could be required… to continuously modify the confirmed plan if the debtor owns an asset that appreciates after confirmation of each confirmed plan." *Forbes*, 215 B.R. at 190 (quoting Lundin, Keith M., Chapter 13 Bankruptcy, vol. 2, § 6.44 at 6-131 to 132). This infeasibility is especially striking when considering the protracted length of a chapter 13 proceeding, which generally lasts for three- to five-years. *See* 11 U.S.C. § 1322(d).

The additional expense of such extensive disclosures during that period would wreak havoc on the Chapter 13 process. For example, in the Western

District of Missouri, where Plaintiff filed his bankruptcy petition,[4] a reasonable attorney's fee for each round of amended schedules is $150. *See* Local Rule 2016-1.F. Because a Chapter 13 debtor's attorney's fees are often paid out of the funds in the Chapter 13 plan, *see e.g.*, Local Rule 2016-1.G., the brunt of these costs may not even be borne by the debtors, but by the unsecured creditors who would stand to receive a lower payout from the plan. Further, these additional fees to the debtor's attorney do not take into account the other increased transaction costs of the additional filings, including the resources required by the trustee and creditors to review each successive amendment.

The impracticality of heightened disclosures cannot be resolved simply by limiting them to the acquisition of major assets. Such a rule would create confusion over whether post-petition assets are substantial enough to warrant amended schedules. Neither the Code nor the rules would provide any guidance on that point because they do not even contemplate such disclosure, except as required by Section 521(f).

Schedules are important at the outset of a Chapter 13 bankruptcy for purposes of determining whether a plan should be confirmed. A broad requirement that debtors update them as their bankruptcy case progresses over several years would serve little value, while working to the detriment of the Chapter 13 process.

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[4] *See* Voluntary Petition, *In re Jones*, Case No. 09-44777-abf13, Doc. 1 (Bankr. W.D. Mo. Sept. 30, 2009).

C. The District Court Erred By Conflating The Ongoing Duty To Correct Inaccurate Schedules With The Limited Duty To Update Schedules.

Some courts conflate a debtor's duties in a Chapter 13 proceeding with other requirements. Even more troublesome, these decisions do so without considering the nuances of a Chapter 13 proceeding, or even consulting the Bankruptcy Code or rules. The trial court in this case exemplifies that folly.

The trial court erroneously cites two cases for the proposition that bankruptcy debtors have an affirmative obligation to amend their schedules to reflect post-petition events. The first citation is a quote from an Eleventh Circuit case, requiring a debtor to "amend his financial statements if circumstances change." (Doc. 59:3 (quoting *Burnes v. Pemco Aeroplex, Inc.*, 291 F.3d 1282, 1286 (11th Cir. 2002).) However, this quote is out of context. The *Burnes* case did not involve whether a debtor was required to amend schedules, but instead involved a debtor who filed false schedules after "the bankruptcy court ordered [him] to file amended or updated schedules." *See Burnes*, 291 F.3d at 1284. Even the Eleventh Circuit has repudiated the trial court's expansive reading of its precedent in *Burnes*. *See Waldron*, 536 F.3d at 1246 (11th Cir. 2008) ("We do not hold that a debtor has a free-standing duty to disclose the acquisition of any property interest after the confirmation of his plan under Chapter 13… and our precedents in *Burnes*, *De Leon*, and *Ajaka* do not address that issue.").

Nor, as the trial court concluded, did this Court's decision in *Stallings* create such a duty. On the contrary, the *Stallings* Court cited only concern with a "debtor's failure to list a claim in the *mandatory* bankruptcy filings." *Stallings v. Hussman*, 447 F.3d 1041, 1047 (8th Cir. 2006) (emphasis added). This Court ultimately rejected the application of judicial estoppel in that case, and only in dicta made a cursory inference that the absence of amended schedules created an inconsistent position. *Id*. at 1049. However, the *Stallings* Court never addressed a debtor's disclosure duties within the bankruptcy rules.

The trial court's decision conflates the ongoing duty of amending the original schedules to correct inaccuracies with non-existent supplementation requirements for property acquired during the life of the plan. As recently described by the Tenth Circuit, the "continuing duty to disclose" is limited to those situations where "a debtor [] does not disclose pre-petition claims at the time of petition." *Mitchell*, 767 F.3d at 998. Indeed, until recently, the "continuing duty" has traditionally been cited in cases where affirmatively false or inaccurate schedules had originally been filed. *See Burnes*, 291 F.3d at 1284; *In re Coastal Plains, Inc.*, 179 F.3d 197, 208 (5th Cir. 1999).

A recent case in the Fifth Circuit provides another concerning illustration of a court reaching a flatly wrong result by conflating these amendment requirements. *See In re Flugence*, 738 F.3d 126, 129-30 (5th Cir. 2013). The *Flugence* Court, latching on to the "continuous duty" language referenced in case law, apparently believed that the amendment question was already well-settled.[5] However, the court pulled that language from a line of cases only involving pre-petition assets that were inaccurately disclosed from the onset. *Id.* at 129 n. 1; *see also Coastal Plains*, 179 F.3d at 202-3; *In re Superior Crewboats, Inc.*, 374 F.3d 330, 333 (5th Cir. 2004); *Kane v. Nat'l Union Fire Ins. Co.*, 535 F.3d 380, 383 (5th Cir. 2008); *Love v. Tyson Foods, Inc.*, 677 F.3d 258, 260-1 (5th Cir. 2012); *Jethroe v. Omnova Solutions, Inc.*, 412 F.3d 598, 599 (5th Cir. 2005).[6] None of these cases stand for the proposition that post-petition fluctuations in estate property required supplementation.

There is no basis in the Bankruptcy Code or the rules to support the *Flugence* Court's conclusory extension of disclosure duties to cover all post-petition events. At no point did the *Flugence* court acknowledge the existing amendment requirements of Rule 1007(h), or the specific procedure for invoking heightened disclosures under Section 521(f). It is quite possible that the Fifth

[5] At least two other district court cases, both cited later in the trial court's decision for another proposition, happen also to gravitate towards the "continuous duty" language without consulting bankruptcy rules. *See Tokheim v. Georgia-Pacific Gypsum, LLC*, 606 F. Supp. 2d 988, 996 (N.D. Iowa 2009); *Wells v. FedEx Ground Package Sys.*, 979 F. Supp. 2d 1006, 1035 (E.D. Mo. 2013).

[6] Another case from this Court apparently also falls under this category of undisclosed pre-petition legal claims. *See EEOC v. CRST Van Expedited, Inc.*, 679 F. 3d 657 (8th Cir. 2012). Of the three participants estopped from pursuing action in *CRST*, at least two of them, Stark and Timmons, had undisclosed pre-petition claims; it is not clear when Payne's claims arose. *Id.* at 678-79.

Circuit could have benefitted from better briefing on these matters. The *Flugence* debtor was apparently represented by personal injury lawyers who did not even raise these bankruptcy procedural issues in their briefs. *See generally* Brief for Appellee, *In re Flugence*, No. 13-30073 (5th Cir. Apr. 15, 2013). Nevertheless, by failing to consider the above bankruptcy procedures, or the specific role played by assets in Chapter 13 cases, the *Flugence* court reached the wrong result, apparently not realizing that it was creating a new and burdensome requirement out of whole cloth.

The trial court in this case erred by misconstruing the disclosure requirements for Chapter 13 debtors. This Court should reverse that decision, refuse to follow other misguided courts, such as *Flugence*, and reinforce the written language of the bankruptcy rules.

II. Judicial Estoppel Is Inappropriate Against Debtors Who Neither Adopt Inconsistent Positions In A Prior Bankruptcy Case, Nor Have Any Motive To Conceal Assets.

"Judicial estoppel is an extraordinary remed[y] to be invoked when a party's inconsistent behavior will otherwise result in a miscarriage of justice. It is not meant to be a technical defense for litigants seeking to derail potentially meritorious claims." *Ryan Operations G.P. v. Santiam-Midwest Lumber Co.*, 81 F.3d 355 (3d Cir. 1996) (internal quotation marks and citations omitted). The parties have outlined well the three primary factors to consider when deciding whether to invoke this harsh measure: (a) a party's position is clearly inconsistent with that in prior litigation, (b) the prior court accepted the party's previous position, and (c) the party would "derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *Stallings*, 447 F.3d at 1047 (quoting *New Hampshire v. Maine*, 532 U.S. 742, 750 (2001)). The trial court below, which applied judicial estoppel based on a misreading of a Chapter 13 debtor's disclosure duties, erred in its application of these elements.

A. Without An Affirmative Statement Or Disclosure Requirement, A Debtor Is Not Taking "Clearly Inconsistent" Positions.

"[J]udicial estoppel is limited to those instances in which a party takes a position that is *clearly inconsistent* with its earlier position." *Hossaini v. Western Missouri Medical Center*, 140 F.3d 1140, 1143 (8th Cir. 1998) (emphasis added); *see also New Hampshire*, 532 U.S. at 750 ("a party's later position must be 'clearly inconsistent' with its earlier position"). The doctrine "is not intended to eliminate all inconsistencies, however slight or inadvertent; rather, it is designed to prevent litigants from playing fast and loose with the courts." *Ryan*, 81 F.3d at 358.

The "clearly inconsistent" standard traditionally bars two affirmative, irreconcilable positions. *Compare New Hampshire*, 532 U.S. at 747-8 (the court "cannot interpret 'Middle of the River'… to mean two different things."), *with Cleveland v. Policy Mgmt. Systems*, 526 U.S. 795, 802-3 (1999) (despite their ostensible inconsistencies, "there are too many situations in which an SSDI claim and an ADA claim can comfortably exist side by side"). However, in the bankruptcy context, courts have inferred inconsistency when a debtor fails to disclose a legal claim, *in violation of an affirmative duty* to do so. *See White v. Wyndham Vacation Ownership, Inc.*, 617 F.3d 472 (6th Cir. 2010) (finding an inconsistent statement where debtor concealed a pre-petition claim from her schedules, in direct violation of statutory disclosure duties). In such situations, the court's inference of a prior inconsistent statement is permissible because a debtor's concealment of information from the "mandatory bankruptcy filings is tantamount to a representation that no such claim existed." *Stallings*, 447 F.3d at 1047. However, as detailed above, it is a misconception that the Chapter 13 debtor has an affirmative duty to disclose newly acquired assets, such as legal claims.

Without an affirmative duty of disclosure in the prior bankruptcy, there is no reason to infer such inconsistency from a debtor's silence. *See Mitchell*, 767 F.3d at 999; *see also Allison v. Ticor Title Ins. Co.*, 979 F.2d 1187, 1193-4 (7th Cir. 1993) (bankruptcy creditor's prior failure to object was not adoption of a formal position). In *Mitchell*, the Chapter 7 debtor initially valued his company's stock at $0.00, which may have been accurate at commencement of the action, but the debtor did not later amend his schedules to reflect subsequent appreciation of the stock when the company filed a $4 million lawsuit. *Id.* at 988. The Tenth Circuit, citing the lack of a clear requirement for a debtor to amend schedules to report the new appreciated value of the property, refused to find any inconsistent statements from the debtor's bankruptcy case and resisted applying judicial estoppel to his claims. *Id.* at 997-999. *Mitchell* also begs comparison to the conversion context, where a former Chapter 13 debtor is clearly entitled to receive post-petition property upon conversion to Chapter 7, even though the debtor is expressly not required to schedule that property. *See Harris*, 135 S. Ct. at 1838-9; Fed. R. Bankr. P. 1019(5)(C)(i). In either scenario, there is simply no reason to infer inconsistency from a debtor's permissible silence.

Similarly, here, there was no requirement for Plaintiff to amend his bankruptcy schedules. Without such a requirement, or other affirmative misstatement, it makes little sense to infer that the debtor represented to the bankruptcy court that the instant legal claim does not exist.

B. Even Assuming Inconsistency, There Is No Acceptance Of The Prior Position By The Bankruptcy Court Once The Case Has Been Reopened.

"[O]nce a plaintiff-debtor has amended his or her bankruptcy schedules and the bankruptcy court has processed or re-processed the bankruptcy with full information… [then] the bankruptcy court ultimately *did not accept* the initial position." *Quin v. Cnty. Of Kauai Dep't of Transp.,* 733 F.3d 267, 274 (9th Cir. 2013) (emphasis in original); *see also Carter v. Nat'l City Mortg., Inc.*, 2015 U.S.

Dist. LEXIS 25766, *9 (N.D. W. Va. Mar. 3, 2015). Here, as described above, it was not necessary for the debtor to amend his bankruptcy schedules. Nevertheless, the debtor has undergone the formality of reopening his Chapter 13 case and filing those amendments. Since that filing, the bankruptcy case has already been closed again, and it is clear that this legal claim had no effect on his bankruptcy case. In such situations, it can no longer be said that the bankruptcy court accepted a perceived inconsistency.

C. Chapter 13 Debtors Have No Motive To Conceal Assets Nor An Unfair Advantage In Post-Petition Proceedings.

Allowing debtors to pursue such post-petition legal claims does not give them an "unfair advantage," and it certainly does not "impose an unfair detriment on the opposing party." *See Stallings*, 447 F.3d at 1047. This "unfair advantage" element is not satisfied when a debtor's "prior position was taken because of a good-faith mistake rather than as part of a scheme to mislead the court." *Stallings*, 447 F.3d at 1049 (quoting *Ryan*, 81 F.3d at 362).

This Court has already rejected the notion that a Chapter 13 debtor sought an "unfair advantage" in this context. *See Stallings*, 447 F.3d at 1049. In *Stallings*, the debtor's legal claims arose after his schedules had already been filed. This Court agreed with *Ryan*, and cautioned against "a rule that the requisite intent for judicial estoppel can be inferred from there mere fact of nondisclosure in a bankruptcy proceeding." Consistent with that approach, this Court refused to infer any "unfair advantage" being sought by the *Ryan* plaintiff, reasoning that he "was already a Chapter 13 debtor when [the defendant] terminated him from his job; therefore, he could not have known at the time he filed his bankruptcy petition to disclose such claims." *See id*.

Other courts have also refused to take the leap from mere nondisclosure to fraudulent scheme in the context of Chapter 13 proceedings. After all, an "allegation that a Chapter 13 debtor has secret motives to secret[e] assets is a dubious claim at best, given that Chapter 13 creditors are repaid out of the debtor's income." *Copeland v. Hussmann Corp.*, 462 F. Supp. 2d 1012, 1020 (E.D. Mo. 2006); *see also Quin,* 733 F.3d at 276 (refusing to apply a presumption of deceit); *Browning v. Levy*, 283 F.3d 761 (6th Cir. 2002) (no motive to conceal for Chapter 11 debtor whose creditors would have been paid from the proceeds of the claim); *Hansford v. Bank of Am.*, 2008 U.S. Dist. LEXIS 65502 (E.D. Pa. Aug. 22, 2008); *EEOC v. Apria Healthcare Group, Inc.*, 222 F.R.D. 608, 613 n. 3 (E.D. Mo. 2004) ("This Court is not convinced that a Chapter 13 debtor-in-possession has a motive to secrete assets").

The court below further supported its inference of deceit here by citing a previous amendment to Plaintiff's bankruptcy schedule, which included his wife's pending worker's compensation claim. The trial court wrongly drew two lessons from this amendment: (1) that Plaintiff has a history of hiding assets from the bankruptcy court; and (2) that Plaintiff should have known about his disclosure obligations from this amendment. Both of these lessons miss the mark. First, the claim was not concealed because the wife's worker's compensation income was listed clearly on the Statement of Financial Affairs. *See* Voluntary Petition, *In re Jones*, Case No. 09-44777-abf13, Doc. 1, at 48 ¶ 2 (Bankr. W.D. Mo. Sept. 30, 2009). Second, neither the court nor the trustee ever requested Plaintiff to amend schedules to reflect this claim. Instead, the trustee filed a routine objection to confirmation of the plan, which at the time, did not include language covering non-exempt income from the claim. *See id.*, Doc. 21, at 1 ¶ 4. The trustee was required to raise such an objection prior to confirmation, or it would have been waived. *See e.g.*, *In re Arnold*, 869 F.2d 240, 243 (4th Cir. 1989) (future modification of plan requires unanticipated changes in circumstances). However, there are no broader lessons about amendments to be learned from this objection. Amendments are still governed by Rule 1007(h). The trial court's attempt to extrapolate deceitful intent on behalf of the debtor from this amendment is wrong.

Allowing post-bankruptcy claims, such as this one, to proceed works absolutely no "unfair detriment" on the opposing party. Unlike *New Hampshire*, where redrawing the border would have prejudiced a neighboring state, 532 U.S. at 754-5, the debtor's bankruptcy petition in this case is entirely unrelated to this matter. It cannot be disputed that the defendant employer's interests were completely unaffected by that bankruptcy case.

There is no basis to infer that debtors, who are in compliance with all disclosure requirements in a bankruptcy case, are gaming the system. Combined with the utter lack of a detriment to the opposing party, it is clear that this "unfair advantage" element is not met here.

D. Applying Judicial Estoppel To Post-Bankruptcy Claims Would Give Defendant Tortfeasors A Windfall Without Strengthening The Integrity Of The Judicial Process.

"[C]ourts have uniformly recognized that [the purpose of judicial estoppel] is to protect the integrity of the judicial process." *New Hampshire*, 532 U.S. at 749; *Stallings*, 447 F.3d at 1047 (aim of judicial estoppel is to "protect[] the integrity of the judicial process"). The integrity of the judicial process, while certainly important, is not undermined, or even threatened, here.

In a 2013 decision, the Ninth Circuit cautioned against overly harsh application of judicial estoppel against bankruptcy debtors. *See Quin*, 733 F.3d at 277. In *Quin*, the debtor moved to reopen her Chapter 7 bankruptcy case after initially failing to disclose a pre-petition legal claim in the schedules. Finding that these actions could be consistent with honest mistake, the Court noted that estopping the claim would "do nothing to protect the integrity of the courts." *Id.* at

276. The court further explained the bad policy that judicial estoppel would promote in that context:

> Perversely, the only "winner" in this scenario is the alleged bad actor in the estopped lawsuit. If Defendant here did, in fact, discriminate against Plaintiff, it will not have to pay the consequences of its actions, for the entirely unrelated reason that Plaintiff happened to file for bankruptcy and, possibly due to inadvertence, happened to omit the claim from her initial schedules. Further, because the application of judicial estoppel does not look to the nature of the underlying claim, the alleged bad actor could be someone who clearly does not warrant a windfall (e.g., someone who physically assaulted the plaintiff and badly injured him or her). It seems hard to justify a policy that takes money from innocent third-party creditors and gives it, for example, to a violent criminal.

Id. at 275-6.

The policy implications of this case are identical. There is no reason for the law to punish otherwise compliant bankruptcy debtors by barring their meritorious claims, and simultaneously giving windfalls to undeserving tortfeasors. There is no countervailing benefit to judicial integrity to support such a lopsided outcome. The recent cases applying judicial estoppel in these circumstances turn the doctrine's policy on its head, and mutate the doctrine into an unwarranted technical defense for savvy litigants.

III. In Chapter 13 Cases, The Debtor, Not The Trustee, Has Standing To Pursue Legal Claims.

The debtor's standing to bring the instant action is not an issue in this case. However, because a debtor's standing has been challenged in similar cases, *see*

Brief for Appellee at 8-13, *Van Horn v. Martin*, No. 2015-1710 (8th Cir. Jul. 22, 2015), it is nonetheless important to address this meritless argument.

It is already well-established that a "Chapter 13 debtor has standing to bring claims that benefit the estate." *Cable v. Ivy Tech State College*, 200 F.3d 467, 474 (7th Cir. 1999); *see also Smith v. Rockett*, 522 F.3d 1080, 1081-1082 (10th Cir. 2008); *Crosby v. Monroe County*, 394 F.3d 1328, 1331 n. 2 (11th Cir. 2004); *Olick v. Parker & Parsley Petroleum Co.*, 145 F.3d 513, 515-516 (2d Cir. 1998); *Young v. Time Warner Cable Capital, LP*, 2006 U.S. Dist. LEXIS 74237 (W.D. Mo. Oct. 12, 2006) ("Although the Eighth Circuit has not addressed the question, the Courts of Appeal that have spoken on the issue have uniformly held that a Chapter 13 debtor has standing to pursue claims in his own name on behalf of the bankruptcy estate."); *In re Mosley*, 260 B.R. 590, 595 (Bankr. S.D. Ga. 2000) (Chapter 13 debtor "controls the litigation as well as the terms of the settlement"). The Chapter 13 debtor's standing to pursue legal claims is premised in the Bankruptcy Code, which assigns to the debtor possession of all estate property, 11 U.S.C. § 1306(b), including legal claims, 11 U.S.C. § 541(a)(1); *see also* Fed. R. Bankr. P. 6009; *Cable*, 200 F.3d at 474.[7] Notably, the Appellee's Brief in *Van Horn* did not cite any authority to support its argument to the contrary.

[7] By contrast, in a Chapter 7 proceeding, the trustee is the sole "representative of the estate," who has the "capacity to sue and be sued." 11 U.S.C. § 323. *See Vreugdenhil v. Hoekstra,* 773 F.2d 213, 215 (8th Cir.1985).

Even the trial court in *Van Horn* acknowledged this general rule on standing, but nonetheless took an outlier approach. *Van Horn v. Martin*, 2015 U.S. Dist. LEXIS 27248, *3-4 (E.D. Ark. Mar. 3, 2015). The court concluded that, because the debtor was "bringing the claims for herself, not on behalf of the bankruptcy estate," the requisite standing was lacking. However, no authority was cited to support this distinction between an individual and "on behalf of" claims. *Id*. The lack of authority may be because the distinction is illusory: individual property acquired by the debtor during pendency of a Chapter 13 case *is* estate property, regardless of whether it is designated as such. *See* 11 U.S.C. § 1306(a). Furthermore, it is telling that many of the above cases, where the debtor had standing, were captioned as individual cases.

CONCLUSION

For the reasons stated above, *amicus curiae* asks this court to reverse the decision of the Western District of Missouri below, and allow this case to proceed on its merits.

/s/ Tara Twomey

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,569 words, excluding parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system on August 10, 2015. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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