Kelly S. Crawford – NJ Attorney ID #29141993
RIKER DANZIG SCHERER HYLAND & PERRETTI LLP
Headquarters Plaza
One Speedwell Avenue
Morristown, NJ 07962-1981
(973) 538-0800

Attorneys for Defendants
Ethicon, Inc. and Johnson & Johnson

GISSELLE VELAZQUEZ and ROBERT VELAZQUEZ, Plaintiffs, vs. ETHICON, INC., ETHICON WOMEN'S HEALTH AND UROLOGY, a Division of ETHICON, INC., GYNECARE, JOHNSON & JOHNSON, and JOHN DOES 1-20, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION – BERGEN COUNTY DOCKET NO. BER-L-10304-14 MASTER DOCKET NO. BER-L-11575-14 CIVIL ACTION In Re Pelvic Mesh/Gynecare Litigation, Case No. 291

ORDER

DEFENDANTS' MOTION TO DISMISS BASED ON PLAINTIFFS' LACK OF STANDING, AND TO JUDICIALLY ESTOP PLAINTIFFS FROM PERSONALLY RECOVERING ANY DAMAGES ON ACCOUNT OF THE CLAIMS IN THIS ACTION

THIS MOTION having been brought before the Court by Defendants Ethicon, Inc. and Johnson & Johnson ("Defendants"), through its counsel Riker Danzig Scherer Hyland & Perretti, LLP, seeking an Order to Dismiss Based on Plaintiffs' Lack of Standing, and to Judicially Estop Plaintiffs from Personally Recovering Any Damages on Account of the Claims

in this Action; and the Court having considered the Motion, any opposition filed with respect to the Motion and any arguments of counsel; and for good cause shown,

IT IS on this 17th day of November, 2015,

ORDERED that Plaintiffs, Giselle Velazquez and Robert Velazquez ("Plaintiffs"), do not have standing to pursue this cause of action in their individual capacities; and

IT IS FURTHER ORDERED that Plaintiffs shall not personally receive any payment on account of any damages or other recovery if Defendants are adjudged to be liable in this action; and

IT IS FURTHER ORDERED that any damages or other recovery for which Defendants are adjudged to be liable in this action shall not exceed the amount necessary to pay, in full, the creditors in Plaintiffs' chapter 7 bankruptcy case, Case No. 12-14507-AJC in the United States Bankruptcy Court for the Southern District of Florida (the "Bankruptcy Case"); and

IT IS FURTHER ORDERED that, the duly appointed Chapter 7 Trustee in the Bankruptcy Case shall have thirty (30) days from the date of this Order to substitute for the Plaintiffs in this action by notifying this Court, on notice to Defendants' counsel, of the Chapter 7 Trustee's intention to proceed with this action; and

IT IS FURTHER ORDERED THAT if the Chapter 7 Trustee fails to substitute for Plaintiffs in this action within thirty (30) days from the date of this Order, ~~this matter shall be deemed dismissed, with prejudice, without the need for any further action by Defendants; and~~ counsel for Defendant may move to dismiss

IT IS FURTHER ORDERED that a copy of this Order shall be served on all counsel within seven (7) days of its receipt by counsel.

Hon. Brian R. Martinotti, J.S.C.

__/__ Opposed

___ Unopposed

NOT TO BE PUBLISHED WITHOUT

THE APPROVAL OF THE COMMITTEE ON OPINIONS

GISSELLE VELAZQUEZ, Plaintiff, v. ETHICON, INC., ETHICON WOMEN'S HEALTH AND UROLOGY, a Division of Ethicon, Inc., GYNECARE, JOHNSON & JOHNSON, AND JOHN DOES 1-20, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION – BERGEN COUNTY DOCKET NO. BER-L-10304-14 MASTER CASE NO. BER-L-11575-14 ***CIVIL ACTION***

Argued: November 17, 2015[1]

Decided: November 17, 2015

APPEARING:

For Plaintiffs Gisselle and Robert Velazquez: Mark T. Sadaka, Esq. (Sadaka Associates, LLC); Wagstaff & Cartmell, L.L.P.

For Defendants Ethicon, Inc., Ethicon Women's Health and Urology, a Division of Ethicon, Inc., Gynecare, and Johnson & Johnson: Kelly S. Crawford, Esq. and Brett M. Becker, Esq. (Riker Danzig, L.L.P.)

MARTINOTTI, J.S.C.

Before this Court is Defendants Ethicon, Inc., Ethicon Women's Health and Urology, Gynecare, and Johnson & Johnson's ("Defendants") Motion to Dismiss Based on Plaintiffs' Lack of Standing, and to Judicially Estop Plaintiffs from Personally Recovering any Damages. This Motion is OPPOSED by Plaintiffs Gisselle and Robert Velazquez ("Plaintiffs").

[1] Counsel agreed at the October 21, 2015 Case Management Conference to conduct this argument telephonically.

ARGUMENTS

Defendants' Motion to Dismiss for Lack of Standing, and to Judicially Estop Plaintiffs from Personally Recovering any Damages from this Action

Defendants make two arguments. First, Defendants argue that Plaintiffs lack standing to bring this lawsuit, which they filed before filing their Chapter 7 bankruptcy petition, because their claim against Defendants was an asset of the bankruptcy estate. Thus, the Chapter 7 Trustee is the rightful party in interest. Second, Defendants argue that Plaintiffs should be judicially estopped from recovering any damages from this lawsuit, because they obtained a discharge of their debts in Chapter 7 bankruptcy based, in part, on their representation that they had no pending personal injury claims.

1. Dismissal for Lack of Standing

Plaintiffs concede that "the Trustee is the proper party to bring the action." (Pls.' Opp. to Defs.' Mot. to Dismiss at 3). Plaintiffs request 60 days for the Trustee to provide notice to this Court of the Trustee's intention to pursue Plaintiffs' claims. Ibid. Defendants consent to this request. (Defs.' Reply to Pls.' Opp. at 1). As the parties agree and the Bankruptcy Court appears willing to permit the Trustee to bring the claim against Defendants, this Court GRANTS Defendants' Motion to Dismiss Plaintiffs based on lack of standing and allows the Trustee to be substituted as plaintiff is in this action within sixty (60) days of this Order.

2. Judicial Estoppel

Defendants argue that judicial estoppel is the appropriate sanction in the instant case, because full disclosure is essential to the bankruptcy process. Judicial estoppel can be applied when a debtor fails to properly schedule a cause of action in a bankruptcy case. Davidowski v. Davidowski, 2012 N.J. Super. Unpub. LEXIS 192, *16-17 (App. Div. Jan. 30, 2012) (citing Oneida Motor Freight, Inc. v. United Jersey Bank, 848 F.2d 414, 419-420 (3d Cir. 1988).

Defendants note that six Circuit Courts of Appeals have ruled that parties can be judicially estopped from bringing claims they failed to disclose in bankruptcy. See Reed v. City of Arlington, 650 F.3d 571, 579 (5th Cir. 2011) ("Absent unusual circumstances, an innocent bankruptcy trustee may pursue for the benefit of creditors a judgment or cause of action that the debtor—having concealed that asset during bankruptcy—is himself estopped from pursuing."); Cannon-Stokes v. Potter, 453 F.3d 446, 448 (7th Cir. 2006) ("All six appellate courts that have considered this question hold that a debtor in bankruptcy who denies owning an asset, including a chose in action or other legal claim, cannot realize on that concealed asset after the bankruptcy ends.") (citing Payless Wholesale Distributors, Inc. v. Alberto Culver (P.R.) Inc., 989 F.2d 570 (1st Cir. 1993); Krystal Cadillac-Oldsmobile GMC Truck, Inc. v General Motors Corp., 337 F. 3d 314 (3d Cir. 2003); Jethroe v. Omnove Solut., Inc., 412 F.3d 598 (5th Cir. 2005); United States ex rel. Genert v. Transport Admin. Servs., 260 F.3d 909, 917-19 (8th Cir. 2001); Hamilton v. State Farm Fire & Cas. Co., 270 F.3d 778 (9th Cir. 2001); Barger v. Cartersville, 348 F.3d 1289, 1293-97 (11th Cir. 2003)). While some Circuit Courts elected not to dismiss the bankruptcy trustee as the party in interest, all estopped the debtor from recovering damages in the previously undisclosed action.

In Reed, the Fifth Circuit ruled that a plaintiff who had won a $1 million judgement against her employer in a Family Medical Leave Act claim was judicially estopped from collecting because she had not disclosed the claim in her bankruptcy. 650 F.3d at 573. The bankruptcy trustee was permitted to collect the judgment on behalf of the bankruptcy estate, and any excess after repayment of creditors was to be returned to the defendant. Ibid. The Southern District of New York reached a similar result in a more recent case. See Grammer v. Mercedes Benz of Manhattan/Mercedes Benz USA, LLC, 2014 U.S. Dist. LEXIS 33752, *19 (S.D.N.Y.

Mar. 13, 2014). The Appellate Division has reached similar results, as well. See Barzda v. Clemente, 2010 N.J. Super. Unpub. LEXIS 426 (App. Div. Mar. 3, 2010); Ruffin v. Kinder Morgan Liquids Terminal, LLC, 2009 N.J. Super. Unpub. LEXIS 251, *17 (App. Div. Jan. 2, 2009).

The Appellate Division upheld the trial court's decision to judicially estop a plaintiff from recovering on a personal injury claim that he failed to disclose in Chapter 7 bankruptcy in Ruffin v. Kinder. Ruffin, supra, at *1. Ruffin filed for Chapter 7 bankruptcy eighteen months after he was injured. Id. at *4-5. Five months later, he filed his personal injury action. Id. at *16. The Appellate Division applied judicial estoppel to Ruffin's claim but modified the trial court's decision by allowing the bankruptcy trustee to pursue the action. Id. at *18. Defendants seek the same result in this matter.

Defendants cite numerous instances of Plaintiffs' failure to disclose their claim against Defendants in their bankruptcy. (See Crawford Cert. Exs. D-G.) At Plaintiffs' 341 Meeting, they swore under oath that neither had sustained any injuries of any sort in the past five years and that neither had consulted with an attorney for any reason other than bankruptcy during that time. (341 Meeting Tr. at 5:2-10, Crawford Cert. Ex. H.) Due, in part, to this testimony, Plaintiffs received a discharge in bankruptcy on June 1, 2012. (Discharge Order, Crawford Cert. Ex. I.) Plaintiffs' unsecured creditors received nothing.

Defendants argue that Plaintiffs' motion to reopen their bankruptcy on August 18, 2015 has no bearing on the instant motion, as Plaintiffs sought to amend their bankruptcy filing only after Defendants made known their intention to file this motion. Plaintiffs, in making their motion to reopen their bankruptcy, submitted identical affidavits in which they assert they never considered their claims an asset. (August 18, 2015 Affidavit of Robert Velazquez, Crawford

Cert. Ex. K; August 18, 2015 Affidavit of Gisselle Velazquez, Crawford Cert. Ex. L.) Defendants argue this assertion is dubious in light of Plaintiffs' testimony at the 341 meeting.

Estoppel is appropriate, Defendants argue, because the Bankruptcy Court accepted and relied on Plaintiffs' testimony and other assertions that they had no personal injury claims. Plaintiffs obtained a discharge as a result of those assertions, and they now seek to adopt a contrary position by bringing this action against Defendants. The Eleventh Circuit, whose decisions bind the Bankruptcy Court where Plaintiffs' filed their Chapter 7 petition, has ruled that a plaintiff cannot avoid judicial estoppel by reopening the bankruptcy estate to include the claim that plaintiff was later estopped from brining. Barger v. City of Cartersville, Ga., 348 F.3d 1289, 1297 (11th Cir. 2003). The Third Circuit has ruled similarly that an amended disclosure cannot preclude judicial estoppel because "[t]he bankruptcy rules were clearly not intended to encourage this kind of inadequate and misleading disclosure by creating an escape hatch debtors can duck into to avoid sanctions for omitting claims once their lack of candor is discovered." Krystal Cadillac-Oldsmobile GMC Truck, Inc. v. GMC, 337 F.3d 314, 321 (3d Cir. 2003). In light of several Courts of Appeals' precedents, as well as this State's Appellate Division decisions, Plaintiffs should be judicially estopped from personally collecting damages on this claim, despite their recent amendment of their bankruptcy disclosures.

Plaintiffs' Argument That the Court Should Not Judicially Estop Them From Personally Recovering in This Action

As noted, Plaintiffs concede that the Trustee is the proper party in interest and request that he be given sixty (60) days to substitute himself for Plaintiffs. Defendants consent to this proposal.

1. Plaintiff's Argument that Judicial Estoppel is not Appropriate in this Case

The United States Supreme Court has identified three factors that must be present for judicial estoppel to apply: (1) a party's prior position must be "clearly inconsistent" with its present position; (2) the party must have succeeded in persuading the prior court because, "[a]bsent success if a prior proceeding, a party's later inconsistent position introduces no risk of inconsistent court determinations"; and (3) the party must derive an unfair advantage if it is not estopped from making its present argument. New Hampshire v. Maine, 532 U.S. 742, 750-51, 121 S.Ct. 1808, 1815, 149 L.Ed. 2d 968, 978 (2001). Plaintiffs argue those three elements are not present here. First, Plaintiffs' claims are not "clearly inconsistent," because they have reopened their bankruptcy case and amended their Schedule B to include this claim as an asset of the bankruptcy estate. The position in the bankruptcy case is now that this case exists, so Plaintiffs are not taking any position that is contrary to that position.

The second element is not met, as there is no danger of inconsistent findings. A debtor in bankruptcy may amend his or her petition at any time. Fed. R. Bankr. P. 1009. The Bankruptcy Court had not "adopted" the position that Plaintiffs had no claim against Defendants, because the Bankruptcy Court adopted the amended Schedule B. As both the Bankruptcy Court and this Court recognize the existence of a claim against Defendants, there is no inconsistent finding.

The third element is not met either, as Plaintiffs will derive no unfair advantage from their initial failure to disclose this lawsuit in bankruptcy. The Trustee will take over the case and all damages will go toward Plaintiffs' creditors. To the extent an award of damages exceeds Plaintiffs' creditors' claims, then Plaintiffs would recover that excess.

Plaintiffs argue their circumstances are similar to those of the debtor/plaintiff in Marquez v. Drew, 2009 N.J. Super. Unpub. LEXIS 2600 (App. Div. Oct. 21, 2009). In Marquez, plaintiff was a Chapter 13 bankruptcy petitioner who failed to disclose a civil rights claim stemming from an incident of police brutality. The Appellate Division found judicial estoppel was not appropriate for several reasons.

> First of all, plaintiffs did not conceal the bankruptcy from defendants, who did not initially propound any discovery asking about a possible bankruptcy filing. Instead, plaintiffs spontaneously disclosed the bankruptcy filing in answer to a form interrogatory asking about their economic losses. Second, plaintiffs applied to the Bankruptcy Court to have Robin Lord, their attorney in this case, appointed as special counsel on October 4, 2006, months before defendants filed their January 30, 2007 motion seeking to amend their answer to raise the defense of judicial estoppel. As plaintiffs' undisputed evidence demonstrated, filing the special counsel application protected the creditors' right to obtain their eventual share of the lawsuit proceeds, if any.

Marquez, supra, at *7.

Plaintiffs argue the same factors are present here. First, Plaintiffs did not conceal their bankruptcy from Defendants but rather disclosed it on their Plaintiff Fact Sheet ("PFS") on April 25, 2012. Plaintiffs are seeking to have their counsel appointed by the Bankruptcy Court. Plaintiffs amended their bankruptcy schedule before Defendants filed the instant motion. Thus, this Court should find that judicial estoppel is not appropriate.

2. Plaintiff's Argument that Defendants Should be Barred from Limiting Their Liability Under the Doctrines of Laches or Equitable Estoppel, and Unclean Hands

Plaintiffs argue Defendants should be barred from limiting their liability under the doctrines of laches or equitable estoppel and unclean hands. Estoppel is an equitable doctrine designed to prevent injustice by not permitting a party to repudiate a course of action that another party has relied on to his detriment. Mattia v. Northern Ins. Co., 35 N.J. Super. 503, 510 (App. Div. 1995). Laches is invoked to deny a party enforcement of a known right when the party

engaged in an inexcusable and unexplained delay in exercising that right to the prejudice of another party. In re Kietur, 332 N.J. Super. 18, 28 (App. Div. 2000).

Plaintiffs assert that their PFS notified Defendants of their bankruptcy more than three years ago. Despite this notice, Defendants did not seek to dismiss Plaintiffs' case until the instant motion. This unfairly prejudices Plaintiffs, who have incurred significant litigation costs, as well as emotional stress, under the belief that their claim was viable. Plaintiffs analogize their situation to that of the plaintiff in Knorr v. Smeal, 178 N.J. 169 (2003). In Knorr, the Supreme Court of New Jersey estopped the defendant from moving to dismiss for failure to file an affidavit of merit, because the defendant waited fourteen months after the filing deadline. Id. at 180. In the time between the filing deadline and defendant's motion to dismiss, plaintiff "incurred significant expert and deposition costs, as well as emotional stress under the mistaken belief that their cause of action was still viable." Ibid. The Court ruled that the defendant's lack of intent to mislead plaintiff was of no moment. Ibid. Plaintiffs note that, while the Knorr defendant waited fourteen months to file its motion to dismiss, Defendants waited forty-one months to file this motion.

Plaintiffs argue Defendants' motion should be denied under the doctrine of unclean hands. The doctrine stands for the principle that the court should not allow itself to be the vehicle of an injustice. Associated East Mortg. Co. v. Young, 163 N.J. Super. 315, 330 (Ch. Div. 1978). Here, Defendants are alleged to have engaged in fraud and punitive conduct, including but not limited to the wanton and willful conduct of marketing a medical device without warnings to known dangers. The fact that courts have already found punitive conduct on Defendants' part in their marketing of similar devices illustrates that a finding of unclean hands is appropriate.

Finally, Plaintiffs argue that the Court should leave for the jury the question of whether Plaintiffs' initial failure to disclose their claim against Defendants was inadvertent or intentional. They argue they did not understand their claim constituted a "contingent liquidated asset." The Court could seek the jury's guidance on this question before deciding if estoppel is appropriate.

Defendants' Reply to Plaintiffs' Opposition of Their Motion to Judicially Estop Plaintiffs from Personally Recovering any Damages from this Action

Defendants advance four arguments in response to Plaintiffs' opposition to their Motion. First, Plaintiffs' reopening of their bankruptcy case to amend their Schedule B does not cure their false statements to the Bankruptcy Court. Plaintiffs made the amendment only after Defendants sought leave of this Court to file the instant motion. Second, Plaintiffs' reliance on the judicial estoppel factors proffered by the United States Supreme Court in New Hampshire v. Maine is misplaced, as New Jersey law, not federal law, controls. Third, Plaintiffs' arguments regarding laches and equitable estoppel are unavailing, because they ignore the procedural requirements that led to Defendants' delay in filing this motion. Fourth, Plaintiffs' unclean hands argument is flawed, because the doctrine of unclean hands does not apply to defendants in an action.

As noted, New Jersey courts apply New Jersey law regarding judicial estoppel. . New Jersey v. Gonzalez, 273 N.J. Super. 260 (App. Div. 1994), *aff'd* 142 N.J. 618 (1995). Though federal courts must determine whether a party gained an unfair advantage before applying judicial estoppel, this is not a factor for New Jersey courts. See Cummings v. Bahr, 295 N.J. Super. 374, 387 (App. Div. 1996). The question of whether the party benefited from its earlier assertion is relevant, however, to determining whether the party attempted "to play fast and loose with the courts." Ibid. As New Jersey does not require a showing of bad faith, Plaintiffs'

assertion that they honestly did not know their claim against Defendants was an asset is irrelevant, even if true.

Defendants argue Plaintiffs' reliance on Marquez is misplaced, as that case is legally and factually distinguishable from Plaintiffs' case. Marquez involved a Chapter 13 reorganization, not a Chapter 7 liquidation, which Plaintiffs filed. Moreover, the Marquez court emphasized that the bankruptcy court never entered a final order and that plaintiff never received a discharge. Thus, the plaintiff in Marquez had not yet obtained a favorable result, unlike Plaintiffs who were granted a discharge.

Defendants reiterate the Circuit Courts of Appeals support for their position cited above. They argue that, other than Marquez, which doesn't apply for the reasons noted, Plaintiffs cite no case law to support their position.

Defendants refute Plaintiffs' claims that this motion was untimely filed given Plaintiffs' disclosure of their bankruptcy on the PFS. Under the Multi-County Litigation program, Plaintiffs' case was one of roughly 8,000 cases relating to the Gynecare mesh products. It is impossible, as well as contrary to the principles of the Multi-County Litigation program's goal of streamlining case preparation and scheduling, for Defendants to review each case for issues of standing as soon as they receive PFSs. There was no delay that could give rise to laches or equitable estoppel, as Defendants sought leave of the Court to file this motion less than two months after Plaintiffs case was identified as a Core Discovery case.

Finally, Defendants argue that Plaintiffs' unclean hands argument must fail, because the "doctrine of unclean hands may be invoked only against a suitor for relief, whether he be the plaintiff or counterclaimant or crossclaimant, but never against the defendant as such." Clark v.

Watts, 10 N.J. Super. 283, 286 (Ch. Div. 1950). As Plaintiffs seek to invoke the doctrine of unclean hands against Defendants, their argument has no merit.

DECISION

Judicial estoppel stands for the premise that "if you prevail in Suit # 1 by representing that A is true, you are stuck with A in all later litigation growing out of the same events." Kimball Int'l, Inc. v. Northern Metal Prods., 334 N.J. Super. 596, 607 (App. Div. 2000) (citation and quotation marks omitted). Thus, "when a party successfully asserts a position in a prior legal proceeding, that party cannot assert a contrary position in subsequent litigation arising out of the same events." Kress v. La Villa, 335 N.J. Super. 400, 412 (App. Div. 2000). A party cannot make a factual assertion when (1) the party made a contrary assertion in an earlier proceeding, and (2) the party convinced the court to accept its prior assertion. Kimball, supra, 334 N.J. Super. at 606-607. The party need not have prevailed in the earlier action in order for judicial estoppel to apply to the later assertion. Cummings v. Bahr, 295 N.J. Super. 374, 387 (App. Div. 1996). Rather, judicial estoppel applies if "the party was allowed by the court to maintain the position [in the earlier proceeding]." Ibid.

New Jersey courts apply New Jersey law regarding judicial estoppel. Gonzalez, supra, 273 N.J. Super. at 260. Under New Jersey law, judicial estoppel does not require that the party made the contrary assertions in bad faith. Ruffin, supra, at *17 (citing Atlantic City v. Cal. Ave. Ventures, LLC, 23 N.J. Tax 62, 68 (App. Div. 2006)). "Judicial estoppel . . . is an extraordinary remedy that courts invoke only when a party's inconsistent behavior will otherwise result in a miscarriage of justice." State v. Jenkins, 178 N.J. 347, 350 (2004) (citations and quotation marks omitted).

The overwhelming weight of legal precedent supports Defendants' argument that Plaintiffs should be judicially estopped from personally recovering any damages in this action. Six Circuit Courts of Appeals, including the Eleventh and Third Circuits, which apply to the jurisdictions where Plaintiffs filed their Chapter 7 petition and where this case is being heard, respectively, have ruled judicial estoppel is appropriate when a plaintiff failed to disclose a claim to the Bankruptcy Court. Plaintiffs rely on Marquez to support their argument that judicial estoppel is not appropriate, but Marquez, is inapposite because the plaintiff in that case had not received a discharge at the time he amended his petition to include the claim for damages. Here, Plaintiffs received a discharge, and their unsecured creditors received nothing. Moreover, Plaintiffs sought to reopen their bankruptcy only after Defendants sought leave to file this motion. The Appellate Division's decision in Ruffin is more applicable to this case. Under Ruffin, Defendants are entitled to the relief they seek.

In Oneida Motor Freight, Inc. v. United Jersey Bank, the Third Circuit upheld the application judicial estoppel to bar a trucking company's claims against a bank, because the trucking company had not disclosed the claims in its Chapter XI proceeding. Oneida Motor Freight, Inc., supra, 848 F.2d at 419-420. Oneida filed a claim for fraudulent misrepresentation against the bank seven months after the bankruptcy court entered an order confirming the Chapter XI reorganization plan. Id. at 415-416. Oneida had not listed its claim against the bank in its bankruptcy filing. Id. at 416. The Third Circuit determined "that Oneida's failure to list its claim against the bank worked in opposition to preservation of the integrity of the system which the doctrine of judicial estoppel seeks to protect." Id. at 419.

Plaintiffs' invocation of the doctrines of laches and equitable estoppel are also unsuccessful. Given the nature of the Multi-County Litigation program in New Jersey, it is not

feasible for defendants to review each PFS upon receipt to detect potential issues of standing. Defendants moved to file this motion once Plaintiffs' case was identified as a Core Discovery case. Plaintiffs fault Defendants for a lack of action over the forty-one months between the filing of the PFS and Defendants' filing of this motion, yet Plaintiffs took no action during that same time to correct their failure to disclose their claim in this action to the Bankruptcy Court. Plaintiffs' assertion that they did not know their claim was an asset is difficult to believe in light of their untruthful responses at the 341 Meeting. While a layperson might not understand that a legal claim qualifies as an asset in bankruptcy, Plaintiffs surely knew they had consulted with an attorney for a purpose other than bankruptcy. Their untruthful answer renders their claim of innocent mistake rather difficult to believe. "By making [litigants] choose one position irrevocably, the doctrine of judicial estoppel raises the cost of lying." Cannon-Stokes, supra, 453 F.3d at 448 (quoting Chaveriat v. Williams Pipe Line Co., F.3d 1420, 1428 (7th Cir. 1993) (internal quotation marks omitted)).

Regardless of whether their lack of disclosure was innocent, they should be judicially estopped from receiving damages from this action. New Jersey law does not require bad faith in order for judicial estoppel to apply. Plaintiffs asserted that this claim did not exist in their Chapter 7 proceeding. The fact that Plaintiffs received a discharge of their debts in Chapter 7 bankruptcy demonstrates that the Bankruptcy Court accepted their initial assertion. They meet New Jersey's factors for judicial estoppel. See Kimball, supra, 334 N.J. Super. at 606-07 ("A threat to the integrity of the judicial system sufficient to invoke the judicial estoppel doctrine only arises when a party advocates a position contrary to a position it successfully asserted in the same or a prior proceeding.") (citations omitted).

CONCLUSION

For the foregoing reasons, Defendants' Motion to Judicially Estop Plaintiffs from Personally Recovering any Damages from this Action is GRANTED. The Chapter 7 Trustee shall have sixty (60) days to be substituted for Plaintiffs as the proper party in interest.