UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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MICHAEL MINTZ,

Plaintiff,

-against-

TRANSWORLD SYSTEMS, INC.,

Defendant.
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REPORT AND RECOMMENDATION
14-CV-7044 (JS)(SIL)

LOCKE, Magistrate Judge:

Presently before the Court, on referral from the Honorable Joanna Seybert for Report and Recommendation, is Defendant Transworld Systems, Inc.'s ("Defendant" or "Transworld") motion to dismiss for lack of jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1), or, in the alternative, for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c). *See* Docket Entry ("DE") [18]. By way of Complaint dated December 3, 2014, Plaintiff Michael Mintz ("Plaintiff" or "Mintz") commenced this action, seeking to recover for Defendant's alleged violation of the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692 *et seq*. *See* DE [1]. On November 5, 2015, Defendant filed the instant motion, which Plaintiff opposes. *See* DE [18], [21]. On April 12, 2016, Judge Seybert referred Transworld's motion to this Court for a Report and Recommendation as to whether it should be granted, and, if necessary, to determine the appropriate amount of damages, costs, and fees to be awarded. *See* DE [24]. For the reasons set forth herein, the Court respectfully recommends that Defendant's motion be granted, and that Plaintiff's Complaint be dismissed.

I. BACKGROUND

Unless otherwise noted, the following facts are taken from Plaintiff's Complaint, and are accepted as true for purposes of the instant motion.

A. Relevant Facts

This action arises out of Transworld's efforts to collect an alleged consumer debt from Plaintiff, either on behalf of a third party or on behalf of itself as a purchaser of the debt. *See* Compl., DE [1], ¶¶ 22, 23. Mintz is a resident of New York, and is a "consumer" as defined by the FDCPA, 15 U.S.C. § 1692a(3). *Id.* at ¶ 2. Transworld is a Pennsylvania corporation engaged in the business of debt collection, and is a "debt collector" as defined by the FDCPA, 15 U.S.C. § 1692a(6). *Id.* at ¶ 3.

Plaintiff alleges that, in an effort to collect a consumer debt, Defendant sent him a mass-produced written communication dated November 11, 2014 (the "Notice"). *Id.* at ¶ 23. The Notice bore a return letterhead of "TRANSWORLD SYSTEMS, INC. COLLECTION AGENCY," and included the following statements: (i) "This account has been placed with our agency for professional collection"; (ii) "Please be advised that we have been authorized to pursue collection and are committed to make efforts as are necessary and proper to effect collection"; (iii) "Send correspondence, other than payment, to this collection agency"; and (iv) "This is an attempt to collect a debt. Any information obtained will be used for that purpose. This is a communication from a debt collector." *Id.* at ¶¶ 24, 25. The Notice further instructed Plaintiff to contact "Jamie Allen at Transworld Systems, Inc." *Id.* at ¶ 26.

On November 21, 2014, Plaintiff contacted Defendant and spoke with a representative named Grace Ludlow. *Id.* at ¶ 27. Ludlow informed Plaintiff that his account was not a "full collections account yet," but rather, Defendant had sent the Notice to inform Mintz of a "delinquent balance." *Id.* Plaintiff informed Ludlow that he did not recognize the debt or the creditor, and Ludlow agreed to notate his account as disputed. *Id.* at ¶¶ 29, 31. Ludlow explained that Defendant is "a 'unique' collection agency and that one of the services Defendant provides clients is to notify people that they owe a balance to [Transworld's] client and to ask them 'to reach out to the client to resolve the matter.'" *Id.* at ¶ 33. Ludlow further informed Plaintiff that "if the matter was not resolved then Defendant has 'further collections that they can place it into where [Transworld's] collectors get involved and then it becomes a full collection account . . . ." *Id.* at ¶ 34.

B. Procedural Background

By way of Complaint dated December 3, 2014, Plaintiff commenced this purported class action on behalf of himself and "all persons/consumers, along with their successors-in-interest, who have received similar debt collection notices and/or letters/communications from Defendant . . . ." *Id.* at ¶ 8. Plaintiff alleges that Transworld violated the FDCPA by: (i) creating and sending written debt collection notices referencing amounts owed that are several months from being in default, thus misrepresenting itself and confusing consumers about the status of their account in violation of 15 U.S.C. § 1692e; and (ii) unfairly and unconscionably training its employees to "misinform and mislead consumers . . . that their accounts are not

actually in collections but in some specious state called 'pre-collections'" in violation of 15 U.S.C. § 1692f. *Id.* at ¶¶ 38-40. According to Plaintiff, "hundreds of persons have received debt collection notices and/or letters/communications from Defendant, which violate various provisions of the FDCPA." *Id.* at ¶ 8.

Approximately eight months after commencing this action, on or about July 27, 2015, Plaintiff and his wife filed a voluntary petition for relief pursuant to Chapter 7 of the United States Bankruptcy Code ("Bankruptcy Code") in the United States Bankruptcy Court for the Eastern District of New York. *See* Declaration of Aaron R. Easley ("Easley Decl."), DE [18-1], Ex. B. It is undisputed that Plaintiff neither disclosed the existence of this action in his Chapter 7 petition, nor claimed it as exempt from the bankruptcy estate in writing. *Id.* On October 28, 2015, Plaintiff and his wife were granted a discharge pursuant to 11 U.S.C. § 727, and their Chapter 7 bankruptcy case was closed. *Id.* at Ex. C.

On November 5, 2015, Transworld filed the instant motion to dismiss for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1), or, in the alternative, for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c). *See* DE [18]. Defendant argues that Plaintiff lacks standing to maintain the instant lawsuit because the claims he asserts herein belong to his bankruptcy estate, and may only be pursued by the Chapter 7 trustee. *See* Transworld Systems, Inc.'s Notice of Motion and Motion to Dismiss, or Alternatively, Motion for Judgment on the Pleadings ("Def.'s Mot."), DE [18], at 1-2. Transworld further argues that Plaintiff is judicially estopped from pursing the instant action because he did not disclose the pending

litigation in his Chapter 7 petition. *Id.* In opposition, Plaintiff argues that the FDCPA's maximum recovery of $1,000 is "well within the exemptions provided for in Section 522 of the Bankruptcy Code," and that "[s]ince the disclosure of the pending F.D.C.P.A. matter in Plaintiff's bankruptcy filing would not have changed the ultimate result (Plaintiff's discharge in bankruptcy), the lack of such filing should not prejudice Plaintiff's claim herein." *See* Declaration of Edward B. Gellar in Opposition to Defendant's Motion to Dismiss, or, Alternatively, Motion for Judgment on the Pleadings ("Gellar Decl."), DE [21], ¶¶ 6, 7. On April 12, 2016, Judge Seybert referred Transworld's motion to this Court for a Report and Recommendation as to whether it should be granted, and, if necessary, to determine the appropriate amount of damages, costs, and fees to be awarded. *See* DE [24].

II. LEGAL STANDARD

Pursuant to Article III, Section 2 of the United States Constitution, "the jurisdiction of the federal courts is limited to 'Cases' and 'Controversies,' which 'restricts the authority of the federal courts to resolving 'the legal rights of litigants in actual controversies.'" *Amityville Mobile Home Civic Ass'n v. Town of Babylon*, No. 14-CV-2369, 2015 WL 1412655, at *2 (E.D.N.Y. Mar. 26, 2015) (quoting *Genesis Healthcare Corp. v. Symczyk*, --- U.S. ---, 133 S. Ct. 1523, 1528 (2013)). In the absence of a case or controversy, Fed. R. Civ. P. 12(b)(1) "provides that a party may move to dismiss a case for lack of subject matter jurisdiction." *Amityville Mobile Home Civic Ass'n*, 2015 WL 1412655, at *3; *see also Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000) ("A case is properly dismissed for lack of subject matter jurisdiction

under Rule 12(b)(1) when the district court lacks the statutory or constitutional power to adjudicate it."). The Second Circuit has held that, "[t]he hallmark of a case or controversy is the presence of adverse interests between parties who have a substantial personal stake in the outcome of the litigation." *Evans v. Lynn*, 537 F.2d 571, 591 (2d Cir. 1975); *see also Ayazi v. New York City Bd. of Educ.*, No. 98-CV-7461, 2006 WL 1995134, at *2 (E.D.N.Y. July 14, 2006), *vacated on other grounds*, 315 F. App'x 313 (2d Cir. 2009) ("Without standing, this court does not have jurisdiction to hear the claim."). Therefore, to survive a defendant's motion to dismiss for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1), "a plaintiff must allege facts 'that affirmatively and plausibly suggest that it has standing to sue.'" *Brady v. Basic Research, L.L.C.*, 101 F. Supp. 3d 217, 227 (E.D.N.Y. 2015) (quoting *Amidax Trading Grp. v. S.W.I.F.T. SCRL*, 671 F.3d 140, 145 (2d Cir. 2011)); *see also City of New York v. Milhelm Attea & Bros., Inc.*, 550 F. Supp. 2d 332, 340 (E.D.N.Y. 2008) ("As standing is 'a limitation on the authority of a federal court to exercise jurisdiction,' it is properly addressed within the context of a Rule 12(b)(1) motion.") (quoting *All. for Envtl. Renewal, Inc. v. Pyramid Crossgates Co.*, 436 F.3d 82, 88 n.6 (2d Cir. 2006)). Moreover, where a motion for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c) "asserts that a court lacks subject matter jurisdiction, the motion is governed by the same standard that applies to a Rule 12(b)(1) motion." *Goodwin v. Solil Mgmt. LLC*, No. 10 Civ. 5546, 2012 WL 1883473, at *5 (S.D.N.Y. May 22, 2012); *see also Dean v. Town of Hempstead*, --- F. Supp. 3d ---, 2016 WL 660884, at *1

(E.D.N.Y. Feb. 18, 2016) (observing that courts apply similar analyses to motions arising under Fed. R. Civ. P. 12(b)(1) and 12(c)).

In deciding a motion to dismiss for lack of subject matter jurisdiction, "a court must accept as true all material factual allegations in the complaint and refrain from drawing inferences in favor of the party contesting jurisdiction." *U.S. ex rel. Phipps v. Comprehensive Cmty. Dev. Corp.*, 152 F. Supp. 2d 443, 449 (S.D.N.Y. 2001). However, "[w]here subject matter jurisdiction is challenged, . . . a court may consider materials outside the pleadings, such as affidavits, documents and testimony." *Id.*; *see also Pyramid Crossgates Co.*, 436 F.3d at 88 n.8 ("The presentation of affidavits on a motion under Rule 12(b)(1) . . . does not convert the motion into a motion for summary judgment under Rule 56."); *Forbes v. State Univ. of New York at Stony Brook*, 259 F. Supp. 2d 227, 231-32 (E.D.N.Y. 2003) ("In a Rule 12(b)(1) motion, the Court may consider affidavits and other material beyond the pleadings to resolve the jurisdictional question."). Likewise, in deciding a motion for judgment on the pleadings, "the court considers 'the complaint, the answer, any written documents attached to them, and any matter of which the court can take judicial notice for the factual background of the case.'" *L-7 Designs, Inc. v. Old Navy, LLC*, 647 F.3d 419, 422 (2d Cir. 2011) (quoting *Roberts v. Babkiewicz*, 582 F.3d 418, 419 (2d Cir. 2009)). The party advocating jurisdiction bears the burden of establishing its existence by a preponderance of the evidence. *See In re Jesup & Lamont, Inc.*, No. 12-1169, 2012 WL 3822135, at *2 (S.D.N.Y. Sept. 4, 2012).

III. DISCUSSION

In the instant motion, Defendant argues that Plaintiff: (i) lacks standing to bring the claims he asserts in this action, and (ii) is judicially estopped from bringing the claims he asserts in this action. *See* Def.'s Mot. ¶¶ 1, 2. Applying the standards outlined above, and for the reasons set forth herein, the Court recommends that Defendant's motion be granted, and that Plaintiff's Complaint be dismissed.

A. Standing

To establish standing to sue, a plaintiff must satisfy three constitutional requirements: "(1) injury-in-fact—an injury that is 'concrete and particularized' and is 'actual or imminent, not conjectural or hypothetical'; (2) an injury that is fairly traceable to the challenged action; and (3) an injury that will likely be redressed by a favorable ruling of the court." *Berkson v. Gogo LLC*, 97 F. Supp. 3d 359, 405 (E.D.N.Y. 2015) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 2136 (1992)); *see also Anjum v. J.C. Penney Co., Inc.*, No. 13-CV-460, 2014 WL 5090018, at *6 (E.D.N.Y. Oct. 9, 2014) ("Standing refers to the requirement that a plaintiff in federal court suffer a non-speculative injury-in-fact, traceable to the conduct of the defendant, and capable of redress by a favorable decision."). Moreover, the doctrine of standing incorporates "several judicially created 'prudential' requirements," which function to "further preserve a proper—and properly limited—role of the courts in a democratic society." *Law Offices of Curtis V. Trinko, LLP v. Bell Atl. Corp.*, 123 F. Supp. 2d 738, 744 (S.D.N.Y. 2000), *vacated in part on other grounds*, 305 F.3d 89 (2d Cir. 2002) (internal quotation omitted). Relevant for purposes of the instant motion,

"[f]oremost among the prudential [standing] requirements is the rule that a party must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Wight v. BankAmerica Corp.*, 219 F.3d 79, 86 (2d Cir. 2000) (internal quotation marks and citation omitted). It is well-established that, "if the plaintiff loses standing at any time during the pendency of the proceedings in the district court or in the appellate courts, the matter becomes moot, and the court loses jurisdiction." *Altman v. Bedford Cent. Sch. Dist.*, 245 F.3d 49, 69 (2d Cir. 2001).

When a debtor files a bankruptcy petition, "all legal or equitable interests of the debtor in property as of the commencement of the case" become property of the bankruptcy estate. 11 U.S.C. § 541(a)(1). It is well-established that, included among the estate's assets are "[p]re-petition causes of action belonging to the debtor." *Kassner v. 2nd Ave. Delicatessen, Inc.*, No. 04 Civ. 7274, 2005 WL 1018187, at *4 (S.D.N.Y. Apr. 29, 2005); *see also Chartschlaa v. Nationwide Mut. Ins. Co.*, 538 F.3d 116, 122 (2d Cir. 2008) (holding that "causes of action owned by the debtor or arising from property of the estate" belong to the bankruptcy estate); *Seward v. Devine*, 888 F.2d 957, 963 (2d Cir. 1989) ("The bankruptcy estate encompasses all legal or equitable interests of the debtor in property as of the commencement of the case, including any causes of action possessed by the debtor.") (internal quotation and citations omitted); *Ayazi*, 2006 WL 1995134, at *3 ("The vested bankruptcy estate includes pending causes of action."). Moreover, the Bankruptcy Code "imposes a 'broad' obligation on debtors 'to disclose all [their] interests at the commencement of

a case.'" *Amash v. Home Depot U.S.A., Inc.*, No. 12-CV-837, 2013 WL 6596682, at *3 (N.D.N.Y. Dec. 13, 2013) (quoting *Chartschlaa*, 538 F.3d at 122); *see also* 11 U.S.C. § 521(a)(1)(B)(i) (requiring that a debtor file "a schedule of assets and liabilities").

When a cause of action becomes property of a bankruptcy estate, "the debtor may not bring suit on that action unless the property has been abandoned by the trustee." *Barletta v. Tedeschi*, 121 B.R. 669, 671-72 (N.D.N.Y. 1990). Relevant for purposes of this motion, where property is "properly disclosed and scheduled, but remains unadministered at the close of the bankruptcy case, it is deemed abandoned by the trustee and returns to the debtor." *Goldson v. Kral, Clerkin, Redmond, Ryan, Perry & Van Etten, LLP*, No. 13 Civ. 2747, 2014 WL 4061157, at *4 (S.D.N.Y. July 11, 2014); *see also* 11 U.S.C. § 554(c) ("[A]ny property scheduled under section 521(a)(1) of this title not otherwise administered at the time of the closing of a case is abandoned to the debtor and administered for purposes of section 350 of this title."). In contrast, "[u]ndisclosed, unscheduled assets . . . 'automatically remain property of the estate after the case is closed.'" *Goldson*, 2014 WL 4061157, at *4 (quoting *Chartschlaa*, 538 F.3d at 122); *see also Azuike v. BNY Mellon*, 962 F. Supp. 2d 591, 598 n.4 (S.D.N.Y. 2013) ("[E]ven though the present action did not exist at the time of plaintiff's original bankruptcy proceedings, plaintiff was obligated to disclose all potential claims that existed at the time he filed for bankruptcy and his failure to disclose his . . . claim arguably deprives him of standing to pursue the present action . . . ."); *In re Narcisee*, No. 96-21345, 2013 WL 1316706, at *5 (Bankr. E.D.N.Y. Mar. 29, 2013) (holding that a lawsuit remained "property of [the] bankruptcy estate and

the chapter 7 trustee [was] the proper party in interest to prosecute the lawsuit" when the lawsuit "was neither administered nor abandoned by the chapter 7 trustee"). It is well-established that "Chapter 7 debtors . . . do not have standing to pursue claims that remain part of the bankruptcy estate." *Goldson*, 2014 WL 4061157, at *4; *see also Ibok v. Siac–Sector, Inc.*, No. 05 Civ. 6584, 2011 WL 293757, at *4-5 (S.D.N.Y. Feb. 2, 2011) (Report and Recommendation), *adopted by*, 2011 WL 979307 (S.D.N.Y. Mar. 14, 2011) ("It is . . . clear that this lawsuit is an unscheduled claim that belongs to the bankruptcy estate and not to [the plaintiff]."); *Kassner*, 2005 WL 1018187, at *4 ("A debtor who conceals a cause of action during his bankruptcy case is not entitled to then litigate those claims for his own benefit once the bankruptcy case is closed."); *In re Drexel Burnham Lambert Grp., Inc.*, 160 B.R. 508, 514 (S.D.N.Y. 1993) (holding that vested claims belong to the bankruptcy trustee, and not the debtor). As such, "an undisclosed claim brought by a debtor must be dismissed." *Ibok*, 2011 WL 293757, at *4.

Here, it is undisputed that when Plaintiff filed his Chapter 7 petition on July 27, 2015, he did not disclose this action or the claims asserted herein. *See* Easley Decl. Ex. B. Likewise, Plaintiff did not amend the Chapter 7 petition at any time prior to his discharge pursuant to 11 U.S.C. § 727 on October 28, 2015. *Id.* at Ex. A. Accordingly, because the claims asserted in this action were neither disclosed nor scheduled at any time during the pendency of Plaintiff's Chapter 7 case, they "automatically remain[ed] property of the [bankruptcy] estate after the case [was] closed." *Goldson*, 2014 WL 4061157, at *4. Because the Chapter 7 trustee has the

exclusive right to assert claims on behalf of the bankruptcy estate, Plaintiff lacks standing to bring the claims he asserts in this action, and his Complaint should be dismissed. *See Ibok*, 2011 WL 293757, at *4; *see also Rosenshein v. Kleban*, 918 F. Supp. 98, 103 (S.D.N.Y. 1996) ("[B]ecause an unscheduled claim remains the property of the bankruptcy estate, the debtor lacks standing to pursue the claims after emerging from bankruptcy, and the claims must be dismissed.").

In opposition to Defendant's motion, Plaintiff argues that, "the disclosure of the pending F.D.C.P.A. matter in Plaintiff's Bankruptcy filing would not have changed the ultimate result (Plaintiff's discharge in bankruptcy)," because the FDCPA's maximum recovery of $1,000 is "well within the exemptions provided for in Section 522 of the Bankruptcy Code." Pl.'s Opp'n ¶¶ 6, 7. Accordingly, Plaintiff argues that his failure to disclose "should not prejudice [his] claim herein." *Id.* at ¶ 7. Plaintiff's argument is unpersuasive. First, Plaintiff offers no factual or legal basis for his opinion that disclosure of this action "would not have changed the ultimate result" of his bankruptcy case. *Id.* at ¶ 6. Although 11 U.S.C. § 522 identifies specific categories of property that a debtor may declare as exempt from the bankruptcy estate, *see* 11 U.S.C. § 522(d), Plaintiff neither specifies the exemption allegedly applicable to this action, nor cites case law in which claims arising under the FDCPA are treated as exempt from a bankruptcy estate. Moreover, because a "trustee may file an objection to a claim of exemption at any time prior to one year after the closing of the case if the debtor fraudulently asserted the claim of exemption," *see* Fed. R. Bankr. P. 4003(b)(2), Plaintiff's unsupported opinion that disclosure of this action

would not have affected the ultimate result lacks merit, as it cannot be said that the Chapter 7 trustee would not have objected to the claim of exemption.[1]

In any event, and even accepting as true Plaintiff's argument that failure to disclose this action would not have affected the ultimate outcome of his bankruptcy case, he still lacks standing. After Plaintiff failed to disclose or schedule this action in his Chapter 7 case, it remained part of the bankruptcy estate when the bankruptcy case was closed on October 28, 2015. *See Goldson*, 2014 WL 4061157, at *4. Because "the bankruptcy trustee 'has exclusive standing to assert causes of action belonging to the estate,'" Plaintiff's claims in this action are no longer his to assert. *Ritchie Capital Mgmt. L.L.C. v. Gen. Elec. Capital Corp.*, 121 F. Supp. 3d 321, 333 (S.D.N.Y. 2015) (quoting *Sec. Inv'r Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC*, 429 B.R. 423, 430 (Bankr. S.D.N.Y. 2010)). Indeed, Plaintiff does not appear to dispute that the claims he asserts belong to the Chapter 7 estate and trustee. Rather, he argues that, "[a]ssuming the claim herein was pursued by the bankruptcy estate and trustee, Defendant would still have to defend itself in that proceeding," and Defendant is therefore "in no worse position by having to defend itself in the pending action herein." Pl.'s Opp'n ¶ 7. However, Plaintiff's argument ignores the well-settled legal principal that precludes a plaintiff from "rest[ing] his claim to relief on the legal

[1] The Court notes that, pursuant to 11 U.S.C. § 522, a debtor must "file a list of property that the debtor claims as exempt . . . ." 11 U.S.C. § 522(*l*). Although Schedule C to Plaintiff's Chapter 7 petition identifies various other property that Plaintiff claimed was exempt pursuant to 11 U.S.C. § 522(b)(2), Plaintiff did not identify this action. *See* Easley Decl. Ex. B. Notably, however, Plaintiff claimed as exempt, among other things, clothing valued at $750 and a watch and other personal property valued at $1,000. *Id.* The inclusion of this other property in Schedule C belies Plaintiff's argument that he was not required to disclose this action because his maximum potential recovery in this action would be $1,000.

rights and interests of third parties." *Wight*, 219 F.3d at 86. As discussed above, because Plaintiff's claims belong to his bankruptcy estate and may only be brought by the Chapter 7 trustee, he lacks standing, and the Court therefore lacks subject matter jurisdiction. *See Ibok*, 2011 WL 293757, at *4. Accordingly, Plaintiff's Complaint should be dismissed. *See Milhelm Attea & Bros., Inc.*, 550 F. Supp. 2d at 340 ("Standing must be established before a court decides a case on the merits.").

Based on the foregoing, the Court recommends that Defendant's motion be granted, and that Plaintiff's Complaint be dismissed.

B. Judicial Estoppel

For the sake of a complete record, even assuming Plaintiff had standing to bring the claims he asserts in this action, the Court would still recommend that his Complaint be dismissed on the grounds of judicial estoppel. The doctrine of judicial estoppel "prevents a party from asserting a factual position in one legal proceeding that is contrary to a position that it successfully advanced in another proceeding." *Rodal v. Anesthesia Grp. of Onondaga, P.C.*, 369 F.3d 113, 118 (2d Cir. 2004); *see also New Hampshire v. Maine*, 532 U.S. 742, 749, 121 S. Ct. 1808, 1814 (2001) ("Where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position . . . .") (internal alteration omitted). Therefore, the Second Circuit has held that, in order to invoke the doctrine of judicial estoppel, "(1) the party against whom it is asserted must have advanced an inconsistent position in a prior proceeding, and (2) the inconsistent position must have been adopted by the court in

some manner." *Peralta v. Vasquez*, 467 F.3d 98, 105 (2d Cir. 2006). However, "if the statements or positions in question can be reconciled in some way, estoppel does not apply." *Negron v. Weiss*, No. 06-CV-1288, 2006 WL 2792769, at *4 (E.D.N.Y. Sept. 27, 2006).

Relevant for purposes of this motion "judicial estoppel is commonly invoked in order 'to prevent a party who failed to disclose a claim in bankruptcy proceedings from asserting that claim after emerging from bankruptcy.'" *Coffaro v. Crespo*, 721 F. Supp. 2d 141, 145 (E.D.N.Y. 2010) (quoting *Negron*, 2006 WL 2792769, at *3); *see also Ibok*, 2011 WL 293757, at *6 ("[M]any courts in this circuit have applied judicial estoppel in the bankruptcy context to dismiss undisclosed claims."); *Oneida Motor Freight, Inc. v. United Jersey Bank*, 848 F.2d 414, 417 (3d Cir. 1988) ("It has been specifically held that a debtor must disclose any litigation likely to arise in a non-bankruptcy context. The result of a failure to disclose such claims triggers application of the doctrine of equitable estoppel, operating against a subsequent attempt to prosecute the actions.") (internal citation omitted). However, courts decline to apply the doctrine of judicial estoppel where the party's initial position at issue resulted from a "good faith mistake or an unintentional error." *Mitchell v. Washingtonville Cent. Sch. Dist.*, 190 F.3d 1, 6 n.2 (2d Cir. 1999). Similarly, "[c]ourts are generally willing to excuse the application of judicial estoppel . . . where the debtor had 'no knowledge of the claims or no motive to conceal the claims.'" *Thomas v. JP Morgan Chase, N.A.*, No. 11-CV-3656, 2012 WL 2872164, at *8 (E.D.N.Y. July 11, 2012) (quoting *Ibok*, 2011 WL 293757, at *7); *see also Whitehurst v. 230 Fifth, Inc.*, 998 F.

Supp. 2d 233, 257 (S.D.N.Y. 2014) ("[T]here is at least a colorable argument that a debtor, after emerging from bankruptcy, should not be precluded from pursuing claims of which he was truly ignorant at the time of his petition.").

Here, it is undisputed that Plaintiff did not disclose this action in his Chapter 7 case. *See* Easley Decl. Ex. B. Accordingly, Plaintiff advanced an inconsistent position in the Bankruptcy Court by representing that he had no claims or lawsuits when, in fact, this action was already pending. *See Amash v. Home Depot U.S.A., Inc.*, 503 B.R. 232, 236 (N.D.N.Y. 2013) (holding that a debtor advanced an inconsistent position in the bankruptcy court when he claimed "that he had no claims or lawsuits when, in fact, he had the claims that [were] the subject of the instant litigation"); *Myers v. Bimbo Bakeries USA, Inc.*, No. 08-CV-1179, 2011 WL 1240095, at *5 (E.D.N.Y. Feb. 10, 2011) (Report and Recommendation), *adopted by*, 2011 WL 1211603 (E.D.N.Y. Mar. 30, 2011) (holding that the plaintiff had advanced an inconsistent position when she "failed to identify any claim against [the defendant] in her bankruptcy petition"). Moreover, the Bankruptcy Court adopted Plaintiff's inconsistent position when it granted him a discharge pursuant to 11 U.S.C. § 727 on October 28, 2015. *See Galin v. United States*, No. 08-CV-2508, 2008 WL 5378387, at *10 (E.D.N.Y. Dec. 23, 2008) (holding that the bankruptcy court adopted a debtor's position by confirming a bankruptcy plan); *Negron*, 2006 WL 2792769, at *3 ("When an assertion in a bankruptcy proceeding is at issue, the latter requirement is usually fulfilled when the bankruptcy court confirms a plan pursuant to which creditors release their claims against the debtor."); *see also Payless Wholesale Distribs., Inc. v.*

Alberto Culver (P.R.), Inc., 989 F.2d 570, 571 (1st Cir. 1993) (holding judicial estoppel applied where the debtor "obtained judicial relief on the representation that no claims existed"). Accordingly, Plaintiff's Complaint should be dismissed on the additional ground of judicial estoppel.

In opposition, Plaintiff neither attempts to reconcile his inconsistent positions, nor contends that his failure to disclose this action in his bankruptcy case was the result of a good faith mistake or an unintentional error. Rather, as discussed above, Plaintiff argues that Defendant will not be prejudiced by having to defend itself in this action. *See* Pl.'s Opp'n ¶ 7. However, "[o]ne of the main purposes of the doctrine [of judicial estoppel]—to protect the integrity of the judicial system, and the bankruptcy process in particular, in ensuring full and honest disclosure—would be frustrated if the doctrine were not applied here." *Myers*, 2011 WL 1240095, at *6; *see also New Hampshire*, 532 U.S. at 743, 121 S. Ct. at 1808 ("The purpose of the doctrine is to protect the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment."). Because Plaintiff has failed to show that "the statements or positions in question can be reconciled in some way," his claims are precluded by the doctrine of judicial estoppel, and his Complaint should be dismissed. *Negron*, 2006 WL 2792769, at *4.

Based on the foregoing, even assuming that Plaintiff had standing to bring this action, the Court would still recommend that Defendant's motion be granted, and that Plaintiff's Complaint be dismissed.

IV. CONCLUSION

For the reasons set forth here, the Court respectfully recommends that Defendant's motion be granted, and that Plaintiff's Complaint be dismissed.

V. OBJECTIONS

A copy of this Report and Recommendation is being served on all parties by electronic filing on the date below. Any objections to this Report and Recommendation must be filed with the Clerk of Court within fourteen days of receipt of this report. Failure to file objections within the specified time waives the right to appeal the District Court's order. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 6(a), 72; *Ferrer v. Woliver*, No. 05-3696, 2008 WL 4951035, at *2 (2d Cir. Nov. 20, 2008); *Beverly v. Walker*, 118 F.3d 900, 902 (2d Cir. 1997); *Savoie v. Merchants Bank*, 84 F.3d 52, 60 (2d Cir. 1996).

Dated: Central Islip, New York
May 16, 2016

s/ Steven I. Locke
STEVEN I. LOCKE
United States Magistrate Judge