



1 **BACKGROUND**

2 **1. Ortiz I**

3 Plaintiff filed *Ortiz I* on March 1, 2010, in the Superior Court of California for the County of  
4 Los Angeles. (*Ortiz I* Notice of Removal ¶ 1, *Ortiz I* ECF No. 1.) Sodexo removed the case to the  
5 United States District Court for the Central District of California on June 10, 2010. (*Ortiz I* Notice  
6 of Removal.) The operative first amended complaint alleges nine claims against Sodexo for violations  
7 of the California Labor Code and California Business and Professions Code. (*Ortiz I* FAC, *Ortiz I*  
8 ECF No. 29.)

9 On January 7, 2011, Sodexo moved for summary judgment in *Ortiz I*, contending that the  
10 entire action is barred by the doctrine of judicial estoppel. (Mem. ISO *Ortiz I* MSJ 1, *Ortiz I* ECF No.  
11 57.) The hearing on Sodexo's summary judgment motion was continued multiple times (*Ortiz I* ECF  
12 Nos. 61, 67, 73, 75, 77), and Judge Manuel L. Real eventually declined to rule on the motion. (*Ortiz*  
13 *I* ECF No. 80.) Instead, he transferred the case to this district (*Ortiz I* ECF No. 81), where it originally  
14 was assigned to Judge Irma E. Gonzalez. (*Ortiz I* ECF No. 83.) Then, under Civil Local Rule 40.1(d),  
15 the case was transferred to this Court. (*Ortiz I* ECF No. 89.) Accordingly, Sodexo's summary  
16 judgment motion is now pending before this Court. (See *Ortiz I* ECF Nos. 90, 93.)

17 **2. Ortiz II**

18 Plaintiff filed *Ortiz II* on June 14, 2010, in the Superior Court of California for the County  
19 of San Diego. (*Ortiz II* Notice of Removal ¶ 1, *Ortiz II* ECF No. 1.) After Plaintiff disclosed that she  
20 is seeking more than \$1,000,000 in damages (Wohl Decl. ISO *Ortiz II* Notice of Removal Ex. E),  
21 Sodexo removed the case to this Court on October 27, 2010. (*Ortiz II* Notice of Removal.) The  
22 operative complaint alleges two claims for sexual harassment and wrongful discharge against Sodexo  
23 and an individual defendant, named in the complaint as “Tom.” (Wohl Decl. ISO *Ortiz II* Notice of  
24 Removal Ex. A (*Ortiz II* Compl.), ECF No. 1-1.)

25 Sodexo moved to transfer *Ortiz II* to the Central District of California on November 9, 2011.  
26 (*Ortiz II* ECF No. 5.) Plaintiff responded to Sodexo's change of venue motion and concurrently  
27 moved to remand the case to state court on the ground that complete diversity of citizenship did not  
28 exist. (*Ortiz II* ECF Nos. 10–11.) The Court took the motions under submission and issued a written

1 order denying both motions. (*Ortiz II* ECF No. 38.) On July 8, 2011, Sodexo filed the instant motion  
2 for summary judgment. (*Ortiz II* ECF No. 32.)

### 3 **3. Ortiz Bankruptcy**

4 On April 8, 2010—after she filed *Ortiz I* (*Ortiz I* Notice of Removal ¶ 1) and obtained  
5 right-to-sue notices for the *Ortiz II* claims (Wohl Decl. ISO *Ortiz II* Notice of Removal Exs.  
6 F–H)—Plaintiff filed for Chapter 7 bankruptcy protection in the United States Bankruptcy Court for  
7 the Southern District of California. (First Wohl Decl. ISO *Ortiz I* MSJ Ex. D, *Ortiz I* ECF No. 55-1;  
8 Wohl Decl. ISO *Ortiz II* MSJ Ex. K, *Ortiz II* ECF Nos. 32-2 to 32-4.) On July 13, 2010, the  
9 Bankruptcy Court granted Plaintiff a full discharge of debts. (First Wohl Decl. ISO *Ortiz I* MSJ Ex.  
10 E; Wohl Decl. ISO *Ortiz II* MSJ Ex. L.)

11 In the schedule of assets accompanying her bankruptcy petition, Plaintiff failed to disclose the  
12 claims asserted in *Ortiz I* and *Ortiz II* and affirmatively represented that she had no such claims. (First  
13 Wohl Decl. ISO *Ortiz I* MSJ Ex. D (Schedule B, question 21 and Statement of Financial Affairs,  
14 question 4(a)); Wohl Decl. ISO *Ortiz II* MSJ Ex. K (same).) At her deposition in *Ortiz I*, Plaintiff  
15 acknowledged that she knew about her lawsuits against Sodexo when her bankruptcy petition was  
16 filed. (First Wohl Decl. ISO *Ortiz I* MSJ Ex. D (*Ortiz I* Dep.), at 58, Oct. 25, 2010; Wohl Decl. ISO  
17 *Ortiz II* MSJ Ex. E (*Ortiz I* Dep.), at 58, Oct. 25, 2010.) She allegedly disclosed the claims to her  
18 bankruptcy attorneys but did not know that the claims should be listed on her statement of assets.  
19 (*Ortiz I* Dep. 58; accord Ortiz Decl. ISO Opp'n to *Ortiz I* MSJ ¶¶ 5–7, *Ortiz I* ECF No. 64; Ortiz Decl.  
20 ISO Opp'n to *Ortiz II* MSJ ¶¶ 5–7, *Ortiz II* ECF No. 35-1.)

21 On March 25, 2011, while Sodexo's motion for summary judgment was pending in *Ortiz I*,  
22 Plaintiff moved to reopen her bankruptcy case for the purpose of "[a]mending Schedules B[ and] C[.]  
23 and Statement of Financial Affairs to include two pending lawsuits against a former employer."  
24 (Third Wohl Decl. ISO *Ortiz I* MSJ Ex. F, *Ortiz I* ECF No. 91-1; Wohl Decl. ISO *Ortiz II* MSJ Ex.  
25 M; accord Third Wohl Decl. ISO *Ortiz I* MSJ Exs. G–I; Wohl Decl. ISO *Ortiz II* MSJ Exs. N–P.) The  
26 Acting United States Trustee filed a limited opposition supporting Plaintiff's motion to reopen but  
27 requesting appointment of the prior Chapter 7 Bankruptcy Trustee, Nancy Wolf. (Third Wohl Decl.  
28 ISO *Ortiz I* MSJ Exs. J–K; Wohl Decl. ISO *Ortiz II* MSJ Exs. Q–R.) On May 16, 2011, the

1 Bankruptcy Court granted Plaintiff's motion to reopen and reappointed Ms. Wolf as the Chapter 7  
2 Bankruptcy Trustee. (Third Wohl Decl. ISO *Ortiz I* MSJ Exs. L–O; Wohl Decl. ISO *Ortiz II* MSJ  
3 Exs. S–V.) Since the reopening of Plaintiff's bankruptcy case, Ms. Wolf has exercised control over  
4 Plaintiff's lawsuits against Sodexo, including engaging—through counsel—in settlement discussions  
5 with Sodexo. (Third Wohl Decl. ISO *Ortiz I* MSJ ¶ 4; Suppl. Wohl Decl. ISO *Ortiz II* MSJ ¶ 2.)

6 On September 23, 2011, Plaintiff and Defendants both filed late Declarations stating that an  
7 open auction of Plaintiff's claims had been held on September 22, 2011, before Bankruptcy Judge  
8 Laura S. Taylor. (Fifth Wohl Decl. ISO *Ortiz I* MSJ, *Ortiz I* ECF No. 102; Ortiz Aff., *Ortiz I* ECF No.  
9 104; Second Wohl Decl. ISO *Ortiz II* MSJ, *Ortiz II* ECF No. 47; Ortiz Aff., *Ortiz II* ECF No. 49.) The  
10 winning bid for the claims was made by Rastegar & Matern ("R&M"), Ms. Ortiz's counsel of record  
11 in *Ortiz I* and *Ortiz II*. (Fifth Wohl Decl. ISO *Ortiz I* MSJ ¶ 3.) Under the terms of the bid, R&M  
12 agreed to pay \$62,500 for ownership of Ms. Ortiz's claims in *Ortiz I* and *Ortiz II*, and Ms. Ortiz  
13 waived the rights to any distribution from the Ortiz bankruptcy estate. (*Id.*) Under this new  
14 arrangement, the bankruptcy estate will be able to satisfy 100% of the claims of all the creditors in the  
15 Ortiz bankruptcy, as well as all other fees owed by the estate. (*Id.*)

#### 16 LEGAL STANDARD

17 Federal Rule of Civil Procedure 56 permits a court to grant summary judgment where (1) the  
18 moving party demonstrates the absence of a genuine issue of material fact and (2) entitlement to  
19 judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). "Material," for  
20 purposes of Rule 56, means that the fact, under governing substantive law, could affect the outcome  
21 of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Freeman v. Arpaio*, 125 F.3d  
22 732, 735 (9th Cir. 1997). For a dispute to be "genuine," a reasonable jury must be able to return a  
23 verdict for the nonmoving party. *Anderson*, 477 U.S. at 248.

24 The initial burden of establishing the absence of a genuine issue of material fact falls on the  
25 moving party. *Celotex*, 477 U.S. at 323. The movant can carry his burden in two ways: (1) by  
26 presenting evidence that negates an essential element of the nonmoving party's case; or (2) by  
27 demonstrating that the nonmoving party "failed to make a sufficient showing on an essential element  
28 of her case with respect to which she has the burden of proof." *Id.* at 322–23. "Disputes over



1     **2.     The Doctrine of Judicial Estoppel Bars Plaintiff's Claims**

2             Defendants' second argument is that the doctrine of judicial estoppel bars Plaintiff's claims  
3 because Plaintiff failed to disclose the claims in the schedule of assets accompanying her April 8, 2010  
4 bankruptcy petition. "Judicial estoppel is an equitable doctrine that precludes a party from gaining  
5 an advantage by asserting one position, and then later seeking an advantage by taking a clearly  
6 inconsistent position." *Hamilton v. State Farm Fire & Cas.Co.*, 270 F.3d 778, 782 (9th Cir. 2001).  
7 Courts invoke judicial estoppel "not only to prevent a party from gaining an advantage by taking  
8 inconsistent positions, but also because of 'general consideration[s] of the orderly administration of  
9 justice and regard for the dignity of judicial proceedings,' and to 'protect against a litigant playing fast  
10 and loose with the courts.'" *Id.* (quoting *Russel v. Rolfs*, 893 F.2d 1033, 1037 (9th Cir. 1990))  
11 (alteration in original).

12             In the bankruptcy context, judicial estoppel applies to bar a debtor from asserting a cause of  
13 action not raised in a reorganization plan or otherwise mentioned in the debtor's schedules or  
14 disclosure statements. *Id.* at 783; see *Cannon-Stokes*, 453 F.3d at 448 ("All six appellate courts that  
15 have considered this question hold that a debtor in bankruptcy who denies owning an asset, including  
16 a chose in action or other legal claim, cannot realize on that concealed asset after the bankruptcy  
17 ends." (citing *inter alia*, *Hamilton*, 270 F.3d 778)). Prohibiting a debtor from asserting undisclosed  
18 claims protects the integrity of the bankruptcy system because a debtor who fails to disclose potential  
19 claims as assets deceives both the bankruptcy courts and her creditors, who rely on the schedules to  
20 determine what action, if any, they will take in the matter. *Id.* at 785.

21             In determining whether to invoke judicial estoppel, courts consider three factors: "(1) whether  
22 a party's later position is 'clearly inconsistent' with its original position; (2) whether the party has  
23 successfully persuaded the court of the earlier position, and (3) whether allowing the inconsistent  
24 position would allow the party to 'derive an unfair advantage or impose an unfair detriment on the  
25 opposing party.'" *United States v. Ibrahim*, 522 F.3d 1003, 1009 (9th Cir. 2008) (quoting *New*  
26 *Hampshire v. Maine*, 532 U.S. 742, 750–51 (2001)).

27             All three factors are met here. First, Plaintiff's assertion of her claims against Sodexo here is  
28 clearly inconsistent with her affirmative representation on her bankruptcy schedules that she had no

1 such claims. (First Wohl Decl. ISO *Ortiz I* MSJ Ex. D (Schedule B, question 21 and Statement of  
2 Financial Affairs, question 4(a)); Wohl Decl. ISO *Ortiz II* MSJ Ex. K (same); see *Hamilton*, 270 F.3d  
3 at 784 (holding that debtor “clearly asserted inconsistent positions” by failing to list claims as assets  
4 and then later suing on same claims).) Second, Plaintiff successfully persuaded the bankruptcy court  
5 to accept her earlier position, which it did when it granted Plaintiff a full discharge of her debts, in  
6 reliance on her omission of known claims. (First Wohl Decl. ISO *Ortiz I* MSJ Ex. E; Wohl Decl. ISO  
7 *Ortiz II* MSJ Ex. L; see *Stallings v. Hussman Corp.*, 447 F.3d 1041, 1048 (8th Cir. 2006) (citing  
8 *Hamilton*, 270 F.3d at 784); *Hamilton*, 270 F.3d at 784 (“[A] discharge of debt by a bankruptcy court  
9 . . . is sufficient acceptance to provide a basis for judicial estoppel . . . .”)) Third, Plaintiff obtained  
10 the benefits of receiving a discharge of her debts. Accordingly, judicial estoppel bars Plaintiff’s  
11 claims.

12 Plaintiff advances three arguments in opposition to application of judicial estoppel, all of them  
13 unpersuasive. First, Plaintiff contends that the Ninth Circuit “requires proof of fraud, chicanery or bad  
14 faith, over and above mere nondisclosure,” before judicial estoppel can apply. (Opp’n to *Ortiz I* MSJ  
15 4–7, ECF No. 62; Opp’n to *Ortiz II* MSJ 11–16.) The Court disagrees. While a court may consider  
16 a plaintiff–debtor’s bad faith, see *Johnson v. Ore. Dep’t of Human Res.*, 141 F.3d 1361, 1369 (9th Cir.  
17 1998) (“If incompatible positions are based not on chicanery, but only on inadvertence or mistake,  
18 judicial estoppel does not apply.”), affirmative evidence of bad faith is not a necessary prerequisite  
19 to application of the judicial estoppel in the bankruptcy context, see *Hamilton*, 270 F.3d at 784  
20 (“Judicial estoppel will be imposed when the debtor has knowledge of enough facts to know that a  
21 potential cause of action exists during the pendency of the bankruptcy, but fails to amend his  
22 schedules or disclosure statements to identify the cause of action as a contingent asset.”). Rather, in  
23 bankruptcy cases, courts infer bad faith “based on a plaintiff’s knowledge of fact supporting the  
24 undisclosed claim.” *Cannata v. Wyndham Worldwide Corp.*, — F. Supp. 2d —, 2011 WL 2910112,  
25 at \*6 (D. Nev. July 21, 2011) (citing *Hamilton*, 270 F.3d at 784).

26 Here, it is undisputed that Plaintiff knew of the facts supporting her claims against Sodexo  
27 when she filed her bankruptcy petition—she admitted as much in her deposition in *Ortiz I*. (First  
28 Wohl Decl. ISO *Ortiz I* MSJ Ex. D (*Ortiz I* Dep.), at 58, Oct. 25, 2010; Wohl Decl. ISO *Ortiz II* MSJ

1 Ex. E (*Ortiz I Dep.*), at 58, Oct. 25, 2010.) Even taking as true Plaintiff's allegation that she disclosed  
2 the claims to her bankruptcy attorney, her nondisclosure cannot be considered inadvertent. *Barger*  
3 *v. City of Cartersville*, 348 F.3d 1289, 1295 (11th Cir. 2003) ("Although it is undisputed that Barger's  
4 attorney failed to list Barger's discrimination suit on the schedule of assets despite the fact that Barger  
5 specifically told him about the suit, the attorney's omission is no panacea.") Accordingly, her failure  
6 to list the claims in her schedule of assets despite knowing the underlying facts where she had motive  
7 to conceal the facts is sufficient evidence of bad faith for judicial estoppel to apply. *Hamilton*, 270  
8 F.3d at 784.

9         Second, Plaintiff argues judicial estoppel should not apply because Ms. Ortiz re-opened her  
10 bankruptcy case to correct the omission of these claims. Because the creditors have been made whole,  
11 Plaintiff contends there is no harm. Further, Plaintiff argues this effort to re-open the bankruptcy  
12 proceedings is evidence that her omission was inadvertent. However, these efforts at honest disclosure  
13 came too late, and the re-opening of bankruptcy proceedings or relative extent to which creditors are  
14 made whole after the fact does not bar the application of judicial estoppel. *Burnes v. Pemco Aeroplex,*  
15 *Inc.*, 291 F.3d 1282, 1288 (11th Cir. 2002) ("The success of our bankruptcy laws requires a debtor's  
16 full honest disclosure. Allowing [plaintiff] to back-up, re-open the bankruptcy case, and amend his  
17 bankruptcy filings, only after his omission has been challenged by an adversary, suggests that a debtor  
18 should consider disclosing potential assets only if he is caught concealing them."); accord *Laisure-*  
19 *Radke v. Pharmaceutical Resources, Inc.*, 313 F. App'x 32, 34 (9th Cir. 2009).

20         Third, Plaintiff attempts to avoid application of judicial estoppel by pointing to various cases  
21 in which courts declined to apply judicial estoppel. However, all of these cases are distinguishable  
22 or unpersuasive for the reasons discussed below.

23         In *Yoshimoto*, despite recognizing that the requirements for judicial estoppel were met, the  
24 court nonetheless declined to apply judicial estoppel because "recovery might aid the bankruptcy  
25 estate's creditors, and there might be other solutions to police [the debtor's] inconsistencies without  
26 punishing the creditors . . . ." *Yoshimoto v. O'Reilly Automotive, Inc.*, 2011 WL 2197697, at \*11  
27 (N.D. Cal. June 6, 2011). This holding conflicts with the Ninth Circuit's in *Hamilton*, 270 F.3d at 784,  
28 and has been certified for interlocutory review, *Yoshimoto v. O'Reilly Automotive, Inc.*, 2011 WL



1 2669604 (N.D. Cal. July 7, 2011). Furthermore, as discussed above, because of R&M's payment to  
2 the Ortiz bankruptcy estate for the rights to the claims in *Ortiz I* and *Ortiz II*, all of the creditors will  
3 recover in full. Thus, judicial estoppel in this case does not operate to deny recovery to creditors in  
4 any way, even if such denial were a compelling reason to bar its application. For these reasons, the  
5 Court finds *Yoshimoto* unpersuasive.

6 *In re Cheng*, 308 B.R. 448 (BAP 9th Cir. 2004), is distinguishable. In that case, the  
7 debtor-in-possession made two different representations regarding the amount of a third-party lien.  
8 *Id.* at 452. The debtors made the representations in different capacities—once for their own account,  
9 and once as a debtor-in-possession. *Id.* at 454. Because the debtors had different interests when  
10 acting in each capacity, the court remanded for an analysis of whether the parties' differing  
11 representations were "clearly inconsistent" for the purpose of applying judicial estoppel. *Id.* at 462.  
12 No such considerations are present here—Plaintiff's interest has always been to maximize her personal  
13 recovery.

14 Finally, *Cloud v. Northrop Grumman Corp.*, 79 Cal. Rptr. 2d 544 (Cal. Ct. App. 1998), and  
15 *Kelsey v. Waste Mgmt.*, 90 Cal. Rptr. 2d 510 (Cal. Ct. App. 1999), are inapposite because they applied  
16 California—rather than federal—judicial estoppel doctrine.

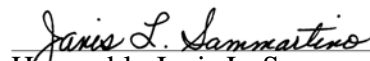
17 Plaintiff took clearly inconsistent positions regarding her claims against Sodexo, and the  
18 bankruptcy court accepted the earlier position in granting Plaintiff a discharge. The integrity of the  
19 bankruptcy system depends on full and honest disclosure by debtors of their assets, and allowing  
20 Plaintiff to assert these claims now would subvert that important goal. Accordingly, the doctrine of  
21 judicial estoppel bars her claims.

## 22 CONCLUSION

23 For the reasons stated above, the Court **GRANTS** Sodexo's motions for summary judgment.  
24 This Order concludes the litigation in this matter. The Clerk shall close the files.

25 **IT IS SO ORDERED.**

26  
27 DATED: September 27, 2011

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Honorable Janis L. Sammartino  
United States District Judge