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MONTANA THIRTEENTH JUDICIAL DISTRICT COURT
YELLOWSTONE COUNTY

SADDLEBROOK INVESTMENTS, LLC, as Assignee of STUART M. SIMONSEN, **Plaintiff,** **v.** **KROHNE FUND, L.P., SEAN WRIGHT, and ANTHONY BIRBILIS,** **Defendants.**	**Cause No.: DV 15-0391** **Judge: Hon. Jessica Fehr** **NOTICE OF ENTRY OF SUMMARY JUDGMENT**

TO: Plaintiff Saddlebrook Investments, LLC as Assignee of Stuart M. Simonsen, and its counsel of record, Thomas Singer:

Pursuant to Rule 77(d) of the Montana Rules of Civil Procedure, Defendant Krohne Fund, L.P. gives Notice to Plaintiff Saddlebrook Investments, LLC, as Assignee of Stuart M. Simonsen, that on the 19th day of October 2022, the Court entered Summary Judgment in the present case in favor of Krohne Fund, L.P. and against Saddlebrook Investments, LLC, as Assignee of Stuart M. Simonsen. Attached as Exhibit "1" is a copy of the Order on Cross Motions for Summary Judgment.

The undersigned certifies that the foregoing Notice of Entry of Judgment was served upon the following individuals by mailing to their current and correct address on this 24th day of April, 2023.

DATED this 24th day of April 2023.

Gallinger & Stockdale Law firm, LLC
Billings, MT 59101

By: _____
Steven L. Stockdale
Attorney for Defendant Krohne Fund, L.P.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent via email and/or U.S. Mail, postage prepaid, on the 24th day of April 2023, to the following interested parties:

T. Thomas Singer
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175 North 27th Street, Ste. 1101
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Steven L. Stockdale

MONTANA THIRTEENTH JUDICIAL DISTRICT COURT
YELLOWSTONE COUNTY

SADDLEBROOK INVESTMENTS, LLC, as an Assignee of STUART M. SIMONSEN, ***Plaintiff,*** **v.** **KROHNE FUND, L.P., AXEL KROHNE, SEAN WRIGHT, ANTHONY BIRBILIS, and DAVID TOLLIVER,** ***Defendants.***	**Cause No. DV 15-0391** **Judge: Hon. Jessica T. Fehr** **Order on Cross Motions for Summary Judgment**

Introduction

This matter comes before the Court pursuant to cross Motions for Summary Judgment filed by Plaintiff, Saddlebrook Investments, LLC[1] (hereafter "Saddlebrook") and Defendants, Krohne Fund, L.P., Axel Krohne, Sean Wright, Anthony Birbilis, and David Tolliver. Defendant, Krohne Fund, L.P. (hereafter "Krohne Fund") filed is Motion for Summary Judgment on January 18, 2022. Saddlebrook filed its Brief on Cross-Motions for Summary Judgment Concerning Judicial Estoppel on May 25, 2022. Krohne Fund filed its response on June 8, 2022, as well as a Reply Brief in Support of Its Motion for Summary Judgment. Saddlebrook filed its Reply in Support of Motion for Summary Judgment on June

[1] Note: due to the Assignee/Assignor relationship between Saddlebrook Investments and Stuart Simonsen, this Court will use their names interchangeably throughout this Order.

EXHIBIT
1

17, 2022. Oral argument was held on June 23, 2022. As such, this matter has been fully briefed and is ready for decision.

It is Hereby Ordered:

I. Defendant's Motion for Summary Judgment is GRANTED.

II. Plaintiff's Motion for Summary Judgment is DENIED.

Statement of Facts

Plaintiff Stuart M. Simonsen (hereafter "Simonsen") is an investment manager and resident of Billings, Montana. Simonsen developed a "black box" investment program or protocol for trading in commodities markets. A "black box" is essentially a computer program which algorithmically directs purchases and sales, long or short, of financial instruments based on a rigid framework of parameters. For purposes of this brief, the "black box" software will be referred to as Xynaquant.[2]

In approximately 2007, Simonsen met the defendant, Anthony Birbilis (hereafter "Birbilis"), a commodities trader from New York. After learning of Simonsen's software, Birbilis convinced a client from Greece to trade using it. After a couple years of successful trading, the client, Birbilis, and Simonsen set up two funds called Axiodyn and Axioquantum to trade using Simonsen's algorithms. Both funds traded successfully for several years, but due to disagreements among the partners, Simonsen and Birbilis formed Kapidyia Capital Partners, LLC (hereafter "Kapidyia"). Kapidyia offered account management services utilizing Simonsen's software, Xynaquant.

After a few months of operation, Simonsen received an email from Sean Wright (hereafter "Wright"). Wright, who was originally from Billings, Montana, told Simonsen that he was managing a fund in California and wished to meet with Simonsen to discuss the use of the Xynaquant software. Wright mentioned that he would be in Billings in early July of 2011 and requested to meet with Simonsen

[2] Note. This software has been known as i90 and Jarvis through various iterations over many years.

at that time. Wright and Simonsen met at Simonsen's house in Billings, where Wright had the opportunity to watch Xynaquant operate.

On August 5, 2011, less than a month after their meeting in Billings, Wright introduced Simonsen to Axel Krohne (hereafter "Krohne") via email, telling Simonsen that Krohne was a friend and a fund manager who was a potential investor that may be interested in using Xynaquant. Simonsen forwarded that email to Birbilis, who then contacted Krohne to introduce himself on August 7, 2011. Birbilis provided a marketing presentation of the Xynaquant algorithm to Krohne. Krohne was able to download Xynaquant, including a feature which tracked Xynaquant's performance with all invested funds since 2004. After the presentation and subsequent downloading of Xynaquant, Krohne's interest in Xynaquant was so strong that the next day, he scheduled an appointment to visit Simonsen in Billings, Montana.

Simonsen met Krohne at the Billings Logan International Airport on August 9, 2011, and took Krohne to his residence, where he talked about Xynaquant's record of success. Krohne was impressed with Xynaquant's success, and he was reassured by Simonsen of the fact that his money would stay strictly in the program to be invested within preset algorithmic parameters and would therefore not be subject to human interactions. Simonsen and Krohne also discussed certain risk management parameters that Krohne would require to proceed with Xynaquant.

On August 15, 2011, Krohne signed the Managed Account Agreement offered by Kapidyia. The agreement provided Kapidyia with discretionary authority over the account which allowed Kapidyia to buy and sell securities. Under Appendix A of the Agreement, there were limited investments to the Xynaquant SLR account with a 30% risk budget of $2,400,000. On September 1, 2011, Krohne received his first monthly statement from Kapidyia showing a profit of $242,699. That profit was generated in less than two weeks. At that time, Krohne was required to pay Kapidyia $66,540, consisting of approximately $48,000 as a management fee for the quarter closing at the end of September, and the rest

as a performance fee. Due to that success, Krohne wired an additional $500,000 into the account on September 3, 2011, with the intent to increase the notational value of the account to $10,000,000 (ten million dollars). On September 8, 2011, Krohne wired an additional $1,400,000 (one million, four-hundred thousand dollars) into the account. On October 3, 2011, the notational value of Krohne's account was $15,000,000 (fifteen million dollars) and Kapidyia took a quarterly fee of $75,000.

In September, Birbilis provided web training on Xynaquant to Krohne. Wright was also present at the training because he wanted to learn how the algorithm operated. It is alleged that Wright's intention was to learn how to reverse engineer the Xynaquant program, and that Axel Krohne, and his fund, Krohne Fund, were aware of Wright's intentions. Further, it is alleged that Wright then shared this information with David Tolliver (hereafter "Tolliver"). In September, Wright and Tolliver tried to set up a meeting with Simonsen to discuss a business venture that would acquire Xynaquant. Simonsen ignored the request. Tolliver followed up with an email to Wright, stating, "a guy whose been kicked in the nuts is probably more likely to accept / ask for help at a reasonable price". This comment is in reference to Simonsen not wanting to accept their partnership proposal. Then, on September 22, 2011, Wright emailed Simonsen a Partnership Proposal, which Simonsen also declined. On October 4, 2011, Wright received an email from Tolliver asking if Wright was "still executing Simonsen's strategy." Wright responded by saying that he stopped executing Simonsen's strategy.

Krohne was able to visually access the program on his desktop computer and thus could monitor activities, as well as profits and losses in his account. On September 29, 2011, he noted a large loss of $657,627 in the account. When Krohne asked Simonsen about the loss, Simonsen responded that it was "extremely rare", and stated that he was "extremely sorry that it had to happen to you so soon after you started." Still nervous about the losses, in late October and the beginning of November, Krohne conducted his own "back test" of the performance of his account within all Xynaquant parameters.

Krohne could only verify a loss of approximately $220,000 by simulating the Xynaquant trades. Krohne then asked Simonsen and Birbilis why the numbers differed. Neither Simonsen nor Birbilis could explain the differences relative to the Xynaquant program. On November 30, 2011, after receiving no explanation as to the discrepancy, Krohne withdrew his funds from trading in the program.

Krohne Fund filed suit on January 12, 2012, in Montana Federal District Court, naming Simonsen as a defendant (DV 12-04-BLG-RFC). The Complaint centered upon allegations that defendants had failed, as contractually required, to manage Krohne Fund's investment account using the contracted trading algorithm. Krohne Fund amended its Complaint on March 12, 2012, which alleged conduct on the part of Simonsen and/or his affiliated company Kapidyia Capital Partners, LLC, to include allegations of common law fraud, breach of contract, promissory estoppel, negligent misrepresentation, and constructive trust. This litigation was premised primarily upon Krohne Fund's allegation that Simonsen had made manual trades (human interactions) in Krohne Fund's account, which resulted in Krohne Fund's losses.

Simonsen and Kapidyia filed a Motion for Leave to Amend Scheduling Order, to Amend Answer, to File Counterclaims, and to File Third-Party Claims. Simonsen also sought leave to prosecute the following claims against Krohne Fund: (1) breach of contract; (2) misrepresentation of trade secrets; (3) conversion; and (4) conspiracy. The matter was ultimately resolved in 2014 in favor of Simonsen.

On April 3, 2015, Simonsen filed a Complaint to recover damages from former business associates, customers, and others who acted alone, or in concert to reverse engineer, misappropriate, or convert an algorithmic program for trading securities created and owned by Simonsen, Xynaquant. The Complaint asserted claims against Krohne Fund, L.P., Axel Krohne, Sean Wright, Anthony Birbilis, and David Tolliver. The Counts in the Complaint included: Count I - Misappropriation of Trade Secrets; Count II - Malicious Prosecution; Count III - Abuse of Process; Count IV - Breach of Duties as Members

of LLC; Count V - Tortious Interference; Count VI - Misrepresentation/Fraud; and Count VII - Conspiracy.

Simonsen alleged that the manual trades at issue were made by Birbilis. Simonsen claimed that Birbilis was upset that Simonsen refused to give Birbilis an ownership interest in Xynaquant, and as a result told lies about Simonsen and discouraged other potential customers from doing business with Simonsen, which led to no clients using Xynaquant by December 2011. Simonsen's First Amended Complaint alleges that Birbilis provided web training on Xynaquant to Defendants Krohne, Tolliver, and Wright, which allowed Wright to access Xynaquant, watch algorithmic trades, and mimic the trades for his own benefit without paying consideration for using the software. Finally, Simonsen alleges that it was Birbilis who helped and encouraged others to assert and/or file claims against Simonsen.

Simonsen ultimately shut down the Xynaquant program and declared bankruptcy. Simonsen filed for bankruptcy in United States Bankruptcy Court for the District of Montana (*In re Stuart Michael Simonsen*, Case No. 14-60015-7).

In the bankruptcy proceedings, Simonsen's claims against the Defendants were assigned to Grizzly Peak Limited Partnership. Grizzly Peak thereafter assigned the claims to Saddlebrook, who is the Plaintiff in the current matter.

Legal Standard of Review

A party is entitled to summary judgment "if the pleadings, discovery, disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the [moving party] is entitled to judgment as a matter of law." M.R.Civ.P. Rule 56(c)(3); *Hadford v. Credit Bureau of Havre, Inc.*, 1998 MT 179, ¶ 14, 289 Mont. 529, 962 P.2d 1198. The moving party has the initial burden of proving that no genuine issues of material fact exist. *Roy v. Blackfoot Telephone Co-op.*, 2004 MT 316, ¶ 11, 324 Mont. 30, 101 P.3d 301. All reasonable inferences which may be drawn from the offered proof

must be drawn in favor of the party opposing summary judgment." *The Stanley L. and Carolyn M. Watkins Trust v. Lacosta*, 2004 MT 144, ¶ 16, 321 Mont. 432, 92 P.3d 620.

Once the moving party satisfies the initial burden, "the burden then shifts to the non-moving party to prove, by more than mere denial and speculation, that a genuine issue of fact does exist." *Gwynn v. Cummins*, 2006 MT 239, ¶ 11, 333 Mont. 522, 144 P.3d 82; *Carelli v. Hall*, 279 Mont. 202, ¶ 207, 926 P.2d 756 (1996). To satisfy this burden, the non-moving party must present facts of a substantial nature; speculative and conclusory statements are insufficient to raise a genuine issue of material fact. *Brothers v. General Motors Corp.*, 202 Mont. 477, ¶ 481, 658 P.2d 1108 (1983); *Thornton v. Flathead Co.*, 2009 MT 367, ¶ 13, 353 Mont. 252, 220 P.3d 395. If the non-moving party fails to raise a genuine issue of material fact, the court must then determine whether summary judgment is appropriate as a matter of law based on the presented facts. *Scott v. Robson*, 182 Mont. 528, 535, 597 P.2d 1150, 1154 (1979).

Discussion

Krohne Fund argues that Simonsen is barred by the principle of judicial estoppel from bringing his claims against Krohne Fund because they were not disclosed as an asset during Simonsen's bankruptcy. It is important to note that the claims against Krohne Fund were actually filed in this Court during the pendency of the bankruptcy proceeding.

Judicial estoppel is an equitable doctrine that precludes a party from gaining an advantage by asserting one position, and then later seeking an advantage by taking a clearly inconsistent position. *Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778 (9th Cir. 2001); *Rissetto v. Plumbers & Steamers Local 343*, 94 F.3d 597, 600-601 (9th Cir. 1996); *Russell v. Rolfs*, 893 F.2d 1033, 1037 (9th Cir. 1990). It is intended to protect the integrity of the judicial process from manipulation by litigants who seek to prevail, twice, on opposite theories. *State v. Darrah*, 2009 MT 96, 350 Mont. 70, 205 P.2d 792 at ¶ 12. As a threshold consideration, the Court must [also] determine whether the party being estopped sought

to intentionally manipulate the courts by taking inconsistent positions; the doctrine does not apply when a party's prior position was based on inadvertence or mistake. *Kucera v. City of Billings*, 2020 MT 34, 399 Mont. 10, 457 P.3d 352 at ¶ 9.

The United States Supreme Court has listed three factors that courts may consider in determining whether to apply the doctrine of judicial estoppel. First, a party's position must be *clearly inconsistent* with the earlier position. *Dovey v. Burlington Northern Santa Fe Ry.*, 2008 MT 350, 346 Mont. 305, 195 P.3d 1223 at ¶ 15 (quoting *U.S. v. Ibrahim*, 522 F.3d 1003, 1009 (9th Cir. 2008) and citing *New Hampshire v. Maine*, 532 U.S. 742, 750-51, 121 S.Ct. 1808, 1815, 149 L.Ed.2d 968 (2001). (Emphasis added). Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create "the *perception that either the first or second court was misled*". *Id.* (Emphasis added). The third consideration is whether the party seeking to assert an inconsistent position would *derive an unfair advantage* or *impose an unfair detriment* on the opposing party if not estopped. *Id.* (Emphasis added).

As it pertains to bankruptcies, a party is judicially estopped from asserting a cause of action not raised in a reorganization plan, or otherwise mentioned in the debtor's schedules or disclosure statements. *Hamilton v. State Farm Fire & Cas. Co.*, at 783 (quoting *Hay v. First Interstate Bank of Kalispell, N.A.*, 978 F.2d 555, 557 (9th Cir. 1992)). The debtor's duty to disclose potential claims as assets does not end when the debtor files schedules, but instead continues for the duration of the bankruptcy proceeding." *Kucera v. City of Billings* at ¶ 12; *In re Coastal Plains*, 179 F.3d at 208; *Youngblood Group v. Lufkin Fed. Sav. & Loan Ass'n*, 932 F.Supp at 867. Generally, a debtor who fails to disclose a contingent and unliquidated claim in a bankruptcy proceeding is judicially estopped from

pursuing that claim after being discharged from bankruptcy. *Id.* at ¶ 9 (quoting *Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 783(9th Cir. 2001)).

I. Simonsen Had Actual Knowledge of His Claims Against Krohne Fund During the Bankruptcy Proceedings.

The record demonstrates that Simonsen had actual knowledge of his claims against Krohne Fund during the bankruptcy proceedings. Therefore, his intentional decision to not include such claims within his bankruptcy schedules and disclosures constituted an inconsistent position done to deceive the Bankruptcy Court.

The record establishes that Simonsen had actual knowledge of his claims against Krohne Fund. First, Simonsen knew about the claim in April of 2015 when his attorney, Tom Singer, filed a complaint against Krohne Fund and the other defendants. Second, Simonsen, through Singer, informed the Trustee of his Bankruptcy Estate of his claims. Simonsen argues that this notice is sufficient to avoid judicial estoppel. However, for reasons discussed further, this argument is without merit. Third, the record also indicates that Tom Singer was actively working with the Trustee to preserve the claims in both federal and state courts.

Simonsen did indeed have actual knowledge of the active claims during his bankruptcy proceedings yet failed to update his disclosures and schedules. The record indicates that Simonsen failed to update his disclosures and schedules intentionally deceiving the Bankruptcy Court and his creditors.

II. Simonsen Should Not Derive an Advantage as a Result of His Intentionally Deceptive Conduct.

Generally, the Bankruptcy Code and Rules "impose upon the bankruptcy debtors an express, affirmative duty to disclose all assets, *including contingent and unliquidated claims.*" *In re Coastal Plains*, 179 F.3d at 207-208; *Hay*, 978 F.2d at 557; 11 U.S.C. § 521(1). (emphasis added). As mentioned

before, the record indicates that Simonsen had actual knowledge of his claims. Simonsen had the express and affirmative duty to disclose all claims including contingent and unliquidated claims.

Both Montana and Federal caselaw have asserted this position on many occasions. In *In Re Coastal Plains*, the Court stated that "it is very important that a debtor's bankruptcy schedule[s] and statement of affairs be as accurate as possible, because that is the initial information upon which all creditors rely." *Id.* at 208. This Court agrees with the Fifth Circuit Court's analysis.

In *Hamilton v. State Farm Fire & Cas. Co.*, the Court determined that Hamilton clearly asserted inconsistent positions. To begin, he failed to list his claims against State Farm as assets on his bankruptcy schedules, and then later sued State Farm on those same claims. Hamilton argued that the Trustee was fully aware of his pending claims against State Farm, but the Trustee denied having knowledge of those claims. The Court disagreed with Hamilton, and judicially estopped him from asserting the claims. In its opinion, the Court declared:

> [...] *notifying the trustee by mail or otherwise* is insufficient to escape judicial estoppel. 11 U.S.C. § 521(1) provides that "[the] debtor shall file a list of creditors, and unless the court orders otherwise, a schedule of assets and liabilities, a schedule of current income and current expenditures, and a statement of the debtor's financial affairs." Hamilton is required to have amended his disclosure statements and schedules to provide *requisite notice*, because of the *express duties of disclosure imposed on him* by 11 U.S.C. § 521 (1), and because both the court and Hamilton's creditors *base their actions on the disclosure statements and schedules*. *Id.* at 784. (emphasis added).

Hamilton's facts are strikingly similar to the facts in the present matter. Here, Simonsen, just like Hamilton, had the express duty to amend his disclosure statements and schedules. Simonsen similarly argues that his notifications via email to the Trustee through his attorney, Tom Singer, qualify as sufficient notice. The Court in *Hamilton*, as well as countless other statutory and caselaw authorities are exceedingly clear that mere notice is insufficient to satisfy the standard – the debtor must actively amend his disclosure statements and schedules. 11 U.S.C. § 521(1). *Hamilton* further opines on how a debtor's

creditors rely wholly upon those documents – moreover, the creditors base their actions upon said documents. Similarly, by merely conveying notice to the Trustee, Simonsen violated the requirements of the Bankruptcy proceeding and deceived his creditors. As such, the informal notice described by Simonsen is insufficient to escape judicial estoppel.

Furthermore, the facts of this matter stand in sharp contrast to caselaw cited by Simonsen himself. In *Dovey v. BNSF Ry. Co.*, Dovey failed to update his assets and debts to include the pending legal claims. The Court held that once Dovey realized that he had a potential claim against BNSF, he had a duty to update his bankruptcy schedules accordingly. *Dovey v. BNSF Ry. Co.*, 2009 MT 350, 346 Mont. 305, 195 P.3d 1223 at ¶ 21. However, in *Dovey*, he did update his schedules. *Id.* When Dovey learned that it was an issue that he failed to disclose his claim against BNSF, Dovey obtained affidavits from his attorney and reopened the bankruptcy to amend his schedules. *Id.* As such, judicial estoppel did not apply and Summary Judgment against Dovey was not appropriate. *Id.* Contrast this to the current matter. Despite Simonsen's insistence to the contrary, the record clearly indicates that Simonsen not only had actual knowledge of the claims during the bankruptcy proceeding, but he actively assigned them to Grizzly Peak Limited Partnership. Moreover, unlike Dovey, he did not disclose the claims to the Bankruptcy Court prior to discharging the bankruptcy – Simonsen made no effort to put his creditors on notice. Plainly, he was aware of the claims, as they were amended and filed by counsel, but unlike *Dovey*, he failed to reopen the bankruptcy corpus to amend his schedules. This failure to list the claims as assets on his bankruptcy schedules deceived the bankruptcy court and his creditors. Simonsen's creditors relied on the accuracy of the schedules to determine what action, if any, they would take in the matter. Based on Simonsen's conduct, he is now judicially estopped from continuing these causes of action.

To conclude, the overwhelming weight of caselaw and statutory text demonstrates that Simonsen's actions were intended to deceive his creditors and the Bankruptcy Court, and as such, this Court finds it inequitable to grant him an advantage based upon his actions. Judicial estoppel applies and precludes Simonsen's cause of action.

III. Simonsen's Motion for Summary Judgment Fails as a Matter of Law.

This matter comes before this Court as the result of cross motions for Summary Judgment filed by Saddlebrook Investments and Krohne Fund. Quite simply, Simonsen's motion fails as a matter of law. This Court has reviewed the record and has discussed in detail why it believes that Simonsen should be judicially estopped from asserting his claims against Krohne Fund.

To summarize, Simonsen had actual knowledge of his claims, dating back to 2015, yet refused to disclose them within his bankruptcy schedules. This is evidenced by the complaints filed by his attorney, Tom Singer, as well as the evidence in the record showing that Simonsen worked with Singer to preserve his claims against Krohne Fund in both Montana and Federal courts. Further, Simonsen claims that his emails to the Trustee through Tom Singer satisfy the statutory standard. However, both Montana and Federal caselaw contradict this argument entirely, and therefore, this argument is without merit. As such, this Court is convinced that Simonsen intentionally deceived his creditors and the Bankruptcy Court by failing to include his claims in his bankruptcy estate.

For these reasons, Simonsen is judicially estopped from pursuing his claims against Krohne Fund further. As such, Simonsen's Motion for Summary Judgment is contrary to the law and without merit.

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Order of the Court

Therefore, it is Ordered that the Motion for Summary Judgment filed by Plaintiff Saddlebrook Investments is DENIED. Furthermore, the Motion for Summary Judgment filed by Defendant Krohne Funds, L.P., is GRANTED.

Dated and Ordered this 19th day of October, 2022.

/s/ Hon. Jessica T. Fehr

District Court Judge

Cc: Thomas Singer, Esq.
Matthew Gallinger, Esq.
Steven Stockdale, Esq.
Kenneth Tolliver, Esq.
Kelly Gallinger, Esq.
Aaron Dunn, Esq.

MONTANA THIRTEENTH JUDICIAL DISTRICT COURT
YELLOWSTONE COUNTY

SADDLEBROOK INVESTMENTS, LLC, as Assignee of STUART M. SIMONSEN, **Plaintiff,** **v.** **KROHNE FUND, L.P., SEAN WRIGHT, and ANTHONY BIRBILIS,** **Defendants.**	**Cause No.: DV 15-0391** **Judge: Hon. Jessica Fehr** **JUDGMENT**

This matter came before the Court on Plaintiff's motion for default judgment against Defendant Anthony Birbilis and on Defendant Krohne Fund, L.P.'s motion for summary judgment. The motions were heard, decisions were rendered, and it is hereby

ORDERED, ADJUDGED AND DECREED THAT:

Plaintiff Saddlebrook Investments, LLC, as Assignee of Stuart M. Simonsen, recover from Defendant Anthony Birbilis the sum of thirty-five million dollars ($35,000,000), with interest at the rate provided by law, and its costs of action; and

Plaintiff Saddlebrook Investments, LLC, as Assignee of Stuart M. Simonsen, recover nothing from Defendant Krohne Fund, L.P., and that Defendant Krohne Fund, L.P., recover its costs of action from Plaintiff.

Dated this 18th day of April 2023.

/s/ JESSICA T. FEHR
District Court Judge

Electronically Signed By:
Hon. Judge Jessica T Fehr
Tue, Apr 18 2023 04:41:39 PM

MONTANA THIRTEENTH JUDICIAL DISTRICT, YELLOWSTONE COUNTY

SADDLEBROOK INVESTMENTS, LLC, as assignee of STUART M. SIMONSEN, Plaintiff, vs. KROHNE FUND, L.P., SEAN WRIGHT, ANTHONY BIRBILIS, Defendants.	Cause No. DV 15-0391 Judge: Jessica T. Fehr **FINDINGS OF FACTS, CONCLUSIONS OF LAW, AND ORDER RE: DAMAGES AGAINST BIRBILIS**

On February 16, 2023, this matter came before the Court for hearing on the amount of damages to be awarded to Plaintiff against Defendant Anthony Birbilis, who was defaulted as a sanction. Plaintiff Saddlebrook Investments, LLC was represented by T. Thomas Singer of Hall & Evans, LC. Steven Stockdale of the Tolliver Law Firm, who represents Defendant Krohne Fund, L.P., was present but did not participate. Plaintiff presented sworn testimony from Stuart Simonsen and offered exhibits numbered 1, 27, 29, 30, 140, 167, 168, 169, 170, 200, 201, 202, and 203, all of which were admitted without objection. Based on evidence presented, the Court makes the following:

FINDINGS OF FACT

1. On January 20, 2023, Plaintiff's counsel sent by email, regular mail, and certified mail to Birbilis a copy of the Court's order setting the hearing with a letter offering to

postpone the hearing if he intended to appear and needed additional time to prepare. (Exhibit 1.) By the time the hearing was adjourned, Birbilis had not responded to counsel, contacted the Court, or filed anything with the Clerk of Court.

2. Simonsen and Grizzly Peak, L.P. have assigned all claims they had against the Defendants in this action to Plaintiff Saddlebrook Investments, LLC.
3. The claims Saddlebrook asserts arise because of a suit Krohne Fund filed against Simonsen in January 2012, accusing him of committing fraud and making manual trades in an account that Simonsen had promised would be traded algorithmically by Xynaquant, a trading platform or program he had created.
4. Plaintiff named Defendant Birbilis as a co-conspirator because he had encouraged Krohne and others to sue Simonsen. He also traveled to Montana and appeared at trial without a subpoena, where he testified falsely that Simonsen had made manual trades in Krohne Fund account when the evidence showed Birbilis had actually made the trades himself.
5. When Simonsen ultimately prevailed in that litigation, he sued Krohne Fund as well as Birbilis and others who had encouraged, supported, and testified falsely for Krohne Fund.
6. As a result of Krohne Fund's lawsuit, Simonsen no longer could convince investors to put money into Xynaquant, which meant he had no source of income. Simonsen could no longer afford to spend $20,000 to $40,000 per month to maintain Xynaquant, so the servers were shut down.
7. Simonsen filed bankruptcy in January 2014. Virtually all the assets he and Grizzly Peak owned before the Krohne Fund lawsuit was filed were lost.

8. Before the lawsuit was filed, Grizzly Peak had owned assets with a fair market value of $22.7 million, and it had liabilities of $9.6 million, leaving equity of $13.1 million. (Exhibit 203.) Grizzly Peak's assets did not generate enough revenue to pay current liabilities, so Simonsen had supplied money to make the necessary payments. After the Krohne Fund lawsuit was filed, he was no longer able to do that, so the assets had to be sold to pay the debts.
9. Before the lawsuit was filed, Simonsen was negotiating with a potential buyer of Xynaquant who was willing to pay $25 million in cash up front plus a cut of the profits until a total of $50 million was paid. (Exhibits 167, 168, and 169.) The negotiations stopped when Krohne Fund sued.
10. Krohne Fund invested $4.5 million at a 30% risk budget, which meant the notional value of the Krohne Fund account was $15 million. (Exhibit 29.)
11. Xynaquant has a 25-year history of consistently producing positive returns ranging from 30% to 180%, even in down markets. (Exhibits 170; 200; and 201.) In the five years before Krohne Fund invested, Xynaquant generated returns on accounts with a 30% risk budget that averaged 69.862% per year. (Exhibits 27, p. 10, and 202.) The returns would have been significantly higher after Krohne Fund filed suit, as shown in back-testing and one account that went live in 2022 using a simpler version of Xynaquant. (Exhibits 200 and 201.)
12. Under the Managed Account Agreement that was signed by Krohne Fund, Krohne Fund was obligated to pay to Kapidyia – which Simonsen owned – a management fee to cover overhead of 2% per year on the notional amount of assets under management

(2% of $15 million is $300,000), and a monthly incentive fee of 20% of net profits. (Exhibit 30.)

13. Saddlebrook presented an estimate of lost earnings since the lawsuit was filed. Saddlebrook's estimate assumes Xynaquant had only one customer during that time, that the customer invested $4.5 million at a 30% risk budget and did not reinvest any earnings, and that the returns were consistent with Xynaquant's average returns from 2006-2010, rather than the higher returns generated since then. (Exhibit 202.) Under those conservative assumptions, Xynaquant would have generated management fees of $2,068,860 per year for Simonsen.
14. On November 14, 2011, Axel Krohne sent an email to Simonsen in which he said, "I consider my investment with you as permanent capital. If I am still underwater by September 2012 I will likely withdraw the money, otherwise I plan to increase the allocation proportionally to your success." (Exhibit 140.) Xynaquant has been consistently successful since that date.
15. At the trial of the Krohne Fund lawsuit, Krohne Fund used the same approach Saddlebrook is proposing here to calculate its claimed damages.
16. Simonsen's testimony is credible, and Saddlebrook's request for an award of $35 million in damages against Defendant Birbilis is conservative and reasonable.

Based on the foregoing, the Court issues the following:

CONCLUSIONS OF LAW

1. If any finding of fact or conclusion of law is labelled incorrectly, it should be read as if it appeared under the appropriate heading.

2. Plaintiff's counsel took appropriate steps to insure Birbilis received notice of the hearing, and the Court presumes that he received the letter that was sent to him by email, regular mail, and certified mail. Because he did not appear at the hearing or respond to the letter from Plaintiff's counsel, the Court finds that he chose not to appear to offer a defense.
3. Saddlebrook Investments, LLC is the real party in interest and proper plaintiff to pursue the claims asserted against Birbilis.
4. Birbilis was defaulted for disregarding the Court's scheduling orders and failing to retain local counsel as required by Rule VI of the Montana Rules for Admission to the Bar.
5. "The fact that a judgment is entered by default does not abrogate the requirement that the damages awarded be reasonable and clearly ascertainable." *Watson v. West*, 2009 MT 342, ¶ 37, 353 Mont. 120, 218 P.3d 1227 (citing *Johnson v. Murray*, 201 Mont. 495, 506, 509, 656 P.2d 170, 175, 177 (1982)). However, "[w]hen there is strong evidence of the fact of damage, defendant should not escape liability because the amount of damage cannot be proven with precision." *Johnson v. Murray*, 201 Mont. at 506, 656 P.2d at 175 (citing *Winsness v. M. J. Conoco Distributors* (Utah 1979), 593 P.2d 1303.
6. The Montana Supreme Court has "adopted the concept that a wrongdoer is not allowed to escape by merely paying nominal damages if there is any reasonable way in which the amount that he should pay in damages can be determined. Therefore, if the damages are measured by a method which is reasonably definite, and not likely to give compensation in excess of the loss suffered, the damages will be approved." *Edington v. Creek Oil Co.*, 213 Mont. 112, 127, 690 P.2d 970, 978 (1984) (citing *Laas v. Montana State Highway Commission et al.* (1971), 157 Mont. 121, 131, 483 P.2d 699, 704).

7. Plaintiff notified the Court the afternoon the hearing on damages was held, after the hearing was concluded, that counsel had received an email from Mr. Birbilis inquiring as to whether additional time could be provided to participate. No documentation was filed with the Court by Mr. Birbilis. In fact, the Court waited to issue the Findings of Fact and Conclusions of Law in this case for over sixty days after the hearing in the event Mr. Birbilis, or any counsel representing the same, were to file a document with the Court requesting an extension or to set aside the default. As of the date o his Order, no documents have been filed by Mr. Birblis or counsel on his behalf.

8. In this case, Plaintiff has clearly established the fact of damage and proposed a method of measurement that is reasonably definite and not likely to give compensation in excess of the loss suffered. Therefore, the damages requested should be approved.

Based on the foregoing findings of fact and conclusions of law, the Court enters the following:

ORDER

It is hereby ordered that a default judgment shall be entered in favor of Plaintiff Saddlebrook Investments, LLC and against Defendant Anthony Birbilis in the amount of thirty-five million dollars ($35,000,000).

DATED this 18th day of April, 2023.

/s/ Hon. Jessica T. Fehr

District Court Judge

Cc: T. Thomas Singer
Steven Stockdale

MONTANA THIRTEENTH JUDICIAL DISTRICT COURT, YELLOWSTONE COUNTY

SADDLEBROOK INVESTMENTS, LLC, as Assignee of STUART M. SIMONSEN, Plaintiff, v. KROHNE FUND, L.P., AXEL KROHNE, SEAN WRIGHT, ANTHONY BIRBILIS, and DAVID TOLLIVER, Defendants.	Cause No: DV 15-0391 Judge: Jessica T. Fehr **ORDER and MEMORANDUM**

This matter comes before the Court pursuant to a variety of outstanding motions by all parties delineated as follows:

- **Motion #1**: Defendant David Tolliver's Rule 12(b)(2) Motion to Dismiss with Prejudice for Lack of Personal Jurisdiction on April 13, 2018. Plaintiff's response was filed on April 26, 2018. Defendant David Tolliver filed a reply brief on May 8, 2018.
- **Motion #2**: Defendant Axel Krohne's Motion to Dismiss and Brief in Support of Defendant Axel Krohne's M.R. Civ. P. Rule 12(b)(5) and 12(b)(2); (4)e(i) filed on April 13, 2018. Plaintiff's response brief filed on April 30, 2018.
- **Motion #3**: Krohne Fund's Rule 12(b)(2) Motion to Dismiss Claims for Lack of Personal Jurisdiction filed on April 13, 2018. Plaintiff's response brief filed on April 30, 2018.

- **Motion #4**: Defendants Krohne Fund and Axel Krohne's Rule 13 Motion to Dismiss Claims Barred Due to Failure to Previously Prosecute Compulsory Counterclaims filed on April 13, 2018. Plaintiff's response filed on April 30, 2018. Defendants Krohne Fund and Alex Krohne filed a reply brief on May 14, 2018.
- **Motion #5**: Defendant Anthony Birbilis' Motion for Judicial Notice Pursuant to Rule 201(d) of the Montana Rules of Evidence filed on April 26, 2018. Plaintiffs filed a response on May 24, 2018. Defendant Anthony Birbilis filed a reply brief on June 7, 2018.
- **Motion #6**: Defendant Anthony Birbilis' Motion to Dismiss Pursuant to Rule 12(b)(2) and (6) of the M.R.Civ.P. filed on April 26, 2018. Plaintiffs filed a response on May 24, 2018. Defendant Anthony Birbilis filed a reply brief on June 7, 2018.

MEMORANDUM

IDENTIFICATION OF THE PARTIES

- Plaintiff Stuart M. Simonsen ("Simonsen"), represented by Thomas Singer, is an investment manager and is a resident of and doing business in Billings, Montana. Simonsen currently resides at 865 Paintbrush Place, Billings, Montana 59106. For purposes of this brief Plaintiff will be referred to as "Simonsen" or Plaintiff.
- Defendant Krohne Fund, L.P., represented by Tyler Dugger, is a California limited partnership with its principal place of business located at 5405 Pacifica Avenue, La Jolla California. Krohne Fund is managed by Defendant Axel Krohne.
- Defendant Axel Krohne, represented by Tyler Dugger, is the manager of Krohne Capital, LLC which manages the Krohne Fund Limited Partnership. Alex Krohne is a resident of California.
- Defendant David Tolliver ("Tolliver"), represented by Kelly Gallinger, grew up in Billings Montana. Tolliver currently resides in Berkley, California.
- Defendant Anthony Birbilis ("Birbilis"), is represented by Crist, Krogh & Nord, PLLC and Vogler & Associates, P.C. Birbilis is a resident of New York.

- Defendant Sean Wright ("Wright") is currently appearing *pro se*. Wright lives in California and works in the securities industry.

RELEVANT BACKGROUND

Simonsen developed a "black box" investment program or protocol for trading in commodities markets. A "black box" is essentially a computer program which algorithmically directs purchases and sales, long or short, of financial instruments based on a rigid framework of parameters. For purposes of this brief this "black box" software will be referred to as Xynaquant.[1]

In approximately 2007, Simonson met Birbilis, a commodities trader from New York. After Birbilis learned about Simonsen's software he convinced a client from Greece to trade using it. After a couple of years of successful trading, the client, Birbilis, and Simonsen set up two funds called Axiodyn and Axioquantum to trade using Simonsen's algorithms. Both funds traded successfully for a few years but due to disagreements among the partners, Simonsen and Birbilis formed, Kapidyia Capital Partners, LLC ("Kapidyia"). Kapidyia offered account management services utilizing Simonsen's software, Xynaquant.

A few months after Kapidyia was formed, Simonsen received an email from Sean Wright ("Wright"). Wright, who was originally from Billings, Montana, told Simonsen he was running a fund in California and wanted to meet Simonsen to discuss the use of the Xyanquant software. Wright mentioned he would be in Billings in early July of 2011 and requested to meet Simonsen at that time. Wright and Simonsen met at Simonsen's house in Billings, where Wright had a chance to watch Xynaquant operate.

Less than a month after the meeting in Billings, on August 5, 2011, Wright made an email introduction to Simonsen of Axel Krohne, telling Simonsen that Krohne was a friend and a fund manager who was a potential investor that may be interested in using Xyanquant. Simonsen forwarded that email to Birbilis who then contacted Krohne to introduce himself on August 7, 2011. Birbilis provided a marketing presentation of the Xynaquant algorithm to Krohne. Krohne was able to download Xynaquant

[1] This software has also been known as i98 and Jarvis through various iterations over many years.

and it included a feature which tracked Xyanquant's performance with all funds invested since 2004. After the presentation and the downloading of Xynaquant, Krohne's interest in Xynaquant was so strong that the next day he made an appointment to visit Simonsen in Billings, Montana.

Simonsen met Krohne at the Billings Logan Airport on August 9, 2011 and took Krohne to Simonsen's residence where Simonsen talked about the record of success of the Xynaquant software. Krohne was impressed by the Xyanquant program's success, and he was reassured by Simonsen of the fact that his money would stay strictly in the program to be invested within preset algorithmic parameters and would therefore not be subject to human interactions. Further, Simonsen and Krohne discussed certain risk management parameters Krohne would require to enter Xyanquant.

On August 15, 2011, Krohne signed the Managed Account Agreement offered by Kapidyia. The agreement provided Kapidyia with discretionary authority over the account which allowed them to buy and sell securities. Under Appendix A of the agreement there were limited investments to the Xynaquant SLR account with a 30% risk budget of $2,400,000. On September 1, 2011, Krohne received his first monthly statements from Kapidyia showing a profit of $242,699, that was generated in less than two weeks. At that time, Krohne was required to pay Kapidyia $66,540 which accounted for approximately $48,000 as a management fee for the quarter closing at the end of September and the rest as a performance fee. Because of that success, Krohne wired an additional $500,000 into the account on September 3, 2011, with the intent to increase the notional value of the account to ten million dollars. On September 8, 2011, Krohne wired an additional $1.4 million dollars into the account. On October 3, 2011, the notional value of Krohne's account was $15.0 million dollars and Kapidyia took a quarterly fee of $75,000.

In September, Birbilis provided web training on Xynaquant to Krohne. Wright was also present at the training because Wright wanted to learn how the algorithms worked. It is alleged that Wright's intention was to learn how to reverse engineer the Xynaquant program and that Axel Krohne and Krohne Fund were aware of Wright's intentions. Further, it is alleged that Wright then shared this information with David Tolliver ("Tolliver"). In September, Wright and Tolliver tried to set up a meeting with

Simonsen to discuss a business venture that would acquire Xynaquant. Simonsen ignored the request. Tolliver sent an email to Wright stating, "a guy whose been kicked in the nuts is probably more likely to accept/ask for help at a reasonable price," referring to Simonsen not wanting to accept their partnership proposal. Then on September 22, Wright emailed Simonsen a Partnership Proposal which Simonsen also declined. On October 4, Wright received an email from Tolliver asking if Wright was "still executing Simonsen's strategy." Wright responded saying that he stopped executing Simonsen's strategy.

Krohne was able to visually access the program on his desktop computer and thus could monitor activities and profits and losses in his account. On September 29, 2011, he noted a large loss of $657,627 in the account. When Krohne asked Simonsen about the loss, Simonsen replied that the loss was "extremely rare" and stated he was "extremely sorry it had to happen to you so soon after you started." Still nervous about the losses, in late-October and the beginning of November, Krohne conducted his own "backtest" of the performance of his account within all Xynaquant parameters. Krohne could only verify a loss of a little over $220,000 by simulating the Xynaquant trades. Krohne then asked Simonsen and Birbilis as to why the numbers differed and neither Simonsen nor Birbilis could explain the differences relative to the Xynaquant program. On November 30, 2011, after receiving no explanation as to the difference in the numbers, Krohne withdrew his funds from trading in the program.

On January 12, 2012, Krohne Fund filed suit in Montana Federal District Court, naming Simonsen as a defendant (DV 12-04-BLG-RFC). The Complaint centered on allegations defendants had failed, as contractually required, to manage Krohne Fund's investment account using the contracted trading algorithm. Krohne fund amended its Complaint on March 12, 2012, which alleged conduct on the part of Simonsen and/or his affiliated company Kapidyia Capital Partners, LLC, to include allegations of common law fraud, breach of contract, promissory estoppel, negligent misrepresentation, and constructive trust. This ligation was premised primarily upon Krohne Fund's allegation that Simonsen had made manual trades in Krohne Fund's Account, which resulted in Krohne Fund's losses.

Simonsen and his affiliated company, Kapidyia, filed a Motion for Leave to Amend Scheduling Order, to Amend Answer, to File Counterclaims, and to File Third-Party Claims. Attached to this Motion, Simonsen included his proposed First Amended Answer which included Counterclaims and Third-Party Complaints. In the attachment to the Motion, Simonsen sought leave to prosecute the following counterclaims against Krohne Fund: (1) breach of contract; (2) misappropriation of trade secrets; (3) conversion; and (4) conspiracy. The matter was ultimately resolved in 2014 in favor of Simonsen.

On April 3, 2015, Simonson filed a Complaint to recover damages from former business associates, customers, and other who acted alone or in concert to reverse engineer, misappropriate, or convert an algorithmic program for trading securities created and owned by Simonsen referred to as Xynaquant. The Complaint asserted claims against Krohne Fund, L.P., Axel Krohne, Sean Wright, Anthony Birbilis, and David Tolliver. The Counts in the Complaint included: Count I - Misappropriation of Trade Secrets; Count II - Malicious Prosecution; Count III - Abuse of Process; Count IV - Breach of Duties as Members of LLC; Count V - Tortious Interference; Count VI - Misrepresentation/Fraud; and Count VII - Conspiracy.

Simonsen alleged that the manual trades at issue were made by Birbilis. Simonsen claimed Birbilis was upset that Simonsen refused to give Birbilis an ownership interest in Xynaquant and as a result told lies about Simonsen and discouraged other potential customers from doing business with Simonsen, which led to no clients using Xynaquant by December 2011. Simonsen's First Amended Complaint alleges Birbilis provided web-training on Xynaquant to Defendants Krohne, Tolliver and Wright, which allowed Wright to access Xynaquant, watch algorithmic trades, and mimic the trades for his own benefit without paying consideration for using the software. Finally, Simonsen alleges it was Birbilis who helped and encouraged other to assert and/or file claims against Simonsen.

Simonsen ultimately shut down the Xynaquant program and declared bankruptcy. Simonsen filed for bankruptcy in United States Bankruptcy Court for the District of Montana (*In re Stuart Michael Simonsen*, Case No. 14-60015-7).

In the bankruptcy proceedings, Simonsen's claims against the Defendants were assigned to Grizzly Peak Limited Partnership. Grizzly Peak thereafter assigned the claims to Saddlebrook who is now the plaintiff in this action.

LEGAL STANDARD

The Court may dismiss a claim under Mont. R. Civ. P. Rule 12(b)(6) when "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." *Pederson v. Rocky Mt. Bank*, 2012 MT 48, ¶ 8, 364 Mont. 258, 272 P.3d 663 (*citation omitted*). Under a Rule 12(b)(6) motion to dismiss, the Court only examines whether a claim has been adequately stated in the complaint. *Plouffe v. State*, 2003 MT 62, ¶ 13, 314 Mont. 413, 66 P.3d 316 (*citation omitted*). In doing so, the Court construes the complaint "in the light most favorable to the plaintiff, and all allegations of fact are taken as true." *Pederson v. Rocky Mt. Bank, supra.*

DISCUSSION

The six outstanding motions before the Court will be discussed separately below.

I. Motions to Dismiss Based on Lack of Personal Jurisdiction.

When a defendant moves to dismiss a complaint for lack of personal jurisdiction, the plaintiff bears the burden of demonstrating that jurisdiction is appropriate. *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 800 (9th Cir. 2004). The Court applies a two-part test to determine whether a Montana court can exercise personal jurisdiction over a nonresident defendant. First, the Court determines whether personal jurisdiction exists under Montana's long-arm statute pursuant to Rule 4(b)(1). Second, the court determines whether exercising personal jurisdiction comports with traditional notions of fair play and substantial justice embodied in the due process clause. *Threlkeld v. Colorado*, 303 Mont. 432, 435, 16 P.3d 359, 361, 2000. Rule 4(b)(1), M.R.Civ.P. states:

> All persons found within the state of Montana are subject to the jurisdiction of the courts of this state. In addition, any person is subject to the jurisdiction of the courts of this state as to any claim for relief arising from the doing personally, through an employee, or through an agent, of any of the following acts:

(A) the transaction of any business within Montana;
(B) the commission of any act resulting in accrual within Montana of a tort action; [or]

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(E) entering into a contract for services to be rendered or for materials to be furnished in Montana by such person.

See M.R. Civ.P. Rule 4(b)(1)(A), (B), and (E).

Personal jurisdiction can be either general or specific. General jurisdiction exists over "all persons found within the state of Montana." *Threlkeld* 303 Mont. 432, 435. A party is "found within" the state if he or she is physically present in the state or if his or her contacts with the state are so pervasive that he or she may be deemed to be physically present there. *Simmons Oil Corp. v. Holly Corp.*, 244 Mont. 75, 83, 796 P.2d 189, 194 (1990). A nonresident defendant that maintains "substantial" or "continuous and systematic" contacts with the forum state is found within the state and may be subject to that state's jurisdiction even if the cause of action is unrelated to the defendant's activities within the forum. *Id.*

Under specific jurisdiction, jurisdiction may be established even though a defendant maintains minimum contacts with the forum as long as the plaintiff's cause of action arises from any of the activities enumerated in Rule 4(b)(1), M.R.Civ.P. and the exercise of jurisdiction does not offend due process. *Id.* at 84; see also See also *Ford Motor Co. v. Mont. Eighth Judicial Dist. Court*, 2019 MT 115, ¶¶ 8-10, 395 Mont. 478, ¶¶ 8-10, 443 P.3d 407, ¶¶ 8-10.

The Montana Supreme Court has adopted the Ninth Circuits test for determining whether the exercise of personal jurisdiction comports with due process:

(1) The nonresident defendant must do some act or consummate some transaction with the forum or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking its law.
(2) The claim must be one which arises out of or results from the defendant's forum-related activities.
(3) The exercise of jurisdiction must be reasonable.

Simmons v. State, 206 Mont. 264, 276, 670 P.2d 1372, 1378 (1983). A nonresident defendant purposefully avails himself of the benefits and protections of the laws of the forum state when he takes voluntary action designed to have an effect in the forum. *Simmons Oils Corp. v. Holly Corp.*, 244 Mont. 75, 86, 796 P.2d 189, 195 (1990) A nonresident defendant does not purposefully avail himself of Montana's laws when his only contacts with Montana are random, fortuitous, attenuated, or due to the unilateral activity of a third party. *Id.* Additionally, it is important to note that the Montana Supreme Court adopted the "stream of commerce plus" theory in *Bunch v. Lancair Int'l, Inc.*, holding that a defendant must do more than merely place a product into the stream of commerce in order to purposefully avail itself of the privilege of conducting business in Montana. See *e.g.*, *Bunch v. Lancair Int'l, Inc*, 2009 MT 29, ¶¶ 24, 28, 30, 55, 349 Mont. 144, 202 P.3d 784.

1. Motion One: Defendant David Tolliver's Motion to Dismiss for Lack of Personal Jurisdiction.

Tolliver contends in his Motion that Simonsen has not pled sufficient facts to establish that the court can exercise personal jurisdiction over Tolliver under Rule 4(b)(1)(B) because there are no actions by Tolliver that resulted in the accrual of a tort action in Montana, therefore, exercising personal jurisdiction over Tolliver does not comport with due process. Simonsen argues that Tolliver committed acts resulting in the accrual within Montana of a tort action pursuant to Rule 4(b)(1)(B) M.R.Civ.P. through his interactions and contact with the other Defendants regarding the alleged reverse engineering of the Plaintiff's algorithm; and that requiring Tolliver to defend the claims asserted in this case is consistent with due process.

Simonsen has failed to sufficiently plead enough facts to support the contention that Montana can and should exercise personal jurisdiction over David Tolliver and that exercising personal jurisdiction over David Tolliver comports with the due process clause. First, to exercise personal jurisdiction over a non-resident defendant under Rule 4(b)(1)(B) of Montana's long arm statute it must be shown that the claims

against the defendant arise out of the contact the defendant himself created resulting in accrual of a tort action in Montana. *Buckles v. Cont'l Res., Inc.*, 2017 MT 235, ¶ 12, 388 Mont. 517, 402 P.3d 1213.

Simonsen focuses on Tolliver's personal contacts with Montana as well as Tolliver's email to Wright and Krohne to show that Tolliver played a role in the alleged scheme that caused damage to Simonsen. Simonsen directs the Court to *Calder v. Jones*, 465 U.S. 783, 789-90, 104 S.Ct. 1482, 1487, 79 L.Ed. 2d 804 (1984), for the contention that personal jurisdiction over an out of state defendant is proper when the Defendants actions directly affect a Plaintiff in the forum state. In *Calder*, an entertainer who lived in California, sued the National Enquirer for libel in California. The Enquirer, a Florida corporation, moved to dismiss for lack of personal jurisdiction, arguing it did not write, edit, or publish the article in that state. *Id.* The Court held the Enquirer knew the article would have a potentially devastating impact on the entertainer and the brunt of that injury would be felt in the state where she lived and worked and in which the Enquirer also had its largest circulation. *Id.* The Supreme Court has since clarified that its decision in *Calder* was bolstered by the fact that the defendant had created various contacts with California, and not just the writing of the allegedly libelous story. *Walden v. Fiore*, 571 U.S. 277, 287-90 134 S.Ct. 1115, 1123-25 (2014). The Court in *Walden* referenced the strength of the connection between the defendant in *Calder* and California was largely attributed to the nature of the libel tort because communication to third persons is an essential element to the tort of libel. *Id.*

Simonsen argues this case is similar to *Calder* because Tolliver's email to Wright stating "a guy whose been kicked in the nuts is probably more likely to accept/ask for help at a reasonable price," along with Tolliver's involvement in the prior Krohne Fund lawsuit as an expert, and Tolliver's various attempts to meet with Simonsen in Montana all provide evidence that Tolliver, Wright, and Krohne were attempting to reverse engineer the Xyanquant algorithm which ultimately led to the accrual of a tort in Montana against Simonsen.

Simonsen argues that the facts demonstrate Tolliver was a part of a chain events that led to the accrual of a tort in Montana and therefore jurisdiction is proper. In *Simmons Oil Corp*, the Court said to ascertain whether a cause of action arises out of a defendant's forum related activity, the Court reviews the entire chain of events leading up to the final act upon which the claim accrued. *Simmons Oil Corp.*, 244 Mont. at 86. The Court rejected the defendant's argument that was focused on a single transaction that occurred outside Montana because the allegations of breach of fiduciary duty and bad faith arose out of the parties' long course of dealing concerning a refinery located in Montana. *Id.* Similarly, the argument that because Simonsen suffered harm in Montana as a result of the actions of the Defendants has been found insufficient to allow the exercise of personal jurisdiction over a defendant in Montana. *Tackett v. Duncan*, 2014, MT 253, ¶ 35, 376 Mont. 348, 334 P.3d 920. In *Tackett* the plaintiff relied on Rule 4(b)(1)(B) as the sole basis of specific personal jurisdiction. Id. at ¶24.The Plaintiff argued his tort accrued in Montana because the defendants' conduct caused the plaintiff to suffer a loss in Montana. *Id.* The Court noted the defendants' conduct did not result in the accrual of a tort action in Montana, because the defendants never traveled to, conducted activities within, or sent anything or anyone to Montana. *Id.*

Besides Tolliver having grown up in Billings, visiting on occasion, and buying his mother a home in Billings, Tolliver has not had any type of contact with Montana. In regard to this litigation the only contact Tolliver had with the Plaintiff was through an email Tolliver sent to Simonsen requesting a meeting – to which Simonsen never replied. Although Simonson points to emails and communication between Tolliver, Wright, and Krohne, these facts are insufficient to show that Tolliver's own personal actions resulted in the accrual of a tort in Montana.

The Plaintiff has failed to show that David Tolliver committed acts resulting in the accrual of a tort action in Montana and therefore there is no basis for a finding of personal jurisdiction over David Tolliver.

2. Motion Two: Defendant Axel Krohne's Motion to Dismiss for Insufficient Service of Process.

Defendant Axel Krohne asserted that he was not served with process and that therefore the Plaintiff's Complaint against him should be dismissed.

Plaintiff was unable to provide any evidence to dispute Axel Krohne's representation that the process server failed to serve the summons directed to Axel Krohne in the time permitted by Montana law. Plaintiff therefore conceded the Motion and the Motion to Dismiss Axel Krohne shall be granted.

3. Motion Three: Defendant Krohne Fund's Motion to Dismiss for Lack of Personal Jurisdiction.

Krohne Fund first contends that the Court should analyze personal jurisdiction on a claim by claim basis and that the Court has personal jurisdiction over Krohne Fund on Simonsen's claims of malicious prosecution and abuse of process but does not have personal jurisdiction over Counts I, V, VI, and VII. Second, Krohne contends Simonsen has plead insufficient facts so support that the court can exercise personal jurisdiction over Krohne Fund because under Rule 4(b)(1) the only jurisdictional tie Simonsen alleges to support a finding of personal jurisdiction is the contract that Krohne Fund entered with Simonsen and that is insufficient Simonsen argues that personal jurisdiction cannot be done on a claim by claim analysis and therefore, if the Court has personal jurisdiction over Krohne Fund on two of the claims then the Court has personal jurisdiction over all of the claims.

Krohne Fund has provided no case law to support the contention that a personal jurisdiction analysis is done on a claim by claim analysis and points to Krohne Fund's only contact with Montana which was Axel Krohne, acting on behalf of Krohne Fund, traveling to Billings, Montana to meet Simonsen. However, while Axel Krohne was in Billings, Montana, acting on behalf of Krohne Fund, he entered into a contract with Simonson for Kapidyia to manage a set amount of money given to Simonsen by Krohne Fund. This type of contract specifically falls under Rule 4(b)(1)(E) which states:

> Any person is subject to the jurisdiction of Montana courts as to any claim for relief arising from the doing personally, or through an employee or agent, any of the following acts:
> ***

(E) entering into a contract for services to be rendered or for materials to be furnished in Montana by such person.

Axel Krohne, on behalf of Krohne fund, went to Billings, Montana and entered into a contract with Simonsen that was to be performed within Montana. Krohne Fund has thereby entered into a contract for services from Kapidyia to be performed in Montana. By Krohne Fund's own actions they have purposefully availed themselves of Montana's law and jurisdiction.

Personal jurisdiction is not evaluated on a claim by claim analysis and because this Court has personal jurisdiction over the two claims it therefore has personal jurisdiction over all of the claims against Krohne Fund. Even if a claim by claim analysis were permitted Krohne fund has purposefully availed themselves of Montana law and jurisdiction by entering into a contract with Simonsen that was to be performed in Montana. Thus, Krohne Fund's motion to dismiss Counts I, V, VI, and VII is denied.

II. Motion Four: Defendant Krohne Fund's Rule 13 Motion to Dismiss Due to Failure to Previously Prosecute Compulsory Counterclaims.

A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. *First Bank, (N.A.) v. District Court for Fourth Judicial Dist.*, 226 Mont. 515, 521, 737 P.2d 1132, 1135-1136. Rule 13, M.R.Civ.P., provides:

> (a) Compulsory Counterclaim
>
> (1) *In general.* A pleading must state as a counterclaim any claim that – at the time of service – the pleader has against an opposing party if the claim;
>
> (A) arises out of the transaction or occurrence that is the subject matter of the opposing party's claim; and
>
> (B) does not require adding another party over whom the court cannot acquire jurisdiction.

M.R.Civ.P. 13(a). The purpose of this statute is to avoid multiplicity of suits by requiring the parties to adjust in one action their various differences growing out of any given transaction, and this insures that only one judicial proceeding is required to settle all matters determinable by the facts or law and to bring

all logically related claims into a single litigation. *Id.* The Montana Supreme Court, relying on United States Supreme Court precedent, defines "Transaction" as follows:

> "Transaction" is a word of flexible meaning. It may comprehend a series of many occurrence, depending not so much upon the immediateness of their connection as upon their logical relationship . . . It is the one circumstance without which neither party would have found it necessary to seek relief. Essential facts alleged by appellant enter into and constitute in part the cause of action set forth in the counterclaim. That they are not precisely identical, or that the counterclaim embraces additional allegations . . . does not matter. To hold otherwise would be to rob this branch of the rule of all serviceable meaning, since the facts relied upon by the plaintiff rarely, if ever, are, in all particulars, the same as those constituting the defendant's counterclaim."

First Bank, (N.A.) v. District Court for Fourth Judicial Dist., 226 Mont. 515, 521-522, 737 P.2d 1132, 1136 (1987) (citing *Moore v. New York Cotton Exchange* (1926), 270 U.S. 593, 610, 46 S.Ct. 367, 371, 70 L.Ed. 750, 757).

Krohne Fund asserts that because Simonsen elected not to prosecute his compulsory counterclaims of misappropriation of trade secrets, tortious interference, misrepresentation/fraud, and conspiracy in the earlier lawsuit in Montana Federal District Court (DV 12-04-BLG-RFC) those claims should therefore be dismissed with prejudice.

Simonson concedes that three of the claims it asserted against Krohne Fund (Count I- Misappropriation of Trade Secrets, Count V- Tortious Interference, and Count VI- Misrepresentation/Fraud) were compulsory counterclaims in the Krohne Fund litigation (in the earlier lawsuit (DV 12-04-BLG-RFC)) and should therefore be dismissed. However, Simonsen contends that Count VII (Conspiracy) should not be dismissed because, like the claims for malicious prosecution (Count II) and abuse of process (Count III), the conspiracy claim arose from the Krohne Fund litigation itself rather than the transaction that was litigated in the prior Krohne Fund litigation. In their reply brief, Krohne Fund agrees that the Conspiracy Count VII claim should not be dismissed but asserts for the first time that the Conspiracy claim should instead be limited in scope.

As counsel are aware, if a party files a reply brief that presents arguments or authorities that were not presented in their opening brief, the Court should disregard those arguments because Plaintiff would be deprived of an opportunity to meaningfully respond. *WLW Realty Partners, LLC v. Cont'l Partners VIII, LLC*, 2015 MT 312 ¶20, 381 Mont. 333, 339, 360 P.3d 1112, 1116.

At this time given the pleadings, given Krohne Fund's newly raised scope argument in their Reply Brief, and given Plaintiff's inability to respond to the newly raised argument, the Court will grant Krohne Fund's Motion to Dismiss Count I – Misappropriation of Trade Secrets, Count V – Tortious Interference, and Count VI – Misrepresentation/Fraud, but deny the Motion to Dismiss in regards to Count VII – Conspiracy.

III. Motion Five: Defendant Anthony Birbilis' Motion for Judicial Notice Pursuant to Rule 201(d) Montana Rules of Evidence.

On April 26, 2018, Birbilis filed his Motion to Dismiss and Brief in Support pursuant to Montana Rule of Civil Procure 12(b)(2) and (6). Birbilis included with his filings documents to support his Motion including: (1) documents from separate litigation related to the same events and occurrences which allegedly gave rise to Plaintiff's claims in the instant action; and (2) documents from the bankruptcy of Stuart Simonsen, the alleged assignor of the instant claims to Plaintiff. In his Motion for Judicial Notice also filed on April 26, 2018, Birbilis requests that the Court take judicial notice of the documents and exhibits provided and/or referenced in his briefing. *See, Def. Birbilis's Mot. for Judicial Notice, pg. 2-3.*

Under the Montana Rules of Evidence, a court may take judicial notice of certain facts which are not subject to reasonable dispute in that said facts are either (1) generally known within the territorial jurisdiction of the trial court, or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned. Mont. R. Evid. 201(b). A court shall take judicial notice of a fact if requested and supplied with the necessary information and that necessary information is in accordance with Rule 201(b). *See* Mont. R. Evid. 201(d). Rule 202 of the Montana Rules of Evidence governs judicial notice of law and includes records of any court of this state or of any court of record of

the United States or any court of record of any state of the United States. Mont. R. Evid. 202(b)(6). Facts which are argumentative and/or require additional information to verify their truth will not be judicially noticed. *Leahy v. Dept. of Revenue*, 266 Mont. 94, 101, 879 P.2d 653, 657 (1994). Additionally, facts which are mere conclusory statements on the evidence and law will not be judicially noticed. *Id.*

Birbilis contends in his Motion that the Court should take judicial notice of all of the documents in his Motion for Judicial Notice, specifically those referenced on pages two and three, because (1) the facts contained within the documents provide a sufficient basis for the taking of judicial notice under 201(d); and (2) under Mont. R. Evid. 202(b)(6) judicial notice is permitted of any "[r]ecords of any court of this state or any court of record of the United States or any court of record of any state of the United States." Simonsen argues that Birbillis has not supplied any information that would suggest any of the assertions, allegations, findings, conclusions, or other content of the documents are not subject to reasonable dispute.

When a court takes judicial notice of another court's opinion, it may do so not for the truth of the facts recited therein, but for the existence of the opinion, which is not subject to reasonable dispute over its authenticity. *Lee v. City of Los Angeles*, 250 F.3d 668, 690 (9th Cir. 2001). Here, Birbilis seeks for this Court to take judicial notice of:

- *Krohne Fund, L.P. v. Simonsen, et al.*, United states District Court of the District of Montana, Case No. CV-12-04-BLG-RFC;
- *In re Stuart Michael Simonsen*, United States Bankruptcy Court for the District of Montana, Case No. 14-600015-7;
- *Vaden v. Simonsen (In re Simonsen)*, United States Bankruptcy Court for the District of Montana, Adversary Case No. 14-00020-RBK;
- *Crum v. Simonsen (In re Simonsen)*, United States Bankruptcy Court for the District of Montana, Adversary case No. 14-00025-RBK; and
- *Kaga Investments, S.A., et al. v. Simonsen, et al.*, Supreme Court of the State of New York, New York County, Index No. 650560/2012.

Def. Birbilis's Mot. for Judicial Notice, pg. 2-3

Nowhere does Birbilis mention which documents in the various listed court cases he wishes the Court to take judicial notice of through his Motion. Although, a court can take judicial notice of a court's

opinion this Court cannot take judicial notice of the facts recited in those cases which are subject to reasonable dispute. *See, Lee v. City of Los Angeles*, 250 F.3d 668, 690 (9th Cir. 2001); *In re Marriage of Carter-Scanlon & Scanlon*, 2014 MT 97, ¶23.

A court may not take judicial notice of a fact from a prior proceeding when the fact is reasonably disputed. *In re Marriage of Carter-Scanlon & Scanlon*, 2014 MT 97, ¶23, 374 Mont. 434, 441-442, 322 P.3d 1033, 1038. Here, there are various disputes as to the ownership of Xynaquant. Birbilis claims Simonsen has no ownership interest in Xynaquant and that Simonsen has assigned his interest in Xyanquant in various prior documents. See, *Def. Birbilis's Reply Brief in Support of Mot. for Judicial Notice, ¶3.* Simonsen claims he has standing to bring the instant suit based upon his ownership of the Xynaquant software. *See*, Am. Compl., ¶2. This dispute alone is involved in many of the documents that Birbilis seeks to have the Court take judicial notice of and is therefore subject to reasonable dispute and inappropriate for judicial notice.

Pursuant to Montana Rules of Evidence 201(b) and (d), Birbilis has failed to supply the Court with the necessary information to show that the documents and exhibits Biriblis seeks the Court to take judicial notice of are not subject to reasonable dispute in that said facts are either (1) generally known within the territorial jurisdiction of the trial court, or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned.

Therefore, the Court declines to take judicial notice of matters and exhibits in Birbilis's Motion at this time. *See, Def. Birbilis's Mot. for Judicial Notice, pg.2-3.*

IV. Motion Six: Defendant Anthony Birbilis's Motion to Dismiss Pursuant to Rule 17(a), 12(b)(2) and 12(b)(6).

As a preliminary matter, the following counts against Birbilis have been dismissed under Rule 13 of the Montana Rules of Civil Procedure as provided above: Count I – Misappropriation of trade Secrets; Count V – Tortious Interference; and Count VI – Misrepresentation/Fraud. The following Counts remain

against Birbilis: Count III – Abuse of Process; Count IV – Breach of Fiduciary Duty; Count VI – Fraud; and Count VII – Conspiracy.

Birbilis contends in his Motion that pursuant to Montana Rules of Civil Procedure, Rules 17(a), 12(b)(2) and (6) Birbilis should be dismissed from this action for the following reasons: (1) Simonsen lacks standing to bring the instant matter under Rule 17(a); (2) the Court lacks personal jurisdiction over Birbilis under Rule 12(b)(2); (3) Plaintiff has waived any claim he may have had against Birbilis; (4) Simonsen should be judicially estopped from asserting the instant claim because Simonsen failed to properly disclose the existence of this claim in Simonsen's personal bankruptcy proceedings and benefitted therefrom; and (5) Plaintiff's claims are time barred.

Simonsen argues: (1) under Rule 17(a) Saddlebrook has standing to prosecute claims against Birbilis; (2) this Court has specific personal jurisdiction over Birbilis because Birbillis has committed acts directed at Montana; and (3) Birbilis's affirmative defenses are contested and cannot justify dismissal under Rule 12(b)(6) because Birbilis's motion provides no basis for dismissing the claims against him.

A. Real Party in Interest Under Rule 17(a).

Pursuant to the Montana Rules of Civil Procedure 17(a)(1) an action must be prosecuted in the name of the real party in interest. The following may sue in their own names without joining the person for whose benefit the action is brought:

(A) an executor;

(B) an administrator;

(C) a guardian;

(D) a bailee;

(E) a trustee of an express trust;

(F) a party with whom or in whose name a contract has been made for another's benefit; and

(G) a party authorized by statute.

The court may not dismiss an action for failure to prosecute in the name of the real party in interest until after an objection, a reasonable time has been allowed for the real party in interest to ratify, join, or be substituted into the action. After ratification, joinder, or substitution, the action proceeds as if it had been originally commenced by the real party in interest. M.R.Civ.P., Rule 17(a)(3).

Birbilis contends Simonsen, and any of Simonsen's assignees, lack standing to bring the instant action because at the time the action was filed, Simonsen, and his assigns, were the rightful owners of Xynaquant, and Simonsen, and his assigns, constituted a real party in interest as required under Montana Rule of Civil Procedure 17(a) because any such claim would have been property of the bankruptcy estate.

Simonsen argues that (1) Simonsen does have an ownership interest in Xynaquant, and (2) under Rule 17(a) the action only has to be prosecuted in the name of the real party in interest and not filed in the name of the real party in interest as Birbilis claims and Simonsen's claim is in accordance with Rule 17(a).

Birbilis's argument that Saddlebrook is not a real party in interest and cannot bring this instant action in unpersuasive. After Simonsen filed for bankruptcy, Simonsen's claims transferred to Grizzly Peak Limited Partnership. Grizzly Peak thereafter assigned the claims to Saddlebrook. Therefore, under Rule 17(a), based on the information before the Court, Saddlebrook is a real party in interest.

B. Specific Personal Jurisdiction under 12(b)(2).

In Montana, personal jurisdiction embodies principles of both general and specific jurisdiction. M.R.Civ.P., Rule 4(b)(1). Specific jurisdiction can be established even though a defendant maintains minimum contacts with the forum as long as the plaintiff's cause of action arises from any of the activities enumerated in Rule 4(b)(1), M.R.Civ.P., and the exercise of jurisdiction does not offend due process. *Id.* at 84.

As was previously discussed *supra*, a nonresident defendant purposefully avails himself of the benefits and protections of the laws of the forum state when he takes voluntary action designed to have an effect in the forum. *Simmons Oils Corp. v. Holly Corp.*, 244 Mont. 75, 86, 796 P.2d 189, 195 (1990). A

nonresident defendant does not purposefully avail himself of Montana's laws when his only contacts with Montana are random, fortuitous, attenuated, or due to the unilateral activity of a third party. *Id.*

Birbilis claims the Court cannot exercise personal jurisdiction over him because under Mont. R. Civ. P. Rule 4(b)(1), Birbilis (1) has not transacted any business in Montana; (2) did not commit any tortious acts in Montana; and (3) did not enter into any contracts in Montana. Simonsen in turn argues this Court can exercise personal jurisdiction over Birbilis because (1) Birbilis chose to travel here voluntarily to testify in the previous Krohne Fund litigation, and (2) Birbilis made five trips to Montana to meet with Simonsen regarding ongoing business matters that would be specifically related to the claims asserted in Simonsen's Complaint. Simonsen argues that Birbilis has therefore availed himself of Montana and its laws.

Birbilis committed acts in the forum by which he purposefully availed himself of the privilege of conducting activities in the forum thereby invoking its laws; the claims arise out of or resulted from Birbilis's forum-related activities; and the exercise of jurisdiction over Birbilis is reasonable. *Simmons v. State*, 206 Mont. 264, 276, 670 P.2d 1372, 1378 (1983). Most importantly the allegations in Count IV – the abuse of process claim – alleges, "Defendant's [including Birbilis] willfully used legal process not proper in the regular conduct of judicial proceedings for the ulterior purpose of wrestling possession, control, or ownership of Xynaquant to themselves." Plaintiff's Am. Comp., ¶44. This cause of action against Birbilis is directly related to Birbilis's contact with Montana. As a nonresident defendant, Birbilis purposefully availed himself of the benefits and protections of the laws of Montana when he voluntarily came to Montana to testify against Simonsen on behalf of Krohne Fund which was designed to have an effect in Montana. *Simmons Oils Corp.*, 244 Mont. at 86, 796 P.2d at 195. Further, Birbilis's contacts with Montana were not random, fortuitous, attenuated, or due to the unilateral activity of a third party. *Id.* In addition, the facts as alleged demonstrate that Birbilis also chose to come to Montana on five separate occasions to meet with Simonsen, and those contacts in Montana directly relate the claims Simonsen is asserting against Birbilis.

By coming to testify in Montana against Simonsen, and by coming to Montana to meet with Simonsen related to work for Kapidyia, Birbilis has availed himself of Montana laws and jurisdiction is appropriate over Birbilis.

C. Affirmative Defenses and Dismissal Under 12(b)(6).

A motion to dismiss under Rule 12(b)(6) allows the district court to examine only whether a claim has been adequately stated in the complaint. *Meagher v. Butte-Silver Bow City-Cty.*, 2007 MT 129 at ¶15. As a result, the court is limited to an examination of the contents of the complaint in making its determination of adequacy. *Id.*

Birbilis contends the Court can dismiss the claims against him on the basis of three affirmative defenses: waiver, estoppel and statute of limitations. Simonsen argues that none of these defenses are supported and should therefore be rejected.

Specific to the affirmative defense of waiver, Birbilis claims that on January 5, 2017, litigation between Simonsen and Birbilis was settled by agreement of the parties where Simonsen explicitly agreed "that any claim, counterclaim or otherwise that he or the Corporate Defendants may have in this action, including but not limited to such claim against the Axioquantum Plaintiffs and Birbilis, is discontinued with prejudice. [2] The plaintiffs in the Kaga Litigation sought an injunction against Simonsen for violating the Axiodyn and Axioquantum Operating Agreements upon Simonsen's use of Xynaquant for his own personal benefit and in connection with Kapidyia and Kapidyia's clients. Simonsen filed a counterclaim against Birbilis alleging that on multiple instances between March 2008 and the end of 2011, Birbilis suspended computerized trading and substituted his own judgment as to the trades. However, this case and the resulting settlement agreement fail to mention Krohne Fund or any trading Birbilis allegedly did for Krohne Fund while working under Kapidyia that would be included under this settlement agreement.

[2] On February 28, 2012 certain entities controlled by Vardinoyannis intiated a derivative action on behalf of Axiodyn and Axioquantum in the Supreme Court of the State of New York, New York County. *Kaga Investments, S.A., et al. V. Simonsen, et all.*, Index No. 650560/2012. ("Kaga Litigation")

In this action, Simonsen's Amended Complaint contains similar language that: "It was Birbilis who made the manual trades in the Krohne Fund account that caused the Fund to lose money when algorithmic trading would have generated profits." Am. Compl. ¶28.

In referencing the settlement documents, the Stipulation of Settlement was entered into between Axiodyn Capital Partners LLC., Axioquantum Capital Partners LLC., and Stuart Simonsen. The settlement agreement involved Axiodyn and Axioquantum, which were two funds that were set up prior to Simonsen and Birbilis forming Kapidyia Capital Partners, LLC. It was Kapidyia Capital Partners LLC, and not Axiodyn or Axioquantum, that managed Krohne Fund's accounts. Therefore, Simonsen's agreement that, "any claim, counterclaim or otherwise that he or the Corporate Defendants may have in this action, including but not limited to such claim against the Axioquantum Plaintiffs and Birbilis, is discontinued with prejudice" is not applicable to any claims or counterclaims regarding Kapidyia. Therefore, this Court is not required to enforce the stipulation entered in the Kaga Litigation and Simonsen has not waived his claim against Birbilis regarding the management of the Krohne Fund account.

Next, Birbilis claims this Court should find that Simonsen is judicially estopped from asserting the instant action because: (1) Simonsen has failed to disclose claims against Defendant in the Simonsen Bankruptcy, and now seeks to bring suit upon those claims herein, through a corporate alter ego; (2) there was judicial acceptance based upon Simonsen's prior position, as the aforementioned settlement agreement was approved; and (3) Simonsen clearly benefited because he was able to settle the claims made by the Trustee and preserve the claims asserted herein for his own personal benefit.

Birbilis's Motion to Dismiss under Rule 12(b)(6) only allows this Court to examine whether a claim has been adequately stated in the Complaint. *Meagher*, 2007 MT ¶15. Birbilis's statements do not rely on anything pled in the Complaint and do not state that the Complaint has not been sufficiently plead. As a result, the Court is limited to an examination of the contents of the Complaint in making its determination of adequacy. The Court finds that the claims against Birbilis have been adequately stated

in the Complaint, and Simonsen is thereby not estopped from bringing the instant claims against Birbilis at this time.

Finally, with respect to Birbilis claims that all of the acts complained of by Simonsen in the instant action occurred either on or before December 2011 and under each claim are therefore barred by the statute of limitations, the Court is also unpersuaded.

Simonsen claims the instant action is not time barred because Birbilis has not shown that all elements of the claims Simonsen asserts against him had occurred by December 2011.

Birbilis's argument that all acts complained of by Simonsen occurred before December 2011 is unpersuasive. The factual allegations that related to Count III – Abuse of Process; Count IV – Breach of Duties as Member of LLC; and Count VII – Conspiracy did not accrue until the resolution of the Krohne Fund Litigation (DV 12-04-BLG-RFC) which was ultimately resolved in June 2014. This case was filed a year later which makes these claims timely filed based on the information before the Court.

Therefore, specific to Birbilis's Motion to Dismiss the Pursuant to Rule 17(a), 12(b)(2) and 12(b)(6), the Court finds: (1) that Saddlebrook is a real party in interest and can prosecute the instant action; (2) that Birbilis is subject to the jurisdiction of this Court; and (3) the affirmative defenses of waiver, estoppel, and statute of limitations do not provide a basis for dismissing the claims against him under 12(b)(6) M.R.Civ.P.

CONCLUSION

Based upon the preceding discussion of Montana law and the documents on file, the following is ordered:

1. Motion #1: Defendant David Tolliver's Rule 12(b)(2) Motion to Dismiss with Prejudice for Lack of Personal Jurisdiction is **GRANTED.**
2. Motion #2: Defendant Axel Krohne's Motion to Dismiss pursuant to Rule 12(b)(5) and 12(b)(2) M.R.Civ.P. is **GRANTED.**

3. Motion #3: Krohne Fund's Rule 12(b)(2) Motion to Dismiss Claims for Lack of Personal Jurisdiction is **DENIED.**
4. Motion #4: Defendants Krohne Fund and Axel Krohne's Rule 13 Motion to Dismiss Claims Barred Due to Failure to Previously Prosecute Compulsory Counterclaims is **GRANTED** as to Count I – Misappropriation of Trade Secrets, Count V – Tortious Interference, and Count VI – Misrepresentation/Fraud, but is **DENIED** as to Count VII – Conspiracy.
5. Motion #5: Defendant Anthony Birbilis' Motion for Judicial Notice Pursuant to Rule 201(d) of the Montana Rules of Evidence is **DENIED.**
6. Motion #6: Defendant Anthony Birbilis' Motion to Dismiss Pursuant to Rule 12(b)(2) and (6) of the M.R.Civ.P. is **DENIED.**

DATED this 5th day of December, 2019.

HON. JESSICA FEHR, DISTRICT JUDGE

cc: T. Thomas Singer
Kenneth Tolliver
Eric Nord
Kelly Gallinger

CERTIFICATE OF SERVICE
This is to certify that the foregoing was duly served by mail or by hand upon the parties or their attorneys of record at their last known address on this 5th day of December, 2019.

By: Beverly J. Moore
Judicial Asst. to HON. JESSICA FEHR