IN THE SUPREME COURT OF THE STATE OF MONTANA
No. DA 23-0246

SADDLEBROOK INVESTMENTS, LLC, as Assignee of STUART M. SIMONSEN,

Plaintiff and Appellant,

v.

KROHNE FUND L.P.,

Defendant and Appellee.

APPELLANT'S OPENING BRIEF

On Appeal from the Montana Thirteenth Judicial District Court, Yellowstone County, the Honorable Jessica T. Fehr, Presiding

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2. Did the District Court err in granting summary judgment against Saddlebrook's claim for malicious prosecution based on judicial estoppel when that claim accrued after the trustee in Simonsen's bankruptcy had assigned and abandoned it?

3. Did the District Court err in granting summary judgment against the claim for abuse of process that the trustee had authorized and pursued?

STATEMENT OF THE CASE

Stuart Simonsen developed an algorithm-based securities trading system in which Defendant Krohne Fund, L.P., invested millions of dollars. Krohne Fund ("Krohne" or "Fund") sued Simonsen in 2012 for fraud and related claims alleging Simonsen had made manual trades that undermined the performance of the algorithmic trading program and caused Krohne financial loss. [1] However, Fund's manager, Axel Krohne, testified at trial that he didn't have any evidence to support the claims at the time he authorized the suit to be filed, or at any time after that.

[1] *Krohne Fund, LP v. Simonsen*, U.S. District Court, District of Montana, Billings Division, Cause No. CV-12-04-BLG-SEH. The case was initially assigned to Hon. Richard F. Cebull, who was later replaced by Hon. Sam E. Haddon.

After a trial, a Ninth Circuit appeal, and an order granting summary judgment, Krohne's claims against Simonsen were finally dismissed with prejudice in late 2017.

Meanwhile, the harm caused by Krohne's lawsuit led Simonsen to declare bankruptcy. Consequently, his assets, including claims he had against Krohne, became property of the bankruptcy estate managed by Trustee Darcy Crum. In 2015, the Trustee authorized this case to be filed in order to preserve the claims against Krohne from being time barred.

A year later, the Trustee settled an adversary proceeding she had filed against Grizzly Peak, L.P., an entity Simonsen's ex-wife managed. In return for a $400,000 payment to the estate, the Trustee assigned to Grizzly Peak "any and all claims … against … any … person or entity, known or unknown." Settlement Agreement (CR 88, Ex. 24, ¶ 10).[2] Later, the Trustee filed a notice of intent to abandon the Krohne litigation, which was then pending before the Ninth Circuit. Though notice of both developments went to all creditors, including Krohne, no objection was filed to either action.

Thus, before Krohne's suit was dismissed, all claims Simonsen had against Krohne were assigned to Grizzly Peak. Soon after the dismissal, Grizzly Peak assigned the claims to Saddlebrook Investments, LLC, as part of an agreement

[2] All references to the Case Record (CR) are to the district court docket entry number.

dissolving Simonsen's marriage. Shortly thereafter, Saddlebrook filed and served the Amended Complaint in this action, asserting the malicious prosecution claim that had accrued just months earlier, as well as the abuse of process claim that the trustee had authorized and pursued. The bankruptcy case closed later that year.

Krohne's counsel conducted little discovery and made a conscious decision not to seek summary judgment. However, in January 2022, seven months after the summary judgment deadline, Krohne substituted counsel and sought leave to amend its answer and file a late motion for summary judgment asserting a judicial estoppel defense Krohne had not pled, and on which no discovery had been taken by any party. Krohne was allowed to proceed on its new theory, which was based on the argument that Saddlebrook could not pursue this action because the claims were not disclosed in Simonsen's bankruptcy. The District Court agreed and granted summary judgment. Order (CR 106); Judgment (CR 118). Saddlebrook appeals from that Order and the Judgment.

STATEMENT OF THE FACTS

The "facts" presented in the District Court's order granting summary judgment misstate the procedural history of the underlying case and other undisputed evidence. Of course, this case was not presented to the District Court on the merits; there was no trial, and the summary judgment motion did not address the merits. As a result, the record does not include evidence refuting the

District Court's misstatements of fact. Saddlebrook will address the misstatements in footnotes and is willing to supplement the record if appropriate.

To assist this Court by providing some context, Saddlebrook will summarize relevant factual allegations in the Amended Complaint before restating the undisputed facts that were presented to the District Court.

Factual Allegations in Complaint

1. Krohne Fund Invests.

Stuart M. Simonsen developed a proprietary, algorithm-based securities trading system best known as Xynaquant. CR 7, ¶¶ 2, 10-11.[3] Around 2007, Simonsen met a commodities trader from New York named Anthony Birbilis, who would later partner with Simonsen to form Kapidyia Capital Partners, LLC, to market investment services utilizing Xynaquant. *Id.*, ¶¶ 3, 12-13. In August 2011, Axel Krohne, the manager of Defendant Krohne Fund, LP, was introduced to Simonsen through Mr. Krohne's friend Sean Wright. Mr. Krohne met Simonsen briefly, decided to invest with Kapidyia, and signed a Managed Account Agreement that gave Kapidyia discretionary authority over account trades. *Id.*, ¶¶

[3] The District Court describes Simonsen as an investment manager, but no party in this case made that assertion, and there is no evidence to support it. Also, it is not true. Judge Haddon found that Simonsen "designed and improved the trading software … now called Xynaquant and trading strategies, including the Optimus SLR 10 protocol." CR 88, Ex. 8, p. 2. At the trial before Judge Haddon, Simonsen testified specifically that he is not an investment adviser, but that transcript is not in the record. Trial Tr., 492:5-15.

4-5, 14-18.[4] The account quickly turned a profit, so Mr. Krohne increased his investment to a notional value of $15,000,000. *Id.*, ¶ 19.

Around that time, Birbilis provided instruction about Xynaquant to Mr. Krohne along with Wright, who then was able to access the program, thereby observing the algorithm and mimicking the trades. *Id.*, ¶ 29. Wright and his friend David Tolliver were interested in acquiring Xynaquant and made efforts to pressure Simonsen to sell, as evidenced by Tolliver's email to Wright saying, "a guy whose been kicked in the nuts is probably more likely to accept / ask for help at a reasonable price". *Id.*, ¶ 30.

2. Krohne Fund Stops Trading and Sues Simonsen.

After a few months, the performance of Kapidyia's account deteriorated, and Krohne stopped trading in Xynaquant. *Id.*, ¶ 20[5].

In January 2012, Krohne Fund filed suit in Montana Federal District Court, asserting fraud and other claims. Krohne alleged that Simonsen had intentionally caused the losses by making manual trades in the account (as opposed to trades determined by the algorithm). *Id.*, ¶ 21. Simonsen denied he made manual trades

[4] The District Court asserts that Krohne "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." In fact, Alex Krohne testified that Simonsen made no such representation or reassurance, and Judge Haddon's findings state the opposite of what the District Court asserts. CR 88, Ex. 8, ¶ 8; CR 88, Ex. 21, pp. 6-7.

[5] The District Court asserts that "[n]either Simonsen nor Birbilis could explain the differences [in performance] relative to the Xynaquant program." In fact, Judge Haddon found there was no evidence that Krohne asked Simonsen about this. CR 88, Ex. 21, p. 7, n. 24.

and presented evidence proving the manual trades had been executed by Birbilis. *Id.*, ¶ 28.

Statement of Undisputed Facts

The claims Saddlebrook is currently pursuing in this action are premised on Krohne's federal litigation, where Mr. Krohne admitted he authorized the suit to be filed and proceeded to trial without having any evidence to support his claims. *Id.*, ¶¶ 22-33, 38-46, 58-60.

Saddlebrook had no opportunity to present to the District Court evidence proving its claims in this case because Krohne moved for summary judgment based on judicial estoppel, and the District Court granted that motion even though the motion was made after discovery closed. Even so, Saddlebrook attached undisputed evidence that should have defeated the affirmative defense to its briefing on the summary judgment motions. That evidence is presented here.

3. Simonsen Files for Bankruptcy; the Trustee Takes Control of the Litigation.

A little over a year into the federal litigation, Simonsen discovered he had viable claims against Krohne and others for contractual breaches, misappropriation of trade secrets and other causes of action. CR 96, Ex. 1; s*ee also*, *id.*, Ex. 2, p. 3. Simonsen moved to amend the scheduling order and sought leave to file an amended answer with new counterclaims and third-party claims. CR 88, Ex. 1. The motion to amend the scheduling order was denied, and the case proceeded to

trial on Krohne's claims.[6]

However, a few days before trial, the litigation was stayed when Simonsen filed a chapter seven petition for bankruptcy.[7] CR 88, Ex. 5. Accordingly, the claims Simonsen had attempted to assert in the federal litigation became part of the bankruptcy estate. Krohne moved to lift the stay, and trial was reset. CR 88, Ex. 7. Trial concluded on July 2, and judgment was entered two weeks later in favor of Simonsen, dismissing Krohne's claims with prejudice. CR 88, Ex. 8. Krohne subsequently appealed to the Ninth Circuit.[8] CR 88, Ex. 11. After counsel received approval and authorization from the Trustee, Simonsen cross-appealed, seeking review of the federal District Court's decision regarding Simonsen's proposed counterclaims and third-party claims.[9] CR 88, Ex. 13; Aff. Crum (CR 97, ¶ 6).

4. The Trustee Settles the Adversary Proceeding, Assigning All Claims to Grizzly Peak, which Later Assigns Them to Saddlebrook.

While the appeals were pending, the Trustee in Simonsen's bankruptcy case litigated an adversary complaint against entities in which Simonsen had ownership

[6] Leave regarding the proposed counterclaims was not explicitly denied; however, Simonsen was discouraged from litigating them in order to avoid disrupting the case's schedule. Tr. Jun. 6, 2013; CR 88, Ex. 4, pp. 47-51.
[7] *In re Stuart Michael Simonsen*, U.S. Bankruptcy Court, District of Montana, Cause No. 14-60015-7-BPH. The case was initially assigned to Hon. Ralph B. Kirscher, who was later replaced by Hon. Benjamin P. Hursh.
[8] *Krohne Fund v. Stuart Simonsen, et al.*, U.S. Court of Appeals, 9th Circuit, Cause No. 14-35668.
[9] Cause No. 14-35713.

or management interests, including Grizzly Peak, L.P.[10] CR 88, Ex. 28. In March 2016, the adversary proceeding was settled under an agreement that broadly assigned nearly all of the Trustee's claims to Grizzly Peak, including any claims against Krohne.[11] CR 88, Ex. 24, ¶ 10. In return for a $400,000 payment to the estate, the Trustee assigned to Grizzly Peak "any and all claims … against … any … person or entity, known or unknown." CR 88, Ex. 24, ¶ 10.[12]

Notice of the settlement was provided to creditors, none objected, and the settlement was approved the following month. Order (CR 88, Ex. 25). Later that year, counsel checked in with the Trustee to confirm the estate's position with respect to the claims against Krohne, which were then being pursued through Simonsen's cross-appeal in the 9th Circuit. The Trustee replied in an email, "I don't think the estate has the funds or stamina to keep the case open for as long as it seems it will take this to resolve. I can't remember what if anything I did on the Krohne case as an asset of the bankruptcy. I will look into it … and see if I need to abandon it." Dec. 15, 2016 emails (CR 88, Ex. 17); Aff. Crum (CR 97, ¶ 10). Shortly thereafter, the Trustee filed a notice to abandon the Krohne litigation and

[10] *Darcy M. Crum v. Grizzly Peak, L.P. et al.*, Adv. Proc. No. 14-00025-BPH.
[11] The Settlement Agreement provided for the Trustee to retain claims or potential claims against a specific list of parties which did not include Axel Krohne or Krohne Fund. Aff. Crum (CR 97, ¶ 9).
[12] The District Court asserts that Simonsen "actively assigned" his claims against Krohne Fund "to Grizzly Peak" and "failed to reopen the bankruptcy … to amend his schedules." Order (CR 106, p. 11). But Simonsen did not own the claims when they were assigned to Grizzly Peak. The Trustee did that. Aff. Crum (CR 97, ¶ 9); CR 88, Ex. 24, ¶ 10.

appeal as burdensome and of inconsequential value to the estate, which was approved without objection. CR 88, Ex. 18, p. 1; Aff. Crum (CR 97, ¶ 10).

While the appeals and bankruptcy proceedings were pending, this action had been filed in April 2015. CR 1. Prior to filing, undersigned counsel sought and received approval and authorization from his client, who was the Trustee since Simonsen's claims belonged to the bankruptcy estate. Aff. Crum (CR 97, ¶ 8); Aff. Simonsen (CR 98, ¶ 6); Tr. Feb. 17, 2022, 15:16-17, 15:25, 17:13-14. In an email exchange discussing the Complaint, the Trustee expressed her approval to file, stating, "I don't know the value of the claims but I agree we need to preserve them." Apr. 2, 2015 emails (CR 88, Ex. 16); *see also* Aff. Crum (CR 97, ¶ 8); Complaint (CR 1, ¶¶ 88-96, 107-109). Since her intent was to preserve the claims against Krohne, no further action was taken in this case until the federal litigation resolved.

5. Krohne Fund's Suit against Simonsen Is Finally Dismissed; Saddlebrook Continues to Pursue the Litigation Against Krohne.

The Ninth Circuit reversed Judge Haddon in part. On remand, Simonsen moved for summary judgment, which was entered on October 16, 2017. CR 88, Ex. 22.

A few months later, after Grizzly Peak assigned the claims to Saddlebrook in Simonsen's divorce, Saddlebrook filed and served the Amended Complaint. CR 7,

98, ¶¶ 10-11; CR 97, ¶¶ 9-11; CR 86, Ex. L[13].

Motions to dismiss were filed. While they were pending, the bankruptcy finally closed at the end of 2018. CR 88, Ex. 23. About the same time, the District Court in this case dismissed all claims except those for malicious prosecution, abuse of process, and conspiracy to commit malicious prosecution and abuse of process arising from Krohne's federal suit. Order (CR 43, p. 24). About a year later, Saddlebrook requested a scheduling conference, and the Court entered a scheduling order that set trial for October 14, 2021 and fixed May 11, 2021 as the close of discovery and June 1, 2021 as the deadline for filing summary judgment motions. CR 59.

As the June 1 summary judgment deadline neared, Krohne's counsel asked for a one-week extension, which was granted, but Krohne did not file a motion, explaining in an email that "[a]s we did not believe we could dispose of all claims on summary judgment, we decided not to file." Jun. 7, 2021 emails (CR 88, Ex. 26).

On September 20, the District Court vacated the October trial date because the case was a "procedural cluster", and a criminal trial was set for the same day.

[13] The District Court states that Krohne's suit "ultimately resolved in 2014 in favor of Simonsen." Order (CR 106, p. 5). In fact, it was not resolved until three years later in November 2017 after Simonsen prevailed on his post-remand summary judgment motion, and Krohne filed no appeal. Aff. Crum (CR 97, ¶ 11); CR 88, Exs. 21-22.

CR 69.

6. Krohne's New Counsel Presents a New and Unpled Affirmative Defense.

The following month Krohne filed a notice of substitution of counsel. Another attorney from the same firm stepped in and immediately filed a motion to vacate the trial that was then scheduled for March. Notice (CR 82); Motion (CR 83). Krohne next sought leave to file an amended answer and a related motion for summary judgment asserting a new affirmative defense of judicial estoppel. Motion (CR 85); Motion (CR 86); *see also* Tr. Feb. 17, 2022, 13:15-17.[14] Krohne's new counsel asserted that he "determined" it was "necessary" to amend Krohne's answer when he reviewed the matter and came to believe that "Saddlebrook [was] attempting to manipulate the court and take a position inconsistent to Simonsen's position in his bankruptcy." Tr. Feb. 17, 2022, 13:15-17; Motion (CR 85, p. 4).

Krohne had not deposed Simonsen and had no direct evidence regarding Simonsen's motivations. Krohne's counsel complained that prior counsel had conducted insufficient discovery without acknowledging that he sought summary

[14] "[E]stoppel is an affirmative defense which must be pled and proved by the party raising it." *Booth v. Argenbright*, 225 Mont. 272, 279, 731 P.2d 1318, 1322 (1987) (citing Rule 8(c), M.R.Civ.P.)

judgment on an affirmative defense for which no discovery had been taken.[15] Counsel's five-page motion consisted mostly of conclusory statements. CR 85. His request for leave to file a motion for summary judgment seven months after the June 2021 deadline was a four-page pleading, which again consisted almost entirely of conclusory statements. CR 86. Saddlebrook opposed both motions.

The District Court heard oral argument and then amended the scheduling order to allow Krohne to move for summary judgment based on judicial estoppel. Scheduling Order (CR 93). The only reason the District Court offered for allowing the motion was that "[h]aving reviewed [Krohne's] motion for leave to file a late motion for summary judgment … based on the good cause presented in the filings [and] at oral argument, the Court will allow the filing".[16] *Id.*

Krohne and Saddlebrook filed cross-motions for summary judgment. The District Court granted Krohne's motion and denied Saddlebrook's on the grounds that Simonsen had actual knowledge of the claims against Krohne during his bankruptcy, so his "decision" to not formally schedule the claims was an inconsistent position "done to deceive the bankruptcy court and his creditors". Order (CR 106, p. 9). The District Court reasoned that Simonsen had "actual

[15] See Tr. Feb. 17, 2022, 11:21-12:6. Later, counsel admitted Saddlebrook had disclosed its intent to use the discovery from the federal action, and the District Court suggested he confer with counsel to obtain those materials. *Id.*, 23:9-24:21.

[16] The Order also stated that an order regarding the motion to amend was "forthcoming", but no written order ever issued.

knowledge" because he had cooperated with "his" attorney[17] in preserving the claims, and he had knowledge through "his" attorney because counsel communicated with the Trustee and filed this action. *Id.*, 12. The Court also said Simonsen had "actively assigned [the claims] to Grizzly Peak Limited Partnership"[18] and failed to "reopen the bankruptcy" to amend his schedules to include them. *Id.*, 11.[19]

Saddlebrook appeals from the Order granting summary judgment in favor of Krohne and the judgment in favor of Krohne. Judgment (CR 118).

STANDARD OF REVIEW

"A district court's ruling on a motion for leave to amend is reviewed for an abuse of discretion." *Seamster v. Musselshell Cnty. Sheriff's Office*, 2014 MT 84, ¶ 6, 374 Mont. 358, 359-60, 321 P.3d 829, 830. Likewise, this Court "review[s] a district court's decision regarding a motion to amend a complaint for abuse of discretion." *Hickey v. Baker Sch. Dist. No. 12*, 2002 MT 322, ¶ 12, 313 Mont. 162, 165, 60 P.3d 966, 969.

[17] At that time, counsel represented the Trustee, not Simonsen. Aff. Simonsen (CR 98, ¶ 6).
[18] The assignment was made by the Trustee, not Simonsen. Aff. Crum (CR 97, ¶ 9); CR 88, Ex. 24, ¶ 10.
[19] Throughout its order, the District Court mistakenly treats Simonsen and Saddlebrook as the same entity, asserting they are "interchangeable". CR 106, p. 1, n. 1. For example, it refers to both Simonsen and Saddlebrook as the plaintiff in this matter. *Id.*, pp. 2 and 6. Saddlebrook is a distinct legal entity. § 35-8-201, MCA. Under long-established law, "a legal entity … is separate from the agents who act on its behalf…." *Zempel v. Liberty*, 2006 MT 220, ¶ 18, 333 Mont. 417, 424, 143 P.3d 123, 129.

This Court "review[s] summary judgment orders de novo, performing the same M. R. Civ. P. 56 analysis as the district court." *Kaul v. State Farm Mut. Auto. Ins. Co.*, 2021 MT 67, ¶ 12, 403 Mont. 387, 391, 482 P.3d 1196, 1199.

SUMMARY OF ARGUMENT

The District Court abused its discretion in allowing Krohne to assert a judicial estoppel defense because Krohne's substitution of counsel was not reasonable justification for raising an unpled and inapplicable defense nearly four years into the litigation, long after the deadlines for completing discovery and summary judgment motions had passed and just two months before trial was then set.

Furthermore, even if the District Court had not abused its discretion by allowing Krohne to assert an unpled defense, the Court erred in granting summary judgment to Krohne against all of Saddlebrook's claims based on that defense. First, the Court erred by misstating facts, treating Simonsen and Saddlebrook interchangeably, applying the factors this Court has articulated to govern judicial estoppel incorrectly, and failing to consider whether the "inconsistent position" Simonsen allegedly took was attributable to mistake or inadvertence.

Second, judicial estoppel does not bar Saddlebrook's malicious prosecution claim because that claim did not accrue until Krohne's suit was terminated in Simonsen's favor, by which time the claim already had been assigned to Grizzly

Peak.

Third, while the abuse of process claim had accrued prior to Simonsen's bankruptcy and was not disclosed there, that omission was obviated because the Trustee pursued the claim on behalf of Simonsen's bankruptcy estate and creditors.

In short, the District Court failed to consider the Trustee's acts, which also included assigning the claims in return for consideration of $400,000 to Grizzly Peak – a creditor in Simonsen's bankruptcy – as well as later abandoning the claims. There is no reason Simonsen's bankruptcy schedules should have a preclusive effect on the assignee (Saddlebrook) of a non-debtor creditor where the claims were received in exchange for a payment of $400,000 to the estate.

ARGUMENT

The District Court abused its discretion by granting Krohne's untimely motions to assert the judicial estoppel defense and erred as a matter of law by granting summary judgment for Krohne based on that defense. Judicial estoppel does not apply because the Trustee pursued, then assigned, and finally abandoned the claims Saddlebrook is pursuing against Krohne.

I. Krohne's Prejudicial and Belated Assertion of Judicial Estoppel Lacked Reasonable Justification and Was Futile.

Although Rule 15(a), M.R.Civ.P., says the court should freely give leave when justice so requires, this Court has said more than once that "this does not mean that a court must automatically grant a motion to amend." *Rolan v.*

New West Health Servs., 2017 MT 270, ¶ 15, 389 Mont. 228, 405 P.3d 65 (quoting *Kershaw v. Mont. Dept. of Transp*., 2011 MT 170, ¶ 25, 361 Mont. 215, 257 P.3d 358). Pertinent circumstances justifying denial include undue delay, undue prejudice to the opposing party, and futility of amendment. *Id.*

Here, the District Court granted leave without offering reasons for doing so. This Court has held that a district court's failure to offer a valid reason for its ruling on a motion for leave to amend can be an abuse of discretion. *See, e.g.*, *Gursky v. Parkside Prof'l Vill*., 258 Mont. 148, 152, 852 P.2d 569, 571 (1993). Even after asking Krohne's counsel about prejudice to Plaintiff at the hearing[20], the District Court failed to explain how Krohne's nominal rationale for seeking leave to amend on the verge of trial could possibly outweigh the obvious prejudice to Plaintiff.

Furthermore, the rationales that might have been offered to justify the Court's decision both to amend the scheduling order and allow Krohne to seek summary judgment on an unpled affirmative defense do not survive scrutiny.

A. Krohne Lacked Reasonable Justification or Explanation for Not Asserting Judicial Estoppel Earlier.

Krohne has never explained why the substitution of its counsel after a decade of representation by the same firm against Simonsen and his successors in

[20] Tr. Feb. 17, 2022, 9:19-10:3.

interest could justify its untimely assertion of judicial estoppel. Krohne's former attorney admitted Krohne decided not to file summary judgment because "we did not believe we could dispose of all claims on summary judgment." Jun. 7, 2021 emails (CR 88, Ex. 26). Krohne had almost four years between being served with the Amended Complaint and filing its motion for leave in which it could have developed a record and asserted the affirmative defense of judicial estoppel.

Krohne did not raise the defense until all pretrial deadlines had passed and trial was only two months away. Only then did substitute counsel determine based on his "review, research, and … information" that it was "necessary to file". Tr. Feb. 17, 2022, 13:15-17. That was too late. Discovery had been closed for months. Neither party had explored the issue of judicial estoppel through written requests or depositions. Saddlebrook was forced to respond by relying on affidavits, as well as emails and pleadings that had not been produced in discovery, all because Krohne had new counsel with a half-baked legal theory.

As this Court held in *Rolan v. New W. Health Servs*., 2017 MT 270, ¶ 19, 389 Mont. 228, 233, 405 P.3d 65, 68, "new counsel does not excuse an inopportune request for amendment when those defenses were available to original counsel".

B. Saddlebrook Was Prejudiced by Krohne's Late Assertion.

In *Rolan*, this Court stated that "a party's prolonged delay in adopting a new legal theory is prejudicial to the opposing party…," "that new counsel does not excuse an inopportune request for amendment when those defenses were available to original counsel," and that "a district court should balance the alleged prejudice to the opposing party against the rationale of the party seeking leave to amend." *Id.*, ¶¶ 19-20.

When a proposed amendment "presents a new legal theory, the test for undue prejudice is whether the opposing party expended substantial effort and expense that would be wasted if the new theory was allowed. Prolonged delay and the stage of proceeding alone do not warrant denial; the key is whether the party's efforts and expenses are wasted in allowing the new legal theory to proceed." *Diana's Great Idea, Ltd. Liab. Co. v. Jarrett*, 2020 MT 199, ¶ 18, 401 Mont. 1, 9, 471 P.3d 38, 43 (internal citations omitted).

In *Rolan*, the defendant sought and obtained leave to amend to assert an affirmative defense – ERISA preemption – that was potentially dispositive. The district court granted leave, but this Court reversed, finding the district court abused its discretion by failing to determine if undue delay, bad faith, undue prejudice to the plaintiff, or futility of the amendment existed. *Rolan*, ¶ 17. This Court noted it has "upheld a District Court's denial to amend to include an

affirmative defense, even if such defense could apply," and said, "If we allowed amending an answer any time an affirmative defense applied it would effectively eliminate M. R. Civ. P. 8(c)." *Id.*, ¶ 18 (internal citations omitted).

This Court ultimately concluded the amendment in *Rolan* was prejudicial and held the district court abused its discretion because it failed to consider the potential prejudice to the plaintiff caused by delay and wasted effort and expense where the defendant offered neither any reasonable justification for the delay nor a sufficient explanation of its failure to earlier assert the new defense. *Id.*, ¶¶ 22-24.

Here, Krohne had nearly four years to develop a record and assert a judicial estoppel defense but failed to do so until two months before trial was scheduled. When Krohne moved for leave to amend, no discovery regarding judicial estoppel had been conducted by either party despite the fact that the dispute between Simonsen and Krohne giving rise to the claims Saddlebrook is now pursuing was already a decade old. The enormous effort and expense invested by Saddlebrook in the pursuit of these claims will be wasted if the District Court's erroneous decision to allow Krohne to raise and prevail on an affirmative defense it failed to plead in almost four years is affirmed. As in *Rolan* and the cases cited therein, allowing Krohne to proceed on an affirmative defense Krohne never pled is unduly prejudicial to Saddlebrook and a clear abuse of discretion.

C. Krohne's Assertion of Judicial Estoppel Should Have Been Denied for Futility.

This Court has "found district courts justified in denying leave to amend when 'the proposed amendment would be futile as a matter of law.'" *Hathaway v. Zoot Enters.*, 2021 MT 292, ¶ 26, 406 Mont. 239, 498 P.3d 204 (quoting *Peeler v. Rocky Mt. Log Homes Can., Inc.*, 2018 MT 297, ¶ 29, 393 Mont. 396, 431 P.3d 911). As discussed below, judicial estoppel does not apply here. That is one more reason the District Court abused its discretion in allowing Krohne to seek summary judgment based on judicial estoppel.

II. The District Court Erred by Denying Saddlebrook's Motion for Summary Judgment on Judicial Estoppel.

The parties filed cross-motions for summary judgment on Krohne's judicial estoppel defense. Under Rule 56, M.R.Civ.P., summary judgment is only appropriate when the "pleadings, the discovery and disclosure materials on file, and any affidavits show there is no genuine issue of material fact," and the moving party is entitled to judgment as a matter of law. *Davis v. State*, 2015 MT 264, ¶ 7, 381 Mont. 59, 357 P.3d 320.

The party seeking summary judgment must demonstrate no genuine issues of material fact exist. *Stutzman v. Safeco Ins. Co. of Am.*, 284 Mont. 372, 376, 945 P.2d 32 (1997). The burden then shifts to the opposing party to show the presence of genuine issues of material fact. *Id.* Conclusory statements, speculative

assertions, and mere denials are not sufficient to defeat a motion for summary judgment. *Davis*, ¶ 7. If the court finds no genuine issues of material fact exist, it must then determine whether the moving party is entitled to judgment as a matter of law. *Stutzman*, 284 Mont. at 376. Only admissible evidence may be considered in determining whether summary judgment is appropriate. *Alfson v. Allstate Prop. & Cas. Ins. Co.*, 2013 MT 326, ¶ 11, 372 Mont. 363, 313 P.3d 107. All reasonable inferences must be drawn in favor of the party opposing summary judgment. *Dovey v. Burlington N. Santa Fe Ry. Co*., 2008 MT 350, ¶ 20, 346 Mont. 305, 195 P.3d 1223.

The District Court granted Krohne's motion, but it erred in holding that judicial estoppel bars Saddlebrook's claims for three reasons. One, because the Court relied on assertions of fact that are incorrect and unsupported by evidence (and also disputed), it applied the caselaw it cited to facts that do not exist. Two, the Court ignored when Saddlebrook's claim for malicious prosecution accrued, a fact that is crucial. Three, the Court ignored Judge Molloy's decision holding that judicial estoppel does not bar a claim the trustee in bankruptcy pursued.

A. The District Court Applied Law it Cited to Misstated Facts.

The District Court's reasoning can be summarized as follows: it is unfair and inconsistent for *Saddlebrook*[21] to pursue claims that were not disclosed or scheduled as assets in *Simonsen's* bankruptcy since *Simonsen* had "actual knowledge" of the claims and "intentional[ly] deci[ded] to not include such claims within his bankruptcy schedules and disclosures … to deceive the Bankruptcy Court." Order (CR 106, p. 9). Because the Court mistakenly treated Simonsen and Saddlebrook as interchangeable, the District Court's application of the factors this Court has articulated regarding judicial estoppel is fundamentally flawed.

Civil causes of action that either accrued[22] prior to a bankruptcy petition date or are "sufficiently rooted in the pre-bankruptcy past" are property belonging to the bankruptcy estate, not the debtor, and must be listed on the debtor's schedule of assets and liabilities. *Stokes v. Duncan*, 2015 MT 92, ¶¶ 11-12, 378 Mont. 433, 436-37, 346 P.3d 353, 356; 11 U.S.C. § 521(a). A debtor who fails to list such causes of action may be judicially estopped from pursuing them, as this Court explained recently:

> Judicial estoppel is an equitable doctrine intended to protect the integrity of the judicial process from manipulation by litigants who seek to prevail, twice, on

[21] "Saddlebrook" and "Simonsen" are emphasized here because, as stated previously, the District Court asserts that they are "interchangeable." Order (CR 106, p. 1, n. 1).

[22] A claim accrues when all elements of the claim … exist or have occurred, the right to maintain an action on the claim … is complete, and a court … is authorized to accept jurisdiction." § 27-2-102, MCA.

> opposite theories. The doctrine prevents a party to an action from intentionally taking a position inconsistent with the party's prior judicial declarations [but] does not apply when [the] prior position was based on inadvertence or mistake.
>
> In the context of bankruptcy … 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…. A debtor who realizes she has a potential claim against a creditor must amend her bankruptcy schedule to include the claim as an asset. [This] duty … continues until the bankruptcy … closes.

McAtee v. Morrison & Frampton, PLLP, 2021 MT 227, ¶¶ 14-15, 405 Mont. 269, 273-74, 512 P.3d 235, 238 (internal citations and quotations omitted).

Several years before *McAtee*, the Court cited three "factors" and a "threshold matter" the Ninth Circuit uses when determining whether judicial estoppel applies:

> (1) whether a party's later position is "clearly inconsistent" with its original position;
> (2) whether the party has successfully persuaded the court of the earlier position…;
> (3) whether allowing the inconsistent position would allow the party to "derive an unfair advantage or impose an unfair detriment on the opposing party[,]" … [and
> (4) the] threshold matter: whether the party intentionally sought to manipulate courts by taking inconsistent positions.

Dovey, ¶¶ 15-16 (citing *U.S. v. Ibrahim*, 522 F.3d 1003, 1009 (9th Cir. 2008) and *New Hampshire v. Maine*, 532 U.S. 742, 750-51, 121 S. Ct. 1808, 1815 (2001)).

Here, the District Court cited the first three factors from *Dovey* but made incorrect factual assertions in analyzing them. For example, the District Court stated that "Simonsen not only had actual knowledge of the claims during the bankruptcy proceeding, but he actively assigned them to Grizzly Peak." Order (CR 106, p. 11). This is plainly incorrect as the assignment was made by the Trustee when she settled the adversary proceeding. Aff. Crum (CR 97, ¶ 9); CR 88, Ex. 24, ¶ 10. Simonsen didn't even sign the settlement agreement for Grizzly Peak. His ex-wife did. CR 88, Ex. 24, p. 4.

The District Court's premise that the undisclosed claims were being pursued by Simonsen or Saddlebrook during the bankruptcy is also incorrect. Throughout the bankruptcy, Simonsen understood the claims belonged first to the Trustee (with whom he cooperated) when the original complaint was filed, and later, to Grizzly Peak, and finally to Saddlebrook. Aff. Simonsen (CR 98). The Trustee has confirmed that she had the same understanding and accepted and exercised responsibility for all decisions made in pursuing the claims until she assigned and abandoned them. Aff. Crum (CR 97, ¶¶ 9; 11).

If the District Court had applied the undisputed facts Saddlebrook presented to the first three *Dovey* factors, it would have concluded that the position taken by Simonsen, the Trustee, and Saddlebrook has been consistent, that they never persuaded any court of an earlier inconsistent position, and they derived no unfair

advantage because no court decided the issue. What actually happened was Grizzly Peak paid $400,000 to the bankruptcy estate for the right to pursue claims the Trustee had pursued until then with Simonsen's full cooperation. A rudimentary analysis of those factors exposes the District Court's error and provides one basis for reversing and remanding with instructions to reject the judicial estoppel defense.

But even if that were not the case, the District Court also "erred as a matter of law" by failing to consider *Dovey's* threshold factor: whether the alleged inconsistent position was "attributable to mistake or inadvertence", and similarly failing to consider whether the plaintiff had "deliberately attempted to manipulate the courts." *Dovey*, ¶ 19. The District Court's repeated assertion that Simonsen had actual knowledge of the claims does not establish intent. There is no evidence in the record supporting any argument that Simonsen deliberately attempted to manipulate the courts. The opposite is clearly true. He cooperated fully with the Trustee as she pursued the claims.[23]

The District Court erred by misstating undisputed facts in order to analogize this case to *Dovey*. The *Dovey* factors defeat Krohne's judicial estoppel defense.

[23] Moreover, if there were some evidence of an intent to manipulate the courts, that would create an issue of fact to be resolved at trial, so summary judgment would not be proper. *Davis*, ¶ 7.

B. The Malicious Prosecution Claim Accrued after It Was Assigned to Grizzly Peak.

Another reason judicial estoppel does not bar Saddlebrook's claim for malicious prosecution is that claim accrued when it no longer belonged to Simonsen.

The 2015 complaint the Trustee had authorized did identify Simonsen as the Plaintiff and did assert a claim for malicious prosecution. However, the complaint was not served until it was amended to identify Saddlebrook as the Plaintiff. Based on Judge Haddon's ruling, the Trustee and Simonsen had reason to expect Krohne to lose, but it took several more years for that to happen.

The malicious prosecution claim did not accrue until well after the Trustee's claims against Krohne (including claims "sufficiently rooted in the pre-bankruptcy past"[24]) had been assigned to Grizzly Peak. Of course, Grizzly Peak was not a debtor in the bankruptcy but a creditor and was under no duty to schedule its assets.

This Court evaluated judicial estoppel of a malicious prosecution claim not disclosed in bankruptcy in *McAtee v. Morrison & Frampton, PLLP*, 2021 MT 227, Mont. 269, 512 P.3d 235. McAtee had been wrongfully accused of fraud in dual civil and criminal actions, which were dismissed in September 2012 and January

[24] *Stokes v. Duncan*, supra.

2014, respectively. *McAtee*, ¶¶ 4-6. In July 2011, while both cases were pending, McAtee filed a bankruptcy petition; her bankruptcy closed almost two years later in May 2013. *Id.*, ¶ 6. Two years after that, McAtee sued one of her accusers for malicious prosecution, but her claims were dismissed on summary judgment based on judicial estoppel. *Id.*, ¶¶ 7-10.

This Court affirmed in part, holding that McAtee was judicially estopped from pursuing the claim "as premised on the criminal case" because she was required to disclose the claim once the criminal charges were dismissed and the claim accrued. *Id.*, ¶ 18 (internal citations and quotations omitted). However, with respect to the civil case, this Court concluded the trial court had erred:

> Considering that the element of termination in a plaintiff's favor is of paramount importance to a malicious prosecution claim, and the claim would not exist without this … predicate, McAtee's malicious prosecution claim … premised on the civil … action, had not yet accrued [when] she filed her bankruptcy petition and cannot be deemed rooted in her pre-bankruptcy conduct. McAtee was therefore not required to schedule the claim as an asset.

Id., ¶¶ 19-20 (internal citations and quotations omitted, brackets in original).

Relatedly, this Court held McAtee was further "not required … to amend her bankruptcy schedules to include" that claim because the underlying case had not terminated "while McAtee's bankruptcy … was pending." *Id.* (internal citations and quotations omitted).

The only fact distinguishing the criminal claim from the civil claim was that one claim accrued during the bankruptcy and the other had not. In all other pertinent respects, the claims were identical: they were both based on similar underlying cases which arose from the same facts and were initiated prior to McAtee's bankruptcy petition.

Here, Saddlebrook's malicious prosecution claim is premised upon Krohne's lawsuit, which commenced prior to Simonsen's bankruptcy. The claim was prematurely presented in this action after Simonsen's bankruptcy was filed but before Krohne's suit was dismissed. Complaint (CR 1, ¶¶ 88-93).

Krohne and the District Court mistakenly view this filing as significant. To Krohne, the claim was required to have been scheduled as an asset on or after that date. Tr. Jun. 23, 2022, 5:3-8, 5:21-24, 9:17-20, 13:13-18, 11:1-9. The District Court seems to have agreed and focused on this being the point when Simonsen had "actual knowledge" of his claims. Order (CR 106, pp. 9, 12). However, the Complaint and Simonsen's awareness or knowledge are irrelevant for two reasons: first, *McAtee* makes clear with respect to malicious prosecution claims that disclosure is not required until the claim has accrued[25]; second, the claim accrued after the Trustee assigned it to Grizzly Peak (meaning it accrued *to* Grizzly Peak rather than Simonsen).

[25] *McAtee*, ¶ 19.

It was later, when Krohne's suit was dismissed (in Simonsen's favor) on October 16, 2017 and was not appealed – more than three years after Simonsen filed his January 10, 2014 bankruptcy petition – that the malicious prosecution claim finally accrued. Because the claim is "sufficiently rooted in pre-petition conduct," Simonsen would have been required to amend his schedule of assets if not for the fact that the claim had already been assigned to, and therefore accrued to, Grizzly Peak. *See* Settlement Agreement (CR 88, Ex. 24, ¶ 10). Thus, Simonsen never had a duty to disclose this claim, and naturally, as non-debtor assignees, neither did Grizzly Peak or Saddlebrook.

C. Simonsen's Nondisclosure of the Abuse of Process Claim is Obviated because the Trustee Pursued It.

Abuse of process claims consist of two elements: "an ulterior purpose" and "a willful act in the use of process not proper in the regular conduct of the proceeding." *Seipel v. Olympic Coast Invs.*, 2008 MT 237, ¶ 20, 344 Mont. 415, 420-21, 188 P.3d 1027, 1031 (internal citations omitted). Here, the abuse of process claim is premised on Krohne's lawsuit, which Saddlebrook alleges was initiated with the ulterior motive of taking over Simonsen's algorithmic trading system. Krohne's suit was filed and the evidence suggesting the ulterior motive was discovered before Simonsen filed his bankruptcy petition, so this claim accrued pre-petition and became an asset of the bankruptcy estate.

As such, Simonsen should have listed the claim as a bankruptcy asset. His omission is obviated, however, because the Trustee knew of the claim, pursued it by filing the Complaint in this action, and gave notice to all creditors before assigning and then abandoning it. As District Judge Donald Molloy has explained, "there is a difference between a debtor attempting to pursue an action for his own benefit, and a trustee pursuing an action for the benefit of creditors." *Samson v. Wal-Mart Stores, Inc*., No. CV 12-39-M-DWM, 2013 U.S. Dist. LEXIS 196196, at *7 (D. Mont. Apr. 30, 2013) (quoting *Wood v. Household Fin. Corp*., 341 B.R. 770, 774 (W.D. Wash. 2006)).

As Judge Molloy put it in *Samson*, "Once substituted, a bankruptcy trustee is free to pursue the debtor's nondisclosed claim." *Id.*, at *7 (citing *Coble v. DeRosia*, 823 F. Supp. 2d 1048, 1051-53; *An Pham v. Allstate Indem. Co.*, 2011 U.S. Dist. LEXIS 149122, 2011 WL 6210663 (W.D. Wash. Dec. 31, 2011)). Here, that is exactly what the Trustee did; she approved and authorized the filing of the Complaint. Apr. 2, 2015 emails (CR 88, Ex. 16); Aff. Crum (CR 97, ¶ 8).

Though the Complaint was filed in Simonsen's name, as discussed above, the abuse of process claim clearly belonged to the estate, and it was filed by Plaintiff's counsel on the authority of his client at that time, the Trustee. Aff. Crum (CR 97, ¶ 8); *see also*, Aff. Simonsen (CR 98, ¶ 6); Tr. Feb. 17, 2022, 15:16-17, 15:25, 17:13-14.

The District Court and Krohne assert that Simonsen deceived his creditors. *See, for example,* Order (CR 106, pp. 10-11); cf. Tr. Jun. 23, 2022, 15:12-15 ("Simonsen never provided his creditors with opportunities to seek the claims in this matter"). To the contrary, the interests of the estate and its creditors were protected when the Trustee filed the Complaint. At that time, had the complaint been served, the claim litigated, and the Plaintiff prevailed, the recovery would have belonged to the estate and been distributed to the creditors, which included Grizzly Peak. *See* Schedule D (CR 86, Ex. C, p. 10). Similarly, when the Trustee settled the adversary proceeding and claims were assigned to Grizzly Peak, the estate and creditors received the benefit of a $400,000 payment to the estate. Aff. Crum (CR 97, ¶ 9).

This is normal in a chapter seven bankruptcy, where the Trustee's duty is to liquidate the estate property and distribute proceeds to creditors after proper notice. See 11 U.S.C. § 704(a)(1). Krohne's counsel has admitted receiving notice when the Trustee moved to abandon claims. Tr. Jun. 23, 2022, 9:23-10:3. He denies receiving any other notice, but Saddlebrook has not been able to test that denial through discovery. The denial is not credible because Krohne was a party in the bankruptcy proceeding, having moved successfully to lift the stay so the lawsuit it filed against Simonsen could be tried. Krohne certainly had access to the electronic docket in bankruptcy court, and that docket includes the Settlement

Agreement that assigned "all claims of the Trustee against … any … person or entity, known or unknown." CR 88, Ex. 24.

The District Court relied on *Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778 (9th Cir. 2001), while ignoring *Samson v. Wal-Mart*. *See* Order (CR 106, pp. 10-11). But the *Hamilton* line of cases is easily distinguished for the reasons Judge Molloy explained in *Samson*.[26] In addition, *Hamilton* is distinguishable from this case because it did not involve claims that had been assigned to and pursued by a non-debtor, and because Simonsen's bankruptcy trustee has testified by affidavit that she knew of and pursued the claims (Aff. Crum (CR 97, ¶¶ 9, 11)), whereas the trustee in *Hamilton* "denied having knowledge of the claims." *Hamilton*, 270 F.3d at 784.

Thus, because the Trustee knew of and pursued the abuse of process claim, judicial estoppel does not bar it.

CONCLUSION

The District Court misstated facts and incorrectly applied the judicial estoppel precedent it cited. Judicial estoppel clearly does not apply in this case where Simonsen understood the claims belonged to the bankruptcy estate, and the

[26] Following decisions of the Eleventh and Seventh Circuits, Judge Molloy held that "the *Hamilton* line of cases … 'does not apply to situations where the bankruptcy trustee is pursuing the nondisclosed action.'" *Samson*, 2013 U.S. Dist. LEXIS 196196, at *7 (quoting *Wood*, 341 B.R. at 774, which cited *Biesek v. Soo Line R.R.*, 440 F.3d 410 (7th Cir. 2006) and *Parker v. Wendy's Int'l, Inc.*, 365 F.3d 1268 (11th Cir. 2004)).

Trustee pursued the claims, assigned them, and later abandoned them.

Also, because judicial estoppel does not apply, and because of the unfair prejudice to Saddlebrook, the District Court abused its discretion when it allowed Krohne to assert the judicial estoppel defense.

Saddlebrook respectfully requests this Court reverse the District Court's order and remand the case with instructions to grant Saddlebrook's motion for summary judgment against the judicial estoppel defense and to set the case for trial without further discovery or dispositive motions.

DATED this 11th day of August, 2023.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this Brief is printed in double-spaced, proportionately-spaced, 14-point, Times New Roman typeface, and the word count calculated by Microsoft Word is 7,850 words, excluding the table of contents, table of authorities, certificate of service and certificate of compliance.

DATED this 11th day of August, 2023.

/s/ T. Thomas Singer
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CERTIFICATE OF SERVICE

I, T. Thomas Singer, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 08-11-2023:

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