

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 23-0281

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

*Plaintiff-Appellee,*

v.

ANTHONY BIRBILIS,

*Defendant-Appellant.*

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**Appeal from Thirteenth Judicial Circuit, Yellowstone County**  
**Case No. DV 15-0391**  
**Hon. Jessica Fehr**

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APPELLANT'S BRIEF

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ANTHONY BIRBILIS  
29 East 9th Street, Apt. 5  
New York, New York 10003  
Phone: (917)539-5403  
tony@birbilis.com

*Appearing Pro Se*

**TABLE OF CONTENTS**

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES..... iii

STATEMENT OF THE CASE..... 1

ISSUES PRESENTED..... 2

STATEMENT OF FACTS..... 2

    I.    Dispute Regarding Ownership and Utilization of Xynaquant Software  
          ..... 2

    II.   Simonsen Failed to Disclose the Instant Claims in Bankruptcy..... 6

    III.  Relevant Procedural History..... 8

SUMMARY OF ARGUMENT..... 11

STANDARD OF REVIEW..... 12

ARGUMENT..... 13

    I.    The District Court Erred in Entering Judgment Against Birbilis on  
          Causes of Action which Appellee was Judicially Estopped from  
          Asserting..... 13

        A.    The District Court Correctly Held that Appellee was Judicially  
              Estopped from Asserting Claims in the Underlying Action.... 13

        B.    Allowing the Judgment Against Birbilis to Stand would Run  
              Contrary to the Clear Purpose of the Doctrine of Judicial  
              Estoppel..... 15

    II.   The District Court Lacks Personal Jurisdiction Over Birbilis as Birbilis  
          Lacks Sufficient Contacts with Montana to Support the Exercise of  
          Personal Jurisdiction..... 18

A.	A Civil Claim for Abuse of Process Cannot be Maintained Against a Witness for Testimony Given During a Proceeding as Said Testimony Should be Absolutely Privileged.....	18
B.	Birbilis’s Travel to Montana is Insufficient to Constitute “Minimum Contacts” Necessary to Support a Finding of Personal Jurisdiction Over Birbilis.....	21
III.	Appellee Lacks Standing to Bring the Underlying Action.....	26
A.	At the Time that the Underlying Action was Filed, Simonsen could not have been the Rightful Owner of the Xynaquant Software.....	26
B.	Any Claims which Appellee may have had Against Birbilis have been Previously Released.....	27
IV.	Appellee’s Claims are Time Barred by the Statute of Limitations.....	28
	CONCLUSION.....	30
	CERTIFICATE OF COMPLIANCE.....	31
	CERTIFICATE OF SERVICE.....	32

## TABLE OF AUTHORITIES

### CASES

<i>Boland v. Crum (In re Brown)</i> , 363 B.R. 591 (D. Mont. Bankr. 2007).....	16
<i>Brault v. Smith</i> , 209 Mont. 21, 679 P.2d 236 (1984).....	20
<i>Bunch v. Lancair Int'l, Inc.</i> , 2009 MT 29, 349 Mont. 144, 202 P.3d 784.....	12
<i>Calphalon Corp. v. Rowlette</i> , 228 F.3d 718 (6th Cir. 2000).....	25
<i>Castonguay v. Polson</i> , 2003 MT 4400 (Missoula Cty., Sep. 16, 2003).....	20
<i>Crum v. Tomlinson (In re Hettick)</i> , 413 B.R. 733 (D. Mont. Bankr. 2009).....	16
<i>Cusano v. Klein</i> , 264 F.3d 936 (9th Cir. 2001).....	16
<i>Dovey v. BNSF Ry. Co.</i> , 2009 MT 350, 346 Mont. 305, 195 P.3d 1223.....	15
<i>Ford Motor Co. v. Eighth Jud. Dist. Ct.</i> , 2019 MT 115, 395 Mont. 478, 443 P.3d 407.....	22, 25
<i>Giambra v. Kelsey</i> , 2007 MT 158, 338 Mont. 19, 162 P.3d 134.....	12
<i>Hamilton v. State Farm Fire &amp; Cas. Co.</i> , 270 F.3d 778 (9th Cir. 2001).....	13, 14
<i>Heffernan v. Missoula City Council</i> , 2011 MT 91, 360 Mont. 207, 255 P.3d 80.....	12

<i>Hughes v. Lynch</i> , 2007 MT 177, 338 Mont. 214, 164 P.2d 913.....	20, 21
<i>In re S.T.</i> , 2008 MT 19, 341 Mont. 176, 176 P.3d 1054.....	12
<i>Miller v. Pac. Shore Funding</i> , 287 B.R. 47 (D. Md. Bankr. 2002).....	16
<i>Occidental Fire &amp; Cas. Co. v. Cont'l Ill. Nat'l Bank &amp; Trust Co.</i> , 689 F. Supp. 564 (E.D.N.C. 1988).....	23
<i>Orbital Publ. Grp., Inc. v. Wells</i> , 2015 U.S. Dist. LEXIS 174402 (D. Or., Dec. 21, 2015).....	19, 20
<i>Posen v. Ozier</i> , 2017 WL 4269957 (D. Mont., Sep. 26, 2017).....	14
<i>R.I.A. Melbourne L.P. v. Formal Capital, LLC</i> , 2008 U.S. Dist. LEXIS 45912 (N.D. Ohio 2008).....	25
<i>Rissetto v. Plumbers &amp; Steamers Local 343</i> , 94 F.3d 597 (9th Cir. 1996).....	13
<i>Russell v. Rolfs</i> , 893 F.2d 1033 (9th Cir. 1990).....	13
<i>Seltzer v. Morton</i> , 2007 MT 62, 336 Mont. 225, 154 P.3d 561.....	20
<i>Simmons Oil Corp. v. Holly Corp.</i> , 244 Mont. 75, 852 P.2d 523 (1993).....	19, 23
<i>Simmons v. State</i> , 206 Mont. 264, 670 P.2d 1372 (1983).....	22, 25
<i>State v. Darrah</i> , 2009 MT 96, 350 Mont. 70, 205 P.2d 792.....	15

*Stokes v. Duncan*,  
2015 MT 92, 378 Mont. 433, 346 P.3d 353..... 17

*Stop Over Spending Mont. v. State*  
2006 MT 178, 333 Mont. 42, 139 P.3d 788..... 12

*Tharo Sys., Inc. v. Cab Produkttechnik GmbH & Co. KG*,  
196 Fed. Appx. 366 (6th Cir. 2006)..... 24

*Wollam v. Brandt*,  
154 Or.App. 156, 961 P.2d 219 (Or. Ct. App. 1998)..... 20

STATUTES

11 U.S.C. § 323..... 16

11 U.S.C. § 521..... 16

Mont. Code Ann. § 27-2-203..... 28

Mont. Code Ann. § 27-2-204..... 28, 30

Mont. Code Ann. § 30-14-401, *et seq.*..... 28

Mont. Code Ann. § 30-14-407..... 28

## STATEMENT OF THE CASE

Birbilis appeals from the district court's entry of default judgment against Birbilis in the amount of Thirty-Five Million Dollars (\$35,000,000.00). *See* Dkt. 118. In its original complaint, Appellee asserts six causes of action against Birbilis, to wit, Count I (Misappropriation of Trade Secrets), Count III (Abuse of Process), Count IV (Breach of Fiduciary Duty), Count V (Tortious Interference), Count VI (Fraud), and Count VII (Conspiracy). *See* Dkt. 7. On December 5, 2019, Counts I, V, and VI were dismissed, leaving only Counts III, IV, and VII pending against Birbilis. *See* Dkt. 43. Default judgment was entered against Birbilis on December 13, 2021. *See* Dkt. 79. Thereafter, summary judgment was granted in favor of the other defendants, *inter alia*, pursuant to the doctrine of judicial estoppel, as Appellee had failed to properly disclose its claims in the instant action in a prior bankruptcy proceeding. *See* Dkt. 106. Nevertheless, a prove-up hearing was still held with respect to the default judgment entered against Birbilis, and the amount of said judgment was fixed on April 18, 2023. *See* Dkt. 118.

Birbilis also appeals from the district court's denial of Birbilis's Motion to Dismiss. *See* Dkt. 43. Most significantly, in his motion, Birbilis argued that the (1) district court lacks personal jurisdiction over Birbilis, and (2) Appellee lacks standing to bring the instant action. *See* Dkt. 24. On December 5, 2019, the district court rejected said arguments, despite later finding that Appellee was, in fact, barred

from asserting its claims in the instant action for the same reasons as previously raised by Birbilis in his motion to dismiss. Thereafter, on August 28, 2020, Birbilis sought a writ of supervisory control, which was denied. *See* Montana S. Ct. No. OP 20-0428.

### **ISSUES PRESENTED**

- I. Did the district court properly enter judgment against Birbilis where the court also found that Appellee was judicially estopped from asserting said claims?
- II. Did the district court have personal jurisdiction over Birbilis?
- III. Did Appellee possess standing to bring the underlying action?
- IV. Were the causes of action asserted in the underlying action time barred?

### **STATEMENT OF FACTS**

#### **I. Dispute Regarding Ownership and Utilization of Xynaquant Software.**

The initial complaint (the “Complaint”) in the underlying action was filed on April 3, 2015. *See* Dkt. 1. Thereafter, on March 16, 2018, Plaintiff filed its First Amended Complaint and Jury Demand in said action. *See* Dkt. 7. The gravamen of the underlying action stems from a dispute related to proprietary trading software known as Xynaquant, which Stuart M. Simonsen (“Simonsen”), a principal of Appellee, claims that he developed and owns.<sup>1</sup> *See* Dkt. 7, ¶¶ 10-11. In or about

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<sup>1</sup> This software has gone by different names, including i98 and Jarvis, however, for purposes of clarity, Birbilis shall refer to said software herein as Xynaquant.

2007, Birbilis met Simonsen and, after learning about Xynaquant, procured a client who desired to trade using Xynaquant. *See Id.* at ¶ 12. To facilitate further investment, Simonsen and Birbilis set up two funds, Axiodyn and Axioquantum, which were designed to trade using Xynaquant. *Id.*

During the process of setting up Axiodyn and Axioquantum, on May 15, 2009, Simonsen purported to assign “all of Simonsen’s right, title and interest in and to [Xynaquant]” to Axiodyn. *See* Dkt. 25, p. 6. Thereafter, on February 16, 2010, Simonsen similarly purported to assign all of his interest in separate intellectual property, to wit, the “Karla” trading system, to Axioquantum.<sup>2</sup> *Id.* By these assignments, it is clear that any interest which Simonsen may have possessed in Xynaquant was assigned to Axiodyn and/or Axioquantum.

This point is further demonstrated by the Axiodyn Operating Agreement, which states that “all Intellectual Property ... is the sole property of [Axiodyn] and that no Member has any personal ownership in such Intellectual Property.” *Id.* Additionally, Axiodyn’s intellectual property only reverted back to Simonsen upon Axiodyn’s dissolution, which could have occurred no earlier than June 1, 2016, when Axiodyn was “cancelled” by the Delaware Division of Corporations for failure to pay applicable Delaware tax. *See Id.*, pgs. 6-7.

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<sup>2</sup> Karla is a derivative product, created entirely utilizing the same code as i98 and Jarvis, but which was designed to operate on a more universal platform.

Separately, another individual, Lyle Vaden, claims to be the creator of Xynaquant, and further asserts that he entered into an agreement with Simonsen whereby Simonsen would split the proceeds from Xynaquant equally between them. *See Id.*, p. 5. Vaden subsequently claimed \$2,437,130.05 in Simonsen's bankruptcy, based upon Simonsen's improper retention of Xynaquant proceeds. Dkt. 22, Ex. A, ¶ 1.

At the time Simonsen initiated the underlying action, Simonsen could not have been the rightful owner of Xynaquant, as either (1) Vaden was the rightful owner of Xynaquant, and Simonsen never possessed an ownership interest in the software, or (2) Simonsen assigned any ownership interest he may have had to Axiodyn and/or Axioquantum, and ownership of Xynaquant could not have reverted back to Simonsen prior to June 1, 2016.

In or about 2011, Simonsen and Birbilis, along with Simonsen's accountant JoAnne Beringer, formed a new entity, to wit, Kapidyia Capital Partners, LLC ("Kapidyia"), for the purpose of offering managed trading accounts utilizing Xynaquant. *See* Dkt. 25, p. 3. Krohne Fund, L.P. ("Krohne Fund") became a Kapidyia client and established an account in or around August 2011. *Id.*

Kapidyia's activities resulted in multiple lawsuits, one with Krohne Fund (the "KF Litigation") and the other with members of Axiodyn and Axioquantum (the "Kaga Litigation"). The KF Litigation related to losses incurred by Krohne

Fund with respect to manual trades that were made in Krohne Fund's account, despite the fact that all trading was to be fully automated. *Id.*

The Kaga Litigation related to Simonsen's improper use of Axiodyn and Axioquantum's intellectual property through Kapidyia. In the Kaga Litigation, Simonsen filed a counterclaim against Birbilis, alleging that it was Birbilis who suspended computerized trading and caused the losses incurred by Krohne Fund. *Id.* at pgs. 12-13. The allegations made against Birbilis in the counterclaim in the Kaga Litigation mirror the allegations made against Birbilis in the Saddlebrook Litigation. *Id.* at p. 13.

The Kaga Litigation, including Simonsen's counterclaim against Birbilis, was ultimately settled on January 5, 2017.<sup>3</sup> As a settlement term, Simonsen 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." *Id.*

Simonsen's claims in the underlying action are premised upon the same conduct alleged in the counterclaim against Birbilis in the Kaga Litigation. Birbilis, however, is a citizen of New York. *Id.* at p. 9. As a basis for the exercise of personal jurisdiction over Birbilis, Simonsen alleged that Birbilis "transacted

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<sup>3</sup> Said settlement occurred after the filing of the Saddlebrook Litigation by Simonsen, but prior to Simonsen effectuating service.

business within Montana, committed acts resulting in the accrual within Montana of tort actions, or entered into contracts for services to be rendered in Montana.” *See* Ex. 1, ¶ 8. The alleged contacts include Birbilis testifying in the KF Litigation in Montana and Birbilis travelling to Montana to meet Simonsen no more than four times. *See* Dkt. 43, p. 20; *see also* Dkt. 22, Ex. G, p. 1.

## **II. Simonsen Failed to Disclose the Instant Claims in Bankruptcy.**

On January 10, 2014, Simonsen filed a voluntary petition for bankruptcy in the United States Bankruptcy Court for the District of Montana (Case No. 14-60015-BPH) (the “Simonsen Bankruptcy”). *See Id.* at Ex. E. Thereafter, on February 4, 2014, Simonsen filed his bankruptcy schedules where he was required, *inter alia*, to identify any potential claims that he might have against any third party. *See Id.* at Ex. L. The only such claim identified by Simonsen is a “counterclaim against BDS Quant Capital LLC.” *Id.* at p. 7. Nowhere in the bankruptcy schedules does Simonsen identify any of the claims asserted in the underlying action. *See Id.*

As discussed *supra*, Appellee initially filed the underlying action on April 3, 2015, however, Appellee elected not to issue or serve summonses upon any defendant at that time. *See* Dkt. 1. At the time that Appellee filed said action, Simonsen was aware of his purported claims asserted therein. Despite this, Simonsen never amended his bankruptcy schedules to reflect said claims, despite amending said schedules twice for other reasons, a fact which is admitted by

Appellee. *See* Dkt. 22, Exs. M & N (amended bankruptcy schedules); *see also* Dkt. 96, p. 2 (Appellee admits that “Krohne Fund notes correctly that Simonsen’s bankruptcy schedules did not specifically list the claims Saddlebrook is asserting in this case.”).

On August 14, 2014, the trustee in the Simonsen Bankruptcy, Darcy M. Crum (“Trustee”), initiated an adversary proceeding against Simonsen, wherein the Trustee alleged that Simonsen had “undertook actions, engaged in transactions and transferred property of the Debtor ... to place the property outside the reach of Debtor’s creditors, to impede Debtor’s creditors in the lawful enforcement of their rights, and to present the appearance of a lack of assets on the part of the Debtor.” *See* Dkt. 22, Ex. O, ¶ 6.

In said proceeding, the Trustee alleged that one of the ways in which Simonsen sought to secrete assets from his bankruptcy estate was through the use of various sham entities, such as Grizzly Peak Limited Partnership (“Grizzly Peak”), an Arizona limited partnership which was owned primarily by Simonsen’s trust, organized under the laws of the Commonwealth of Belize, which Simonsen used as a conduit to funnel funds to himself under the guise of a “Accounts Receivable Financing Agreement,” which purportedly allowed Simonsen to receive money as an advance on certain undisclosed receivables. *Id.* at pgs. 3-4. Simonsen and the Trustee ultimately reached a settlement in the adversary proceeding,

however, Simonsen again failed to disclose the existence of the claims being asserted in the underlying action as part of said settlement.

During the pendency of the Simonsen Bankruptcy, and the adversary proceeding, on March 16, 2018, Appellee filed its first amended complaint in the underlying action, and finally elected to serve the defendants therein. *See* Dkt. 7. Thereafter, on October 31, 2018, the Trustee filed her Final Report/Account of Assets, which included Simonsen's "Asset Cases," but which did not list any of the claims being asserted in the underlying action. *See* Simonsen Bankruptcy, Dkt. 494, pgs. 9-10. On December 3, 2018, the Simonsen Bankruptcy was closed.

### **III. Relevant Procedural History.**

On April 20, 2018, Birbilis filed his motion to dismiss, which sought dismissal, *inter alia*, (1) pursuant to Montana Rule of Civil Procedure 12(b)(2) because the district court lacked personal jurisdiction over Birbilis, and (2) pursuant to Montana Rule of Civil Procedure 12(b)(6) because Appellee (i) lacked standing to bring the underlying action, (ii) released any claims it may have had against Axiodyn and, by extension, Birbilis, and covenanted not to sue, (iii) waived any claim it may have had against Birbilis, (iv) should be judicially estopped from asserting the underlying claims because they were never disclosed in the Simonsen Bankruptcy, and (v) failed to file the underlying claims within the applicable statute of limitations rendering said claims time barred. *See* Dkt. 24.

On December 5, 2019, the district court denied Birbilis's motion to dismiss and held, *inter alia*, that the district court possessed personal jurisdiction over Birbilis and that Birbilis's argument regarding judicial estoppel was not a basis for dismissal at the pleading stage. *See* Dkt. 43. Birbilis thereafter sought a writ of supervisory control from this Court, however, on September 15, 2020, this Court denied said petition, on the basis that there was no reason presented as to why the normal appeal process would be inadequate in the instant action. *See* Order (Sep. 15, 2020), Case No. OP 20-0428.

Thereafter, Birbilis was unable to afford local counsel to represent him in the underlying action and, as a result, on December 13, 2021, default judgment was entered against Birbilis. *See* Dkt. 79. At that time, the district court set a date, to wit, January 5, 2022, for the setting of damages with respect to said default judgment. *See Id.* Said hearing was subsequently vacated, however, and not immediately reset pending trial. *See* Dkt. 81.

Prior to trial, however, on January 17, 2022, Krohne Fund filed a motion for summary judgment, arguing that Appellee "is barred by the principle of judicial estoppel from bringing these claims because these claims were not disclosed as an asset during Simonsen's bankruptcy even though the claims in this matter by Simonsen were filed before this Court during the pendency of the bankruptcy proceeding." Dkt. 86, Ex. 1.

On October 19, 2022, the district court granted Krohne Fund's motion for summary judgment, holding that "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." Dkt. 106, p. 12. Tellingly, the district court does not state that its holding applies only to claims asserted against any individual defendant, but to "Simonsen's cause of action" as a whole. *Id.*

Despite entering summary judgment and finding that Simonsen was judicially estopped from bringing the underlying action, the district court nevertheless scheduled the prove-up hearing for Birbilis's default on February 16, 2023. *See* Dkt. 108. In the same order, the district court held that Appellee "shall provide Defendant Birbilis with a copy of this order thirty (30) days prior to the above scheduled damages hearing." *Id.*

The day before the hearing, to wit, on February 15, 2023, counsel for Appellee filed its "Brief Before Hearing on Damages," wherein Appellee admitted, *inter alia*, that it did not comply with the district court's prior order dated November 1, 2022, and that there had been no confirmation of delivery of the certified letter purportedly mailed to Birbilis providing notice of said hearing date. *See* Dkt. 111, pgs. 1-2. Birbilis contacted counsel for Appellee, after the occurrence of the

hearing, in an effort to obtain an extension of the hearing date. *See* Dkt. 115. Despite this, no extension was granted, and the district court ultimately entered judgment on the same claims which were summarily dismissed on October 19, 2022, against Birbilis in the amount of Thirty-Five Million Dollars (\$35,000,000.00). *See* Dkt. 118. In the findings of facts in support of the entry of judgment, the district court does not address the fact that Appellee had been previously estopped from asserting the claims upon which judgment was entered against Birbilis with respect to another defendant in the same action. *See* Dkt. 117.

### **SUMMARY OF ARGUMENT**

The district court did not properly enter judgment against Birbilis because Appellee was judicially estopped from bringing the claims against Birbilis in the underlying action, for the reasons set forth by the Court in its grant of summary judgment in favor of Krohne Fund. *See* Dkt. 106.

The district court did not possess personal jurisdiction as Birbilis lacks sufficient contacts with Montana to support the exercise of personal jurisdiction.

Appellee lacked standing to bring the underlying action because any claims asserted therein properly belonged to the Trustee of the Simonsen Bankruptcy.

The claims made against Birbilis are time barred, as there exist no allegations against Birbilis in the underlying action for conduct which occurred after December 2011, over three years prior to the filing of said action.

## STANDARD OF REVIEW

“A finding of fact is clearly erroneous if it is not supported by substantial evidence, if the court misapprehended the effect of the evidence or if, upon reviewing the record, this Court is left with the definite and firm conviction that the district court made a mistake.” *See In re S.T.*, 2008 MT 19, ¶ 8, 341 Mont. 176, 176 P.3d 1054 (citation omitted). This Court reviews a district court’s conclusions of law de novo to determine whether they are correct. *See Giambra v. Kelsey*, 2007 MT 158, ¶ 28, 338 Mont. 19, 162 P.3d 134 (citations omitted).

This Court reviews mixed questions of law and fact de novo. *See Stop Over Spending Mont. v. State*, 2006 MT 178, ¶ 10, 333 Mont. 42, 139 P.3d 788 (citation omitted). Mixed questions of law and fact are presented to this Court when the historical facts of a case are admitted or established, the applicable law is undisputed, and the issue is whether the facts satisfy the statutory standard. *Id.*

A court’s determination as to its jurisdiction is a conclusion of law, which is reviewed de novo to determine whether the court’s interpretation of the law is correct. *See Bunch v. Lancair Int’l, Inc.*, 2009 MT 29, ¶ 15, 349 Mont. 144, 202 P.3d 784 (citation omitted).

The determination of a party’s standing to maintain an action is a question of law, which this Court reviews de novo. *See Heffernan v. Missoula City Council*, 2011 MT 91, ¶ 28, 360 Mont. 207, 255 P.3d 80 (citations omitted).

## ARGUMENT

### **I. The District Court Erred in Entering Judgment Against Birbilis on Causes of Action which Appellee was Judicially Estopped from Asserting.**

In ruling on Krohne Fund's motion for summary judgment, the district court was explicit in its ruling that Appellee was judicially estopped from asserting its claims in the underlying action because "Simonsen's actions were intended to deceive his creditors and the Bankruptcy Court, and as such, [it is] inequitable to grant him an advantage based upon his actions." Dkt. 106, p. 12.

The argument made by Krohne Fund in support of its motion for summary judgment largely mirrors the argument made by Birbilis in his motion to dismiss. *Compare* Dkt. 25 with Dkt. 86, Ex. 1. The findings made by the district court with respect to Appellee being estopped from asserting the underlying action against Krohne Fund are equally applicable to Birbilis. To allow Appellee to collect from Birbilis on actions it has been judicially estopped from asserting would be tantamount to granting precisely the "advantage" that the district court held is inappropriate. *See* Dkt. 106, p. 7; *see also* *Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778 (9th Cir. 2001); *Rissetto v. Plumbers & Steamers Local 343*, 94 F.3d 597, 600-01 (9th Cir. 1996); *Russell v. Rolfs*, 893 F.2d 1033, 1037 (9th Cir. 1990).

#### **A. The District Court Correctly Held that Appellee was Judicially Estopped from Asserting Claims in the Underlying Action.**

The doctrine of judicial estoppel "precludes a party from gaining an advantage

by asserting one position, and then later seeking an advantage by taking a clearly inconsistent position.” *Posen v. Ozier*, 2017 WL 4269957, at \*7 (D. Mont., Sep. 26, 2017) (citing *Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 782 (9th Cir. 2001)). To determine whether said doctrine is applicable in a bankruptcy context, a court must consider three factors, to wit, whether “(1) a party takes clearly inconsistent positions by failing to disclose a legal claim in bankruptcy and then subsequently brings suit on the undisclosed claim; (2) there was judicial acceptance or reliance on the party’s prior position; and (3) the party receives an unfair advantage by failing to disclose the claim.” *Id.* (citing *Hamilton*, 270 F.3d at 783-85).

Here, it is undoubtedly true that (1) Simonsen failed to disclose claims against the defendants in the underlying action in the Simonsen Bankruptcy, and thereafter sought to bring suit upon those claims, albeit through a corporate alter ego, (2) there was judicial acceptance based upon Simonsen’s prior position, as the settlement agreement for the adversary proceeding within the bankruptcy was approved, and (3) Simonsen clearly benefitted because he was able to settle the claims made by the Trustee therein while preserving the claims asserted in the underlying action for his own personal benefit. *See* Dkt. 22, Ex. Q.

The district court correctly held that Simonsen’s conduct warranted judicial estoppel, holding that:

“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.”

Dkt. 106, p. 11 (*citing Dovey v. BNSF Ry. Co.*, 2009 MT 350, ¶ 21, 346 Mont. 305, 195 P.3d 1223).

The “causes of action” referenced by the district court were asserted, in at least four instances, against both Krohne Fund and Birbilis. *See* Dkt. 7. The district court made no meaningful distinction regarding its holding of judicial estoppel, focusing on the claims themselves as opposed to the parties against whom said claims were asserted. *See* Dkt. 106.

**B. Allowing the Judgment Against Birbilis to Stand would Run Contrary to the Clear Purpose of the Doctrine of Judicial Estoppel.**

The doctrine of judicial estoppel itself is designed “to protect the integrity of the judicial process from manipulation by litigants who seek to prevail, twice, on opposite theories.” *Id.* at p. 7 (*citing State v. Darrah*, 2009 MT 96, ¶ 12, 350 Mont. 70, 205 P.2d 792). This is precisely what Appellee has attempted to do, by taking one position in an effort to obtain an advantageous ruling in the Simonsen

Bankruptcy, before subsequently seeking to improperly maintain causes of action which did not rightly belong Appellee and prevail against Birbilis. To allow the judgment against Birbilis to stand would run directly contrary to the stated purpose of the doctrine of judicial estoppel.

The significance of the district court's ruling with respect to the question of judicial estoppel is to find that any claims made by Simonsen during his bankruptcy were not his claims to make, and that the right to bring any such claims was held by the Trustee alone. It is well understood under federal law that any claim and/or lawsuit related to events which occurred prior to the filing of a bankruptcy petition constitute property belonging to the bankruptcy estate. *See, e.g., Crum v. Tomlinson (In re Hettick)*, 413 B.R. 733, 752 (D. Mont. Bankr. 2009) (*citing Cusano v. Klein*, 264 F.3d 936, 945 (9th Cir. 2001)); *see also* 11 U.S.C. § 521. Simonsen filed his Chapter 7 Voluntary Petition on January 10, 2014, nearly fifteen (15) months prior to initiating the underlying action on April 3, 2015. *See* Dkt. 22, Ex. E.

Any claim which Simonsen may have had against the defendants in the underlying action was not his at the time of its filing. It is also well understood that only the bankruptcy trustee may pursue a cause of action belonging to the bankruptcy estate. *See, e.g., Boland v. Crum (In re Brown)*, 363 B.R. 591, 609 (D. Mont. Bankr. 2007) (*quoting Miller v. Pac. Shore Funding*, 287 B.R. 47, 50-51 (D. Md. Bankr., 2002)); *see also* 11 U.S.C. § 323.

In Montana, “[a]n action must be prosecuted in the name of the real party in interest.” Mont. R. Civ. P. 17(a). Montana courts have also acknowledged that with respect to claims held by a bankruptcy estate, the bankruptcy trustee is the real party in interest. *See, e.g., Stokes v. Duncan*, 2015 MT 92, 378 Mont. 433, 346 P.3d 353 (2015) (affirming District Court’s grant of trustee’s motion to intervene as real party in interest with respect to debtor’s claim and trustee’s subsequent sale of said claim to a third party). Here, the conduct complained of by Appellee occurred prior to Simonsen’s bankruptcy petition, thus, any such claim related thereto belonged to the bankruptcy estate, and not to Simonsen. Therefore, Simonsen was not a real party in interest under Montana law, as the bankruptcy trustee was the sole party with standing to bring the underlying action.

The district court has already found Simonsen to have acted duplicitously with respect to the prosecution of the underlying action vis-à-vis his bankruptcy, and the record of this action demonstrates such malfeasance. In light of the district court’s ruling, Appellee’s decision not to serve the original complaint in this action for roughly three (3) years can only be seen as intentional. Simonsen secreted the cause of action from the bankruptcy court and his creditors for years, and only sought to pursue said action once it became clear that the his bankruptcy was nearing resolution. What reason would a plaintiff have to allow a cause of action which said plaintiff claims to be worth tens of millions of dollars to sit idle?

Ultimately, it is immaterial whether Birbilis was defaulted, as Appellee lacked standing to bring the underlying action in the first instance, thus there never should have been an opportunity for Birbilis to be found to be in default. The fact that Birbilis lacked funds to hire local counsel to defend his interests should not allow Appellee to avoid the effect of the district court's ruling regarding judicial estoppel. In essence, allowing the judgment against Birbilis to stand would be to allow Appellee to conduct an "end around" of said ruling, and avoid its effect completely, collecting the balance of claims which it is estopped from bringing from a single defendant solely because that defendant lacks the means to defend himself.

**II. The District Court Lacks Personal Jurisdiction Over Birbilis as Birbilis Lacks Sufficient Contacts with Montana to Support the Exercise of Personal Jurisdiction.**

This argument, as well as the argument presented in Sections III and IV, should be mooted by the argument made *supra* that Appellee's claims in the underlying action must necessarily fail as Appellee was judicially estopped from asserting said claims, however, it is being presented herein in the alternative in the event that this Court rejects Appellant's argument related to said estoppel.

**A. A Civil Claim for Abuse of Process Cannot be Maintained Against a Witness for Testimony Given During a Proceeding as Said Testimony Should be Absolutely Privileged.**

In its order denying Birbilis's motion to dismiss, the District Court held that it possessed specific personal jurisdiction over Birbilis, holding that "[b]y 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.” Dkt. 43, p. 21.

In finding specific personal jurisdiction over Birbilis, the District Court focused on the abuse of process claim against Birbilis based upon Birbilis “voluntarily com[ing] to Montana to testify against Simonsen on behalf of Krohne Fund.” *Id.* at p. 20 (citing *Simmons Oil Corp. v. Holly Corp.*, 244 Mont. 75, 86, 796 P.2d 189, 195 (1990)).

The *Simmons* case, however, dealt with the recording of a lien by a foreign bank against collateral in Montana, not an individual citizen who served as a witness in a Montana trial. *Simmons Oil Corp.*, 244 Mont. at 85. There exists no binding authority in Montana with respect to the question of whether or not a witness who voluntarily testifies at a trial within a state is purposefully availing himself of the jurisdiction of that state.

There exists persuasive authority, however, which suggests that such actions should not constitute purposeful availment. *See Orbital Publ. Grp., Inc. v. Wells*, 2015 U.S. Dist. LEXIS 174402, at \*11 (D. Or., Dec. 21, 2015) (applying Oregon law). In *Orbital*, suit was brought against a foreign expert witness who testified at a trial in Oregon. The *Orbital* court held that jurisdiction did not exist over the witness as the witnesses’ testimony “is absolutely privileged under Oregon law.”

*Id.* (citing *Wollam v. Brandt*, 154 Or.App. 156, 162, 961 P.2d 219 (Or. Ct. App. 1998)) (holding that “statements made in a judicial proceeding are absolutely privileged from ensuing tort actions.”).

A Montana district court has similarly acknowledged the importance of the same privilege. See *Castonguay v. Polson*, 2003 MT 4400, ¶¶ 22-25 (4th Judicial Dist., Missoula County, Sep. 16, 2003). In *Castonguay*, the plaintiff brought claims for fraud and misrepresentation based upon purportedly perjured testimony from a prior dissolution proceeding. *Id.* at ¶ 20.

In dismissing the action, the *Castonguay* court held that “[t]he common law provides that civil suits do not lie against a witness or party for false testimony in a judicial proceeding because of the application of the absolute privilege rule.” *Id.* at ¶¶ 22-25 (internal citations omitted). Similarly, Birbilis’s testimony in the KF Litigation should be privileged, thus it cannot be said that Birbilis purposefully availed himself of Montana.

Under Montana law, the elements of an abuse of process claim are “(1) an ulterior purpose and (2) a willful act in the use of the process not proper in the regular conduct of the proceeding.” *Hughes v. Lynch*, 2007 MT 177, ¶ 21, 338 Mont. 214, 222-23, 164 P.2d 913, 919 (2007) (citing *Brault v. Smith*, 209 Mont. 21, 28, 679 P.2d 236, 240 (1984) (citing Prosser, *The Law of Torts* § 121, at 857 (4th ed., West 1971))); *Seltzer v. Morton*, 2007 MT 62, ¶ 57, 336 Mont. 225, 245,

154 P.3d 561, 580 (2007)).

In the context of an abuse of process claim, “process” refers to “summons, subpoenas, attachments, garnishments, replevin or claim and delivery of writs, arrest under a warrant, injunctive orders, and other orders directly affecting obligations of persons or rights in property.” *Id.* at ¶ 23 (*citing* Dobbs, *The Law of Torts* § 438, at 1235-36 (West 2001)). Process can be taken to include all procedures in the litigation process, however, “merely filing a complaint in court does not institute any process.” *Id.*

There is no allegation in the underlying action that Birbilis instituted any process. He was not a named party to the KF Litigation and did not stand to benefit from the outcome of said litigation. It is clear that Simonsen cannot maintain an action for abuse of process against Birbilis, thus it is equally clear that Birbilis committed no action resulting in the accrual of a tort action in Montana, which the District Court claimed served as a basis for the exercise of specific personal jurisdiction over Birbilis.

**B. Birbilis’s Travel to Montana is Insufficient to Constitute “Minimum Contacts” Necessary to Support a Finding of Personal Jurisdiction Over Birbilis.**

The District Court also held, as a basis for exercising specific personal jurisdiction over Birbilis, that “the facts as alleged demonstrate that Birbilis chose to come to Montana on five separate occasions to meet with Simonsen, and those

contacts in Montana directly relate [to] the claims Simonsen is asserting against Birbilis.” Dkt. 43, p. 20.

While one of those occasions was Birbilis’s privileged testimony in the KF Litigation, with respect to the other four occasions where Birbilis traveled to Montana, there is no mention of such activities in the amended complaint, and Simonsen makes no allegations linking said travel to his claims against Birbilis. Such a failure should be fatal to Simonsen’s claim, as in order to exercise personal jurisdiction over Birbilis, Simonsen must allege facts that tend to show that “(1) [Birbilis] purposefully availed [him]self of the privilege of conducting activities in Montana, thereby invoking Montana’s laws; (2) the plaintiff’s claim arises out of or relates to [Birbilis’s] forum-related activities; and (3) the exercise of personal jurisdiction is reasonable.” *Ford Motor Co. v. Eighth Jud. Dist. Ct.*, 2019 MT 115 at ¶ 12 (*citing Simmons v. State*, 206 Mont. 264, 276, 670 P.2d 1372, 1378 (1983)).

The only information about Birbilis’s trips to Montana actually comes from Birbilis himself, stating:

“I have never transacted business in the State of Montana. Any work I performed related to Stuart Simonsen (“Simonsen”), or any of his entities, was generally done via email or phone call. Occasionally, however, Simonsen and I would meet in person. On at least four occasions, Simonsen travelled to New York to meet me regarding ongoing business matters. In an effort to show reciprocity, and not to require Simonsen to travel to New York every time we needed to meet, I would sometimes visit Simonsen in Montana. On no more than four occasions, I traveled to Montana to meet with Simonsen regarding an ongoing business matter.”

Dkt. 22, Ex. G, pgs. 1-2.

There was no reason why Birbilis needed to travel to Montana to conduct business. He merely did so to show reciprocity to Simonsen, who had travelled to New York on a number of occasions. Had Birbilis known that merely discussing business while visiting Simonsen in Montana would make him amenable to suit in Montana, he would have never made said trips.

Simonsen has made no allegation of how Birbilis's non-testimonial trips to Montana relate to his claims against Birbilis, aside from a single, self-serving conclusory statement in his response to Birbilis's motion to dismiss. *See* Dkt. 38, p. 5 ("Five trips to Montana, all specifically related to the claims asserted in Saddlebrook's complaint are certainly enough to support" the exercise of personal jurisdiction over Birbilis.).

Montana courts have previously held, for the purpose of determining whether a party has "purposefully availed" itself of Montana law, that "minimal entry into the forum to protect [a party's] interests does not constitute a voluntary effort to do business in the state." *See Simmons Oil Corp.*, 244 Mont. at 86 (*citing Occidental Fire & Cas. Co. v. Cont'l Ill. Nat'l Bank & Trust Co.*, 689 F. Supp.564, 567 (E.D.N.C. 1988)). Thus, the mere fact that Birbilis travelled to Montana to discuss business is insufficient, absent additional allegations of how said travel relates to Simonsen's claims, to support a finding that Birbilis "purposefully availed" himself

of the laws of Montana.

Birbilis's contacts with Montana are "fortuitous" and "attenuated," as the only reason Birbilis travelled to Montana was because Simonsen chose to live in Montana, and Birbilis wished to relieve him from having to travel to New York everytime they needed to meet. Simonsen has admitted that the work to be performed by Birbilis with respect to Kapidyia was to be performed in New York, not Montana. *See* Ex. 1, ¶ 3 ("The company was called Kapidyia Capital Partners, LLC. Its principal place of business was in Montana, but Birbilis was responsible for marketing, which he did from his home in New York City, New York.").

The underlying action bears a striking factual resemblance to a Sixth Circuit decision, where an Ohio corporation sought to have personal jurisdiction exercised over a Minnesota corporation in Ohio:

"Though Rowlette sent letters and faxes and made telephone calls to Ohio (*and made three trips to Calphalon's facilities there for a tour and meetings*), this court held that Ohio lacked personal jurisdiction over Rowlette ... despite the existence of a contract. The court concluded that Rowlette's contacts with Ohio were too "fortuitous" or "attenuated" to support the exercise of jurisdiction *because Rowlette's obligations under the agreement were to be performed outside of Ohio* ... The Court also noted that Rowlette's contacts with Ohio (by letter, telephone, fax and personal visit there) resulted not because Rowlette chose to create continuous and substantial consequences in Ohio, but because Calphalon chose to be headquartered there."

*Tharo Sys., Inc. v. Cab Produkttechnik GmbH & Co. KG*, 196

Fed.Appx. 366, 371 (6th Cir. 2006) (*discussing Calphalon Corp. v. Rowlette*, 228 F.3d 718 (6th Cir. 2000)) (emphasis added).

The Sixth Circuit has further held that the exercise of personal jurisdiction over a defendant is improper where the defendant's contacts with the forum state "were the result of the Plaintiff's choice of location" and where the defendant "likely would have done nothing differently had the Plaintiff chosen an alternative 'base of operation.'" *R.I.A. Melbourne L.P. v. Forman Capital, LLC*, 2008 U.S. Dist. LEXIS 45912, at \*14 (N.D. Ohio 2008) (*citing Calphalon*, 228 F.3d at 723).

Similarly herein, any contacts which Birbilis had with Montana were the result of Simonsen's choice to live in Montana. There was no business-related reason for Simonsen to live in Montana, he did so presumably due to his affinity for Montana and its natural beauty. Birbilis would have done nothing differently had Simonsen elected to move to Wyoming, North Dakota, Idaho, or any other state.

As such, the exercise of personal jurisdiction over Birbilis is patently unreasonable. *See Ford Motor Co.*, 2019 MT 115 at ¶ 12 (*citing Simmons*, 206 Mont. at 276). An individual travelling to Montana should not be found to have availed himself of Montana law simply because he discussed business while visiting a business associate. To do so would be to create a perverse result, and to dissuade tourists from visiting Montana. If a company from another state were to have a hunting trip at a Montana lodge, would the members of the company be amenable to suit if they happened to discuss business while on the trip?

### **III. Appellee Lacks Standing to Bring the Underlying Action.**

Appellee lacks standing to bring the underlying action for numerous reasons, outlined in detail in the brief in support of Birbilis's Motion to Dismiss pursuant to Rule 12(b)(2) and (6), M.R.Civ.P. *See* Dkt. 25, pgs. 4-8; 12-13. Most notably, (1) Simonsen could not have been the rightful owner of the Xynaquant software at the time the underlying action was initiated, and (2) any claims which Simonsen has against Birbilis were previously released. *See Id.*

#### **A. At the Time that the Underlying Action was Filed, Simonsen could not have been the Rightful Owner of the Xynaquant Software.**

At the time that the underlying action was initiated, to wit, on April 3, 2015, there were only two possibilities with respect to the ownership of Xynaquant: either (1) Simonsen never owned Xynaquant, and said software was owned by Vaden, or (2) Simonsen did own Xynaquant, and licensed it to Axiodyn and/or Axioquantum.

In the amended complaint, Appellee pleads no facts with respect to the actual ownership of Xynaquant, aside from representing that Simonsen created Xynaquant and that Simonsen's claims were assigned during Simonsen's bankruptcy to Grizzly Peak Limited Partnership ("Grizzly"), which thereafter assigned said claims to Saddlebrook Investments, LLC. *See* Dkt. 7, ¶ 2.

As discussed *supra*, Vaden has claimed ownership of Xynaquant, and Simonsen has agreed to assign his ownership interest in Xynaquant to Axiodyn and/or Axioquantum. While these statements both cannot be true, this Court need

not determine which is accurate, as in either circumstance it is clear that Simonsen did not possess any ownership interest in Xynaquant. Simonsen lacks standing because he was not the rightful owner of Xynaquant at the time the Saddlebrook Litigation was initiated.

**B. Any Claims which Appellee may have had Against Birbilis have been Previously Released.**

In 2012, Simonsen was subject to the Kaga Litigation related to his misappropriation of the Xynaquant software, over which Axiodyn and Axioquantum claimed ownership over.<sup>4</sup> *See* Dkt. 22, Ex. I. In the Kaga Litigation, Simonsen filed a counterclaim against Birbilis. The allegations made in Simonsen’s counterclaim mirror those made against Birbilis in the underlying action. Simonsen ultimately settled his counterclaim against Birbilis on January 5, 2017. *See Id.*, Ex. K. Thus, Simonsen lacks standing to bring the same claims in the underlying action.

The District Court, in denying Birbilis’s motion to dismiss, held that the settlement agreement in the Kaga Litigation “fail[ed] 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.” *See* Dkt. 43, p. 21.

The district court, however, misapprehends the nature of the Kaga Litigation, which was initiated due to Simonsen's utilization of the Xynaquant software, which

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<sup>4</sup> The Kaga Litigation was filed in the Supreme Court of the State of New York, New York County, styled as *Kaga Investments, S.A., et al. v. Simonsen, et al.*, Index No. 650560/2012.

he had purportedly assigned to Axidoyn and/or Axioquantum, in connection with Kapidyia and its clients, including Krohne Fund. Additionally, the alleged "bad acts" committed by Birbilis are the same in Simonsen's claims against Birbilis in both the Kaga Litigation and the underlying action. As such, it is clear that the settlement of Simonsen's Kaga counterclaim necessarily settles the same claim brought in the underlying action and, therefore, Simonsen lacks standing to bring the underlying action against Birbilis.

#### **IV. Appellee's Claims are Time Barred by the Statute of Limitations.**

All of the acts complained of by Appellee in the underlying action occurred either on or before December 2011. *See, e.g.*, Dkt. 7, ¶ 27 ("As a result [of Birbilis's actions], by December 2011, no clients were using Xynaquant, and the program was generating no revenue for Simonsen. Count I sounds in misappropriation of trade secrets, in violation of the Montana Uniform Trade Secrets Act, Mont. Code Ann., § 30-14-401, *et seq.*, which provides for a statute of limitations of three years. Mont. Code Ann., § 30-14-407. Count VI sounds in common law fraud, which under Montana law has a statute of limitations of two years. *Id.* at § 27-2-203. Finally, Counts III, IV, V, and VII sound in various torts, which under Montana law have a statute of limitations of three years. *Id.* at § 27-2-204.

Given that the initial complaint in the underlying action was filed on April 3, 2015, in excess of three years and three months after the last complained of conduct

against Birbilis, each such claim is time barred as Appellee has exceeded the time allotted under the statute of limitations in which to assert said claims. Such failure is rendered even more inexplicable given that the KF Litigation was initiated in January 2012, and given that Simonsen declared bankruptcy in January 2014, clearly demonstrating Simonsen's knowledge of said claims.

The district court held that the claims were not time barred because “[t]he 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.” Dkt. 43, p. 23.

The district court misapprehends the nature of the allegations in the amended complaint, as there exist no allegations against Birbilis which occurred after December 2011. The existence of separate litigation to which Birbilis was not a party does not somehow toll the statute of limitations with respect to Birbilis. Additionally, the nature of the cause of action themselves demonstrate that they are unrelated to the Krohne Fund Litigation.

For example, Count IV alleges that “Birbilis breached the duties owed to Simonsen by engaging in grossly negligent or reckless conduct, intentional misconduct, and knowing violations of the law, and by taking actions adverse to the

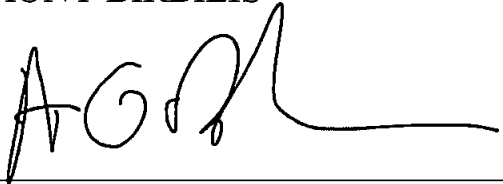
company's interest." Dkt. 7, ¶ 48. While not clearly stated in the complaint, Count IV clearly relates to Appellee's allegation that Birbilis made certain manual trades in Krohne Fund's account, which clearly occurred before December 2011, when Appellee admits that "no clients were using Xynaquant, and the program was generating no revenue for Simonsen." *Id.* at ¶¶ 27-28. Thus, the three-year statute of limitations for Count IV must have necessarily run no later than December 31, 2014, prior to the filing of the original complaint in the underlying action. *See* Mont. Code Ann., § 27-2-204.

The allegations of the complaint made against Birbilis ultimately do not identify acts which occurred after December 2011. As such, the statute of limitations has expired with respect to any claims made against Birbilis in the underlying action.

**CONCLUSION**

Appellant Anthony Birbilis respectfully requests that this Court (1) vacate the judgment entered against Birbilis on April 18, 2023, (2) hold that Appellee is judicially estopped from pursuing claims against Birbilis, and (3) enter judgment in favor of Birbilis with respect to said claims.

Dated: August 25, 2023

ANTHONY BIRBILIS  
  
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**CERTIFICATE OF COMPLIANCE**

Pursuant to Rules 11(4)(c) and 14(9)(b) of the Montana Rules of Appellate Procedure, I certify this Appellant’s Opening Brief is double spaced (except for point headings, footnotes, and quotes), printed with proportionately spaced Times New Roman Typeface, 14 point, and contains 7,338 words as calculated by Word, excluding any table of contents, table of citations, certificate of service, certificate of compliance, case caption, and appendix or exhibits.

Dated: August 25, 2023

A handwritten signature in black ink, appearing to read 'A. Birbilis', written over a horizontal line.

Anthony Birbilis

## CERTIFICATE OF SERVICE

I, Anthony Birbilis, hereby certify that I have served true and accurate copies of the foregoing Petition for Writ of Supervisory Control to the following on August 25, 2023:

- (1) T. Thomas Singer  
Hall & Evans  
175 North 27th Street, Suite 1101  
Billings, Montana 59101  
singert@hallevans.com

*Attorneys for Appellee Saddlebrook Investments, LLC*

- (2) Steven L. Stockdale  
Matthew B. Gallinger  
Gallinger & Stockdale Law Firm, LLC  
1004 Division Street  
Billings, Montana 59101  
sstockdale@thegsfirm.com  
mgallinger@thegsfirm.com

*Attorneys for Krohne Fund, L.P. and Axel Krohne*

- (3) Kelly J.C. Gallinger  
Brown Law Firm, P.C.  
315 North 24th Street  
P.O. Drawer 849  
Billings, Montana 59103  
kgallinger@brownfirm.com

*Attorney for David Tolliver*

Dated this 25th day of August, 2023



Anthony Birbilis