IN THE SUPREME COURT OF THE STATE OF MONTANA

Supreme Court Cause No. DA 23-0246

SADDLEBROOK INVESTMENTS, LLC, as Assignee of Stuart M. Simonsen,	)
Plaintiff and Appellant,	)
and	)
KROHNE FUND, L.P.,	)
Defendant and Appellee.	)

BRIEF OF THE DEFENDANT AND APPELLEE

ON APPEAL FROM THE
MONTANA THIRTEENTH JUDICIAL DISTRICT COURT
YELLOWSTONE COUNTY
HONORABLE JESSICA T. FEHR PRESIDING

For Plaintiff/Appellant:

T. Thomas Singer
Amanda G. Hunter
Greyson D. Hill
Hall & Evans, LLC
175 N. 27th Street, Ste 1101
Billings, MT 59101
Telephone: (406) 969-5227
singert@hallevans.com
huntera@hallevans.com
hillg@hallevans.com

For Defendant/Appellee:

Steven L. Stockdale
Matthew B. Gallinger
Gallinger & Stockdale Law Firm, LLC
1004 Division Street
Billings, MT 59101
Telephone: (406) 534-2644
sstockdale@thegsfirm.com
mgallinger@thegsfirm.com

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

Rules and Regulations

STATEMENT OF ISSUES

1. Did the District Court err when it amended the Scheduling Order and allowed Krohne to amend its answer and assert an affirmative defense of judicial estoppel?

2. Did the District Court err in granting summary judgment on Saddlebrook's claim for malicious prosecution?

3. Did the District Court err in granting summary judgment on Saddlebrook's claim for abuse of process?

STATEMENT OF THE CASE

Stuart Simonsen (hereinafter referred to as "Simonsen") developed a trading algorithm for securities. CR[1] 1. Simonsen sued Krohne Fund, LP (hereinafter referred to as "Krohne"), Axel Krohne, Sean Wright, Anthony Birbilis, David Tolliver, Carden Capital, LLC, Lyle Vaden, Mark De Souza, Cohesion Partners Inc., and John or Jane Does 1 through 10 on April 3, 2015. *Id*. Simonsen filed the Complaint during the pendency of his bankruptcy in this matter, bringing the following claims: Count I – Breach of EULA; Count II – Misappropriation of Trade Secrets; Count III – Conversion; Count IV – Malicious Prosecution; Count V – Abuse of Process; Count VI – Breach of Duties as Member of LLC; Count VII –

[1]All references to the Case Record ("CR") are designated pursuant to the District Court docket number.

Tortious Interference; County VIII – Misrepresentation/Fraud; and Count IX – Conspiracy. *Id.*

On March 16, 2018, Saddlebrook, as assignee of Simonsen, filed the First Amended Complaint and Jury Demand. CR 7.

On December 23, 2019, Krohne filed its Answer to First Amended Complaint and Jury Demand. CR 44.

On December 17, 2020, the District Court issued the Scheduling Order. CR 59.

On January 5, 2022, the District Court issued an Order Vacating Hearing and Setting Trial Schedule. CR 81.

On January 14, 2022, Krohne filed a Motion to Vacate Jury Trial and Set Scheduling Conference, a Motion Seeking Leave to File First Amended Answer, and a Motion Seeking Leave to File Motion for Summary Judgment. CRs 83, 85, and 86.

On February 10, 2022, the District Court issued an Order Setting Hearing on Defendant Axel Krohne's Motion to Vacate Jury Trial and Set Scheduling Conference. CR 90.

On February 17, 2022, the District Court heard oral arguments regarding Krohne's motion to vacate and on April 27, 2022, issued the Amended Scheduling Order – Jury Trial. CR 93.

On May 25, 2022, Saddlebrook filed its Cross-Motion for Summary Judgment on the Judicial Estoppel Defense. CRs 95 and 96.

On June 23, 2022, the District Court heard oral arguments on Krohne's Motion for Summary Judgment based on Judicial Estoppel.

On October 19, 2022, the District Court granted Krohne's Motion for Summary Judgment and denied Saddlebrook's Motion. CR 106.

STATEMENT OF FACTS

1. On January 11, 2012, Krohne filed suit against Stuart Simonsen in the Montana Federal District Court asserting Simonsen had improperly manually traded Krohne's investment alleging breach of contract. CR 86, Exhibit A.

2. On May 7, 2013, Simonsen sought leave of the Federal District Court to assert the claims against Krohne and third parties. CR 96, Exhibit 1.

3. On June 6, 2013, Judge Sam E. Haddon held a hearing on Simonsen's motion seeking leave wherein Simonsen was offered two options, the counterclaims could be asserted and go to trial as currently scheduled or, in the alternative, the Court would sever the counterclaims. CR 96 Exhibit 4, lines 15 – 21; Exhibit 3.

4. On January 10, 2014, Simonsen filed for Chapter 7 Bankruptcy before the United States Bankruptcy Court District of Montana. CR 96, Exhibit 5.

5. On February 4, 2014, Simonsen filed his Summary of Schedules in the bankruptcy. CR 86, Exhibit C.

6. On July 14, 2014, following a bench trial, Judge Sam E. Haddon issued an Order dismissing all claims against Defendants on the basis that the Managed Account Agreement (hereinafter referred to as "MAA") did not contain specific language requiring the trades be based only on protocol or algorithmic software, and Ordered judgment be entered on behalf of Defendants. CR 96, Exhibit 8.

7. On July 14, 2014, Judgment in a Civil Case was issued by the Deputy Clerk. CR 96, Exhibit 9.

8. On August 14, 2014, Darcy Crum, Trustee for the Simonsen Bankruptcy, filed an Adversary Complaint against Simonsen and John Does 1 – 50. CR 86, Exhibit E.

9. On April 3, 2015, Simonsen—specifically designated as the Plaintiff—filed his complaint and jury demand in the Thirteenth Judicial District Court of Yellowstone County through his counsel of record, Mr. Singer with Count IV – Malicious Prosecution and Count V – Abuse of Process. CR 1.

10. On June 16, 2015, Darcy Crum, in her capacity as the Trustee, filed a Second Amended Complaint. CR 86, Exhibit G.

11. On March 4, 2016, a Settlement Agreement was executed in the Adversarial Proceedings. CR 96, Exhibit 24.

12. On May 5, 2016, the District Court issued Notice pursuant to Court Rule 9. CR 2.

13. On May 17, 2016, Simonsen provided a Response stating this filing was meant to preserve the claims. CR 3.

14. On March 9, 2017, the Ninth Circuit Court ordered the Federal District Court's ruling in the Krohne Fund v. Simonsen matter be vacated in part, affirmed in part, and remanded. The Ninth Circuit Court remanded Krohne's claim for breach of contract, concluding that the MAA required the trades be made exclusively through the software unless Krohne Fund agreed otherwise. CR 86, Exhibit I.

15. On January 9, 2018, the District Court issued a second Notice (Pursuant to Court Rule 9). CR 4.

16. On January 29, 2018, Simonsen filed his Response to Notice Pursuant to Court Rule 9, specifically providing "Simonsen's Complaint". CR 5.

17. On March 16, 2018, Saddlebrook filed the First Amended Complaint and Jury Demand as Assignee of Simonsen. CR 7.

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 County Sheriff's Office*, 2014 MT 84, 374 Mont. 358, 321 P.3d 829, 830. "A district court abuses its discretion when it acts arbitrarily, without employment of conscientious judgment, or in excess of the bounds of reason resulting in substantial injustice." *Rolan v. New West Health*

Services, 2017 MT 270, 389 Mont. 228, 405 P.3d 65, 67 (citing *Kershaw v. Mont. Dept. of Transp.*, 2011 MT 170, 361 Mont. 215, 257 P.3d 385).

This Court will "review a district court's ruling on motions for summary judgment *de novo*, using the same M.R.Civ.P. 56 (Rule 56) criteria used by the district court." *Chapman v. Maxwell*, 2014 MT 35, 374 Mont. 12, 322 P.3d 1029, 1031 (citing *Pub. Lands Access Assn. v. Bd. Of Co. Commrs.*, 2014 MT 10, 373 Mont. 277, 321 P.3d 38).

SUMMARY OF ARGUMENT

The District Court properly granted Krohne's Motion for Summary Judgment against Saddlebrook based on the affirmative defense of judicial estoppel. First, the District Court properly permitted Krohne to amend its Answer and assert the affirmative defense of judicial estoppel pursuant to Rule 8 M.R.Civ.P. *Rule 8(1) M.R.Civ.P.* The District Court duly inquired regarding what, if any, prejudice Saddlebrook would experience based upon this amendment. *MH[2] 11:21 – 12:9*. Based on the pleadings before the Court and evidence and testimony submitted during oral argument, the District Court properly determined Krohne was permitted to amend its answer.

[2] All references to the Motions Hearing before the District Court on February 17, 2022, shall be designated MH with the page and line numbers specified.

Second, based on Krohne's affirmative defense of judicial estoppel, the District Court properly granted summary judgment in Krohne's favor based on Simonsen's failure to amend his schedules, thus preventing Saddlebrook from attaining an unfair advantage to the detriment of Simonsen's creditors.

ARGUMENT

The District Court did not abuse its discretion in granting Krohne's motion to amend to assert a judicial estoppel defense because justice required the amendment based upon Simonsen's failure to amend his bankruptcy schedules. CR 93; *See Also MH* 9:15 – 11:6; 11:21 – 14:24. Following the appropriate amendment of Krohne's Answer, the District Court properly granted summary judgment against Saddlebrook based on Simonsen's failure to amend his bankruptcy disclosures. CR 106.

As a preliminary matter, and before advancing to the substantive legal arguments in this appeal, it is necessary to address Saddlebrook's improper attempt to introduce evidence into the record on appeal that was never admitted before the District Court and was not available to the District Court for review.

1. Evidence That Was Not Admitted Before the District Court Cannot be Considered on Appeal.

In Appellant's Opening Brief, it recites a litany of "facts" and "evidence" from other legal proceedings that was never admitted into evidence before the District Court in this matter. Evidence that was not properly admitted before the District Court cannot be considered on appeal.

Rule 8 M.R.App.P. provides in part "the original papers and exhibits filed in the district court, the transcript of proceedings, if any, and a certified copy of the docket entries prepared by the clerk of district court shall constitute the record on appeal in all cases." *Rule 8(1) M.R.App.P.* Beginning on page 4 of Appellant's Opening Brief, Saddlebrook introduces facts not in evidence before the District Court for review and consideration by this Court. *See Appellant's Opening Brief*, p. 4. Saddlebrook fortuitously argues that the District Court misstated facts in reaching its conclusions on Summary Judgment, but Saddlebrook now relies upon information it failed to present during the briefings and hearings at issue. *Id.* In some of its responsive pleadings, Saddlebrook provided limited emails, partial transcripts, incomplete filings, and affidavits to the District Court that Saddlebrook admitted it had not disclosed in discovery. Saddlebrook is now providing this Court with its self-serving narrative relating to the separate federal lawsuit between Krohne Fund and Simonsen. Notably, Saddlebrook had failed to enter complete evidence of this separate lawsuit into the District Court record and, accordingly, the District Court had no opportunity to consider it when reaching its decision on the cross-motions for summary judgment. *Id.*, p. 17, ¶ 2; *See Also* CR 96 – 98.

This is not the first time Saddlebrook has attempted to bootstrap an argument in footnotes, as Saddlebrook included over a one-half page footnote in Plaintiff's Brief Before Hearing on Damages arguing against the District Court's prior Order

Granting Krohne's Motion for Summary Judgment. CR 111, p. 3; *See Also* CR 106. Saddlebrook now attempts, again, to introduce new evidence that was never properly made a part of the record to the District Court. This Court has condemned such conduct.

In *State v. MacKinnon*, exhibits and testimony in the form of a written letter were provided for the first time on appeal. *State v. MacKinnon*, 288 Mont. 329, 957 P.2d 23, 26 (1998). Assertions were made for the first time regarding a book that may have been read, results of polygraph exams, and motives. *Id.* This Court condemned this practice and reminded the attorneys "that the parties on appeal are bound by the record and may not add additional matters in briefs or appendices." *Id.* citing *State v. Hatfield*, 256 Mont. 340, 846 P.2d 1025, 1028 (1993); *State v. Puzio*, 182 Mont. 163, 595 P.2d 1163, 1164 (1979).

The matters on appeal are limited to the bounds of the record and counsel is not permitted to add additional matters in their briefs. *Hatfield*, 846 P.2d 1025. This Court has firmly stated "[w]e will not tolerate an attempt to introduce extraneous information into the proceedings." *MacKinnon*, 957 P.2d 23, 26; citing *State v. Hall*, 203 Mont. 528, 662 P.2d 1306, 1312 (1983). Although this Court has continually upheld this position, Saddlebrook is attempting to introduce evidence that was not a part of the District Court record in an effort to bolster its argument on appeal. Accordingly, attempts Saddlebrook makes to introduce evidence and argument

regarding the proceedings in the separate federal court lawsuit – that were not admitted in the District Court record – should not be considered by this Court on appeal.

2. The District Court Did Not Abuse Its Discretion in Granting Leave to Krohne to Amend Its Answer.

The District Court's determination to grant leave to Krohne to amend its answer to set forth the affirmative defense of judicial estoppel was not an abuse of discretion. District courts are given broad discretion to permit amendments of the pleadings. Moreover, the District Court here carefully considered all of the facts and circumstances in this case, entertained full briefing, and held oral argument with the parties, before determining justice required permitting Krohne to amend its answer.

A. The District Court Explicitly Considered Whether Or Not Granting Leave Would Be Burdensome Or Prejudicial.

Rule 15(a), M.R.Civ.P. provides in part "[…] a party may amend its pleadings only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires." *Rule 15(a)(2) M.R.Civ.P.* The undersigned contacted Mr. Singer, counsel for Saddlebrook, and inquired whether he would object to Krohne amending its answer and to a motion to vacate the jury trial in this matter. *See* CR 87 & 88. Saddlebrook objected, and Krohne subsequently sought leave from the District Court to amend its answer pursuant to Rule 15(a)(2) M.R.Civ.P. CR 85. The contested Motion to Amend was fully briefed and the

District Court entertained oral argument from the parties at a hearing held on February 17, 2022. *MH* 4:10-5:13.

This Court has previously held "[t]he decision to grant or deny a motion to amend a pleading lies within the discretion of the district court, and we will reverse its decision only for an abuse of that discretion." *Gursky v. Parkside Professional Village*, 258 Mont. 148, 852 P.2d 569, 571 (1993). Although leave should be given when justice requires, it should not be automatic. *Rolan v. New West Health Services*, 389 Mont. 228, 405 P.3d 65, 68 (2017). District Courts are directed to inquire whether the opposing party would suffer prejudice. *Id.*

During oral argument, the District Court directly queried the parties regarding whether the Amendment would be burdensome and prejudicial to Saddlebrook. *MH* 9:18 – 10:3. Krohne established there had been little to no discovery in this matter, no depositions had been taken, and there was no undue expense. *Id.* at 11:21 – 12:9. Ultimately, the District Court reasoned that allowing the amendment and allowing Krohne to assert the judicial estoppel affirmative defense was not overly burdensome or prejudicial to Saddlebrook. CR 93.

Furthermore, it was clear that the District Court would have to vacate the original trial date due to a criminal matter set before the same judge on the same date that was proceeding to trial. *Id.* at 26:20 – 27:4. Coincidentally, undersigned counsel was also representing the criminal defendant in the conflicting matter. *Id.* This clear

scheduling conflict was also presented in the briefing on amendment as well as presented during oral argument on February 17th. *Id.* at 8:12 – 9:12; 26:20 – 27:1; *See Also* CR 87.

Saddlebrook attempts to argue again on appeal that Krohne's prior counsel stated an opinion in an email that he was not going to file a motion for summary judgment in the case and that this informal opinion should somehow be dispositive of the Court's decision on allowing Amendment of the Answer. *See* CR 88, Exhibit 26; *See Also Appellant's Opening Brief*, p. 17. Krohne was represented by different counsel on the Motion to Amend and, clearly, the decision to file summary judgment on a judicial estoppel theory had not been previously considered. *MH* 24:4 – 24:8. Notably, the District Court considered Saddlebrook's argument about prior counsel's informal e-mail and did not find it compelling when making its ruling to allow Krohne to amend its Answer. CR 93. The District Court considered these factors and determined - without abusing its discretion - to permit Krohne to Amend its Answer and add the affirmative defense of judicial estoppel. *Id*.

B. Saddlebrook's Argument That The District Court Failed To Provide Reasons To Support Its Order Granting The Motion To Amend Is Unfounded.

Saddlebrook proffers that a district court not providing reasons for granting leave for a party to amend its answer can be an abuse of discretion. *Appellants Opening Brief*, p. 6, ¶ 2. Contrary to Saddlebrook's assertion, this Court has found

that in specific cases where the district court denies a motion to amend a pleading without valid reason, there may be a basis for finding an abuse of discretion. *Gursky*, 852 P.2d 569, 571. The difference between the District Court granting a motion to amend versus denying the motion to amend is paramount.

In *Gursky v. Parkside Professional Village*, the district court denied Gursky's motion to extend the scheduling order based upon medical procedures of counsel and the desire to join other parties. *Id.* at 570. The district court granted Gursky's request over Parkside's objection finding that "in its opinion and order that 'the interests of justice' would be served by extending the times set in its previous scheduling order. *Id.*

Nine days before the deadline of the new scheduling order, Gursky filed an amended complaint including new defendants. *Id.* Parkside moved to strike the amended complaint as Gursky had failed to seek leave of the Court as required pursuant to Rule 15(a), M.R.Civ.P. *Id.* The district court granted Parkside's motion to strike based on Gursky's failure to either obtain leave from the court or written consent by the opposing party and failure to respond to Parkside's motion to strike. *Id.* at 571.

There is a stark contrast between *Gursky* and the matter before this Court. First, Krohne properly sought leave of the District Court to Amend its Answer after conferring with opposing counsel, as required by Rule 15, M.R.Civ.P. *See* CR 87 &

88. Second, the District Court accepted full briefing, held a hearing on the contested motion, and specifically inquired whether granting leave would be overly burdensome and prejudicial to Saddlebrook. *MH* 9:18 – 10:3. Third, the District Court granted Krohne's motion for leave to file an Amended Answer "based on the good cause presented in the filings as well as at oral argument". CR 93, Line 21.

Just as in *Gursky* when the district court first permitted the extension of time in the scheduling order, the District Court here found good cause to permit the extension of time to amend the answer after weighing the prejudice on Saddlebrook. *See* CR 93. The evidence of record clearly shows Krohne complied with the requirements of Rule 15, M.R.Civ.P. in seeking leave to Amend its Answer by first conferring with opposing counsel then seeking leave of the District Court. The evidence of record further shows the District Court permitted full argument, including oral argument, on the contested motion and weighed the potential prejudice to Saddlebrook before granting the Motion to Amend. Good cause was shown for the amendment and the District Court did not abuse its discretion.

C. Saddlebrook Did Not Expend Substantial Effort And Expense Related To Krohne's Conduct.

Saddlebrook relies heavily on *Rolan v. New West Health Services* for the position that it was prejudiced by the District Court Granting leave to Amend. *Appellant's Opening Brief*, p. 17 – 19. This Court has previously found that undue prejudice could exist if a party had already expended substantial effort and expense

during the course of the matter which would be wasted if the party seeking leave to amend was granted leave. *See Rolan*, 405 P.3d 65, 68. This Court further found that "[a]lthough length of delay and stage of the proceedings are crucial factors, alone they may not warrant denying the amendment." *Id.* at 69.

Here, Saddlebrook admitted during the hearing on February 17, 2022, that it was not accusing Krohne of causing undue delay. *MH* p. 19:6 – 19:7. After conceding that there was no undue delay by Krohne, Saddlebrook argued that the prejudice is Saddlebrook's requirement to respond to a motion for summary judgment. *Id.* at 19:10 – 19:16. Saddlebrook further conceded at the hearing that it was Saddlebrook's intent to use discovery from the federal matter. *Id.* at 23:24 – 24:2.

The test set forth in *Rolan* is whether "the opposing party **already** had expended 'substantial effort and expense' in the course of the dispute that 'would be wasted' if the moving party were allowed to proceed on a new legal theory." *Rolan,* 405 P.3d 65, ¶ 16 (*citing Eagle Ridge Ranch v. Park County*, 283 Mont. 62, 68-69, 938 P.2d 1342, 1346 (1997) (emphasis added). Saddlebrook now appears to be asserting that Krohne is causing undue delay and is convoluting the costs of the federal cause of action with the matter before this Court. *Appellant's Opening Brief*, p. 19, ¶ 3. Saddlebrook continues to argue the costs associated with the federal cause

of action are to be considered in this matter, but that is not the test set forth by this Court. *Id.*

This holding in *Rolan* also stands for the proposition that litigants should only be permitted to change legal theories after a motion for summary judgment has been filed in extraordinary cases. *See Rolan*, 405 P.3d 65, ¶ 19 (*citing Peuse v. Malkuch*, 275 Mont. 221, 228, 911 P.2d 1153, 1157 (1996)). In this matter, Krohne did not seek leave to amend after summary judgment had been filed, but rather sought leave to Amend so that it could pursue summary judgment based upon an added affirmative defense. Accordingly, the District Court did not need to articulate extraordinary circumstances to justify granting leave for the amendment as there was no motion for summary judgment pending at the time leave to amend was granted. *Id.* at ¶16. Instead, the District Court must consider the prejudice versus the justification, and in its discretion either grant or deny leave. *Id.* The District Court properly granted leave to amend because there was no argument that substantial resources and efforts had already been expended by Saddlebrook related to Krohne's requested Amendment.

3. <u>Saddlebrook's Argument Contradicts Its Conduct.</u>

Saddlebrook opposed Krohne's Motion seeking leave to Amend its Answer and argues that because the pre-trial deadlines had passed the District Court abused its discretion in granting leave to Amend. *See Appellant's Opening Brief*, p. 17.

Contrary to this position, however, Saddlebrook filed an unopposed motion for leave to file a cross-motion for summary judgment after the District Court granted Krohne leave to Amend. CR 94. Within Saddlebrook's motion, Saddlebrook provides "[b]y presenting a cross-motion, Saddlebrook intends to give the Court the opportunity to resolve the issue before trial." *Id.* at Lines 20 – 21. Saddlebrook argues that the District Court should not grant leave to Amend, but then seeks leave to file its own summary judgment, outside of the original deadlines, after leave is granted to Krohne to Amend its Answer.

The District Court did not abuse its discretion in granting Krohne's Motion seeking leave to Amend its Answer. The evidence of record shows the District Court entertained full briefing on the contested motion, allowed oral argument from the parties, and even inquired into whether Saddlebrook would be prejudiced by the amendment during the hearing. *See Rolan*, 405 P.3d 65, ¶ 16. Accordingly, Krohne respectfully requests this Court affirm the District Court's Order allowing Amendment of Krohne's Answer and the inclusion of Judicial Estoppel as an affirmative defense.

4. <u>The District Court Properly Granted Summary Judgment For Krohne Based on Judicial Estoppel.</u>

The District Court properly granted Krohne's motion for summary judgment based on the doctrine of judicial estoppel. The parties agreed on cross-motions for summary judgment there was no genuine issue of material fact. The evidence

presented showed Simonsen failed to disclose both the claim for malicious prosecution and the claim for abuse of process during the pendency of his bankruptcy, thus taking clearly different positions in the bankruptcy and in his lawsuit filed before the District Court.

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *See* Rule 56(c), M.R.Civ.P. Summary judgment is intended to encourage judicial economy by eliminating unnecessary trials in which no genuine issue of fact is present. *Belcher v. Department of State Lands*, 228 Mont. 352, 355, 742 P.2d 475, 477 (1987) (internal citation omitted).

The moving party has the burden to establish that there is no genuine issue as to any material fact and that it is entitled to summary judgment as a matter of law. *Kullick v. Skyline Homeowners Association. Inc*., 2003 MT 137, ¶ 13, 316 Mont. 746, 150, 69 P.3d 225, 228. If the moving party carries its burden, the party opposing summary judgment must then prove, by more than mere denial and speculation, that there is a genuine issue for trial. *Bruner v. Yellowstone County*, 272 Mont. 261, 264, 900 P.2d 901, 903 (1995). The opposing parties' facts must be material and substantial, not fanciful, frivolous, gauzy nor merely suspicious." *Hatlan v. Anderson*, 169 Mont. 447, 450, 548 P.2d 613, 615 (1976).

Here, the parties filed cross-motions for summary judgment on the issue of judicial estoppel, both agreeing there were no material issues of fact in dispute impeding the ability to rule on the issue as a matter of law. Saddlebrook's attempts on appeal to raise additional evidence and facts from the separate federal court lawsuit in the footnotes of its brief—which facts and evidence were not entered into the District Court record—are disingenuous, at best. Saddlebrook now, self-servingly, argues that there were material issues of fact not considered by the District Court, adds these additional facts that are not in the District Court record in its footnotes, and then offers to "supplement the record if appropriate". *See Appellant's Opening Brief*, pg. 3 & 4. As argued above, this Court has clearly held that it will not tolerate any attempt to introduce extraneous information into the proceeding. *MacKinnon*, 957 P.2d 23, 26.

In contrast to its appellate position, Saddlebrook submitted its own motion for summary judgment to the District Court on the issue of judicial estoppel, and certified that there were no genuine issues of material fact in dispute. Accordingly, this Court should reject any attempts by Saddlebrook to interject new "facts" and "evidence" into this appellate proceeding that have not been properly made a part of the District Court record.

With the parties' agreement that there were not material issues of fact in dispute, the District Court then looked to the law governing the case. "Judicial

estoppel is an equitable doctrine that precludes a party from gaining an advantage by asserting one position, and then later seeking an advantage by taking clearly inconsistent positions". *See Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, (9th Cir. 2001) (internal citations omitted). "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 opposite theories. *State v. Darrah*, 2009 MT 96, 350 Mont. 70, 205 P.3d 792 at ¶ 12. "The debtor's duty to disclose potential claims as assets does not end when the debtor files schedules, but instead continues for the duration of the bankruptcy proceeding." *Kucera v. City of Billings*, 2020 MT 34, 399 Mont. 10, 457 P.3d 352 at ¶ 12 (internal citations omitted). "Generally, a debtor who fails to disclose a contingent and unliquidated claim in a bankruptcy proceeding is judicially estopped from pursuing that claim after being discharged from bankruptcy. *Id.* at ¶ 9.

Court's invoke judicial estoppel to prevent parties from taking advantage of inconsistent positions, but also to "protect against a litigant playing fast and loose with the courts." *Dovey v. BNSF Ry. Co.*, 2008 MT 350, 346 Mont. 305, 195 P.3d 1223.; *See also Russell v. Rolfs*, 893 F.2d 1033 (9th Cir. 1990). The United States Supreme Court has set forth three factors the Court may consider:

i. Whether a party's later position is clearly inconsistent;

ii. Did the party successfully persuade the court to accept the parties' earlier positions; and

iii. Whether allowing the inconsistent position would allow the party to "derive an unfair advantage or impose an unfair detriment on the opposing party". *See New Hampshire v. Maine*, 532 U.S. 742, 121 S.Ct. 1808, 1815, 149 L.Ed.2d 968 (2001)

Although this three-part test has been adopted by this Court, this Court further adopted a precursory finding of "whether the party intentionally sought to manipulate the courts by taking inconsistent positions." *Dovey*, 195 P.3d 1223, 1225.

As provided *infra*, the District Court correctly applied the standards set forth and properly granted summary judgment in Krohne's favor on the basis of judicial estoppel pursuant to Rule 56, M.R.Civ.P.

A. Simonsen's Conduct Shows Neither Inadvertence Nor Mistake In His Failure To Amend His Bankruptcy Schedules.

The District Court properly granted summary judgment for Krohne on Saddlebrook's claims for malicious prosecution and abuse of process because Saddlebrook never claimed or argued there was mistake or inadvertence on Simonsen's part for his failure to amend his schedules in the bankruptcy. Furthermore, even if Saddlebrook had argued this point, the facts do not support the argument.

This Court adopted the threshold determination regarding whether a party intended to manipulate the courts by taking inconsistent positions in *Dovey v. BNSF Ry. Co.. Dovey*, 195 P.3d 1223, 1226. The origin of this threshold consideration is well established by this Court referring to a party showing good faith in complying with the law. *Id.*

In *Dovey*, the Plaintiff alleged he did not include a claim on his bankruptcy schedule because he did not consider suing on the claim until after he had already filed for bankruptcy. *Id.* The district court in *Dovey* did not consider mistake or inadvertence, but provided that if the court had considered intent the result would have been the same. *Id.* This Court determined that Dovey's self-protestations established a question of fact regarding his unscheduled claims. *Id.*

The facts of the matter before this Court are different. Notably, Saddlebrook did not make any assertion that the failure to file notice of these claims on the schedules of the bankruptcy was based on mistake or inadvertence in their briefing before the District Court. *See* CR 96. Furthermore, Saddlebrook's counsel did not present this argument in oral arguments before the District Court. *SJH*[3] *19:3 – 25:5*.

Instead, Saddlebrook argued there were no inconsistent positions, and the Trustee was the only party that convinced the bankruptcy court to act. CR 96, pp. 10

[3] All references to the Summary Judgment Hearing before the District Court on June 12, 2022, shall be designated SJH with the page and line numbers specified.

– 11. This Court held in *Kucera v. City of Billings* that "Kucera's omission can hardly be interpreted as a result of mistake or inadvertence." *Kucera*, 457 P.3d 952, 955. As provided *infra* and *supra*, Simonsen was aware of the claims in May of 2013 when he sought to bring counterclaims and third-party claims in Federal District Court action. CR 86, Exhibit A. Moreover, Simonsen clearly had knowledge of the claims in April of 2015 when he filed the Complaint and Jury Demand in this matter. CR 1. Nothing in Simonsen's conduct, as specifically provided in this matter, can be interpreted as a result of mistake or inadvertence.

The District Court's conclusion was correct, Simonsen had actual knowledge of the claims at the latest in April of 2015, when he formally asserted these claims against Krohne in a Complaint filed in State District Court in this action. CR 106, p. 9, Lines 3 – 16. Pursuant to this Court's holding in *Dovey*, Simonsen had knowledge of the claims and was aware of the potential claims against Krohne as they had been filed by his lawyer, under his name, in this matter. *Dovey*, 195 P.3d 1223, ¶ 21; *See* CR 1. Therefore, this Court should affirm the District Court's Order.

B. Simonsen's Position In The Bankruptcy Proceeding Was Clearly Inconsistent With The Position He Has Taken In This Matter.

The District Court properly granted summary judgment for Krohne on Saddlebrook's claims for malicious prosecution and abuse of process because Simonsen had actual knowledge of the claims and elected not to specifically disclose them during his bankruptcy, thus taking inconsistent positions.

As provided *supra*, the purpose of judicial estoppel is to prevent a party from taking inconsistent positions in separate matters and seeking to gain an advantage. *Hamilton*, 270 F.3d 778. Therefore, it is essential to carefully evaluate the timeline of the filings on the claims for malicious prosecution and abuse of process.

Simonsen was first aware of these claims in May of 2013 when he sought leave from the Federal District Court to amend his answer in that matter and file counterclaims and third-party claims. CR 96, Exhibit 1. On June 6, 2013, Judge Haddon held a hearing on Simonsen's motion seeking leave to amend. *Id.* at Exhibit 4. During the hearing, Judge Haddon ruled that claims against new parties were not going to be permitted. *Id.* at lines 13 -14. Regarding his alleged counterclaims, Judge Haddon gave Simonsen two options: the counterclaims could be asserted, and the parties proceed to trial; or the Court would sever the counterclaims and they would proceed separately from the rest of the case. *Id.* at lines 15 – 21.

Having affirmatively tried to bring these claims as counterclaims and/or third-party claims in the federal court action, Simonsen cannot now credibly argue that he was unaware of the claims. Simonsen further argued the claims were relevant and compulsory counterclaims in the Federal Court action, but instead decided to file these claims separately in District Court. CR 1.

On January 10, 2014, approximately eight (8) months after Simonsen sought leave from the Federal District Court to file these claims, Simonsen filed his Notice

of Bankruptcy Case Filing. *Id.* at Exhibit 5. On February 4, 2014, Simonsen filed his Summary of Schedules in the bankruptcy. CR 86, Exhibit C. Notably, under number 21 "Other contingent and unliquidated claims of every nature, including tax refunds, counterclaims of the debtor, and the right to setoff claims" Simonsen identifies one claim, described specifically as "COUNTERCLAIMS AGAINST BDS QUANT CAPITAL LLC". *Id.* at p. 7. Despite Simonsen's efforts to bring the abuse of process and malicious prosecution claims in the Federal District Court action, he failed to identify or list these same claims as assets in his bankruptcy schedules as required by law. *Id.*

Simonsen, as the sole plaintiff without assignment to another party, continues to pursue these claims with responses to two (2) Notices Pursuant to Rule 9. CR 2-5. Although Simonsen now attempts to claim he had no knowledge of these claims, he clearly attempted to pursue them in the Federal District Court action and then filed a formal Complaint alleging them in 2015 in the District Court. *Id.* The language used is notable in these responses provided by Mr. Singer on behalf of Simonsen as the caption only carries Simonsen's name, and in the second response, Simonsen responds starting with "Simonsen's Complaint". CR 5.

Saddlebrook's assertion on appeal that these claims belonged to the Trustee without any reference to the Trustee in the contemporaneously filed pleadings in federal district court and State District court is an example of Simonsen playing fast

and loose with the law. Now Saddlebrook is attempting to attain the same advantage Simonsen would have based on Simonsen's conduct. Throughout the duration of the Bankruptcy, Simonsen held the position that Krohne was a creditor and that there were no contingent or unliquidated claims outside of the claim designated as "COUNTERCLAIMS AGAINST BDS QUANT CAPITAL LLC". CR 86, Exhibit C, at p. 7. Simonsen had ample opportunity to revise his Bankruptcy schedules to include the abuse of process and malicious prosecution claims against Krohne, even after filing the 2015 Complaint in this matter in State District Court, but he did not.

Furthermore, evaluation of the Settlement in the Adversarial proceedings only shows Simonsen's position that no claims existed against Krohne. In the Settlement, notice was provided to creditors, but as Saddlebrook admits, Simonsen never amended his disclosures during the bankruptcy, therefore denying the creditors the right to object. CR 96.[4]

On March 4, 2016, approximately eleven (11) months after Simonsen filed his Complaint and Jury Demand before the District Court alleging both Malicious Prosecution and Abuse of Process, a Settlement Agreement was filed regarding the adversarial proceedings. CR 96, Exhibit 24. Simonsen never amended his Summary

[4] Saddlebrook provided in Plaintiff's Combined Brief on Cross-Motions for Summary Judgment Concerning Judicial Estoppel "Krohne Fund notes correctly that Simonsen's bankruptcy schedules did not specifically list the claims Saddlebrook is asserting in this case." CR 96, p 2, lines 4 - 7.

of Assets to disclose the claims against Krohne from his filing of his Summary of Schedules in the bankruptcy. CR 86, Exhibit D, p. 7.

Simonsen's disclosure of claims in his Bankruptcy schedules throughout the duration of the bankruptcy is clear: the only contingent and unliquidated claim of any nature he identified were his Counterclaims against BDS Quant Capital LLC. CR 86, Exhibit C, at p. 7. His failure to also list claims against Krohne for abuse of process and malicious prosecution is directly contrary to representations made in the 2015 Complaint, including those claims, filed in the instant case. CR 1, pp. 15 – 16. Therefore, Simonsen position in State District Court that these claims exist and are valid; but his failure to disclose them as claims on his bankruptcy schedule during the bankruptcy proceeding is clearly inconsistent.

C. Simonsen Successfully Persuaded The Bankruptcy Court Of His Inconsistent Position.

The District Court properly granted Krohne's Motion for Summary Judgment because Simonsen took inconsistent positions and was able to convince the Bankruptcy Court of his position that the only claim that existed was his Counterclaims against BDS Quant Capital LLC.

In considering whether Simonsen was successful in persuading the prior court, specifically the bankruptcy court, of his prior position, it is clear to see he was successful as Simonsen's creditors were never given the opportunity to investigate and evaluate these claims as Simonsen did not provide them notice of the existence

of the claims. Simonsen elected not to list the claims in this matter as required during the pendency of his bankruptcy although he had formally filed a Complaint including these claims in this matter. *See 11 U.S.C. §521; Fed. R. Bankr. P. 1007*; CR 86; *See Also Kucera*, 457 P.3d 352 at ¶ 12, Exhibit C; CR 1. Although Simonsen never informed the creditors during his bankruptcy of these claims, Saddlebrook, the ultimate assignee of the claims, is now attempting to assert these claims should not be judicially estopped.

Simonsen filed for bankruptcy on January 10, 2014. CR 96, Exhibit 5. Simonsen filed his Summary of Schedules in his bankruptcy on February 4th, 2014. CR 86, Exhibit C. Notably, under number 21 "Other contingent and unliquidated claims of every nature, including tax refunds, counterclaims of the debtor, and the right to setoff claims" Simonsen specifically identifies only one claim, specifically "COUNTERCLAIMS AGAINST BDS QUANT CAPITAL LLC". *Id.* at p. 7. There is no reference to the claims in this matter against Krohne within the bankruptcy filings. *Id.*

Federal law and the Federal Rules of Bankruptcy require a party in a bankruptcy to provide a schedule of assets. *See 11 U.S.C. §521; See Also Fed. R. Bankr. P. 1007.* In *Hamilton v. State Farm Fire & Cas. Co.,* the Ninth Circuit Court considered a situation where the bankruptcy trustee was informed of potential claims and the party to the bankruptcy failed to inform the creditors of the claims by failing

to list them on his disclosure statements. *Hamilton*, 270 F.3d 778, 784. The Ninth Circuit provided that notice to the trustee was, in itself, insufficient to escape judicial estoppel as the express duty of disclosure is on the party. *Id.* The Ninth Circuit provides the best explanation for this requirement stating "both the court and Hamilton's creditors base their actions on the disclosure statements and schedules. *Id.*

This Court has considered a similar case when it affirmed the district court's determination that judicial estoppel barred Kucera's claims in *Kucera v. City of Billings*. *Kucera*, 457 P.3d 952, 955. In *Kucera,* this Court held that although Kucera has reopened his bankruptcy to amend the schedules, Kucera was still judicially estopped because Kucera had enough knowledge to disclose the claim in the bankruptcy. *Id.*

Saddlebrook's assertion that Simonsen informed the Trustee is not sufficient indicia to escape judicial estoppel. Furthermore, the Ninth Circuit has provided that "when a debtor has knowledge of enough facts to know that a potential cause of action exists during the pendency of the bankruptcy but fails to amend his schedules or disclosure statements to identify the cause of action as a contingent asset" judicial estoppel will be imposed. *Hamilton*, 270 F.3d 778, 784. Here, Simonsen clearly had knowledge of the claims in May of 2013 when he sought to bring counterclaims and third-party claims in the federal court action. CR 86, Exhibit A. Moreover, Simonsen

had knowledge of and formally asserted the claims in April of 2015 when he filed the Complaint and Jury Demand in the case at bar. CR 1. Simonsen had sufficient knowledge of these claims to disclose them but elected to continue to keep these claims hidden from the creditors and the Bankruptcy Court.

D. Allowing Saddlebrook, As The Assignee Of Simonsen, To Pursue Claim Never Disclosed In The Bankruptcy Denies Creditors Their Right To Pursue The Claims.

The District Court properly granted Summary Judgment for Krohne based on Judicial Estoppel because Simonsen's failure to amend his schedules to include these claims denied creditors the right to pursue these claims. Debtors, like Simonsen, have an express duty imposed under federal law to file disclosures, including any contingent or unliquidated claims. *11 U.S.C. § 521(1); Hamilton*, 270 P.3d 778, 784; *Dovey*, 195 P.3d 1223, 1224. The duty of the debtor to update their disclosures is ongoing throughout the duration of the bankruptcy. *Kucera*, 457 P.3d 952, 954 – 955. Disclosure and notice to creditors is essential because this is the information the creditors and bankruptcy court base their actions on. *Hamilton*, 270 P.3d 778, 784 (citing *In re Coastal Plains, Inc.*, 179 F.3d 197, 206 (C.A.5 1999)).

The District Court articulates Simonsen's conduct precisely stating "Simonsen made no effort to put his creditors on notice." CR 106, p. 11, lines 14 – 15. Simonsen's "failure to list the claims as assets on his bankruptcy schedules deceived the bankruptcy court and his creditors." *Id.* at lines 16 – 17. Saddlebrook,

as the ultimate assignee of Simonsen, would obtain an unfair advantage as it would have the opportunity denied to Simonsen's creditors, specifically the opportunity to pursue claims against Krohne.

E. Saddlebrook's Argument Regarding Accrual of the Malicious Prosecution Claim is Misplaced.

Saddlebrook argues that its malicious prosecution claim, at least, could not have been included on Simonsen's bankruptcy schedules because it arguably did not accrue until 2017 when the federal court action fully resolved. Saddlebrook relies extensively on *McAtee v. Morrison and Frampton, PLLP* to support this argument. The facts in *McAtee*, however, are clearly distinguishable from the facts in this case.

Morrison & Frampton (hereinafter referred to as "M&F") filed a civil complaint against McAtee and also reported fraud allegations to federal law enforcement in March of 2011. *McAtee v. Morrison and Frampton, PLLP,* 2021 MT 227, 405 Mont. 269, 512 P.3d 235, 237. McAtee filed for bankruptcy in July of 2011. *Id.* McAtee's bankruptcy was discharged in November of 2011 and closed in May of 2013. *Id.* Ultimately the criminal charges were dismissed in September of 2012 and the civil claims were not dismissed until January of 2014. *Id.*

In January 2015, McAtee brought claims against M&F for malicious prosecution and abuse of process relating to M&F's involvement in the fraud allegations and proceedings. *Id.* M&F moved for summary judgment on the affirmative defense of judicial estoppel. *Id.* The district court granted summary

judgment on all claims outside of the malicious prosecution claim, this Court remanded the case in light of its opinion in *Kucera*, and the district court granted summary judgment for M&F on all claims based on judicial estoppel. *Id.* at 272 – 273.

This Court found that McAtee's claim for malicious prosecution related to the criminal fraud charges had accrued during the pendency of her bankruptcy, but the malicious prosecution related to the civil claims had not accrued during the pendency of the bankruptcy. *Id.* at 273. This Court stated "McAtee's malicious prosecution claim, as premised on the civil fraud action, had not yet accrued at the time she filed her bankruptcy petition and cannot be deemed rooted in her pre-bankruptcy conduct." *Id.* at ¶19. This is the quintessential difference between *McAtee* and the instant matter before this Court.

Krohne sued Simonsen in January 2011 in Federal District Court. CR 86, Exhibit A. Simonsen sought leave of the Federal District Court to assert a counterclaim for malicious prosecution claim in May of 2013. CR 96, Exhibit 1. In June of 2013, Judge Haddon offered Simonsen the option to pursue the malicious prosecution claim in a separate proceeding. CR 96 Exhibit 4, lines 15 – 21; Exhibit 3. In January of 2014 Simonsen filed for Bankruptcy. CR 96, Exhibit 5. In July of 2014, the Federal District Court ruled in Simonsen's favor. CR 96, Exhibit 8. In

April of 2015 Simonsen, as the sole plaintiff, filed a Complaint in this matter formally alleging a claim for malicious prosecution. CR 1.

The malicious prosecution claim had certainly accrued by the time Simonsen formally alleged it in his April 2015 Complaint. Either the malicious prosecution claim had accrued or Simonsen is guilty of filing a frivolous and unsubstantiated claim against Krohne. It's one or the other. Simonsen cannot have his cake and eat it too.

Moreover, in *Kucera* and *Dovey*, this Court articulated that the standard for when a debtor must amend their bankruptcy schedule is when the debtor has sufficient knowledge of a claim, not when the claim formally accrues. *See Kucera*, *Kucera*, 457 P.3d 952, ¶ 10; *Dovey*, 195 P.3d 1223, ¶ 21. In the *McAtee* case, the debtor did not have sufficient knowledge of the malicious prosecution claim during her bankruptcy, for which she attained a discharge in November of 2011 and ultimately the bankruptcy closed in 2013. *McAtee*, 512 P.3d 235, ¶ 5.

Simonsen, on the other hand, not only had sufficient knowledge during the bankruptcy, but also formally pursued the malicious prosecution claims in both Federal District Court and State District Court prior to the adversary proceedings within the bankruptcy, but most importantly over five (5) years before the bankruptcy was closed. *See* CR 96, Exhibits 1 and 23. Although this is sufficient enough to show the contrast in these matters, the facts are even more stark when this

Court considers that Simonsen further filed the claims in this case, including malicious prosecution and abuse of process in April of 2015, before the adversarial proceedings commenced in the bankruptcy and three (3) years before the bankruptcy closed. *See* CR 1. Simonsen had actual knowledge that he was formally pursuing these claims in litigation and withheld this information from his creditors, a stark contrast to the facts in *McAtee*.

The threshold question a court must consider when determining whether or not to apply Judicial estoppel is whether or not a party is intentionally manipulating the Court. *Kucera*, 457 P.3d 952, ¶ 9. The most critical factor here is that Simonsen's claims are rooted in his pre-bankruptcy conduct as Simonsen attempted to pursue these claims six (6) months prior to filing bankruptcy. CR 96, Exhibit 1 & 5. The timeline and facts are drastically divergent when considering *McAtee* and the case at bar. Accordingly, the District Court properly applied the criteria of judicial estoppel as set forth by this Court and properly awarded summary judgment to Krohne pursuant to Rule 56, M.R.Civ.P.

5. <u>Saddlebrook's Reliance On *Samson* Is In Contrast To This Court's Prior Holdings.</u>

Saddlebrook admits in its Opening Brief that "Simonsen should have listed the claim as a bankruptcy asset." *See Appellant's Opening Brief*, p. 30. This has been the Court's position historically relating to a party during the pendency of a bankruptcy. *See Kucera*, *Kucera*, 457 P.3d 952, ¶ 10; *Dovey*, 195 P.3d 1223, ¶ 21.

Saddlebrook relies on the position that once the trustee is substituted they can pursue a debtors non-disclosed asset as found by Judge Molloy in *Samson v. Wal-Mart Stores, Inc. Id.*; *See also Samson v. Wal-Mart Stores, Inc.*, CV 12-39-M-DWM, 2013 WL 12141486 (D. Mont. Apr. 30, 2013).

Saddlebrook continues to argue that the Trustee pursued the claims and uses highly redacted e-mails that were never disclosed in discovery and the filing in this matter as its evidence. This limited and self-serving "evidence" did not persuade the District Court in this matter and should not be persuasive on appeal.

Simonsen filed these claims before the District Court in his own name, not in the Trustee's name. CR 1. As provided *supra*, Simonsen's counsel continued to defend against Rule 9 Notices with Simonsen, not the Trustee, as the plaintiff. Finally, there is the baseless allegation that the creditors were somehow put on notice of the claims despite the fact that the claims were never identified or listed in Simonsen's bankruptcy schedules. This is factually proven to be false.

Undersigned counsel admitted during the summary judgment hearing that the only notice that was provided to creditors with any relation to litigation against Krohne was the document notes in Saddlebrook's response as Exhibit 18, the Trustee's notice of intent to abandon the litigation before the Federal District Court on appeal to the Ninth Circuit. CR 96, Exhibit 18; *See SJH* 26:9 – 26:11. This notice was dated December 16, 2016, a full twenty (20) months after Simonsen filed the

claims in this matter before the District Court. *Id.*; *See Also* CR 1. This notice by the Trustee provided the creditors with the ability to challenge its abandonment relating to the federal matter, but the pending matter before the District Court was never identified or disclosed. Simonsen intentionally deceived the Bankruptcy Court and the creditors by never providing any notice regarding the claims in this matter pending in the instant action. Saddlebrook finally makes one correct assertion, Simonsen should have disclosed these claims, but because he did not the District Court properly granted Krohne's motion for summary judgment on the basis of judicial estoppel.

CONCLUSION

For the foregoing reasons, the evidence of record and argument in this matter shows the District Court did not abuse its discretion in granting Krohne's Motion to Amend its Answer and add an Affirmative Defense of Judicial Estoppel. Further, the evidence of record and preceding argument demonstrates that the District Court properly awarded summary judgment to Krohne as Saddlebrook is judicially estopped from asserting both the abuse of process and malicious prosecution claims. Krohne respectfully requests that this Court affirm the District Court's rulings in this regard.

RESPECTFULLY SUBMITTED this 11th day of October, 2023.

/s/ Steven L. Stockdale
Steven L. Stockdale
Attorney for Defendant/Appellee

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 27 of the Montana Rules of Appellate Procedure, I certify that this Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated by Microsoft Word for Windows is not more than 10,000 words, not averaging more than 280 words per page, excluding certificate of service and certificate of compliance. The word count is 8,475.

DATED this 11th day of October, 2023.

/s/ Steven L. Stockdale
Steven L. Stockdale

CERTIFICATE OF SERVICE

I, Steven Leon Stockdale, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 10-11-2023:

Matthew B. Gallinger (Attorney)
1004 Division Street
Billings MT 59101
Representing: Krohne Fund L.P.
Service Method: eService

T. Thomas Singer (Attorney)
Hall & Evans, LLC
175 North 27th Street
Suite 1101
Billings MT 59101
Representing: Saddlebrook Investments, LLC
Service Method: eService

Greyson Douglas Hill (Attorney)
175 North 27th St., Ste. 1101
Billings MT 59101
Representing: Saddlebrook Investments, LLC
Service Method: eService

Amanda G. Hunter (Attorney)
125 Bank Street
Suite 403
Missoula MT 59802
Representing: Saddlebrook Investments, LLC
Service Method: eService

Electronically signed by Amanda Nelson on behalf of Steven Leon Stockdale
Dated: 10-11-2023