IN THE SUPREME COURT OF THE STATE OF MONTANA
No. DA 23-0281

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

Plaintiff and Appellee,

v.

ANTHONY BIRBILIS,

Defendant and Appellant.

APPELLEE'S RESPONSE BRIEF

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

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2. Did the District Court err in denying Birbilis's motion to dismiss?

STATEMENT OF THE CASE

Defendant/Appellant Anthony Birbilis ("Birbilis") was a partner with Stuart Simonsen in Kapidyia Capital Partners. Their relationship soured, and Birbilis took steps to harm Simonsen, including making manual trades in a customer account to undermine the performance of Simonsen's algorithmic trading program, calling that customer and making false statements, and helping the customer – Krohne Fund, L.P. – pursue a lawsuit against Simonsen and Kapidyia.

The evidence at trial showed Birbilis had made the manual trades and collaborated with Krohne and others in an effort to seize control of Simonsen's trading system. Axel Krohne, the manager of Krohne Fund, testified he had no evidence to support the claims Krohne Fund had asserted.

Simonsen prevailed at trial, but Krohne Fund appealed and its claims against Simonsen were not dismissed with prejudice until late 2017. Meanwhile, the harm caused by Krohne's lawsuit led Simonsen to declare bankruptcy. In the bankruptcy, the Trustee filed and later settled an adversary claim on terms that

included assigning Simonsen's claims against Birbilis to Grizzly Peak, L.P.

Grizzly Peak then assigned the claims to Saddlebrook Investments, LLC, and, in March 2018, Saddlebrook amended the complaint that Simonsen had filed in this action in 2015 but never served.

Birbilis was served. He responded by filing motions for judicial notice (Rule 201(d), M.R.Evid.) and to dismiss (Rules 12(b)(2) & (6), M.R.Civ.P.). The District Court denied his motions. Birbilis's local counsel then withdrew, his *pro hac vice* counsel's Montana licensure expired, and Saddlebrook served a Rule 10 Notice requiring Birbilis to answer or be defaulted. After several months, Birbilis finally answered.

The District Court entered a scheduling order that gave the parties six months to complete discovery. Birbilis and his counsel took no discovery, filed no motions and, as the trial date neared, failed to respond to Saddlebrook's multiple requests to draft a final pretrial order.

Saddlebrook moved for sanctions. Birbilis filed no response, but at the hearing his *pro hac vice* counsel appeared remotely without local counsel (who had withdrawn). The District Court ordered Birbilis to obtain local counsel within one month or have default judgment entered against him. The deadline passed, local counsel had not appeared, and the District Court entered default judgment.

When the hearing on damages was set, Birbilis again failed to respond or appear. However, an hour after the hearing, he contacted Saddlebrook's counsel seeking additional time. Counsel notified the Court, which sat on the issue for two months to allow Birbilis to request relief. Despite the extra time, Birbilis took no action. The Court entered judgment. Even after judgment was entered, Birbilis made no effort to seek relief from the default or the judgment.

Birbilis appeals from the Default Judgment (CR 79, 117, 118), and the order denying his motion to dismiss. (CR 43).

STATEMENT OF THE FACTS

The case comes to this Court from rulings on pretrial motions. There has been no trial, and Birbilis has not ordered transcripts of any hearings. The following statement of facts is taken from the First Amended Complaint, Birbilis's judicial admissions in his briefs and motion to dismiss, and affidavits Saddlebrook submitted in support of motions.

1. Birbilis Partners with Simonsen to Form Kapidyia.

Stuart M. Simonsen developed a proprietary algorithm-based securities trading system known as Xynaquant. CR 7, ¶¶ 1; 10-11. Simonsen had started developing algorithmic investing models based on market trends he observed in 1996. *Id.* ¶ 10. Simonsen's algorithms were successful enough to make him a multimillionaire.

Simonsen enlisted programmers to create software that would integrate with his trading system. *Id.,* ¶ 11. Between 2006 and 2013, Simonsen spent approximately $17 million dollars developing the algorithm-software pairing. *Id*.

Around 2007, Simonsen met Anthony Birbilis, a commodities trader from New York. *Id.*, ¶ 12. After learning about Simonsen's trading system, Birbilis convinced a high value client to trade with the algorithms, and the three later set up two new funds, Axiodyn and Axioquantum, to trade using Simonsen's algorithms. *Id.*

Despite good returns, disagreements arose over how much risk the funds should take, so Birbilis and Simonsen decided to partner with an accountant on a new venture called Kapidyia Capital Partners, LLC., to offer account management services utilizing Xynaquant. *Id.,* ¶¶ 3; 13. Kapidyia's principal place of business was in Billings, Montana, where Simonsen and the accountant resided. *Id.,* ¶¶ 1; 3. Birbilis performed his marketing role primarily from New York, where he resides, but he travelled to Montana on at least four occasions in relation to his work with Simonsen. *Id.,* ¶ 3; *see also,* Aff. Birbilis, CR 22, Ex. G, pp. 1-2.

2. Birbilis Markets Xynaquant to Krohne Fund; Krohne Fund Invests.

In August 2011, Axel Krohne, the manager of Defendant Krohne Fund, LP, was introduced to Simonsen through Mr. Krohne's friend Sean Wright. Simonsen forwarded the introduction to Birbilis, who contacted Wright and Krohne by email

and identified himself as Simonsen's partner. CR 7, ¶¶ 14-16. In the email, Birbilis provided them with brochures describing Xynaquant's portfolio options, as well as a link to download Xynaquant and login information by which to access it. *Id.*

Mr. Krohne flew to Billings to meet Simonsen briefly, decided to invest with Kapidyia, and signed a Managed Account Agreement that gave Kapidyia discretionary authority over account trades. *Id.*, ¶¶ 4-5, 14-18. The account quickly turned a profit, so Krohne increased its investment to a notional value of $15,000,000. *Id.*, ¶ 19.

Birbilis provided instruction about Xynaquant to Messrs. Krohne and Wright so they could access the program and observe the trades (Wright also mimicked the trades in his own account). *Id.*, ¶ 29. Wright and his friend David Tolliver became interested in acquiring Xynaquant. They made a proposal to create a joint venture that would have given them majority interest in the algorithms and Xynaquant. When Simonsen ignored the proposal, they grew frustrated. Tolliver sent an email to Wright saying, "a guy whose been kicked in the nuts is probably more likely to accept / ask for help at a reasonable price". *Id.*, ¶ 30. How they intended to kick Simonsen in the nuts would become clear later.

3. Krohne Fund Stops Trading and Sues Simonsen.

Birbilis made manual trades that undermined the performance of the algorithmic program and caused Krohne's investment to lose money. *Id.*, ¶¶ 20,

21, 28. Krohne stopped trading in November 2011. In January 2012, Krohne Fund sued Simonsen in Montana Federal District Court asserting fraud and other claims.[1] In that litigation, Mr. Krohne admitted he authorized the suit to be filed without having any evidence to support his claims. *Id.*, ¶¶ 22-33, 38-46, 58-60.

4. Simonsen Files for Bankruptcy; Birbilis's Tortious Acts Are Uncovered During Krohne's Litigation.

A few days before trial, Simonsen filed a chapter seven petition for bankruptcy that stayed the litigation.[2] CR 38, Ex. 2. At that point, Krohne's suit against Simonsen and any claims Simonsen had against Krohne, Birbilis or others became part of the bankruptcy estate, which was managed by Trustee Darcy Crum. *Id.,* Ex. 5. However, Krohne moved to lift the stay on its claim against Simonsen, the motion was granted, and trial was reset. *Id.,* Ex. 2.

At trial, Birbilis and Wright were Krohne's principal witnesses. CR 7, ¶ 24. Both travelled to Montana voluntarily to testify in support of Krohne's claims against Simonsen. *Id.* Birbilis testified he had developed strong negative feelings towards Simonsen that he did not disclose to him. He testified he had become angry with Simonsen during Kapidyia's negotiations with Krohne Fund in August

[1] *Krohne Fund, LP v. Simonsen*, U.S. District Court, District of Montana, Billings Division, Cause No. CV-12-04-BLG-SEH. The case was initially assigned to Hon. Richard F. Cebull, who was later replaced by Hon. Sam E. Haddon.
[2] *In re Stuart Michael Simonsen*, U.S. Bankruptcy Court, District of Montana, Cause No. 14-60015-7-BPH. The case was initially assigned to Hon. Ralph B. Kirscher, who was later replaced by Hon. Benjamin P. Hursh.

2011 when he learned he would not receive an ownership interest in Xynaquant. *Id.*, ¶ 25. For months after that, Birbilis had feigned loyalty to Kapidyia and Simonsen. At the same time, as Birbilis admitted, he discouraged potential customers from doing business with Simonsen. *Id.,* ¶ 27. Birbilis also admitted telling Mr. Krohne falsehoods about Simonsen being mentally unwell and about Birbilis investing his savings with Simonsen and never receiving a return on his investment. *Id.,* ¶ 26. Most notably, the heart of Krohne's claim against Simonsen – that non-algorithmic manual trades were made in Krohne's Kapyidia account – was undone when it was shown that the manual trades could not have been made by Simonsen and had to have been made by Birbilis. *Id.,* ¶ 28.

Trial concluded and judgment was entered dismissing Krohne's claims with prejudice. CR 38, Ex. 3. Krohne appealed to the Ninth Circuit.[3] *Id.,* Exs. 4-5.

5. Simonsen's Claims Are Assigned to Saddlebrook; Krohne Fund's Suit is Dismissed; Birbilis Moves to Dismiss Saddlebrook's Suit Against Him.

While the appeals were pending, Trustee Crum pursued an adversary action. As part of settling that action, Simonsen's claims against Birbilis were assigned to Grizzly Peak, L. P., which later assigned them to Saddlebrook. CR 7, ¶ 2. The

[3] *Krohne Fund v. Stuart Simonsen, et al.*, U.S. Court of Appeals, 9th Circuit, Cause No. 14-35668.

Trustee also abandoned claims the bankruptcy estate had against Krohne Fund and other third parties, including claims against Birbilis. CR 38, Ex. 5.[4]

After the Ninth Circuit remanded Krohne's case, Simonsen moved for and prevailed on summary judgment, and Krohne dismissed its remaining claims in December 2017. CR 5. Saddlebrook filed and served the Amended Complaint a few months later. CR 7.

Birbilis timely responded by filing two motions. CR 24 and 22. His motion to dismiss argued that Simonsen (and therefore Saddlebrook) lacked standing, that the District Court lacked personal jurisdiction over him, and that dismissal was appropriate based on affirmative defenses of waiver, the statute of limitations, and judicial estoppel. *Id.*; CR 25.

His other motion asked the district court to take judicial notice of various legal proceedings involving Simonsen, as well as a large number of exhibits he attached to his moving papers. CR 22. Birbilis was represented at the time by Illinois attorney Matthew Edward Vogler, appearing *pro hac vice*, and local counsel Eric Edward Nord. CR 20, 22, 33.

[4] The Trustee had authorized the instant case to be filed in April 2015 to preserve claims against Birbilis and others. C.R. 1. However, the claims that were preserved in that complaint were all dismissed by Judge Fehr. The claims that survived her ruling on the 12(b) motions were claims that accrued after Simonsen filed for bankruptcy. The surviving claims accrued either when they were discovered by Simonsen or the Trustee, or when Simonsen finally prevailed against Krohne in 2017. Those are the claims that the Trustee assigned to Grizzly Peak.

6. Birbilis's Motions are Denied; He Ceases Participating; Saddlebrook Moves for Sanctions.

On December 5, 2019, the District Court denied Birbilis's motions. CR 43. With respect to his motion for judicial notice, the District Court held Birbilis had failed to demonstrate that the cases and documents he wanted the court to take judicial notice of were not subject to reasonable dispute. *Id.,* pp. 16-17.

The District Court held Saddlebrook had standing because Simonsen's claims had been assigned by the Trustee to Grizzly Peak and by Grizzly Peak to Saddlebrook. *Id.,* p. 19. Judge Fehr concluded she had personal jurisdiction over Birbilis because his actions were "designed to have an effect in Montana." *Id.*, p. 20. "By coming to testify in Montana against Simonsen, and by coming to Montana to meet with Simonsen related to work for Kapidyia, Birbilis has availed himself of Montana laws…." *Id*., p. 21.

Regarding waiver, the District Court held it was "not required to enforce the stipulation entered in the Kaga litigation and Simonsen has not waived his claim against Birbilis regarding the management of the Krohne Fund account." *Id*., p. 22. Birbilis's motion based on judicial estopped was denied because Rule 12(b)(6) allows the Court only "to examine whether a claim has been adequately stated in the Complaint[, and] ... Birbilis's statements do not rely on anything pled in the Complaint and do not state that the Complaint has not been sufficiently plead." *Id.* Finally, the Court rejected "Birbilis's argument that all acts complained of by

Simonsen occurred before December 2011" because the case was filed within a year after the Krohne litigation was resolved. *Id.*, p. 23.[5]

After the Court denied his motions, Birbilis and his counsel failed for nine months to file an answer. They ignored Saddlebrook's Rule 10 Notice and other warnings that Saddlebrook would pursue Birbilis's default for failure to answer. CR 50; CR 55, ¶ 12. During that time, Birbilis's first local counsel withdrew and Mr. Vogler's licensure expired. CR 50. Once Vogler was readmitted and Layne Scheveck stepped in as new local counsel, Birbilis filed a Petition for Writ of Supervisory Control, which this Court summarily denied. CR 52.[6]

Birbilis finally filed an answer to the Complaint. CR 53. Saddlebrook then requested a scheduling conference, at which the Court set an October 14, 2021 trial date and a deadline to meet and exchange witness and exhibit lists during the week of August 9, 2021. CR 57 and 59.

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[5] Judge Fehr asserted incorrectly that the Krohne litigation was resolved in June 2014. That is when Judge Haddon entered judgment the first time, but that judgment was appealed to the Ninth Circuit and remanded. After Krohne Fund appealed the final judgment, "the proceedings do not terminate until final disposition of the appeal and of any other proceedings it may entail." *Restatement of the Law, Third, Liability Economic Harm* §24, comment e. *See, also*, *Webb v. Airlines Reporting Corp.*, 825 F. Supp. 273, 276 (D. Kan. 1993) ("If the filing of an appeal occurred after the filing of the malicious prosecution action, the malicious prosecution claim would be subject to dismissal as premature because the plaintiff would not have obtained a favorable termination of the underlying case."); *Roger Cleveland Golf Co., Inc. v. Krane & Smith, APC*, 225 Cal. App. 4th 660, 674, 170 Cal. Rptr. 3d 431, 440-41 (2014) (citing *Gibbs v. Haight, Dickson, Brown & Bonesteel*, 183 Cal.App.3d 716, 722, 228 Cal. Rptr. 398 (1986) ("The filing of an appeal renders the malicious prosecution action premature. The statute of limitations is tolled and recommences to run when the appellate process has been exhausted.").

[6] *Anthony Birbilis v. Thirteenth Judicial District Court*, OP 20-0428.

Saddlebrook was responsible for arranging the meeting, which it duly attempted to do. CR 62. Counsel for Saddlebrook sent an email on August 2 to counsel for both Krohne and Birbilis, proposing a date for the meeting. Neither defendant responded. *Id.,* ¶ 5. On August 4, counsel sent another email, providing Saddlebrook's transcript designations pursuant to the scheduling order, and also following up on the proposed meeting date. *Id.,* ¶ 6. This time, Mr. Scheveck – Birbilis's second local counsel – responded, but all he said was "Thank you Tom." *Id.*

On August 10, Saddlebrook's counsel sent a third email asking when the defendants would be ready to meet and, also, reminding them that the scheduling order authorized the parties to stipulate to a different date. *Id.,* ¶ 7. Saddlebrook received no response. *Id.,* ¶ 8. On August 12, counsel re-sent the previous email. *Id.,* Only counsel for Krohne Fund responded, proposing a new date for the meeting. Saddlebrook agreed and asked Birbilis's counsel whether they would stipulate also. *Id.,* ¶ 9. Saddlebrook received no response. *Id.*

Without Birbilis's participation, the parties were unable to conduct the mandatory conference and exchange witness and exhibit lists in compliance with the District Court's order. *Id.,* ¶ 11. With trial looming, Saddlebrook moved for the imposition of sanctions to ensure that the case could proceed to trial. CR 61. In its motion, Saddlebrook suggested several possible sanctions pursuant to M. R. Civ.

P. 16(f), ranging from an award of attorney fees if Birbilis started participating to default judgment if he did not. CR 61, p. 4.

7. Birbilis is Sanctioned for Noncompliance with the Scheduling Order and *Pro Hac Vice* Rules.

The day after Saddlebrook filed its motion for sanctions, Birbilis's second local counsel filed a motion to withdraw, which was soon granted. CR 63; 66. Saddlebrook filed another Rule 10 Notice to Birbilis followed by a motion in limine. CR 64; 65.

Birbilis did not file a written response to either motion. Even so, at a hearing on October 1, 2021, Mr. Vogler appeared telephonically but without local counsel as required by Montana Rule of Admission VI. The Court nonetheless permitted him to explain that he had missed filings and communications due to his recent change of address and problems with his internet service provider. CR 77, pp. 1-2. The District Court noted Mr. Vogler had failed to update his contact information with the court, ignored the Court's deadlines, and filed no response to Saddlebrook's motion for sanctions and motion in limine, which meant both were deemed well-taken. *Id.* Although the Court found Birbilis's actions prejudicial and "was prepared to enter default as a sanction," Judge Fehr "decided instead to restrict the evidence Mr. Birbilis [could] present at trial" and warned him that, "If local counsel does not appear by [November 1st], the Court will entertain a motion to enter judgment by default against Birbilis." *Id.,* p. 3, ¶ 4.

8. Birbilis's Continued Noncompliance Results in Default Judgment.

Several weeks after the deadline passed and no local counsel had appeared, Saddlebrook moved for the entry of default judgment. CR 75. Birbilis ignored the motion, and the District Court entered default judgment. CR 79. In its Order, the District Court referred to its earlier sanction against Birbilis for his violation of its scheduling order, and further explained that more severe sanctions were now appropriate based on his continued failure to obtain local counsel, and the impact of his dilatory conduct on the parties' ability to prepare the case for trial. *Id.*

A month later, Krohne Fund moved to vacate trial and for leave to file an amended answer and late motion for summary judgment. CR 83; 85; 86. Consequently, the default judgment hearing was delayed while Saddlebrook and Krohne briefed and the Court ruled on the new defense asserted by Krohne.

Then the District court set a hearing on damages for the default judgment, ordering Saddlebrook to provide Birbilis thirty-days' advance notice of the hearing. CR 108. Saddlebrook sent a copy of the order and a cover letter to Birbilis by certified mail, regular mail, and email on January 20, 2023. CR 111, Ex. 1. Though this was a few days later than necessary to provide notice within the thirty-day window, Saddlebrook noted the deficiency in its cover letter and offered to postpone the hearing should Birbilis request additional time to prepare or appear. *Id.* Birbilis did not respond.

Despite being aware of the hearing, Birbilis failed to appear at it. CR 117, p. 5, ¶ 2. However, several hours *after* the hearing concluded, Birbilis sent an email to Saddlebrook's counsel requesting additional time. CR 115, Ex. A.

Saddlebrook's counsel provided the email to the District Court, which postponed entering Judgment for two months to provide Birbilis time to act. CR 117, p. 6, ¶ 7. Despite the extra time, Birbilis took no action either before or after judgment was entered. He did not contest the proceedings or seek relief from the default judgment. *Id.*

The District Court found the evidence of damages Saddlebrook presented at the hearing to be credible and reasonable. *Id.,* pp. 3-4. Birbilis does not dispute Judge Fehr's conclusions regarding the damage award.

STANDARD OF REVIEW

This Court "review[s] a district court's decision to impose sanctions for failure to comply with a Rule 16(b) order for an abuse of discretion." *Watson v. West*, 2009 MT 342, ¶ 17, 353 Mont. 120, 125, 218 P.3d 1227, 1231. The sanction imposed is also reviewed for an abuse of discretion. *Id.*

A district court's decision on a motion to dismiss under Rule 12(b)(2) and 12(b)(6) is reviewed de novo, construing the complaint "in the light most favorable to the plaintiff." *Gateway Hosp. Grp. Inc. v. Phila. Indem. Ins. Co.*, 2020 MT 125,

¶ 12, 400 Mont. 80, 89, 464 P.3d 44, 51; *Plouffe v. State*, 2003 MT 62, ¶ 8, 314 Mont. 413, 415, 66 P.3d 316, 318.

SUMMARY OF ARGUMENT

The District Court acted within its discretion when it sanctioned Birbilis by entering default judgment for his willful and prejudicial repeated noncompliance with the District Court's orders. That the Court later granted summary judgment to a different defendant based on judicial estoppel is immaterial because Birbilis made no motion for summary judgment, his motion to dismiss based on judicial estoppel was properly denied because it was premised on allegations that were subject to dispute, and he refused repeatedly to comply with *pro hac vice* rules and the Court's orders.

The District correctly resolved Birbilis's other pre-answer motions by construing the complaint in the light most favorable to Saddlebrook and holding that Saddlebrook, as the assignee of Simonsen, is the real party in interest, that Birbilis availed himself of the privilege of conducting activities in Montana that gave rise to the claims asserted in this action, and that nothing in the complaint established that Saddlebrook's claims were waived or barred by a statute of limitations.

Birbilis's appeal relies on disputed evidence and presents arguments that were not preserved below.

ARGUMENT

I. The District Court Did Not Err When It Sanctioned Birbilis with Default Judgment Pursuant to M. R. Civ. P. 16(f).

Birbilis argues here for the first time that default judgment was improper because the District Court later granted summary judgment to Krohne Fund. The District Court sanctioned Birbilis properly based on a well-documented history of disregard for the District Court's orders and his dilatory and prejudicial conduct in this matter.

A. The District Court's Later Decision Regarding Judicial Estoppel Has No Bearing on This Appeal.

Birbilis first asks this Court to reverse the default judgment against him because the District Court later granted summary judgment to defendant Krohne Fund on a judicial estoppel theory. Birbilis did not challenge the default judgment through a Rule 55 motion to set aside or a Rule 60 motion for relief from judgment. As a result, the District Court had no opportunity to consider Birbilis's argument.

This Court "do[es] not address an issue raised for the first time on appeal." *Hoff v. Lake Cnty. Abstract & Title Co.*, 2011 MT 118, ¶¶ 34-35, 360 Mont. 461, 468-69, 255 P.3d 137, 143 (refusing to address whether default judgment proper where defaulted party had not moved for relief from the default judgment).[7] *See*

[7] Inexplicably, in *Hoff,* the prevailing party – *not the defaulted party* – raised the issue on appeal. *Id.*

also, Molnar v. Mont. PSC, 2008 MT 49, ¶ 11, 341 Mont. 420, 424, 177 P.3d 1048, 1051 ("The rationale for this rule is that we refuse to fault a trial court for failing to rule correctly on an issue it was never given the opportunity to consider.") (internal quotations omitted).

Birbilis gave up the right to raise the issue below because he refused to abide by Montana's rules and the District Court's orders. The default judgment entered against him is entirely distinct from this action's merits, being that it was entered as a sanction for his conduct and noncompliance with the District Court's orders.[8]

B. The District Court Did Not Abuse Its Discretion in Sanctioning Birbilis with Default Judgment.

Saddlebrook moved for sanctions under Rule 16(f), M.R.Civ.P., which authorizes a district court to award sanctions.

> (1) In General. On motion or on its own, the court may issue any just orders, including those authorized by Rule 37(b)(2)(A)(ii)-(vii), if a party or its attorney:
>
> (A) fails to appear at a scheduling or other pretrial conference;
>
> (B) is substantially unprepared to participate - or does not participate in good faith - in the conference; or
>
> (C) fails to obey a scheduling or other pretrial order.

The sanctions authorized by Rule 16(f) incorporate those permitted in Rule 37, which are broad, and include the entry of a default judgment against a

[8] The question of whether summary judgment was properly granted to Krohne Fund based on judicial estoppel has not been resolved. It will be addressed in Saddlebrook's appeal from that decision, which is pending in *Saddlebrook Investments, LLC, as Assignee of Stuart M. Simonsen, v. Krohne Fund, L.P.,* DA 23-0246.

disobedient party. M.R.Civ.P. 37(b)(2)(A)(ii-vii); *McKenzie v. Scheeler*, 285 Mont. 500, 511, 949 P.2d 1168, 1174 (1997); *Watson v. West*, 2009 MT 342, ¶ 24, 353 Mont. 120, 126-27, 218 P.3d 1227, 1232. Sanctions may be imposed in response to a motion, or by a court on its own initiative. *McKenzie*, 285 Mont, at 512.

Birbilis repeatedly failed to obey the court's orders, failed to file responsive pleadings, failed to appear or have an attorney appear on his behalf at the default judgment hearings, and overall caused numerous delays and expressed disregard for the judicial process. Given his past behavior and inexcusable actions, the default sanction imposed by the District Court was justified and well within its discretion.

1. Birbilis Had a History of Absenteeism and Delay

After his motion to dismiss was denied, Birbilis effectively stopped participating in this case. He delayed filing an answer for almost a year. During that time, he received a Rule 10 Notice informing him of case deadlines and notifying him that Saddlebrook would seek his default if he failed to file an answer, all of which he ignored.

When he finally filed his answer, he resumed his pattern of absenteeism, ignoring Saddlebrook's attempts to arrange a pretrial meeting as mandated by the District Court's scheduling order, frustrating the parties' ability to prepare for trial. This pattern of conduct continued through the remainder of the litigation, as

Birbilis successively ignored Saddlebrook's motion for sanctions, two more Rule 10 notices, Saddlebrook's motion in limine, and its motion for entry of default judgment.

Birbilis's *pro hac vice* counsel did appear telephonically at the October 1 motions hearing, which motivated the District Court to impose a lesser sanction than default. But nothing changed. Birbilis afterwards became absent from the case again, squandering the District Court's leniency.

Similarly, despite receiving notice of the default judgment and damages hearing, Birbilis remained absent, only to momentarily materialize via an email sent *after* the hearing had concluded. Once again, this bought him more time, as the District court did not want to enter its findings right away in order to provide Birbilis one last chance to offer a defense. Yet two more months passed, and he failed to act.

This appeal is the first time Birbilis has complied with deadlines or timely sought extensions on briefs, but he still failed to cooperate in the mediation process mandated by Rule 7, M.R.App.P. He did not submit a statement of position and he ignored the appointed mediators multiple entreaties.

2. Default Judgment was an Appropriate Sanction.

The entry of default judgment as a sanction is appropriate "where counsel or a party has acted willfully or in bad faith in failing to comply with the rules of

discovery, with court orders enforcing the rules, or in flagrant disregard of those rules." *Stokes v. Ford Motor Co.,* 2013 MT 29, ¶ 18, 368 Mont. 365, 370, 300 P.3d 648, 652-53. This Court "has consistently deferred to a district court's imposition of sanctions because the trial judge is in the best position to know . . . which parties callously disregard the rights of their opponents and other litigants seeking their day in court" and is further "also in the best position to determine which sanction is the most appropriate." *Smart v. Molinario*, 2004 MT 21, ¶ 8, 319 Mont. 335, 337, 83 P.3d 1284, 1286 (ellipsis in original).

While it is well understood that a trial on the merits is generally preferred to a judgment by default, the merits of Saddlebrook's claims against Birbilis were never presented at trial precisely because of Birbilis's actions and inactions, and no matter the strength of a party's prosecution or defense, a party cannot disregard the court's rules with impunity.

In *Audit Services v. Kraus Construction, Inc., 189 Mont. 94, 615 P.2d 183 (1980)*, this Court quoted with approval and applied the following standard for entering a default judgment as a sanction under M. R. Civ. P. 37:

> [D]efault judgment must normally be viewed as available only when the adversary process has been halted because of an essentially unresponsive party. In that instance, the diligent party must be protected lest he be faced with interminable delay and continued uncertainty as to his rights. The default judgment remedy serves as such a protection. Furthermore, the possibility of a default is a deterrent to those parties who choose delay as part of their litigative strategy.

Audit Services, 615 P.2d at 187-88 (overruled on unrelated grounds). Whether delay was or was not part of Birbilis's strategy, he certainly caused delays.

Judge Fehr took appropriate steps to protect the rights of Saddlebrook, which was prejudiced when Birbilis and his counsel refused to respond to emails, failed to participate in the court-mandated conference to prepare the pretrial order, and ignored multiple Rule 10 notices. Saddlebrook incurred the expense of filing multiple motions and briefs related to sanctions, and of having counsel present at hearings that were only necessary because of Birbilis's actions and inactions. "These expenses were incurred as a direct result of [Birbilis's] lack of diligence and disregard for the court's orders." *Watson v. West*, 2009 MT 342, at ¶ 28.

Birbilis was warned that default judgment was a potential sanction on two occasions. First, in Saddlebrook's request for sanctions (which Birbilis ignored), and second, at the hearing his attorney attended where the District Court explained that it was already prepared to enter default, but decided to impose a lesser sanction and effectively provide Birbilis with what amounted to a second chance. Instead, Birbilis failed to take advantage of the District Court's leniency, and willfully disobeyed its orders once again.

The District Court took Birbilis's conduct into consideration and imposed sanctions that appropriately matched the level of misconduct that had occurred, as well as the prejudice to Saddlebrook in the additional delay and expense added to

the already substantial long-running tally dating back a decade earlier to Krohne Fund's federal suit in 2012.

II. The District Court Did Not Err in Denying Birbilis's Motion to Dismiss.

Birbilis's motion to dismiss was based almost entirely on evidence he attempted to introduce through a contemporaneous motion for judicial notice, which the District Court properly denied. Therefore, Birbilis's evidence is not part of the record.

The District Court viewed the well-pled allegations contained in Saddlebrook's Complaint in the light most favorable to Saddlebrook and found them sufficient to survive Birbilis's motion to dismiss, as they establish standing and personal jurisdiction, and taken as true, entitle Saddlebrook to relief. Further, Birbilis's affirmative defenses are not supported by the Complaint. The District Court properly denied the motion to dismiss.

A. Birbilis's Motion to Dismiss Relies Upon Evidence Which the District Court Properly Declined to Consider

Though Birbilis has not asked this Court to review the District Court's denial of his motion for judicial notice, he continues to rely heavily on materials outside the record that he presented as exhibits to that motion, which he filed at the same time as his motion to dismiss. CR 22. The "facts" he recites and the evidence he cites are clearly subject to reasonable dispute and therefore were properly ignored when evaluating his motion to dismiss.

For example, in support of his argument that Simonsen and Saddlebrook lack standing to pursue the claims in this action, Birbilis asserts Simonsen unconditionally assigned all his interest in Xynaquant. *See* CR 25, pp. 4-7. Despite acknowledging that "[t]he provenance of Xynaquant has been the subject of a very protracted and contentious dispute," Birbilis nevertheless cites an exhibit from outside the record purporting to evince this alleged assignment.

As another example, Birbilis asserts that standing is lacking because "[Lyle] Vaden has claimed ownership of Xynaquant, and Simonsen has agreed to assign his ownership interest in Xynaquant to Axiodyn and/or Axioquantum." Appellant's Opening Brief, p. 26. Birbilis immediately follows this assertion by acknowledging that "these statements both cannot be true." *Id.*

By further example, Birbilis cites the formation documents for Axiodyne and Axioquantum – two entities he helped create – as support for his argument that Simonsen assigned his rights to Xynaquant or otherwise waived his claims against Birbilis. But his argument is one of convenience. If his assertion were true, Birbilis knew he was violating rights owned by Axiodyne and Axioquantum when he marketed Xynaquant through Kapidyia. Of course, he never made that argument when he stood to benefit from providing Xynaquant through Kapidyia.

As Judge Fehr said, "Facts which are argumentative and/or require additional information to verify their truth will not be judicially noticed. …

Additionally, facts which are mere conclusory statements on the evidence and law will not be judicially noticed." CR 43, p. 16 (citing *Leahy v. Dept. of Revenue*, 266 Mont. 94, 101, 879 P.2d 653, 657 (1994). Furthermore, "[w]hen a court takes judicial notice of another court's opinion, it may do so not for the truth of the facts recited therein, but for the existence of the opinion, which is not subject to reasonable dispute over its authenticity." *Id.* (citing *Lee v. City of Los Angeles*, 250 F.3d 668, 690 (9th Cir. 2001)).

By his own presentation, Birbilis has demonstrated that the evidence he relies upon is disputed; in fact, his argument seems to hinge on the existence of disputes. The District Court rightly concluded that Birbilis failed to meet his burden in showing that the materials he requested the District Court take judicial notice of were not subject to reasonable dispute.

Birbilis has not challenged the District Court's denial of his motion for judicial notice. For that reason as well as the reasons presented above, the Court's order must be affirmed. And, because that motion was properly denied, Birbilis's arguments for dismissing Saddlebrook's case based on waiver, judicial estoppel, and limitation statutes all fail.

B. Saddlebrook's Complaint Sufficiently Pleads Facts, Which, if True, Entitle It to Relief

The District Court had other valid reasons for rejecting Birbilis's motion to dismiss. A motion to dismiss is "viewed with disfavor and rarely granted." *Tai*

Tam, LLC v. Missoula Cnty., 2022 MT 229, ¶ 18, 410 Mont. 465, 475, 520 P.3d 312, 319. A complaint "should not be dismissed under Rule 12(b)(6) unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." *Id.* When Saddlebrook's well-pled allegations are taken as true, its claims easily meet the bar for surviving a motion to dismiss.

1. The Complaint Alleges Facts Which Establish Standing.

Birbilis asserts that Simonsen (and by extension Saddlebrook) lacks standing to bring the present claims because Simonsen was not the owner of Xynaquant, and because he released any claims against Birbilis. Appellant's Brief, p. 26. Notably, Birbilis asserts that Saddlebrook "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…to Saddlebrook". *Id.* (emphasis added).

Birbilis's argument that these facts are insufficient is based entirely on the disputed evidence he improperly attempts to inject even after the District Court rejected it. As discussed above, such evidence was not made part of the record. As such, the facts as pleaded in the Complaint establish standing. Simonsen created Xynaquant, and his claims were ultimately assigned to Saddlebrook. CR 7, ¶¶ 1-2; 10-11. Saddlebrook has standing to pursue the claims.

2. The Complaint Alleges Facts Which Establish Personal Jurisdiction

In determining whether specific personal jurisdiction should be exercised over a defendant, Montana applies a two-part analysis. *Simmons Oil Corp. v. Holly Corp.,* 244 Mont. 75, 82-83, 796 P.2d 189, 193 (1990). First, a court examines Montana's long-arm statute, M.R.Civ.P. 4(b)(1), to ascertain whether a defendant's activities fall within that statute's provisions. *Id.* Then, if the defendant's activities comply with M.R.Civ.P. 4(b)(1), the court determines whether exercising jurisdiction comports with the Due Process Clause's traditional notions of fair play and substantial justice. *Id.* The District Court correctly applied this test to Birbilis's Motion.

A nonresident defendant such as Birbilis purposefully avails himself of the benefits and protections of the laws of Montana when he takes voluntary action designed to have an effect in Montana, provided that his contacts with Montana are not "random, fortuitous, or attenuated or due to the unilateral activity of a third party." *Id.,* 244 Mont. at 86, 796 P.2d at 195.

Here, Birbilis admitted he travelled to Montana on four occasions to meet with Simonsen in connection with their business relationship. He attempts to characterize his travel as fortuitous and attenuated, claiming the trips to Montana were a gesture of goodwill made so that Simonsen would not always be the one traveling in their relationship. Appellant's Brief, pp. 23-24 ("There was no reason

why Birbilis needed to travel to Montana to conduct business. He merely did so to show reciprocity to Simonsen.") By making that argument, Birbilis admits he did not need to travel to Montana to conduct his business with Simonsen; rather, he freely *chose* to make the trip for the benefit of their mutual business relationship.

Birbilis suggests he would have visited Simonsen in whatever state Simonsen chose to reside. Appellant's Brief, p. 25. Relatedly, he asserts that the exercise of jurisdiction over him is unreasonable because someone traveling 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…dissuade tourists from visiting" *Id.* Finally, he offers the inapposite analogy of a foreign company discussing business while in Montana solely for a hunting trip. *Id.*

All of these arguments fail for the obvious reason that Birbilis mischaracterizes himself and his trips. He was not a tourist, nor was he was simply paying a friendly visit to someone who merely happened to be a business associate. Birbilis traveled to Montana explicitly in furtherance of his business relationship with Simonsen.

Birbilis chose to come to Montana a fifth time when he voluntarily testified in Krohne Fund's federal litigation. His testimony was clearly designed to have an effect in a lawsuit in Montana asserted against Simonsen, and the claims against

Birbilis in this action – particularly abuse of process and conspiracy – directly arise from that testimony.

Birbilis argues that his testimony is privileged and does not provide a basis for asserting jurisdiction over him. The District Court properly disregarded that argument because, as asserted on information and belief in the Amended Complaint, Birbilis conspired with Krohne Fund and others to do much more to foster, encourage, and promote Krohne Fund's suit and harm Simonsen than simply testify at trial. He helped Wright and Tolliver try to "reverse engineer" Simonsen's algorithms. CR 7, ¶ 30. He made manual trades to generate losses and cut off Simonsen's revenue. *Id.* He tried to leverage Simonsen into selling Xynaquant to Wright and Tolliver for a fraction of its value. *Id.* When that failed, he called Axel Krohne and told lies about Simonsen. *Id.*, ¶ 26. Soon after Birbilis made that call, Krohne Fund filed suit. *Id.*, ¶ 21. Birbilis also encouraged and assisted litigation against Simonsen by other third parties. *Id.*, ¶ 31. If Birbilis had done nothing more than testify at trial, then he might be able to claim that could not support finding personal jurisdiction over him. But he did much more.

Birbilis also argues that he cannot be liable for abuse of process because he did not institute any process listed in *Hughes v. Lynch*, 2007 MT 177, ¶ 23, 338 Mont. 214, 164 P.3d 913, and "did not stand to benefit from the outcome of [Krohne Fund's] litigation." Appellant's Brief, p. 28. There is no evidence to

support the latter statement. We do not know why Birbilis was so eager to see Krohne Fund prevail, but he clearly stood to benefit emotionally if not financially. He had some reason for encouraging Krohne Fund to sue, providing Krohne access to Xynaquant, cooperating with Krohne's counsel, and traveling to Montana to testify at trial.

Abuse of process, like malicious prosecution, is "intended to provide a remedy for malicious acts which wrongly subject an individual to legal action"; the "mere happenstance that the wrongful allegations may have been embodied in [Birbilis's] testimony or affidavit does not, and should not, automatically thereby serve to immunize" him. *Andrews v. Steinberg*, 122 Misc. 2d 468, 477, 471 N.Y.S.2d 764, 771 (Sup. Ct. 1983). To apply an absolute privilege in such circumstances would effectively eliminate any causes of action arising from tortious conduct committed through judicial process, simply by the tortfeasor having provided testimony. Dan B. Dobbs, Paul T. Hayden and Ellen M. Bublick, *The Law of Torts* § 594 (2d ed.).

Birbilis conspired with Krohne Fund to pursue the meritless litigation that Krohne Fund filed. He submitted to Montana's jurisdiction when he did that and, also, by being a partner in a Montana-based business and traveling to the state at least four times in furtherance of that business partnership. The District Court correctly concluded that exercising personal jurisdiction over Birbilis in this matter

is appropriate given his purposeful availment of Montana law and the fact that Saddlebrook's claims arise from and relate to his activities in Montana.

3. Birbilis's Affirmative Defenses Do Not Appear on the Face of the Complaint.

"A motion to dismiss under Rule 12(b)(6) allows the district court to examine only whether 'a claim has been adequately stated in the complaint.'" *Meagher v. Butte-Silver Bow City-Cty.,* 2007 MT 129 at ¶ 15 (quoting *Gebhardt v. D.A. Davidson & Co.,* 203 Mont. 384, 389, 661 P.2d 855, 857 (1983)).

For a complaint to be dismissed based on an affirmative defense, such defense "must clearly appear on the face of the pleading." *Wheeler v. Moe,* 163 Mont. 154, 161, 515 P.2d 679, 683 (1973); *see also, Jones v. Bock,* 549 U.S. 199, 215, 127 S. Ct. 910, 921 (2007) ("Whether a particular ground for opposing a claim may be the basis for dismissal for failure to state a claim depends on whether the allegations in the complaint suffice to establish that ground, not on the nature of the ground in the abstract"); and *Beckman v. Chamberlain*, 673 P.2d 480, 482 (Mont. 1983) (affirmative defense such as statute of limitations may be basis for motion to dismiss if "the complaint on its face establishes that the claim is barred").

Birbilis asserts the affirmative defenses of waiver, statute of limitations, and judicial estoppel. None are present on the face of the Complaint, and the evidence Birbilis offers in support of dismissal on these defenses is not found in the

Complaint, but rather exclusively from his own presentation of facts, allegations, arguments, and evidence in briefing and as attached to his motion for judicial notice. That evidence was not considered by the District Court and cannot be considered by this Court. As a result, the District Court's rejection of Birbilis's affirmative defenses must be affirmed.

CONCLUSION

The District Court did not abuse its discretion in denying Birbilis's motions for judicial notice and to dismiss, or when it later imposed default judgment as a sanction for his pattern of litigation abuse. The judgment of the District Court should be affirmed.

DATED this 9th day of November 2023.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this Brief is printed in double-spaced, proportionately-spaced, 14-point, Times New Roman typeface, and the word count calculated by Microsoft Word is 7,297 words, excluding the table of contents, table of authorities, certificate of service and certificate of compliance.

DATED this 9th day of November, 2023.

/s/ T. Thomas Singer
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CERTIFICATE OF SERVICE

I, T. Thomas Singer, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 11-09-2023:

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