STATE OF IDAHO)
County of KOOTENAI)ss

FILED 11/17/2021

AT 1:40 O'Clock P. M
CLERK OF DISTRICT COURT

Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

MICHAEL NEWELL,

Plaintiff,

vs.

BLACK HAWK FUNDING, INC., ROBERT NEWELL, INDIVIDUALLY AND AS PRESIDENT OF BLACK HAWK FUNDING, INC., VERDE PARTNERS, INC., VERDE HOLDEINGS, INC., VERDE VENTURES, INC., VERDE X. INC., GROUP OF TWO INVESTMENTS, LLC., PLEIADES,LP., MANUFACTURING 360, LLC., SCARLET FOUNDATION, HIGH DESERT MANAGEMENT AND CONSULTING, LLC., COACHELLA DISTILLATION, LLC., 420 DISTRIBUTION, LLC, COACHELLA LEAF COMPANY, LLC., CENTAURUS REALITY, LP., BLACK BIRD FARMS, LLC., LIVE WEALTHYDIE WEALTHY INSTITUTUTE, LLC., GREENHAWK, LLC., 72 AVE GREENHOUSE I, LLC., 72 AVE. GREENHOUSE II, LLC., MARTHA NEWELL, JOSEPH J. QUERCIO III, GARNETT WILIAMS, RALPH TRIGG, DALE TENHULSEN, HIGH YIELD HOLDINGS, LLC., C AND R TRUST, PHARMALABS COACHELLA VALLEY, LLC, AND RICHARD OLIPHANT,

Defendants.

Case No. **CV28-20-3292**

MEMORANDUM DECISION GRANTING MOTION FOR SUMMARY JUDGMENT BY DEFENDANT BLACK HAWK FUNDING, INC. and DEFENDANT ROBERT NEWELL

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

This matter is before the Court on a Motion for Summary Judgment filed by defendants Black Hawk Funding, Inc. and Robert Newell, Individually and as President of Black Hawk Funding, Inc. (collectively Black Hawk) filed on June 2, 2021, against

plaintiff Michael Newell (Newell). At the October 6, 2021, hearing on Black Hawk's motion, defendant Group Two Investments, LLC, joined in Black Hawk's motion for summary judgment.

Newell's Complaint was filed on May 22, 2020. An Amended Complaint for Affirmative Relief, Declaratory Relief, and Damages, was filed on December 9, 2020. Newell is an attorney, licensed in the State of Idaho, and in good standing. Affidavit of Attorney Regarding Standing 1, ¶ 1. Newell is representing himself in this proceeding. Newell's Amended Complaint alleges an ownership position in various real estate and cannabis entities. Am. Complaint 6. Newell also asserts that "[a]ll ownership interest in any entity owned by Plaintiff has been assigned, transferred, rebooked by accounting or otherwise concealed by the Defendants and no significant ownership interest remain in the name of Group Two or individually for Plaintiff." *Id.* at 13 ¶ 88. Newell seeks relief in the form of "[a]n injunction prohibiting Defendants from diluting Plaintiff's interests as described herein"; "Damages as may be determined at trial"; "[a] declaration affirming Plaintiff's rights in the entities listed above"; "[p]unitive damages as determined by this Court"; "Costs and reasonable attorney fees;" and "[a]ny other relief this Court deems proper." *Id.* at 27, ¶¶ 1-6. On February 8, 2021, Black Hawk filed an Answer to Amended Complaint and Demand for Jury Trial.

On May 10, 2021, this Court entered an Order and Judgment in which all causes of action against the following defendants were dismissed for lack of personal jurisdiction: Verde X, Inc., Verde Ventures, Inc., Verde Partners, Inc., Verde Holdings Inc., Pleiades, LP, Manufacturing 360, LLC Kings Valley, Group, LLC, Greenhawk, LLC, Centaurus Realty, LLP, Black Bird Farms, LLC, 72nd Avenue Greenhouses I, LLC, 72nd Avenue Greenhouses II, LLC. On June 9, 2021, this Court entered an Order

Granting Defendants Richard Oliphant, Joseph J. Quercio III, Ralph Trigg, and Garnett Williiam's Motion to Dismiss, also for lack of personal jurisdiction.

On June 2, 2021, Black Hawk filed a Motion for Summary Judgment of Defendants Black Hawk Funding, Inc., and Robert Newell, Individually and as President of Black Hawk Funding, LLC, a Memorandum in Support of Motion for Summary Judgment, a Declaration of Michael E. Ramsden in Support of Motion for Summary Judgment, and a Notice of Hearing scheduling the motion for summary judgment for hearing on July 6, 2021. On June 25, 2021, Newell filed Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment. On June 29, 2021, Black Hawk filed a Reply Brief in Support of Motion for Summary Judgment. On July 1, 2021, Newell filed a Plaintiff's Supplemental Declaration Regarding Defendant's Motion for Summary Judgment. On July 6, 2021, the date scheduled for oral argument on Black Hawk's motion for summary judgment, Newell filed a Notice of Bankruptcy Stay. On August 26, 2021, Black Hawk filed a Defendants' Notice of Termination of Stay and Renewed Motion for Summary Judgment, and a Defendants' Second Request for Judicial Notice. On September 9, 2021, Newell filed two identical Plaintiff's Affidavit in Support of Demur[rer] to Defendants['] Motion for Summary Judgment. On September 10, 2021, Newell filed a Plaintiff's Motion for Demur[rer] to Defendants['] Motion for Summary Judgment. On September 20, 2021, Newell filed a Supplemental Memorandum in Opposition to Defendants['] Motion for Summary Judgment. On September 23, 2021, Newell filed an Amended Plaintiff's Memorandum in Opposition to Defendant's [sic] Motion for Summary Judgment and Supplemental Affidavit in Support of Motion for Demur[rer]. On September 28, 2021, Black Hawk filed Defendants' Supplemental Reply Brief in Support of Defendant's Motion for Summary Judgment,

and an Opposition to Plaintiff's Motion for Demurrer to Defendants' Motion for Summary Judgment.

Oral argument on Black Hawk's Motion for Summary Judgment was held on October 6, 2021. At the beginning of that hearing, the Court denied Newell's Plaintiff's Motion for Demur to Defendants[']' Motion for Summary Judgment as such was procedurally improper. A demurrer is a term not really used in present times. As correctly noted by counsel for Black Hawk, a demurrer has been characterized by the Idaho Supreme Court as being similar to a motion to dismiss a pleading under I.R.C.P. 12(b)(6), *Williams v. Williams*, 82 Idaho 451, 354 P.2d 747 (1960), and Newell's Motion for Demur[rer] is not a motion to dismiss a pleading. The Court next took up Black Hawk's Motion for Summary Judgment. First, the Court addressed the two requests by Black Hawk for Judicial Notice, the first filed on June 2, 2021, and the second filed on August 26, 2021. These various requests were made pursuant to Idaho Rule of Evidence 201 and Idaho Code § 9-101. The Court found them to be mandatory under I.R.E. 201(c)(2), and that Black Hawk had met the requirement of identification of the specific items, and that Newell has had the opportunity to be heard on the issue. At the October 6, 2021, hearing, Newell stated he had no objection to this Court taking judicial notice of all the attached documents. Both of Black Hawk's requests for judicial notice were granted by this Court. At the conclusion of the October 6, 2021, hearing this Court took Black Hawk's Motion for Summary Judgment under advisement.

II. STANDARD OF REVIEW

A. Summary Judgment

Idaho Rule of Civil Procedure 56 governs motions for summary judgment. Summary judgment must be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of

law." I.R.C.P. 56(a). A party asserting that there is no genuine dispute as to any material fact, or a party asserting that a genuine dispute exists, must support that assertion by "citing to particular parts of materials in the record" or "showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." *Id.*

> If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may:
>
> (1) give an opportunity to properly support or address the fact;
>
> (2) consider the fact undisputed for purposes of the motion;
>
> (3) grant summary judgment if the motion and supporting materials, including the facts considered undisputed, show that the movant is entitled to it; or
>
> (4) issue any other appropriate order.

Id. 56(e).

The burden of proof is on the moving party to demonstrate the absence of a genuine issue of material fact. *Rouse v. Household Fin. Corp.*, 144 Idaho 68, 70, 156 P.3d 569, 571 (2007) (citing *Evans v. Griswold*, 129 Idaho 902, 905, 935 P.2d 165, 168 (1997)). "Once the moving party establishes the absence of a genuine issue of material fact, the burden shifts to the non-moving party" to provide specific facts showing there is a genuine issue for trial. *Kiebert v. Goss*, 144 Idaho 225, 228, 159 P.3d 862, 864 (2007) (citing *Hei v. Holzer*, 139 Idaho 81, 85, 73 P.3d 94, 98 (2003)). To do so, the non-moving party "must come forward with evidence by way of affidavit or otherwise that contradicts the evidence submitted by the moving party, and that establishes the existence of a material issue of disputed fact." *Chandler v. Hayden*, 147 Idaho 765, 769, 215 P.3d 485, 489 (2009) (citing *Kiebert v. Goss*, 144 Idaho 225, 228, 159 P.3d 862, 865 (2007)). "Circumstantial evidence can create a genuine issue of material fact. . . . However, the non-moving party may not rest on a mere scintilla of evidence." *Shea*

v. Kevic Corp., 156 Idaho 540, 545, 328 P.3d 520, 525 (2014) (quoting *Park West Homes, LLC v. Barnson*, 154 Idaho 678, 682, 302 P.3d 18, 22 (2013)).

> In determining whether material issues of fact exist, all allegations of fact in the record and all reasonable inferences from the record are construed in the light most favorable to the party opposing the motion. *City of Kellogg v. Mission Mountain Interests Ltd., Co.*, 135 Idaho 239, 240, 16 P.3d 915, 919 (2000). When a jury is to be the finder of fact, summary judgment is not proper if conflicting inferences could be drawn from the record and reasonable people might reach different conclusions. *State Dep't of Fin. v. Res. Serv. Co., Inc.*, 130 Idaho 877, 880, 950 P.2d 249, 252 (1997).

Edmondson v. Shearer Lumber Prod., 139 Idaho 172, 176, 75 P.3d 733, 737 (2003).

The moving party may also meet "the 'genuine issue of material fact' burden. . . by establishing the absence of evidence on an element that the nonmoving party will be required to prove at trial." *Dunnick v. Elder*, 126 Idaho 308, 311, 882 P.2d 475, 478 (Ct. App. 1994). "Such an absence of evidence may be established either by an affirmative showing with the moving party's own evidence or by a review of all the nonmoving party's evidence and the contention that such proof of an element is lacking." *Heath v. Honker's Mini-Mart, Inc.*, 134 Idaho 711, 712, 8 P.3d 1254, 1255 (Ct. App. 2000) (citing *Dunnick* at 311, 882 P.2d at 478).

> Once such an absence of evidence has been established, the burden then shifts to the party opposing the motion to show, via further depositions, discovery responses or affidavits, that there is indeed a genuine issue for trial, or to offer a valid justification for the failure to do so under [Rule 56(d)]. *Sanders v. Kuna Joint School Dist.*, 125 Idaho 872, 874, 876 P.2d 154, 156 (Ct.App.1994) (alteration added).

Dunnick at 311, 882 P.2d at 478; *see also Heath* at 712, 8 P.3d at 1255.

B. Judicial Estoppel

The Idaho Supreme Court has stated that a Motion for Summary Judgment on the grounds of judicial estoppel will be reviewed under the abuse of discretion standard, which sounds in equity. *McCallister v. Dixon*, 154 Idaho 891, 894, 303 P.3d 578, 581 (2013). The Idaho Supreme Court traditionally used a three-factor test to determine

whether the District Court has abused its discretion: "(1) whether the trial court correctly perceived the issue as one of discretion; (2) whether the trial court acted within the outer boundaries of its discretion and consistently with legal standards applicable to the specific choices available to it; and (3) whether the trial court reached its decision by an exercise of reason." *Id.* (citing *Riley v. W.R. Holdings, LLC*, 143 Idaho 116, 122, 138 P.3d 316, 322 (2006)). In *Lunneborg v. My Fun Life*, 163 Idaho 856, 863-64, 421 P.3d 187, 194-93 (2018), the Idaho Supreme Court made it clear that this former three-part analysis for review of abuse of discretion is now four parts, which requires the trial court judge to do four things:

> When this Court reviews an alleged abuse of discretion by a trial court the sequence of inquiry requires consideration of *four* essentials. Whether the trial court: (1) correctly perceived the issue as one of discretion; (2) acted within the outer boundaries of its discretion; (3) acted consistently with the legal standards applicable to the specific choices available to it; and (4) reached its decision by the exercise of reason. *See Hull* [*v. Giesler*], 163 Idaho [247], at 250, 409 P.3d [827] at 830.

III. ANALYSIS

A. Case Law on Application of Judicial Estoppel to Bankruptcy Assets.

In its Memorandum in Support of Motion for Summary Judgment, Black Hawk argued that Newell did not possess the right to enforce his claim against Black Hawk under the doctrine of judicial estoppel because "the plaintiff's claims are property of his Chapter 13 bankruptcy estate;" thus, "the plaintiff does not own them and cannot bring this suit." Def. Mem. Supp. Summ. J. 4-5, 11. Under Idaho law, judicial estoppel "precludes a party from advantageously taking one position, then subsequently seeking a second position that is incompatible with the first." *McCallister,* 154 Idaho at 894, 303 P.3d at 581. The goal of the doctrine is to protect the "integrity of the judicial system, by protecting the orderly administration of justice and having regard for the dignity of the judicial proceeding," *A & J Const. Co. v. Wood*, 141 Idaho 682, 684, 116 P.3d 12, 14

(2005) quoting *Robertson Supply Inc. v. Nicholls*, 131 Idaho 99, 101, 952 P.2d 914, 916 (Ct. App. 1998)), as well as "to prevent parties from playing fast and loose with the legal system. *McCallister*, 154 Idaho at 894, 303 P.3d, at 581. Judicial estoppel applies to inconsistent positions taken by a party in bankruptcy proceedings and the present proceedings. *Id.* Whether to invoke the doctrine of judicial estoppel is within the Court's discretion. *Watkins v. Watkins*, 162 Idaho 600, 608, 402 P.3d 1053, 1061 (2017).

A bankruptcy action begins when a potential debtor files a petition with the bankruptcy court. 11 U.S.C. § 301. The commencement of a bankruptcy action creates a bankruptcy estate. 11 U.S.C. § 541(a). The bankruptcy estate consists of all legal or equitable interests held by the debtor at the time the bankruptcy action is commenced, including causes of action that belong to the debtor. 11 U.S.C. § 541(a)(1); *McCallister* 154 Idaho at 897-98, 303 P.3d at 584-85 (citing *Kane v. Nat'l Union Fire Ins. Co.*, 535 F.3d 380, 385 (5th Cir. 2008)). Thus, after a debtor files for bankruptcy, any potential legal claims he or she had against another party is no longer his or hers to assert. *Houpt v. Wells Fargo Bank, Nat'l Ass'n*, 160 Idaho 181, 187, 370 P.3d 384, 390 (2016) (citing *McCallister*, 154 Idaho at 898, 303 P.3d at 585). Instead, the legal claim is "an asset of the bankruptcy estate for the bankruptcy trustee to assert." *Id.* Moreover, "when a plaintiff has knowledge of a claim during the pendency of his bankruptcy[,] the claim becomes 'an asset of the bankruptcy estate, and [] a claim for the bankruptcy trustee alone to assert.'" *Id.* (quoting *Mowrey v. Chevron Pipe Line Co.*, 155 Idaho 629, 635, 315 P.3d 817, 823 (2013)). The debtor then no longer has rights in that asset unless it is abandoned under § 554 of the Bankruptcy Code or the case is dismissed. 11 U.S.C. § 554 (2012); 11 U.S.C. § 349(b)(3) (2012). The phrase "during the pendency of his bankruptcy" set forth immediately above in the quote from *McCallister* is significant to this Court in Newell's case. This Court finds the duration of Newell's

bankruptcy to be from no less than March 11, 2014, to December 5, 2019, as is established in the next two paragraphs that follow.

On August 29, 2012, Newell and his wife filed their Chapter 13 Plan. Defs.' Black Hawk Funding, Inc., and Robert Newell Req. for Judicial Notice, Ex. A, 6-12.[1] That was converted to a Chapter 7 a few months later, on November 13, 2012. *Id.* at 19. That Chapter 7 plan was discharged on June 26, 2013. *Id.* at 24-25.

On March 11, 2014, Newell and his wife filed a new voluntary petition under Chapter 13. *Id.* at 26-62. The only asset they listed were one parcel of real property having a value of $800,000.00 and personal property valued at $22,960.00. *Id.* at 33. By far the biggest debt (liability) they disclosed was a secured debt of $580,617.00. *Id.* That was a debt owed to U.S. Bank, secured by their primary residence and land. *Id.* at 45, Schedule D. **Under that plan, Newell and his wife proposed to not pay U.S. Bank $75,808.02, for which they were in default. *Id.* at 65, ¶ 5.3.** This plan was completed on November 6, 2019. *Id.* at 76. Discharge was granted on December 5, 2019. *Id.* at 77-81. At all times set forth in this paragraph, Newell, an attorney, and his wife, were represented by a bankruptcy attorney, Tyler Wyrick.

More recently, on August 10, 2021, Newell re-opened his bankruptcy and disclosed these potential assets they had concealed from the bankruptcy court. Defs.' Black Hawk Funding, Inc., and Robert Newell Second Req. for Judicial Notice, Ex. A, Stipulation to Rescind Discharge and Abandon Property, 5-8; Acting Trustee's (1) Motion to Vacate Order Reopening Closed Case; and (2) Objection to Motion to

[1] Exhibit A is a series of bankruptcy court documents. There are three page numbers which could be referenced, 1) the page number within a document as set forth in the bankruptcy court document, 2) the page number of Exhibit A (which are unnumbered by Black Hawk), and the sequential page number of the entire Request for Judicial Notice Document (again, unnumbered by Black Hawk). The Chapter 13 plan is seven pages long, appears as pages 2-8 of Exhibit A and pages 6-12 of the overall document the Request for Judicial Notice. This Court will only use the latter, the sequential page numbers within the Request for Judicial Notice.

Rescind Discharge as Moot, 9-20.[2] In these recent proceedings, Newell and his wife were represented by a different bankruptcy attorney, Safa Riadh. On August 17, 2021, the Bankruptcy Court again closed the proceedings. Defs. Black Hawk Funding, Inc., and Robert Newell Second Req. for Judicial Notice, Ex. A, 21-27.

In this litigation Newell claims an interest in the assets held by Black Hawk. The dates Newell claims he came into possession of those assets, must be overlaid against the above chronological backdrop of Newells' bankruptcies. Group Two Investments came into existence on July 10, 2014. October 28, 2020, Aff. [of Michael Newell] in Opp'n. to Mot. to Vacate Order of Default and Partial J. 2-4 [Newell does not use page numbers in his affidavit], ¶¶ 3, 4, 7, 8, 10, 13, Ex. A. This was exactly four months after Newell and his wife filed a new voluntary petition under Chapter 13 on March 11, 2014. Defs. Black Hawk Funding, Inc., and Robert Newell Req. for Judicial Notice, Ex. A, at 26-62. This is discussed more fully below, but Newell states under oath, in the context of Group Two and other defendants in the instant litigation: "I once held in name assets managed by individual Defendants well over $8,000,000 in equity value and now I have none." January 12, 2021 and January 16, 2021 [same document filed twice] Affid. [of Michael Newell] in Supp. of Mot. to Amend Complaint for Punitive Damages 6 [Newell does not use page numbers in his affidavit], ¶ 22. Newell also stated under oath that he is owed over $40 million (half of over $81 million). January 18, 2021, Suppl. Aff. for Claim for Punitive Damages 2-3 [no page numbers in Newell's affidavit], ¶¶ 2 A-Q.

In *McCallister v. Dixon*, upon which Black Hawk heavily relies, the Idaho Supreme Court upheld the application of the doctrine of judicial estoppel where the

[2] Again, the page numbers noted by this Court are the page number of the entire Second Request for Judicial Notice Document, so pages 6-12 of that document are the Chapter 13 plan. This Court will use the page number in the overall filed document, the Second Request for Judicial Notice.

plaintiff failed to disclose the present litigation to the bankruptcy estate overseeing the plaintiff's assets in his then-pending Chapter 13 bankruptcy proceedings. The Idaho Supreme Court reasoned that the "application of judicial estoppel is necessary in such cases to discourage debtors from concealing potential assets" from the bankruptcy estate. *McCallister*, 154 Idaho at 895, 303 P.3d at 582.

The Idaho Supreme Court held that subjective intent to conceal assets is irrelevant, but rather what mattered was "whether the party seeking to avoid judicial estoppel was sufficiently aware of the facts giving rise to application of judicial estoppel." 154 Idaho at 896, 303 P.3d at 583. The Idaho Supreme Court found the plaintiff "possessed the requisite knowledge for the application of judicial estoppel" because the plaintiff was aware of the "potential malpractice before bankruptcy proceedings; [he] did not claim the potential asset; and did not amend his asset schedule after implementing this suit against the Respondents while his bankruptcy was still pending." *Id.* (citations omitted).

The Idaho Supreme Court rejected the plaintiff's defense of reopening the bankruptcy claim to cure his list of assets because "judicial estoppel protects the judicial *system*—not merely the enforcing court" and because:

> [p]ermitting the reopening cure as a defense to judicial estoppel provides an incentive for debtors to conceal potential causes of action until the opposing party identifies the concealment and objects, but no incentive to disclose all assets: If the cause of action is disclosed and goes unnoticed, then the debtor can recover free from the claims of his discharged creditors. But if the nondisclosure is noticed, the debtor simply needs to reopen and amend his schedule.

154 Idaho at 897, 303 P.3d at 584. Likewise, the Idaho Supreme Court rejected the plaintiff's argument that it would be inequitable to deny the reopening cure since the bankruptcy creditors would be denied potential recovery. *Id.* The Idaho Supreme Court reasoned that:

> [t]he Bankruptcy Code provides that title to the debtor's assets, including causes of action that belong to the debtor when bankruptcy is filed, vest in the bankruptcy estate. Property that is not disclosed on the asset schedule, or otherwise administered by the time the bankruptcy case closes, remains property of the bankruptcy estate forever.

154 Idaho at 899, 303 P.3d at 586. The Idaho Supreme Court further held that "the inadvertence-or-mistake exception is only applicable where it negates the knowledge that the estopped party actually had, or that he or she is reasonably charged with having at the time the estopped party adopted his or her original position." 154 Idaho at 898, 303 P.3d at 585. The Idaho Supreme Court found both ignorance of the law and reliance on legal counsel did not satisfy the ignorance or mistake exception to the application of judicial estoppel. 154 Idaho at 893, 303 P.3d at 581.

Shortly after *McCallister* was decided, the Idaho Supreme Court decided *Mowrey*, 155 Idaho 629, 315 P.3d 817, where it upheld the application of judicial estoppel where the plaintiff failed to disclose the personal injury case at hand to the bankruptcy estate overseeing the plaintiff's assets in his then-pending Chapter 7 bankruptcy proceedings. The defendant moved for summary judgment on the basis of judicial estoppel and, alternatively, on the basis that the defendants "were not the real party in interest since it was the bankruptcy trustee alone who possessed the authority to prosecute this claim." *Id.* In response, the plaintiff reopened the bankruptcy case and amended the schedule to include the proceedings. *Id.* The plaintiff argued that, "when they filed their petition for bankruptcy they had no knowledge of their claims against Chevron; that until Chevron's motion for summary judgment they were unaware that their claim should have been disclosed; and that they did not intentionally conceal this cause of action." *Id.* Applying *McCallister*, the Idaho Supreme Court found that the district court did not err in granting summary judgment to defendants on the basis of judicial estoppel because the plaintiff was charged with knowledge of the claim before

filing for the bankruptcy proceedings since the loss in income from the injury in question was the reason he had filed for bankruptcy. 155 Idaho at 630-31, 634, 315 P.3d at 818-19, 822. The Idaho Supreme Court also found that the plaintiff's "subsequent reopening of their bankruptcy estate to amend their asset schedule nearly five years after they certainly became aware of this potential cause of action does not avoid application of judicial estoppel." *Id.* This Court finds this to be an important and controlling finding from *Mowrey* (and is consistent with the same finding in *McCallister*), that one cannot avoid the application of judicial estoppel by reopening the bankruptcy. Accordingly, this Court makes the same finding in the instant case. Newell's reopening of his bankruptcy case does not avoid the application of judicial estoppel against Newell. The Idaho Supreme Court further reasoned that whether the plaintiffs "intended to conceal this potential asset is irrelevant: objectively there was a motive for them to conceal the claim, as is evident by their filing the claim six weeks after the bankruptcy estate closed." 155 Idaho at 634-35, 315 P.3d at 822-23. This Court also finds this finding from *Mowrey* to be present and controlling in the instant case as well. Finally, the Idaho Supreme Court also found summary judgment on the basis that the plaintiff was not the real party in interest was appropriate because the "claim became an asset of the bankruptcy estate, and it was a claim for the bankruptcy trustee alone to assert." 155 Idaho at 635, 315 P.3d at 823. That finding by the Idaho Supreme Court in *Mowrey* described the same fact scenario in the present case until recently--until the bankruptcy estate was asked by Newell and the Chapter 13 Trustee on August 10, 2021, to rescind the Bankruptcy Court's its discharge and abandon certain property. Defs.' Black Hawk Funding, Inc., and Robert Newell's Second Req. for Judicial Notice 2, Ex. A, Stipulation to Rescind Discharge and Abandon Property 5-8. Much of that property very recently sought to be abandoned by the Bankruptcy Court was Newell's ownership in Group Two

Investments, LLC, Blackhawk Funding, Inc., and this present cause of action. *Id.* at 2-4. In that Stipulation to Rescind Discharge and Abandon Property, Newell admitted that "During the term of this [Bankruptcy] Case, and after the petition date [August 14, 2012], Debtors [Newell and his wife] formed certain entities and engaged in business ventures in order to generate income to fund the Chapter 13 Plan" and "During the term of this [Bankruptcy] Case, and after the petition date [August 14, 2012], Debtors [Newell and his wife] became aware of potential cause(s) of action related to [those] business activities." *Id.* Ex. A, 2, ¶¶ 1-2. The Bankruptcy Court confirmed the Amended Plan on May 6, 2015, and the Bankruptcy Court issued a Discharge on December 5, 2019. *Id.* at ¶¶ 4, 7. On August 16, 2021, the United States Bankruptcy Judge signed the Order Rescinding Discharge, and a separate Order Abandoning Property. *Id.* at Ex. A. 17. 18. Prior to that time, Newell would have lacked standing to bring this current lawsuit in Idaho State District Court.

In *Houpt v. Wells Fargo Bank*, 160 Idaho 181, 370 P.3d 384 (2016), the Idaho Supreme Court discussed both *McCallister* and *Mowrey*, but really only in the context of standing, not in the context of whether or not judicial estoppel should apply. 160 Idaho at 187-88, 370 P.3d at 390-91. Unlike *McCallister* and *Mowrey*, where the bankruptcy court at no time abandoned its interest in the plaintiff's [debtor in bankruptcy] claims in the state court action, the bankruptcy trustee in *Houpt* had specifically abandoned its interest in Houpt's property. 160 Idaho at 188, 370 P.3d at 391. Because Houpts had knowledge of their claims against Wells Fargo during the pendency of their bankruptcy at the time they filed their complaint in state court, the "Houpts were not the real party in interest at the time they filed their Compliant." *Id.* Because the issue of "standing" had never been ruled upon up to and including the time of the appeal before the Idaho Supreme Court, and because the bankruptcy court had abandoned its interest in

Houpts' property, there was no longer a standing issue. *Id.* "Therefore, even though Houpts may not have been the real party in interest at the time of filing—they are now. Requiring Houpts to start over would only result in needless waste." *Id.* (citations omitted). At no point did the Idaho Supreme Court in *Houpt* directly address the judicial estoppel issue.

A decision by the Idaho Supreme Court made before *McCallister, Mowrey* and *Houpt*, were written, is instructive, due to the similarity of arguments Newell now makes in the present case. In *A & J Const. Co. Inc. v. Wood*, 141 Idaho 682, 116 P.3d 12 (2005), the Idaho Supreme Court affirmed the district court's decision to grant Wood, one of two participants in a joint venture, summary judgment against the other participant, A & J Construction. Summary judgment was granted based on A & J Construction being judicially estopped due to what A & J Construction had told the bankruptcy court in 1991. In 1979, A & J Construction and Wood entered into a joint venture agreement to buy seventy-three acres near Homedale, Idaho, speculating that a highway bypass would be built. 141 Idaho at 683, 116 P.3d at 13. That bypass project never materialized. A & J Construction filed for bankruptcy in 1991, but failed to list the joint venture project or its sole asset. *Id.* Then, A & J Construction filed its state court action against Wood, requesting an accounting, claiming unjust enrichment, conversion and quiet title. 141 Idaho at 684, 116 P.3d at 14. Wood filed a summary judgment motion claiming A & J Construction should be judicially estopped due to its representations before the bankruptcy court. Summary judgment was granted in Wood's favor. *Id.* A & J Construction appealed. After discussing judicial estoppel in this context, the Idaho Supreme Court held:

> While Idaho appellate courts have applied the doctrine of judicial estoppel in a number of cases, the courts have not dealt with a situation where the first proceeding from which a party later takes an inconsistent

position is a bankruptcy proceeding. The Ninth Circuit Court of Appeals provides guidance in a similar case, *Hamilton v. State Farm Fire & Cas. Co.,* 270 F.3d 778 (9th Cir.2001). Hamilton brought suit against State Farm for bad faith and breach of contract after the insurance company refused to pay his claims relating to alleged acts of theft and vandalism. *Hamilton,* 270 F.3d at 780. State Farm denied Hamilton's claim only a few days after Hamilton had filed for bankruptcy. *Id.* at 781. Hamilton's bankruptcy schedules listed the vandalism loss against his estate but failed to list the corresponding claims against State Farm as assets of the estate. *Id.* State Farm filed a motion to dismiss Hamilton's claims against the insurance company and the motion was granted based upon the doctrine of judicial estoppel. This decision was affirmed on appeal. *Id.* at 782. The Ninth Circuit Court of Appeals cited the following rule regarding application of the doctrine in the bankruptcy context:

> In the bankruptcy context, a party is judicially estopped from asserting a cause of action not raised in a reorganization plan or otherwise mentioned in the debtor's schedules or disclosure statements. *Hay v. First Interstate Bank of Kalispell, N.A.,* 978 F.2d 555, 557 (9th Cir.1992) (failure to give notice of a potential cause of action in bankruptcy schedules and Disclosure Statements estops the debtor from prosecuting that cause of action); *In re Coastal Plains,* 179 F.3d 197, 208 (5th Cir.1999), *cert. denied,* 528 U.S. 1117, 120 S.Ct. 936, 145 L.Ed.2d 814 (2000) (holding that a debtor is barred from bringing claims not disclosed in its bankruptcy schedules); *Payless Wholesale Distributors, Inc. v. Alberto Culver (P.R.) Inc.,* 989 F.2d 570, 572 (1st Cir.), *cert. denied,* 510 U.S. 931, 114 S.Ct. 344, 126 L.Ed.2d 309 (1993) (debtor who obtained relief on the representation that no claims existed cannot resurrect such claims and obtain relief on the opposite basis); *Oneida Motor Freight, Inc. v. United Jersey Bank,* 848 F.2d 414, 419 (3rd Cir.), *cert. denied,* 488 U.S. 967, 109 S.Ct. 495, 102 L.Ed.2d 532 (1988) (debtor's failure to list potential claims against a creditor 'worked in opposition to preservation of the integrity of the system which the doctrine of judicial estoppel seeks to protect,' and debtor is estopped by reason of such failure to disclose).

Id. at 783.

The court went on to recite the following rationale for the rule:

> The rationale for ... decisions [invoking judicial estoppel to prevent a party who failed to disclose a claim in bankruptcy proceedings from asserting that claim after emerging from bankruptcy] is that the *integrity of the bankruptcy system depends on full and honest disclosure by debtors of all of their assets.* The courts will not permit a debtor to obtain relief from the bankruptcy court by representing that no claims exist and then subsequently to assert those claims for his own benefit in a separate

proceeding. *The interests of both the creditors, who plan their actions in the bankruptcy proceeding on the basis of information supplied in the disclosure statements, and the bankruptcy court, which must decide whether to approve the plan of reorganization on the same basis, are impaired when the disclosure provided by the debtor is incomplete.*

Id. at 785 (quoting *In re Coastal Plains, Inc.*, 179 F.3d 197, 208 (5th Cir.1999)).

The Eleventh Circuit Court of Appeals has pointed out that a debtor seeking shelter under the bankruptcy laws is required to disclose all assets, or potential assets, to the bankruptcy court under 11 U.S.C. § 521(1), and 541(a)(7). *Burnes v. Pemco Aeroplex, Inc.*, 291 F.3d 1282, 1286 (11th Cir.2002). Full disclosure is "'crucial to the effective functioning of the federal bankruptcy system.'" *Id.* Because both creditors and bankruptcy courts rely on the accuracy of the disclosure statements the court concluded, "the importance of full and honest disclosure cannot be overstated." *Id.* Responding to the debtor's arguments of lack of both privity and prejudice, the court noted that judicial estoppel protects the integrity of the judicial system, not litigants, so numerous courts have held that " '[w]hile privity and/or detrimental reliance are often present in judicial estoppel cases, they are not required.' " *Id.* Additionally, parties asserting judicial estoppel are not required to demonstrate individual prejudice since courts have concluded that the doctrine is intended to protect the judicial system. *Id.*

In *Hamilton* the Ninth Circuit said it was immaterial that the debtor filed for bankruptcy before he filed suit against State Farm, holding, "Judicial estoppel will be imposed when the 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." *Id.* at 784. The duty to disclose all assets and potential assets continues after the initial filing since a debtor is required to amend his or her financial statements if circumstances change. *Burnes,* 291 F.3d at 1286. Consequently, in this case it is irrelevant that the president's wife was purportedly unaware of A & J's interest in the property or joint venture when she met with A & J's attorney to initiate the bankruptcy filing. Clearly, A & J had the opportunity to amend its bankruptcy schedules after the president returned and became aware of the omission. In any event, it was not the president's wife who was seeking bankruptcy protection. A & J, the corporation, was the party filing for bankruptcy and it is the corporation's knowledge, not that of just one officer, that is relevant. The president's wife, who was corporate secretary, declared under oath that the statement of financial affairs was accurate at the time of filing: the president later verified under oath that the disclosure statement was correct. The corporation knew of the asset but did not disclose it to the bankruptcy court.

A & J argues that the joint venture was omitted due to the president's erroneous belief that the joint venture was not an asset because the debt against it allegedly exceeded its value. This is often the

case in a bankruptcy and there is no justification for a debtor to exclude an asset based on the debtor's subjective determination of its value. And, if there was a debt, it should have been listed. The record discloses that the company's interest in the joint venture was known to A & J and disclosed to its attorney. At the time the joint venture was discussed with the attorney, the schedules and disclosure statement should have been amended to reflect the company's interest because the bankruptcy was still pending.

As mentioned, A & J first contended the joint venture interest was excluded because the corporate secretary had no knowledge of the asset. It was then contended that the asset was known but not listed because it had no value. In a seemingly inconsistent argument, A & J then contends that judicial estoppel is inappropriate because the company had relied upon advice from counsel in excluding the asset from the bankruptcy filings. A & J cites *McKay v. Owens,* 130 Idaho 148, 937 P.2d 1222 (1997), for the proposition that the doctrine should not apply where the first position was taken because of mistake, inadvertence, innocently, or if the inconsistency is reconcilable, and urges this Court to find that this rule applies in this case. However, as previously stated, the facts indicate that the company's interest in the joint venture was disclosed to its attorney and a deliberate decision was made to not list the interest on bankruptcy papers. In its brief, A & J states:

> Plaintiff relied upon its attorney's advice with regard to the preparations of all bankruptcy filings and trusted his judgment with regard to how assets and debts were scheduled, listed, and/or disclosed. Details related to the joint venture were omitted from Plaintiff's bankruptcy filings because of advice and efforts of [A & J's bankruptcy attorney], not because of deliberate intention by Plaintiff to mislead the Bankruptcy Court.

Additionally, the president of A & J states in an affidavit, "details of the joint venture were discussed with the Company attorney ... along with all of the Company financial matters. [The attorney] then put together the schedules which did not include the details related to the joint venture." The district court found the evidence demonstrated that A & J knew there may be some value to the joint venture, pointing out that the joint venture was a business investment and the parties considered selling the property after it became clear that the highway project was not going to take place. The court stated "clearly, it is a potential value" and was not disclosed in bankruptcy court. This Court agrees with the district court's conclusion that following the advice of counsel is not equivalent to inadvertence or mistake and appears to have been a strategic decision made in preparation for bankruptcy court.

At oral argument, A & J remarked that in *New Hampshire v. Maine,* 532 U.S. 742, 121 S.Ct. 1808, 149 L.Ed.2d 968 (2001), the United States Supreme Court laid out three factors courts may consider when determining whether to apply the doctrine of judicial estoppel. First, courts may look at whether a party's later position is "clearly inconsistent" with its prior position. *New Hampshire,* 532 U.S. at 750, 121 S.Ct. at 1815, 149

L.Ed.2d at 977. Secondly, courts may look at whether the party succeeded in persuading the court to accept its prior position, so that acceptance of the later position would create "the perception that either the first or the second court was misled." *Id.* Finally, courts may consider whether the party asserting the inconsistent position "would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *Id.* at 751, 121 S.Ct. at 1811, 149 L.Ed.2d at 978. A & J argues that the application of the doctrine in this case is erroneous because its failure to disclose the real property and joint venture in the bankruptcy proceeding does not result in an unfair advantage for A & J or an unfair detriment to Wood, thus not satisfying the third factor. However, as emphasized in *Hamilton,* these are factors a court *may* consider, so these are not required elements. *Hamilton,* 270 F.3d at 782. The Supreme Court in *New Hampshire* held, "[t]he circumstances under which judicial estoppel may appropriately be invoked are probably not reducible to any general formulation of principle." *New Hampshire,* 532 U.S. at 750, 121 S.Ct. at 1815, 149 L.Ed.2d at 977 (citing *Allen v. Zurich, Ins. Co.,* 667 F.2d 1162, 1166 (4th Cir.1982)); *Lowery v. Stovall,* 92 F.3d 219, 223 (4th Cir.1996); *Patriot Cinemas, Inc. v. General Cinema Corp.,* 834 F.2d 208, 212 (1st Cir.1987). Even if the third factor is considered by this Court, the outcome in this case would be the same. In a discussion of the third factor, the Ninth Circuit Court of Appeals noted that a debtor, once he institutes the bankruptcy process, "disrupts the flow of commerce and obtains a stay and the benefits derived by listing all his assets." *Hamilton,* 270 F.3d at 785. The court noted that Hamilton enjoyed the benefit of both an automatic stay and a discharge of debt in his bankruptcy proceeding. *Id.* In this case A & J also enjoyed the benefits gained by filing for bankruptcy. The disclosure statement reflects that A & J's unsecured creditors relied on the nondisclosure and accepted payment on a pro rata basis, meaning they were not paid in full. A & J received a discharge of unsecured indebtedness when its reorganization plan was approved in December 1991.

While there is no Idaho case with similar facts, it seems clear that the doctrine of judicial estoppel applies here. The doctrine clearly prohibits "a party from assuming a position in one proceeding and then taking an inconsistent position in a subsequent proceeding." *Robertson Supply,* 131 Idaho at 101, 952 P.2d at 916. It is undisputed that A & J succeeded in persuading the bankruptcy court to accept its prior position, in which it failed to disclose any interest in either the real property subject to the dispute or the joint venture agreement. Now, A & J takes an inconsistent position by seeking to have the courts determine the existence, nature and extent of its interest in the nondisclosed real property and joint venture agreement. This Court affirms the district court's decision to grant Wood's motion for summary judgment on the basis of judicial estoppel.

141 Idaho at 685-88 116 P.3d 15-18.

In the present case, Newell makes several claims as to why judicial estoppel should not apply. These are discussed fully below, but should be mentioned at this point in light of *A & J Construction*. Newell claims, 1) the "inadvertence-or-mistake exception" applies and Newell "lacks knowledge of the undisclosed claim or has not motive to conceal the claim" (Pl.'s Mem. in Opp'n to Defs.' Mot for Summ. J. 2-4); 2) Newell did not intend to conceal assets from the bankruptcy court, did not intend to fail to amend his claims before the bankruptcy court, and he lacked a motive to fail to disclose these assets to the bankruptcy court (*Id.* at 3-4); 3) the non-disclosure of assets had a *de minimis* effect on Newell's creditors (*Id.* at 4-5); 4) Newell was "not obliged to schedule a cause of action that did not accrue pre-petition" (*Id.* at 6); and 4) Newell re-opened his bankruptcy so judicial estoppel should not apply. *Id.* at 6-8.

Finally, this Court is mindful of its own prior decisions, and strives to be consistent with such. In *Montee v. Daugharty*, Kootenai County Case No. CV2017 4677, this Court on January 31, 2018, issued its Memorandum Decision and Order: Granting Defendants' Request for Judicial Notice; Denying Plaintiffs' I.R.C.P.56(d) Motion; and Granting in Part and Denying in Part Defendant's Motion for Summary Judgment. This decision is found on Westlaw at 2018 WL 916500. In that decision, this Court noted that in that case, the bankruptcy trustee had abandoned the malpractice claim Montee had against Daugharty, and thus, similar to *Houpt* (and dissimilar to *McCallister* and *Mowrey*), Montee lacked standing at the beginning of the state court action, but later acquired standing. No. CV-2017-4677, 2018 WL 916500, at Westlaw pages *10-11 (Idaho 1st Jud. Dist. Jan. 31, 2018). In *Montee*, the defendant moved for summary judgment on the basis that because the plaintiff's "professional negligence claim [was] the property of the bankruptcy estate, the [plaintiff was] judicially estopped from asserting that claim." *Id.* at *2. During the proceedings, the bankruptcy estate

abandoned all interest in the plaintiff's claims against the defendant. *Id.* at *9. This Court found that, after the plaintiff filed for bankruptcy, any claims the plaintiff had against the defendant "became the property of the bankruptcy estate and were no longer the [plaintiff's] to assert" and that the plaintiff was "not the real party in interest and lacked standing to assert any claims against [the defendant], at least to the extent that the claims asserted existed prior to the [plaintiff's] bankruptcy filing." *Id.* at *10. Citing *Houpt*, this Court continued to state that since the bankruptcy abandoned any interest in the plaintiff's claims against the defendant, the plaintiff was "now the real party in interest with standing to pursue their claims against" [the defendant]. Therefore, any defect in the [plaintiff's] standing as the real party in interest has been cured." *Id.* at *11.

The Court went on to analyze Daugharty's claim that the Montees were judicially estopped from asserting that Daugharty had negligently advised the Montees to file for bankruptcy. This Court found the Montees were judicially estopped from bring such claim, due to the Montees' failure to disclose that claim to the trustee, even though the trustee later abandoned such. That analysis in that case is as follows:

> **3. Professional Negligence Claim.**
>
> Daugharty makes three arguments with regard to the Montees' professional negligence claim. First, he argues that the Montees do not have a right to enforce a claim of professional negligence related to Daugharty's representation of the Montees in *Wolford v. Montee* because the Montees are not the real party in interest. Def.'s Paul W. Daugharty and Paul Daugharty, P.A.'s Mem. Supp. Mot. Summ. J. 8–9. Because this argument raises the issue of standing, the Court addressed it at the outset in Part III(D) above. Second, Daugharty contends that the Montees are judicially estopped from claiming that Daugharty was negligent by advising them to file for bankruptcy because that claim is a pre-petition claim. *Id.* at 9–10. Third, with regard to the Montees claim that Daugharty was negligent by advising the Montees that they could form North Pacific, LLC, Daugharty argues that he was not the proximate cause of damage to the Montees. *Id.* at 10–12.
>
> ***i. The Montees are judicially estopped from pursuing their claim that Daugharty was negligent by advising***

them to file for bankruptcy because the Montees have a duty to disclose that claim as an asset in their bankruptcy case and the undisputed evidence demonstrates that they have not done so.

Daugharty argues that "[t]he claim that Daugharty was negligent by advising the Montees to file for bankruptcy is a pre-petition claim that is not listed as an asset of the estate in the debtor's most recent schedules." Defs. Paul W. Daugahrty and Paul Daugharty, P.A.'s Mem. Supp. Mot. Summ. J. 9–10. He contends that "[u]nder the doctrine of judicial estoppel, [the Montees are] barred from asserting the professional negligence claim against Daugharty." *Id.* at 10.

To begin, the Court notes that Daugharty only applies his judicial estoppel argument to the Montees' claim that Daugharty was negligent by advising them to file for bankruptcy. Therefore, the Court only considers the applicability of judicial estoppel to that claim. The doctrine of judicial estoppel applies to bankruptcy proceedings. *McCallister*, 154 Idaho at 895, 303 P.3d at 582; *see* 11 U.S.C. §§ 521(a), 541(a). "Judicial estoppel precludes a party from advantageously taking one position, then subsequently seeking a second position that is incompatible with the first." *McCallister*, 154 Idaho at 894, 303 P.3d at 581.

> Judicial estoppel takes into account ... what the [estopped] party knew, or should have known, at the time the original position was adopted. Thus, the knowledge that the party possesses, or should have possessed, at the time the statement is made is determinative as to whether that person is 'playing fast and loose' with the court. Judicial estoppel, however, should only be applied when the party maintaining the inconsistent position either did have, or was chargeable with, full knowledge of the attendant facts prior to adopting the initial position. Bankruptcy rules require disclosing all existing and potential assets. This duty continues during the pendency of the bankruptcy. Judicial estoppel will be imposed when the 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. It is the knowledge that a party has or is chargeable as having that is considered, not the intent of the party.

Id. at 895, 303 P.3d at 582 (citations omitted) (internal quotation marks omitted).

In this case, the Montees allege Daugharty negligently advised them to file for bankruptcy. The Montees filed a Chapter 11 bankruptcy case on April 21, 2015, which was later converted to a Chapter 7 bankruptcy case. Judicial Notice Req. 000099–126. It follows that Daugharty's allegedly negligent advice must have occurred before April 21, 2015. Therefore, the Montees' claim that Daugharty negligently advised them to file for bankruptcy is a pre-petition claim they were required to disclose. The Montees did not disclose this claim in their

> Amended Schedule B, filed August 21, 2015. *Id.* at 000118. Moreover, as noted above, the Montees have a continuing duty during the pendency of their bankruptcy to amend their schedules to disclose all potential assets. The only evidence before the Court is the evidence submitted by Daugharty. Based on that evidence, the Court concludes that the Montees have not made the requisite disclosures in their bankruptcy case. As such, based on the undisputed facts, the Montees claim that Daugharty negligently advised them to file for bankruptcy is an undisclosed prepetition claim. As a result, the Montees are estopped from asserting that claim against Daugharty in this case.

Id. at *12-13.

B. Analysis of Newell's Claims in Light of Pertinent Case Law.

Preliminarily, this Court appreciates that whether or not judicial estoppel is applied to Newell's claims in this case is a matter committed to its discretion. As set forth above, in *Lunneborg*, the Idaho Supreme Court established a four part analysis in reviewing abuse of discretion issues, which requires the trial court judge to do four things:

> When this Court reviews an alleged abuse of discretion by a trial court the sequence of inquiry requires consideration of *four* essentials. Whether the trial court: (1) correctly perceived the issue as one of discretion; (2) acted within the outer boundaries of its discretion; (3) acted consistently with the legal standards applicable to the specific choices available to it; and (4) reached its decision by the exercise of reason. *See Hull* [*v. Giesler*], 163 Idaho [247], at 250, 409 P.3d [827] at 830.

163 Idaho at 863-64, 421 P.3d at 194-93. This Court will show, based on the case law above and the analysis below, that this Court is acting within the bounds of that discretion in finding that judicial estoppel applies to bar Newell's claims against defendants in this matter, that this court is acting consistently with the legal standards applicable to the specific choices available to this Court, and that this Court has reached its decision by the exercise of reason.

In this case, Newell filed for bankruptcy under Chapter 13 on March 11, 2014. Thereafter, any claims Newell had against Black Hawk would have become the property

of the bankruptcy estate and were no longer Newell's to assert. Thus, when Newell filed his Complaint against Black Hawk on May 22, 2020, and his Amended Complaint on December 9, 2020, he did not have the legal right to do so. Newell lacked standing. Recently, however, the bankruptcy estate was ordered to abandon its interest in Newell's property interests pursuant to § 554(b) of the Bankruptcy Code ("On request of a party in interest and after notice and a hearing, the court may order the trustee to abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate."). The bankruptcy court rescinded Newell's discharge after finding the discharge was erroneous since Newell paid off the balance of his debts and was not eligible for discharge because of timing issues and subsequently dismissed the case. *See* Def.'s 2d Req. Judicial Notice, Ex. A, 17, 18, Order Closing Reopened Case, Order Abandoning Property. Thus, the bankruptcy estate is no longer the owner of the property interests in question in this case; Newell is. At the current time, Newell has standing.

However, this Court finds Newell is judicially estopped from asserting his claims in this action, due to his decisions made before the bankruptcy court. Black Hawk argues that Newell:

> got rid of millions of dollars in debt, did not disclose his new assets (the claimed assets held by Group Two worth millions according to the plaintiff in the records of this case), did not disclose his causes of action in this case (which he previously brought in the Nevada complaint), but received the benefit of confirmation of a convenient five-year repayment plan for his remaining creditors without risk of reopening his prior chapter 7 bankruptcy . . . [and that] creditors owed over $5 million in the plaintiff's first bankruptcy were not paid.

Def. Reply Brief Supp. Summ. J. 6. While Newell may or may not have "got rid of millions of dollars of debt", he did secure an advantage through bankruptcy. Newell has stated under oath that beginning,

3) In 2014, BHF [Black Hawk Funding] made an offer to me to become involved in correcting the loan programs, underwriting and collateralization within its loan program. I was hired as Chief Operation Officer of BHF and since money was tight as a result of no income coming in as all loan in default, I went to work for $1,000 a month and promises of ownership in BHF and other companies owned or managed by BHF.
4) During the ensuing two years, I was able to recoup greater returns as anticipated on the $10,000,000 of defaulting loans and put BHF into a new loan program that provided the investment return due to the investors, expansion of the business profits, and volume of income that was not existent for the previous three years. I was given stock bonuses in BHF each year for the next four years totally [sic] over 650,000 shares of common stock in BHF.

. . . .

7) By the fact that greater risk was inherent in the marijuana market, a new investment fund originated through Group of Two Investments, LLC (Group of Two) (see Operation Agreement of Group of Two Investments marked as Exhibit A) which would be owned by Robert Newell and Michael Newell to explore the cannabis equity loan program. This loan program would be managed by BHF and equity obtained by the loan program would be shared with investors and BHF.
8) One of the loan programs was Pleiades LLC, a marijuana PUD within the City of Coachella. Group of Two, through a new investment entity known as Verde Ventures LLC entered into an approx. $9,000,000 loan and received 45% equity ownership in Pleiades. 40% went to Group of Two, the owner of Verde Ventures and the investors as shareholders of Verde Ventures (see exhibit B) and 5.5% went to BHF as manager of the project (see membership Agreement marked as Exhibit B) Investors were to receive 10% annually and 10% equity interest (see exhibit C MJN affidavit).

. . . .

10) Other money was raised through Group of Two and BHF through a company owned by Group of Two, known as Verde Holdings, LLC, to build out the project owned by Pleiades and there are presently eight building[s] constructed on the project of which 6 are being rented at $4.50 a month per sq ft NNN (see newsletter marked as exhibit D) In an email to the CFO (see Exhibit E) the ownership interest were outlined as to percentage of ownership in Verde Ventures. 19,000,000 shares were noted to Michael J Newell as a 50% owner in Group of Two and 10,000,000 preferred and 10,000,000 common to the investors and 6.5% to BHF. Investors also received a 10% annualized interest return.

. . . .

13) Pleiades LLC, the grow and distribution campus in Coachella, has a value of over $33,000,000 per a MA! appraisal in its "present value" and over $51,000,000 in its completed value (exhibit II). Verde Partners owns 90% of the ownership of Pleiades.

October 28, 2020, Aff. [of Michael Newell] in Opp'n. to Mot. to Vacate Order of Default and Partial J. 2-4 [Newell does not use page numbers in his affidavit], ¶¶ 3, 4, 7, 8, 10, 13, Ex. A. In his Amended Complaint (which is not verified under oath, I.R.C.P 7(a), 11.1), Newell claims:

> 21. At all times material to this complaint, Robert [Newell] was a resident of the State of Idaho, and is an officer, shareholder, and director of Black Hawk Funding, Verde Partners, Verde Ventures, Verde Holdings, and the managing member of Group Two, Greenhawk, and other Defendant limited liability companies.
> . . . .
>
> 79. 50/50 ownership in the Defendant entities, as well as other companies, was the bargain and agreement between Plaintiff [Michael Newell] and Robert [Newell]. Additionally, the interests held between Plaintiff an Robert was known by all Defendants. Unfortunately, the Defendants are now attempting to renege on this understanding and are selling or transferring ownership between themselves. They are not sharing the terms of the transfers nor transferring and [sic] ownership to Plaintiff.

Am. Complaint for Affirmative Relief, Declaratory Relief and Damages 4, 12, ¶¶ 21, 79. Newell states under oath: "I once held in name assets managed by individual Defendants well over $8,000,000 in equity value and now I have none." January 12, 2021, and January 16, 2021, Affid. [of Michael Newell] in Supp. of Mot. to Amend Complaint for Punitive Damages 6 [Newell does not use page numbers in his affidavit], ¶ 22. Following which, Newell stated under oath that he is owed half of over $81 million:

> 2) The following assets were, at the time of termination from employ with Black Hawk in January 2019, held by Group Two, which was owned 50/50 by it's two members, Plaintiff [Michael Newell] and Defendant Robert Newell. As a result of having incomplete files, Affiant can only provide partial evidence concerning how the assets were held and what percentage of ownership of each asset was held with other Defendant entities:
> A) Kings Valley Group, LLC—Retail and office complex in Conifer, Colorado. $8,000,000 estimated value. See Exhibit B and C
> B) Pleiades, LLC. 11 acre warehouse cannabis grow and distribution center in Coachella California. Estimated value $61,000,000 See exhibit D
> C) 420 Distribution, LLC California distribution license. Estimated value

$500,000. See Exhibit E EE
D) Idaho Club 8 residential lots in Sandpoint Idaho. Estimated value $600,000. See Exhibit F and FF
E) Pharma Labs LLC. Testing Lab in Coachella California. Estimated value $3,000,000 See exhibit G
F) Ambary Gardens LLC CBD manufacturing and hemp grow in Evergreen Colorado. Estimated value is unknown See Exhibit H
G) 72 Ave I and II, LLC Greenhouse facility in Denver Colorado. Estimated value $3,000,000 See Exhibit I
H) Verde Ventures, Inc. Merged into Verde Partners. See Exhibit J
I) Verde Holdings, Inc. Merged into Verde Partners Inc Same ownership
J) Scarlet Rae High Desert Management Grow facility located in Coachella, California Estimated value $2,000,000 See Exhibit L
K) Manufacturing 360, LLC. Extraction facility located in Coachella, California. Estimated value $3,000,000 See Exhibit M
L) Cultivation 360, LLC. Grow facility located in Coachella California. Merged into Verde Partners, Inc Exhibit MM attached
M) Corridor 5, LLC Excavator Estimated value $50,000 See Exhibit I
N) Stock in Chewelah Basin Investments 49 Degree North Ski Mountain Value unknown Exhibit I
O) Misc. Small Cap Cannabis Companies Value unknown
P) 660,000 shares of Black Hawk Funding, Inc Black Hawk obtained 30,000,000 shares of Verde Partners, Inc Owns 50% plus of stock issue by Verde Partners
Q) Eminger Note in the amount of $150,000 attached as Exhibit N. Balance in excess of $200,000.

January 18, 2021, Suppl. Aff. for Claim for Punitive Damages 2, 3 [Newell does not use page numbers in his affidavit], ¶ 2. The Court notes that only the assets Newell listed to which Newell attaches monetary amounts, total $82,350,000.00. Half of that (since it is evenly split between Michael Newell and defendant Robert Newell, according to Newell) is $41,175,000.00. Newell has stated under oath that, "I was the Chief Operations Officer (COO) of Black Hawk Funding, Inc (Black Hawk) from 2014 to January of 2019." Decl. of Plaintiff [Michael Newell] in Opp'n. to Mot. to Dismiss 2 [Newell does not use page numbers in his declaration], ¶ 2. See also, Second Decl. of Pl. in Opp'n to Mot. to Dismiss 2 [Newell does not use page numbers in his declaration]. Newell then stated under oath:

> 3) In 2008 Declarant [Michael Newell] had total assets worth over $30,000,000 in real estate and business holdings, with over $17,000,000

> in equity in business and real estate in Idaho, Nevada, California, and Hawaii. Then the seconded largest recession in America hit. Real estate values plummeted by almost 50%. Declarant liquidated, sold properties for huge discounts, but was unable to weather the storm. Declarant was behind in all real estate secured loans including his residence which had two loans with US Bank. Real estate taxes were in arrears and IRS were in levy stage when it became inevitable that the recession was bigger than my ability to hold on after 5 years of liquidation. Bankruptcy was the only way that I could get a fresh start. I filed Chapter 13 wage earners plan on 08/29/2012. The plan called for payment to over $350,000 of plan creditors. The plan was not confirmed because the limit for a Chapter 13 plan only allowed up to $300,000 as a limit in a plan and the Chapter l3 trustee moved to dismiss the plan and convert to a Chapter 7 total bankruptcy. My attorney then modified the bankruptcy to a chapter 7 and reaffirmation of certain debts after the total discharge through Chapter 7. After discharge, my attorney refiled a Chapter 13 on 03/11/2014 to save the residence and to pay the arrearages on the two loans with US Bank, real estate taxes due on the residence and the IRS lien. Since all my creditors claims were extinguished, my Chapter 13 plan of reaffirmation for over $150,000 to these four remaining creditors was to be paid at $3600 dollars a month. I had just started my employ with Black Hawk Funding, Inc as an employee and had money coming in in my law practice and paid the month installments for over 5 years when final payment was made.
>
> . . . .
>
> 6) Declarant was uninformed and without knowledge, that if property, money, or claims became available during the post-petition plan payment period that these became part of the bankruptcy estate.
>
> . . . .
>
> 8) My attorney that filed the bankruptcies for me did not inform me of this fact. The trustee did not inform me of this fact. Declarant was completely absent of any knowledge that such requirement to refile schedules was the case.

Pl.'s Decl. in Opp'n. to Defs.' Mot. for Summ. J 2-4 [Newell does not use page numbers in his declaration] ¶¶ 3, 6, 8.

The claims Newell has against the various defendants in the present case arose over the exact same time period as Newell's bankruptcies. Newell filed his first chapter 7 proceeding on August 14, 2012, and received a discharge on June 26, 2013. On March 11, 2014, Newell filed his second bankruptcy, a chapter 13. Four months later, Group Two was founded. Ten months later, Newell's chapter 13 plan was confirmed on

May 6, 2015. The acquisitions and creations of various businesses, the transfers of stock in the various defendant business entities Newell complains of, all occurred in 2015-2019, culminating in Newell filing the Nevada court complaint on August 6, 2019. Newell's bankruptcy was discharged (erroneously, as we come later to find out due to Newell's failure to disclose all his assets) *after* that date, on December 5, 2019.

As set forth above in *McCallister*, 154 Idaho at 896, 303 P.3d at 583, Newell did not disclose these claims he is now seeking in this present action, "while his bankruptcy was still pending." "[W]hen a plaintiff has knowledge of a claim during the pendency of his bankruptcy the claim becomes 'an asset of the bankruptcy estate, and [ ] a claim for the bankruptcy trustee alone to assert.'" *Houpt*, 160 Idaho at 187, 370 at 390. (quoting *Mowrey* 155 Idaho at 635, 315 P.3d at 823). The duty to disclose contingent assets, such as causes of action, does not end when the bankruptcy is filed, but continues throughout the bankruptcy until it is closed. *In re JZ, LLC*, 357 B.R. 816, 824 n. 21 (Bannkr. D. Id. 2006), *citing Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 783 (9th Cir. 2001). It is beyond any doubt that as Black Hawk claims and has proven, Newell "did not disclose his new assets (the claimed assets held by Group Two worth millions according to the plaintiff in the records of this case), did not disclose his causes of action in this case (which he previously brought in the Nevada complaint), but received the benefit of confirmation of a convenient five-year repayment plan for his remaining creditors without risk of reopening his prior chapter 7 bankruptcy." Def. Reply Brief Supp. Summ. J. 6. The question then becomes whether Newell is nevertheless judicially estopped from bringing this action against Black Hawk. This Court finds Newell is judicially estopped from bringing this case against Back Hawk.

In *McCallister*, the plaintiff was aware of the potential litigation prior to filing for bankruptcy, did not claim it as a potential asset, and did not amend his schedule to

include it. 154 Idaho at 896, 303 P.3d at 583. Similarly, in *Mowrey*, the plaintiff was aware of the potential personal injury action when filing for bankruptcy, since the accident leading to the litigation was the reason for initiating bankruptcy proceedings in the first place. Here, Newell did not allegedly come into possession of the disputed assets until after the commencement of the bankruptcy proceedings. However, once he became aware of these claims, it is uncontroverted that he failed to update the bankruptcy court during the pendency of those proceedings. Newell's uncontroverted failure to update the bankruptcy court results in judicial estoppel being applied in the present case. *A & J Construction* makes it clear that, as soon as Newell became aware of these assets, he had a duty to update the bankruptcy court. As noted above, the Idaho Supreme Court in *A & J Construction* held:

> In *Hamilton* [*v. State Farm Fire & Cas. Co.*, 270 F.3d 778 (9th Cir.2001)] the Ninth Circuit said it was immaterial that the debtor filed for bankruptcy before he filed suit against State Farm, holding, "Judicial estoppel will be imposed when the 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." *Id.* at 784. The duty to disclose all assets and potential assets continues after the initial filing since a debtor is required to amend his or her financial statements if circumstances change. *Burnes* [*v. Pemco Aeroplex, Inc.*, 291 F.3d 1282, 1286 (11th Cir.2002).

141 Idaho at 686, 116 P.3d at 16. Whether the asset Newell held in Group Two was worth $8 million or $41.175 million, it is fair to say Newell knew of that asset "during the pendency of the bankruptcy." As both *McCallister* and *Mowrey* make clear, Newell's reopening the bankruptcy this summer, the same day that defendant's motion for summary judgment was first scheduled to be heard, does not result in judicial estoppel not being applied against Newell.

Newell has filed three separate briefs at three separate times, in which he makes the same five arguments. On June 25, 2021, Newell filed Plaintiff's Memorandum in

Opposition to Defendant's Motion for Summary Judgment; on September 20, 2021, Newell filed Supplimental [sic] Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment; and on September 23, 2021, Newell filed Amended Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment. There are no page numbers used by Newell in each of these three briefs There are formatting issues in each of the last two memoranda which make it difficult to ascertain if block quotes are being used from cases (without citing to those cases), or whether this is original work of Newell with formatting errors. This Court will cite to and quote from Newell's first brief, Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment filed on June 25, 2021, as it contains the least amount of formatting issues. The five arguments made by Newell are: 1) judicial estoppel should not apply because of the "inadvertence-or-mistake exception" and Newell "lacks knowledge of the undisclosed claim or has not motive to conceal the claim" (June 25, 2021, Pl.'s Mem. in Opp'n to Defs.' Mot for Summ. J. 2 [this is even more confusing as what was filed appears to omit page two, the page 2 as cited by this Court is the second page of what was actually filed by Newell on June 25, 2021]); 2) Newell did not intend to conceal assets from the bankruptcy court, did not intend to fail to amend his claims before the bankruptcy court, and he lacked a motive to fail to disclose these assets to the bankruptcy court (*Id.* at 3-4); 3) the non-disclosure of assets had a *de minimis* effect on Newell's creditors (*Id.* at 5-6); 4) Newell was "not obliged to schedule a cause of action that did not accrue pre-petition" (*Id.* at 6); and 4) Newell re-opened his bankruptcy so judicial estoppel should not apply. *Id.* at 6-8. These last two arguments were repeated again by Newell at pages 8-9 of that brief filed on June 25, 2021. Without that repetition at pages 8-9, the entirety of Newell's argument is as follows:

The application of judicial estoppel is inappropriate in this case because the inadvertence-or-mistake exception should apply due to the fact that the Plaintiff had no objective motive, let alone subjective intent, to gain an advantage by concealing his post-petition cause of action. Summary judgment is inappropriate because there exists a genuine issue of material fact as to whether the Plaintiff's failure to disclose his post-petition cause of action was due to inadvertence or mistake. Exceptions to the application of judicial estoppel exist if the failure to list the claim was due to inadvertence or mistake or if the effect of the omission was *de minimis*. In Idaho, the "inadvertence-or-mistake" exception is satisfied if the debtor lacks knowledge of the undisclosed claim or has no motive to conceal the claim. *McCallister v. Dixon*, 154 Idaho 891, 303 P.3d 578 (2013). For purposes of the judicial estoppel analysis, the knowledge that a party is charged with having is considered, not their subjective intent to conceal the asset; whether a debtor intends to conceal a potential asset is irrelevant if objectively there is a motive for concealment. *Mowrey v. Chevron Pipe Line Co.*, 155 Idaho 629, 315 P.3d 817 (2013). This is the key to invoking judicial estoppel. In this case there is no motive as no creditor would have received any additional benefit if the asset had been disclosed.

The doctrine of judicial estoppel, which exists to prevent parties from deliberately changing positions, can prevent a party from asserting a claim or cause of action if he has failed to disclose it as an asset in his bankruptcy proceeding. The doctrine of judicial estoppel sounds in equity and is invoked at the discretion of the court. *McCallister v. Dixon*, 154 Idaho 891, 303 P.3d 578 (2013). However, the Ninth Circuit has found that a court is not bound to apply judicial estoppel, particularly when a party's prior position was based on inadvertence or mistake. *Ah Quin v. Cty. of Kauai Dep't of Transp*, 733 F.3d 267 (9th Cir. 2013) (where the Court held a factual issue existed on summary judgment as to whether omission of prepetition employment discrimination claim in bankruptcy filing was inadvertent). The United States Supreme Court has explained in *New Hampshire v. Maine*, 532 U.S. 742, 121 S. Ct. 1808, 149 L. Ed. 2d 968 (2001) that the purpose of judicial estoppel is to protect the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment. The doctrine is not intended to protect tort-feasors or parties who are in breach of contract from their liability. When a plaintiff's position is inconsistent because of inadvertence or mistake there is no injury to the integrity of the court and there is no need to apply judicial estoppel.

In *McCallister v. Dixon*, 154 Idaho 891, 303 P.3d 578 (2013) the Idaho Supreme Court held that judicial estoppel will not be applied if the inconsistent positions are based only on inadvertence or mistake; this exception is satisfied if the debtor lacks knowledge of the undisclosed claim or has no motive to conceal the claim. In *Mowrey v. Chevron Pipe Line Co.*, 155 Idaho 629, 315 P.3d 817 (2013) the Idaho Supreme Court held that, in a matter where a party fails to disclose a potential cause of action in his bankruptcy schedules, for purposes of the judicial estoppel analysis, a court must consider the knowledge (rather than the subjective

intent) that a party is charged with having. Whether a debtor intended to conceal a potential asset is irrelevant if there existed an objective motive for concealment. Citing *McCallister v. Dixon*, 154 Idaho 891, 303 P.3d 578 (2013) the *Mowrey* Court explained that an objective motive exists when a debtor has an incentive to try concealing an asset for personal gain. *Id.* at 633, 315 P.3d at 821. An objective motive simply does not exist when creditors are not affected by the omission. In this case, the omitted cause of action arose post-petition. Under the Plaintiff's Chapter 13 plan (which was the only bankruptcy proceeding open when the cause of action arose) there were only four creditors. Under the plan all four creditors were due to receive (and did, in fact, receive) the full amount of their claims, plus interest. Had the schedule been amended to include the omitted cause of action, it would have made no difference to the creditors, since they were all satisfied in full. In *Clark v. All Acquisition, LLC*, 886 F.3d 261 (2d Cir. 2018) the Second Circuit has held that judicial estoppel is improper when creditors have not been materially affected, reasoning that the doctrine "cannot extend to the 'unusual case' in which a debtor's nondisclosure had at most a '*de minimis* effect'" in the bankruptcy case. *Id.* at 267. In *Clark* the estate of a litigant who died of mesothelioma brought personal injury action in state court against multiple corporations, alleging that his mesothelioma was caused by his long-term exposure to asbestos during his service in the US Air Force and his subsequent private sector employment. The Second Circuit held that the District Court had abused its discretion in invoking judicial estoppel to dismiss the action, finding that the failure of the litigant to disclose the action as an asset had a *de minimis* effect on the bankruptcy proceeding because Chapter 13 plan required litigant to repay creditors in full at standard interest rate, litigant was only weeks away from full repayment under plan at time he was diagnosed with mesothelioma, and there was no showing that litigant withheld his diagnosis from bankruptcy court in effort to game the bankruptcy system or that corporations named as defendants in personal injury action were otherwise prejudiced by litigant's nondisclosure in bankruptcy case. *See also Williams v. Keystone Peer Rev. Org., Inc.*, No. 17-1 145-MMM-JEH, 2019 WL 1014605 (C.D. Ill. Mar. 4, 2019) (where judicial estoppel was not applied when plaintiff's Chapter 13 Plan provided for full payment to her creditors and plaintiff continued to make all payments until the plan was completed and all creditors were paid in full); *In re Williams*, No. 12-82275, 2018 WL 6287968 (Bankr. C.D. Il]. Nov. 30, 2018) (holding that debtors derived no benefit from failing to disclose a lawsuit on their bankruptcy schedules when the scheduling of the lawsuit would have added nothing to the bankruptcy estate for the benefit of creditors, as creditors stood to be paid the same amount regardless of its presence); *In Reciprocal Merch. Servs., Inc. v. All Advert. Assocs., Inc*, 163 B.R. 689 (S.D.N.Y. 1994) (debtor was not judicially estopped from prosecuting an action, although the debtor failed to detail the nature of the claim in former bankruptcy disclosures, where there was no evidence of the debtor's deliberate intention to mislead the court or to obtain an unfair advantage and the debtor's reorganization plan provided full payment to creditors, and the debtor did not conceal the claim and

disclose the contingent liability of the defendant as an asset in the debtor's financial statements); *McBride v. Brown*, 2000 WL 1253261 (Ga. Ct. App. 2000) (motorist's failure to list his personal injury action as a possible asset on his subsequent petition for bankruptcy relief did not judicially estop him from bringing a tort action against the other driver involved in the accident, considering that the debtor did not benefit from the nondisclosure at the expense of his creditors due to the dismissal of the bankruptcy proceeding); and *In re Llanos*, 609 B.R. 228 (Bankr. C.D. Cal. 2019) (Chapter l3 debtor was not judicially estopped from pursuing claims against mortgage lender, mortgage assignee, and servicer of mortgage debt by failing to schedule these claims as assets; failure to schedule the claims and their value did not affect court's "best interest" analysis, and debtor did not appear to have gained any advantage by failing to schedule the claims). The application of judicial estoppel is not warranted in this case because the Plaintiff had neither subjective intent nor objective motive to conceal his post-petition cause of action from the bankruptcy court. *See Slater v. United States Steel Com*, 871 F.3d 1174 (11th Cir. 2017) (as an equitable doctrine, judicial estoppel should apply only when the plaintiffs conduct is egregious enough that the situation demands equitable intervention; when a plaintiff intended no deception, judicial estoppel may not be applied).

Additionally, it has been held that a debtor is not obliged to schedule a cause of action that did not accrue pre-petition. *See In re JZ, LLC*, 357 B.R. 816 (Bankr. D. Idaho 2006), afl'd sub nom. *In re JZ L.L.C.*, 371 B.R. 412 (B.A.P. 9th Cir. 2007) (generally, a debtor is not obligated to schedule a cause of action that did not accrue prepetition; under Idaho law, Chapter 11 debtor's cause of action for other party's alleged breach of licensing agreement did not accrue when party first threatened to breach it during prepetition negotiations with debtor for modification of their contractual obligations, but only when other party allegedly breached contract years after petition was filed, either by attempting to wrongfully terminate contract or by manufacturing machines in breach of contract's non-competition clause; accordingly, debtor's breach of contract claims were not unscheduled estate assets).

Lastly, reopening the bankruptcy case is an alternative to the imposition of judicial estoppel. *See Dunmore v. United States*, 358 F.3d 1107 (9th Cir. 2004) (although prior omission of tax refund claims during debtor's Chapter 7 bankruptcy would ordinarily act as judicial estoppel against his asserting those very same claims against government, remedy chosen by judge to allow debtor to reopen his bankruptcy case, thereby giving bankruptcy trustee an opportunity to administer the unscheduled claims was permissible alternative to judicial estoppel, since it prevented debtor from deriving an unfair advantage if not estopped; debtor risked that bankruptcy trustee would retain, rather than abandon, his refund claims). Plaintiff intends to reopen his Chapter 13 filing so as to amend the asset petition to include these claims, property and causes of action to amend this error, mistake and inadvertence in not amending at the time that the property, claim or cause of action arose.

Summary judgement is inappropriate here because there are genuine issues of material fact as to whether the inadvertence-or-mistake exception to the application of the doctrine of judicial estoppel applies. *Ah Quin v. Cty. Of Kauai Dep't of Transp.*, 733 F.3d 267 (9th Cir. 2013) (factual issue existed on summary judgment as to whether omission of prepetition employment discrimination claim in bankruptcy filing was inadvertent). *See also Love v. Tyson Foods, Inc.*, 677 F.3d 258, 262 (5th Cir. 2012) (whether a debtor's failure to disclose claims was inadvertent presents a question of fact); *Robinson v. Tyson Foods, Inc.*, 595 F.3d 1269 (11th Cir. 2010) (a finding as to a party's intent to take inconsistent positions, as would merit application of the doctrine of judicial estoppel, is considered a factual finding); *Ah Quin v. Cty. of Kauai Dep 't of Transp.*, 733 F.3d 267 (9th Cir. 2013).

As asserted by Plaintiff, he did not know of the need to amend the bankruptcy schedules of assets. He was of the impression that the bankruptcy schedules included assets of the estate at the time the bankruptcy was filed and all dealings, contracts, procurement of assets was his under the "fresh start" understanding (see declaration of Plaintiff). He was shocked when he reviewed the Motion for Summary Judgment filed by the Defendant's to lean that the assets procured by him after the filing debt were assets of the bankruptcy estate until the date of discharge and that amendment of the schedules was necessary if an asset, contractual right, cause of action or claim was procured during the bankruptcy plan period (see Declaration of Plaintiff). The Court must ascertain what the intent of the Plaintiff was for not amending the schedules to include the "fruits of his labor". Was it to hide the assets from the creditors of the estate or was it a matter of mistake or inadvertence? This is a fact question to be determined after weighing all the evidence and not just the fact that the schedules were not amended. Another question of fact is whether the actions of Plaintiff in not amending the schedules caused any harm to the estate or creditors in the estate. Again, this must be weighed by the Court or in this matter, the jury, as trier of the facts.

The trier of fact must look beyond the act itself to address the intent behind the act to conclude whether judicial estoppel is a bar to be invoked. Facts, such as the intent of Plaintiff, the value of the asset, claim or cause of action, the time that the asset became a part of the estate, the circumstances around the procurement of the asset, if the asset was absolute or contingent, and if certain circumstances existed to make the asset a true asset, must be weighed as well as consideration given as to vesting, contingencies, consideration and intent of the parties when the asset would ripen.

While the Idaho Supreme Court has held that the trier of fact must look to the objective motive of the debtor, the debtor's subjective intent is also illustrative. It is for the trier of fact to assess the intent/motive. Surrounding circumstances are also relevant. What action was done by the Plaintiff after learning of his mistake and/or inadvertence? Furthermore, what would be the effect of corrective action once discovered? Is there is a "victim" as a result of his mistake and

> inadvertence? An equitable doctrine such as judicial estoppel should not be imposed if the doctrine itself would work an inequity. Whether to impose the doctrine is discretionary for this very reason.

Pl.'s Mem. in Opp'n to Defs.' Mot for Summ. J. 2-8. (At this point of the brief, there are a few paragraphs that are direct repeats of earlier paragraphs. *Id.* at 8-9). Newell then concludes:

> Summary judgement is inappropriate because there are genuine issues of material fact as to whether the inadvertence-or-mistake exception to the application of the doctrine of judicial estoppel applies. It is a question of fact whether the Plaintiff had an objective motive to gain an advantage by concealing his post-petition cause of action. Plaintiff did not possess an objective motive since all his creditors were satisfied in full, with interest, even though the cause of action had not been listed in the bankruptcy schedules. If judicial estoppel is imposed in this case it would allow wrongdoers to go free; an equitable doctrine should not be imposed if it would work an inequity, particularly when Plaintiff's failure to amend his bankruptcy schedules was due to mistake or inadvertence and when neither the judicial process of the bankruptcy court nor the Plaintiff's creditors were harmed. Weighing all the evidence must be done after "all is in front" of the jury. Furthermore, Plaintiff should be afforded the opportunity to reopen and amend the schedules to correct his mistake and inadvertence. Since Plaintiff just learned of the mistake, there needs to be time to correct the mistaken or inadvertence so that possible negative consequences can be avoided.

Id. at 9-10.

Newell's argument regarding his intent to re-open the bankruptcy (which he did re-open eleven days after filing the above-quoted brief), is disposed of by both *McCallister* and *Mowrey*. That issue was a matter of first impression before the Idaho Supreme Court in *McCallister*. 154 Idaho at 897, 303 P.3d at 584. Recognizing that allowing a plaintiff to reopen their bankruptcy case to amend their own asset schedule as an exception to the application of judicial estoppel would do nothing to "maintain the integrity of the judicial system," the Idaho Supreme Court held: "Therefore, Doherty's reopening and amending of his bankruptcy assets does not avoid application of judicial estoppel." 154 Idaho at 898, 303 P.3d at 585. The same result occurred in *Mowrey*

which followed *McCallister* later that same year. The Idaho Supreme Court wrote: "Thus, the Mowreys' subsequent reopening of their bankruptcy estate to amend their asset schedule nearly five years after they certainly became aware of this potential cause of action does not avoid application of judicial estoppel." 155 Idaho at 634, 315 P.3d at 822. This is because the duty to disclose such assets is continuous throughout the pendency of the bankruptcy case. *McCallister*, 154 Idaho at 895, 303 P.3d at 582, *citing Burnes v. Pemco Aeroplex, Inc.*, 291 F.3d 1282, 1286 (11th Cir. 2002).

Another of Newell's arguments is that the Group Two assets arose "post-petition". This argument is likewise disposed of straightforward. Newell argues:

> Additionally, it has been held that a debtor is not obliged to schedule a cause of action that did not accrue pre-petition. *See In re JZ, LLC*, 357 B.R. 816 (Bankr. D. Idaho 2006), afl'd sub nom. In re JZ L.L.C., 371 B.R. 412 (B.A.P. 9th Cir. 2007) (generally, a debtor is not obligated to schedule a cause of action that did not accrue prepetition; under Idaho law, Chapter 11 debtor's cause of action for other party's alleged breach of licensing agreement did not accrue when party first threatened to breach it during prepetition negotiations with debtor for modification of their contractual obligations, but only when other party allegedly breached contract years after petition was filed, either by attempting to wrongfully terminate contract or by manufacturing machines in breach of contract's non-competition clause; accordingly, debtor's breach of contract claims were not unscheduled estate assets).

Pl.'s Mem. in Opp'n to Defs.' Mot for Summ. J. 6. This argument has no merit, as Newell clearly has a duty to update the bankruptcy court upon coming into these assets, and Newell failed to do that. As mentioned above, *A & J Construction* makes it clear that as soon as Newell became aware of these assets, he had a duty to update the bankruptcy court. As noted above, the Idaho Supreme Court in *A & J Construction* held: "The duty to disclose all assets and potential assets continues after the initial filing since a debtor is required to amend his or her financial statements if circumstances change. *Burnes* [*v. Pemco Aeroplex, Inc.,*] 291 F.3d [1282] at 1286 [(11th Cir.2002)]." 141 Idaho at 686, 116 P.3d at 16. Additionally, even a cursory reading of *In re JZ, LLC*,

357 B.R. 816 (Bankr. D. Id. 2006) shows the holding "that a debtor is not obliged to schedule a cause of action that did not accrue pre-petition" is limited to the unique facts present in that case. The Bankruptcy Court held that because the licensing agreement involved was an "executory contract. . . the [Bankruptcy] Court determines the Licensing Agreement 'rode through' the bankruptcy and that JZ, LLC, the reorganized debtor, has standing to sue upon it." 357 B.R. at 825. An executory contract is "a contract that remains wholly unperformed or for which there remains something still to be done on both sides." Black's Law Dictionary, 9th Ed. 321 (1999).

The remainder of Newell's defenses to the application of judicial estoppel against him are somewhat related arguments: the lack of Newell's motive and intent to defraud the bankruptcy court, the "inadvertence-or-mistake exception", and the *de minimis* effect his bankruptcy had on his creditors.

Newell's arguments in his brief tend to conflate motive and intent. The two are very separate under the applicable case law and in this Court's analysis. As to Newell's claimed lack of intent, such argument is completely irrelevant from a legal standpoint. As mentioned above, the Idaho Supreme Court in *McCallister* held that subjective intent to conceal assets is irrelevant, but rather what mattered was "whether the party seeking to avoid judicial estoppel was sufficiently aware of the facts giving rise to application of judicial estoppel." 154 Idaho at 896, 303 P.3d at 583. This Court finds Newell's claim that he lacked intent is simply not relevant as a matter of law.

As to Newell's claimed lack of motive, such claim is one of many things for the Court to consider in analyzing the "inadvertence-or-mistake exception." "The inadvertence-or-mistake exception to judicial estoppel is satisfied only if the debtor lacks knowledge of the undisclosed claim or has no motive to conceal the claim." *McCallister*, 154 Idaho at 898, 303 P.3d at 585. Newell needs one of those two elements to keep

judicial estoppel from applying against him. He must prove either, 1) a lack of knowledge of the undisclosed claim, or 2) no motive to conceal the claim from the bankruptcy court. The element of Newell's claimed lack of knowledge of the undisclosed claim will be discussed immediately below. As to Newell's motive to conceal the claim from the bankruptcy court, the Idaho Supreme Court has found this to be an objective standard. *Id. citing Benton v. Ryan's Family Steakhouse*, 222 F.R.D. 112 (S.D.Miss. 2004). Thus, Newell claiming he lacked motive does not carry the day. The Idaho Supreme Court in *McCallister* found, "objectively, there was a motive for Doherty to conceal this claim [from the bankruptcy court]." 154 Idaho at 899, 303 P.3d at 586. The Idaho Supreme Court found Doherty's "inferences" from his affidavit that, 1) he was unaware he was required to disclose this cause of action on his bankruptcy schedule and 2) that his legal counsel failed him, were "reasonably disposed of by the district court", and that those claimed inferences did not negate "his potential motive to conceal." *Id.* Doherty did not list a malpractice claim (which resulted in the loss of his eye) which arose in 2004, when he filed bankruptcy in 2005 due to being behind on his truck payments. 154 Idaho at 893, 303 P.3d at 580. The Idaho Supreme Court noted: "As to the two issues the district court found dispositive—knowledge and incentive—it found that Doherty knew of the claim [against the eye doctor], benefitted from the discharge by the bankruptcy proceeding, and had a potential motive to conceal the claim from the bankruptcy court." *Id.* In the present case, Newell clearly knew of his claim against Black Hawk, benefitted from the discharge in the bankruptcy proceeding (he kept his house and five years were added to his loan payments), and he had a potential motive to conceal the $8 million-$41.175 million claim from the bankruptcy court. It matters not whether Newell had actual motive, it is sufficient that he "had a potential motive to conceal the claim from the bankruptcy court." Clearly Newell had

such potential motive. In *Mowrey*, Idaho Supreme Court dealt with the similar claim that the Mowreys did not know they had to disclose their claim against Chevron, and that they were relying on the assistance of a lawyer. The Idaho Supreme Court reasoned that whether the plaintiffs "intended to conceal this potential asset is irrelevant: objectively there was a motive for them to conceal the claim, as is evident by their filing the claim [against Chevron] six weeks after the bankruptcy estate closed." 155 Idaho at 634-35, 315 P.3d at 822-23. The timing is the same for Newell. On the present Idaho state court lawsuit, Newell waited until after his bankruptcy was discharged (the first time) to file this lawsuit, but Newell filed his Nevada lawsuit on August 6, 2019, four months before his bankruptcy was (erroneously as we now find out) discharged. Under *Mowrey*, Newell had potential motive to conceal his claim from the bankruptcy court. It is easy for Newell to claim he lacked motive. Being able to prove he objectively lacked motive is extremely difficult for Newell. In fact, the Ninth Circuit Court of Appeals called it, "**the universal motive** to conceal a potential asset." *Ah Quin*, 733 F.3d at 276. Newell is saddled with that "universal motive" given the undisputed facts of his case. This Court finds Newell has not met that challenge of proving he objectively lacked motive to conceal his very significant asset from the bankruptcy court. This Court finds the facts of this case are much more egregious than found in *McCallister Mowrey* or *Ah Quin*. Newell's concealed asset was worth $8 million-$41.175 million, Newell is an attorney involved in business creation and capitalization, and Newell had himself just been through a bankruptcy. Objectively, this Court finds Newell had a motive to conceal his claim from the bankruptcy court.

Next, the Court must turn its attention to the other test of the "inadvertence-or-mistake exception" to judicial estoppel—whether Newell lacked knowledge of the undisclosed claim. Whether Newell was "sufficiently aware of the facts giving rise to

application of judicial estoppel" (quoted from *McCallister* two paragraphs above) is essentially the converse of "lacking knowledge of the undisclosed claim." This Court finds the "inadvertence-or-mistake exception" cannot apply to the facts of Newell's case.

In analyzing the "inadvertence-or-mistake exception" to judicial estoppel, this Court cannot overlook the following uncontroverted facts. Newell is an attorney in good standing in the State of Idaho. Newell was involved in creating and operating multiple business entities such as corporations and limited liability companies. Prior to filing the bankruptcy in question, Newell had just finished a prior bankruptcy where he was represented by a bankruptcy attorney. As mentioned above, Newell claims under oath:

> 3) In 2014, BHF [Black Hawk Funding] made an offer to me to become involved in correcting the loan programs, underwriting and collateralization within its loan program. I was hired as Chief Operation Officer of BHF and since money was tight as a result of no income coming in as all loan in default, I went to work for $1,000 a month and promises of ownership in BHF and other companies owned or managed by BHF.
> 4) During the ensuing two years, I was able to recoup greater returns as anticipated on the $10,000,000 of defaulting loans and put BHF into a new loan program that provided the investment return due to the investors, expansion of the business profits, and volume of income that was not existent for the previous three years. I was given stock bonuses in BHF each year for the next four years totally [sic] over 650,000 shares of common stock in BHF.

October 28, 2020, Aff. [of Michael Newell] in Opp'n. to Mot. to Vacate Order of Default and Partial J. 2-4 [Newell does not use page numbers in his affidavit], ¶¶ 3, 4, 7, 8, 10, 13, Ex. A. In his Amended Complaint (which is not verified under oath, I.R.C.P 7(a), 11.1), Newell claims:

> 21. At all times material to this complaint, Robert [Newell] was a resident of the State of Idaho, and is an officer, shareholder, and director of Black Hawk Funding, Verde Partners, Verde Ventures, Verde Holdings, and the managing member of Group Two, Greenhawk, and other Defendant limited liability companies.

Am. Complaint for Affirmative Relief, Declaratory Relief and Damages 4, ¶ 21. For Newell to claim to be ignorant and chaste from the mysterious and unknown world of bankruptcy is a bit absurd. As mentioned above, Newell claims:

> As asserted by Plaintiff, he did not know of the need to amend the bankruptcy schedules of assets. He was of the impression that the bankruptcy schedules included assets of the estate at the time the bankruptcy was filed and all dealings, contracts, procurement of assets was his under the "fresh start" understanding (see declaration of the Plaintiff). He was shocked when he reviewed the Motion for Summary Judgment filed by the Defendant's to lean [sic learn] that the assets procured by him after the filing debt were assets of the bankruptcy estate until the date of discharge...

Pl.'s Mem. in Opp'n to Defs.' Mot for Summ. J. 6. This Court must keep in mind the fact that Newell is an attorney hired for his knowledge of business entities and capitalization of those entities. In *Slater v. U.S. Steel Corp.*, 871 F.3d 1174 (11th Cir. 2017), the Eleventh Circuit Court of Appeals held that:

> to determine whether a plaintiff's inconsistent statements were calculated to make a mockery of the judicial system, a court should look to all the facts and circumstances of the particular case. When the plaintiff's inconsistent statement comes in the form of an omission in bankruptcy disclosures, the court may consider such factors as the plaintiff's level of sophistication, whether and under what circumstances the plaintiff corrected the disclosures, whether the plaintiff told his bankruptcy attorney about the civil claims before filing the bankruptcy disclosures, whether the trustee or creditors were aware of the civil lawsuit or claims before the plaintiff amended the disclosures, whether the plaintiff identified other lawsuits to which he was party, and any findings or actions by the bankruptcy court after the omission was discovered.

Id. at 1185. It is simply beyond comprehension how a licensed attorney who was hired to create multiple business entities, and then capitalized those entities via multi-millions in capitalization through the sales of shares of stock he created and which he helped to sell to others, and who induced other entities to loan money to those entities he created, **and who had himself just finished a bankruptcy**, would not have any knowledge at all about one of the fundamental tenants of bankruptcy law. Newell's "level of

sophistication" is quite high. Newell's level of sophistication make his claims under oath that he did not know he had to disclose his assets, absolutely unbelievable. Although unbelievable, in the ordinary context of summary judgment, Newell's unbelievable claims under oath would be sufficient to survive summary judgment. Newell's unbelievable claims would create an issue of material fact--should he have known he had to disclose millions in assets to the bankruptcy court? However, Idaho case law "charges" Newell with knowledge. Newell being **charged with that knowledge** takes that issue out of the usual summary judgment analysis. As noted above, the Idaho Supreme Court in *McCallister* held that "the inadvertence-or-mistake exception is only applicable where it negates the knowledge that the estopped party actually had, or that he or she is *reasonably charged with having* at the time the estopped party adopted his or her original position." 154 Idaho at 898, 303 P.3d at 585 (italics added). The Idaho Supreme Court found both ignorance of the law and reliance on legal counsel did not satisfy the ignorance or mistake exception to the application of judicial estoppel. 154 Idaho at 893, 303 P.3d at 581. Applying *McCallister*, the Idaho Supreme Court in *Mowrey* found that the district court did not err in granting summary judgment to defendants on the basis of judicial estoppel because the plaintiff was charged with knowledge of the claim before filing for the bankruptcy proceedings since the loss in income from the injury in question was the reason he had filed for bankruptcy. 155 Idaho at 630-31, 634, 315 P.3d at 818-19, 822.

In the present case, Newell is highly sophisticated as an established attorney, investor, and businessman. Newell only corrected his bankruptcy disclosures after Black Hawk raised the doctrine of judicial estoppel as grounds to move for summary judgment. At all times before Newell attempted to amend his disclosures a few months ago, the bankruptcy trustee and creditors were kept unaware by Newell of Newell's

undisclosed property interests in 2014. Newell had just completed a previous bankruptcy before filing the bankruptcy at issue in 2014. The only logical inference is Newell intentionally hid his involvement in marijuana-related businesses from the bankruptcy court and estate because, a) they were illegal ventures, or b) they were worth a lot of money, or both. Either reason would have negatively impacted his ability to maintain his second bankruptcy, which resulted in forced renegotiation of the terms of the loan on his house. Most importantly, that logical inference does not matter. Such a logical inference may preclude summary judgment being granted. This Court finds as a matter of law that Newell was *charged* with the knowledge that he needed to make the bankruptcy court aware of the fact that he had between $8 million and $41.175 million in assets, if not at the time he sought the bankruptcy court's protection by filing, certainly during the time his bankruptcy plan (which modified his mortgage over the course of five years) was in operation. There can be no other conclusion reached by this Court. As a matter of law, Newell can find no protection in the "inadvertence-or-mistake exception" to judicial estoppel. Due to Newell being charged with the knowledge he had to disclose all assets to the bankruptcy court when he came into those assets, the "inadvertence-or-mistake exception" does not apply as a matter of law. The Idaho Supreme Court in *McCallister* held, "the inadvertence-or-mistake exception is only applicable where it negates the knowledge that the estopped party actually had, or that he or she is reasonably charged with having at the time the estopped party adopted his or her original position." 154 Idaho at 898, 303 P.3d at 585. That test is not met when Newell successfully unilaterally modified his mortgage via the bankruptcy court's blessing of Newell's 2014 bankruptcy, when at all pertinent times, the bankruptcy court was kept in the dark by Newell of the true extent of Newell's assets.

All that is required under *McCallister* and *Mowrey*, is that Newell "had knowledge of the facts fiving rise to his claim against [Black Hawk] at the time he filed bankruptcy and during his bankruptcy proceeding." *McCallister*, 154 Idaho at 898, 303 P.3d at 585. That is all Black Hawk needs at summary judgment, and this has been proven beyond any doubt. As compared to both *McCallister* and *Mowrey*, for the reasons mentioned above, the facts of Newell's case present a plethora of additional reason not to apply the "inadvertence-or-mistake exception" to judicial estoppel.

As set forth above, Newell twice cites to *Ah Quin v. Cty. of Kauai Dep't of Transp*, 733 F.3d 267 (9th Cir. 2013), for the proposition, "where the Court held a factual issue existed on summary judgment as to whether omission of prepetition employment discrimination claim in bankruptcy filing was inadvertent." Pl.'s Mem. in Opp'n to Defs.' Mot for Summ. J. 3, 7. In neither location in his brief does Newell give a page citation to the 28-page reported decision in *Ah Quin*. In that decision, the Ninth Circuit Court of Appeals held the district court applied the wrong standard in determining whether plaintiff's omission of her employment discrimination suit before the bankruptcy court was "mistaken" or "inadvertent." 733 F.3d at 269. After reading *Ah Quin*, this Court finds the standard set in that case to be the same as articulated by the Idaho Supreme Court in *A & J Contruction*, *McCallister* and *Mowrey*.

In *Ah Quin*, the plaintiff, Kathleen Ah Quinn, had filed a gender discrimination suit against her employer, and then filed bankruptcy, and failed to list that state court claim in her bankruptcy schedules. *Id.* Mitigating against her trying to "hide the lawsuit from the bankruptcy court" was the fact she listed her state-court lawyer as a creditor for $5,000.00." 733 F.3d at 277-78. The Ninth Circuit Court of Appeals held the district court incorrectly relied on the presumption of deceit. The Ninth Circuit Court of Appeals did not indicate that summary judgment could never be accorded judicial estoppel in the

bankruptcy context, that Court simply held the district court applied the wrong standard.

The Ninth Circuit Court of Appeals held:

> In these circumstances [where the plaintiff-debtor has reopened the bankruptcy proceedings and has corrected the initial filing error], rather than applying a *presumption* of deceit, judicial estoppel requires an inquiry into whether the plaintiff's bankruptcy filing was, in fact, inadvertent or mistaken, as those terms are commonly understood. Courts must determine whether the omission occurred by accident or was made without intent to conceal. The relevant inquiry is not limited to the plaintiff's knowledge of the pending claim and the universal motive to conceal a potential asset—though those are certainly factors. The relevant inquiry is, more broadly, the plaintiff's subjective intent when filling out and signing the bankruptcy schedules.
>
> We recognize that, by adopting the ordinary understanding of "mistake" and "inadvertence" in this context, we differ from the test articulated by most of our sister circuits—whether the plaintiff knew of the claims and had a motive to conceal them. Our review of our sister circuits' case law, however, suggests that their application of the rule has not been as rigid as one would expect. We read many of those cases as implicitly recognizing the harsh results to which the narrow interpretation leads and avoiding that harsh result.
>
> . . . .
>
> But, rather than adopting a narrow interpretation of "mistake" and "inadvertence" and applying it broadly, we believe that an ordinary interpretation of those terms in these circumstances is more consistent with the Supreme Court's decision in *New Hampshire,* better reflects the equitable considerations underlying the doctrine, and will be less confusing for courts to apply.

733 F.3d at 276-77. At this point in *Ah Quin,* the Ninth Circuit Court of appeals had already discussed the United States Supreme Court decision *New Hampshire v. Maine,* 532 U.S. 742, 750, 121 S.Ct. 1808, 149 L.Ed.2d 968 (2001), 733 F.3d at 270:

> Although judicial estoppel is "probably not reducible to any general formulation of principle, ... several factors typically inform the decision whether to apply the doctrine in a particular case." *Id.* at 750, 121 S.Ct. 1808 (citations and internal quotation marks omitted). "First, a party's later position must be 'clearly inconsistent' with its earlier position." *Id.* "Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled." *Id.* (internal quotation marks omitted). "A third consideration is whether the party seeking to assert an inconsistent position would derive an unfair

advantage or impose an unfair detriment on the opposing party if not estopped." *Id.* at 751, 121 S.Ct. 1808. "In enumerating these factors, we do not establish inflexible prerequisites or an exhaustive formula for determining the applicability of judicial estoppel. Additional considerations may inform the doctrine's application in specific factual contexts." *Id.*

532 U.S. at 750-51, 733 F.3d at 270-71.

The Idaho Supreme Court in *A & J Construction* also discussed the United States Supreme Court decision in *New Hampshire*. In doing so, the Idaho Supreme Court demonstrates why all three factors from *New Hampshire* are met in the present case:

> At oral argument, A & J remarked that in *New Hampshire v. Maine,* 532 U.S. 742, 121 S.Ct. 1808, 149 L.Ed.2d 968 (2001), the United States Supreme Court laid out three factors courts may consider when determining whether to apply the doctrine of judicial estoppel. First, courts may look at whether a party's later position is "clearly inconsistent" with its prior position. *New Hampshire,* 532 U.S. at 750, 121 S.Ct. at 1815, 149 L.Ed.2d at 977. Secondly, courts may look at whether the party succeeded in persuading the court to accept its prior position, so that acceptance of the later position would create "the perception that either the first or the second court was misled." *Id.* Finally, courts may consider whether the party asserting the inconsistent position "would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *Id.* at 751, 121 S.Ct. at 1811, 149 L.Ed.2d at 978. A & J argues that the application of the doctrine in this case is erroneous because its failure to disclose the real property and joint venture in the bankruptcy proceeding does not result in an unfair advantage for A & J or an unfair detriment to Wood, thus not satisfying the third factor. However, as emphasized in *Hamilton,* these are factors a court *may* consider, so these are not required elements. *Hamilton,* 270 F.3d at 782. The Supreme Court in *New Hampshire* held, "[t]he circumstances under which judicial estoppel may appropriately be invoked are probably not reducible to any general formulation of principle." *New Hampshire,* 532 U.S. at 750, 121 S.Ct. at 1815, 149 L.Ed.2d at 977 (citing *Allen v. Zurich, Ins. Co.,* 667 F.2d 1162, 1166 (4th Cir.1982)); *Lowery v. Stovall,* 92 F.3d 219, 223 (4th Cir.1996); *Patriot Cinemas, Inc. v. General Cinema Corp.,* 834 F.2d 208, 212 (1st Cir.1987). Even if the third factor is considered by this Court, the outcome in this case would be the same. In a discussion of the third factor, the Ninth Circuit Court of Appeals noted that a debtor, once he institutes the bankruptcy process, "disrupts the flow of commerce and obtains a stay and the benefits derived by listing all his assets." *Hamilton,* 270 F.3d at 785. The court noted that Hamilton enjoyed the benefit of both an automatic stay and a discharge of debt in his bankruptcy proceeding. *Id.* In this case A & J also enjoyed the benefits gained by filing for bankruptcy. The disclosure statement reflects that A & J's unsecured creditors relied on the nondisclosure and accepted payment on

> a pro rata basis, meaning they were not paid in full. A & J received a discharge of unsecured indebtedness when its reorganization plan was approved in December 1991.
>
> While there is no Idaho case with similar facts, it seems clear that the doctrine of judicial estoppel applies here. The doctrine clearly prohibits "a party from assuming a position in one proceeding and then taking an inconsistent position in a subsequent proceeding." *Robertson Supply,* 131 Idaho at 101, 952 P.2d at 916. It is undisputed that A & J succeeded in persuading the bankruptcy court to accept its prior position, in which it failed to disclose any interest in either the real property subject to the dispute or the joint venture agreement. Now, A & J takes an inconsistent position by seeking to have the courts determine the existence, nature and extent of its interest in the nondisclosed real property and joint venture agreement. This Court affirms the district court's decision to grant Wood's motion for summary judgment on the basis of judicial estoppel.

141 Idaho at 687-88, 116 P.3d at 17-18.

Looking only to the *New Hampshire* factors, without a doubt the first factor is satisfied. Newell's later position that he had (and still has) a claim worth between $8 million and $41.175 million is "clearly inconsistent" with his prior position that he had no such asset, while at the same time his mortgage holder U.S. Bank was forced to have its contract with Newell re-negotiated. The second factor has been met as well, as Newell succeeded in persuading the bankruptcy court to accept his prior position that he had disclosed all assets, so that acceptance of the later position (having claims worth between $8 million and $41.175 million) would create "the perception that either the first or the second court was misled." The third factor, whether the party asserting the inconsistent position "would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped" is not as obvious. Black Hawk is the party asserting the inconsistent position Newell has taken, and if Newell's state court claims against Black Hawk have merit (which this Court must assume at this point), then Black Hawk may derive an unfair advantage and Newell may experience an unfair detriment if judicial estoppel is granted. The key word is "unfair." As noted by the Idaho Supreme

Court in *A & J Construction*, quoting *Hamilton*, and its discussion of the third *New Hampshire* factor, "once [a bankruptcy debtor such as Newell] institutes the bankruptcy process, [he] 'disrupts the flow of commerce and obtains a stay and the benefits derived by listing all his assets.'" 141 Idaho at 687, 116 P.3d at 17, citing *Hamilton,* 270 F.3d at 785. Newell's creditors were forced to be repaid on a different schedule than their loan contract provided. In doing so, Newell disrupted the flow of commerce. Thus, it is not unfair to Newell, it is not unfair to Newell's bank which had its loan renegotiated, and it is not unfair to the bankruptcy court, to have judicial estoppel apply to Newell in this state court action. While Newell certainly experiences a detriment, it is not an unfair detriment. An additional lack of unfair detriment toward Newell is discussed by the bankruptcy trustee immediately below, in describing the illegality of Newell's business operations which were withheld from the bankruptcy court.

The *New Hampshire* decision is not mentioned in *McCallister* or *Mowrey*, but both of those cases were focused on the "inadvertence or mistake exception", where *New Hampshire* and *A & J Construction* were focused on judicial estoppel in general. All three cases, *A & J Construction*, *McCallister* and *Mowrey* were decided on summary judgment. In all three cases, the Idaho Supreme Court affirmed the district court's granting summary judgment on the basis of judicial estoppel.

The remaining argument by Newell is his "*de minimis*" argument. Newell's argument is basically that this was just a half million dollar loan which eventually was paid eventually in full. Newell argues:

> In *Clark v. All Acquisition, LLC*, 886 F.3d 261 (2d Cir. 2018) the Second Circuit has held that judicial estoppel is improper when creditors have not been materially affected, reasoning that the doctrine "cannot extend to the 'unusual case' in which a debtor's nondisclosure had at most a '*de minimis* effect'" in the bankruptcy case. *Id.* at 267.

Pl.'s Mem. in Opp'n to Defs.' Mot for Summ. J. 4. This argument has no merit both legally and factually. First, the legal reason. Black Hawk points out "Idaho law does not make any such [*de minimis*] exception to the application of judicial estoppel." Defs.' Suppl. Reply Br. in Supp. of Defs.' Mot. for Summ. J. 6. Black Hawk is correct in this observation. This Court can find no mention of a *de minimis* exception in *McCallister, Mowrey* or *A & J Construction*. Factually, Newell's *de minimis* argument finds no support. The facts of *Clark* are different compared to those of the present case. In the present case, Newell's creditor, the bank, was paid in full, according to the trustee, as noted below. That fact is similar to *Clark*. But that is the only fact in common. In the present case, the bank's contractual repayment schedule with Newell was altered by Newell's bankruptcy. Newell came into his millions in assets about the same time his bankruptcy began, and certainly during the five-year plan. On the other hand, in *Clark*, John Clark was *diagnosed* with mesothelioma in 2015, when he was nearing completion of a Chapter 13 bankruptcy plan he and his wife entered into in 2010. 886 F.3d at 263. In fact, Clark was diagnosed with mesothelioma about three weeks before his final bankruptcy payment. 886 F.3d at 264. Clark suspected he was exposed at work for Boeing, and on July 29, 2016, a week before final discharge from bankruptcy, Clark filed his lawsuit against Boeing and others. Boeing moved to dismiss on the grounds of judicial estoppel, and the trial court granted such motion. *Id.* It is the *de minimis* effect on the bankruptcy court that was discussed by the Second Circuit Court of Appeals. Obviously, there is a big difference between Newell's situation and the *diagnosis* of a disease, and converting that diagnosis into an asset via a lawsuit against Boeing. In the present case, Newell tells us under oath that he had *assets* totaling between $8 million and $41.175 million about the same time he sought bankruptcy protection on a half-million dollar loan on his house. It is doubtful U.S. Bank would consider being forced to

wait five extra years to be paid *de minimis,* when the bankruptcy itself was not justified given Newell's assets. It is undisputed Newell had those assets not long after his bankruptcy started. Compare those facts to the facts of Clark where all he had was a *diagnosis* of a disease that *may* have been cause by his employment, *three weeks before his last payment* to the bankruptcy trustee. The Second Circuit Court of Appeals in finding this was the "'unusual case' in which a debtor's nondisclosure had at most a '*de minimis* effect' on a prior bankruptcy proceeding", held:

> This is because the Plan already required the Clarks to repay their creditors in full. Disclosing Mr. Clark's diagnosis to the bankruptcy court would therefore have only affected the couple's bankruptcy proceeding if their creditors were able to convince the bankruptcy court to raise the applicable interest rate under the Plan. Given that the Clarks were mere weeks away from completing repayment at the time of Mr. Clark's diagnosis, and were already paying interest at a standard rate, this scenario strikes us as more than implausible.
>
> Boeing does not seriously dispute any of these facts. Instead, it urges that, because "judicial estoppel protects the sanctity of the oath and the integrity of the judicial process," there are cases in which a court may properly invoke the doctrine even in response to a prior inconsistent position that had only a *de minimis* effect. *Bates v. Long Island R.R. Co.,* 997 F.2d 1028, 1037 (2d Cir. 1993). The point is well taken. We do not deny that there may be unusual circumstances in which the need to safeguard the integrity of the courts may tip the equities in favor of judicial estoppel even when the inconsistency in question made no material difference.
>
> But this case is surely not of that sort. Nothing in the record before us suggests that the Clarks withheld Mr. Clark's diagnosis from the bankruptcy court in an effort to game the bankruptcy system. Indeed, it is hard to see what benefit they could even have hoped to obtain from nondisclosure. In these circumstances, we hold that the principles of equity require the courts to entertain Mrs. Clark's personal injury claims. To be clear, we are not giving unscrupulous litigants the green light to play "fast and loose with the courts." *Wight v. BankAmerica Corp.*, 219 F.3d 79, 89 (2d Cir. 2000). Nor do we wish to hamper district courts who deem judicial estoppel necessary to ensure the "full disclosure by debtors" that is "essential to the proper functioning of the bankruptcy system." *Chartschlaa v. Nationwide Mut. Ins. Co.,* 538 F.3d 116, 122 (2d Cir. 2008). But to hold on the facts of this case that Mrs. Clark's claims are barred by an equitable doctrine would be to deprive the concept of equity of any meaning. The district court's April 28, 2017 judgment granting Boeing's motion to dismiss is VACATED, and the case REMANDED for further proceedings.

886 F.3d at 267-68 (footnotes omitted). Given the differences in the facts of the instant case as compared to the facts in *Clark*, there is no way this Court can find the impact on the bankruptcy court was *de minimis*. The differences between the circumstances in *Clark* and Newell's case are profound. There is the *temporal* difference of three weeks from the end of a five-year plan when Clark received a diagnosis, as opposed to *at or near the beginning* of the five-year bankruptcy plan when Newell had multiple millions in actual assets which he failed to disclose to the bankruptcy court at that time and at all times subsequent through and including discharge by the bankruptcy court. There is the *magnitude* difference between a diagnosis only (without yet establishing causation and proximate cause) as opposed to multiple millions in assets to which Newell himself declares under oath he is entitled. There is the *culpability* difference of Clark's situation where the Court held (as noted above), "Indeed, it is hard to see what benefit they could even have hoped to obtain from nondisclosure", as compared to Newell's situation where the bankruptcy plan would have simply terminated had Newell disclosed he was worth between $8 million and $41.175 million. These differences between *Clark* and Newell are further bolstered by the reasons set forth by the bankruptcy trustee, immediately below.

Black Hawk claims that the, "U.S. Trustee made it clear that had those assets (including marijuana business related assets and claims) been disclosed on the assets schedules, then the U.S. Trustee would have refused to administer the estate and the plaintiff's Chapter 13 bankruptcy case would have been dismissed for cause, under 11 U.S.C. § 1307(c), on the grounds of illegality of the assets of the estate." Def.'s Opp. Mot. Demurrer to Def.'s Mot. Summ. J. 13; *see* Second Req. Judicial Notice, Ex. A, Acting United States Trustee's (1) Motion to Vacate Order Reopening Closed Case; and

(2) Objection to Motion to Rescind Discharge as Moot 7-11. Here is what the U.S. Bankruptcy Trustee, Gregory M. Garvin, through his attorney, Jason R. Naess, told the Bankruptcy Court:

> ARGUMENT
>
> Pursuant to 11 U.S.C. § 350(b), "[a] case may be reopened in the court in which such case was closed to administer assets, to accord relief to the debtor, or for other cause." The bankruptcy court has broad discretion in deciding whether to reopen a case. *In re Castillo*, 297 F.3d 940, 944 (9th Cir. 2002). It is not an abuse of discretion to decline to reopen a case when reopening would not result in any relief being granted. *In re Beezley*, 994 F.2d 1433, 1434 (9th Cir. 1993).
>
> None of the bases for reopening this case are present. In moving to reopen, Debtors indicated they intended to amend their Schedules "to correct a previously omitted claim." The post-reopening amendments brought to light for the first time long-held but undisclosed marijuana-related assets, the ownership of which is a violation of Federal law. Debtors have also moved to rescind their discharge. The only potential beneficiary of such action, however, is Debtors. There were no unsecured creditors affected by entry of Debtors' discharge; the two general unsecured creditors under Debtors' Plan, who had combined debt of $5,139.08, were paid in full. In other words, reopening of the 2014 Bankruptcy will not result in any relief being granted to other parties in interest.
>
> The Court should not ratify Debtors' behavior of concealing marijuana-related assets from the Court and parties in interest during the duration of their Plan only to disclose those interests in connection with what appears to be a litigation tactic in the State Court Lawsuit. In addition, the Debtors should not receive whatever benefit the rescission of their discharge might afford them; the request for rescission appears to only be sought in aid of Debtors' marijuana-related businesses and the State Court Lawsuit related thereto.
>
> Federal law makes it a crime for "any person knowingly or intentionally . . . to . . . possess with intent to manufacture, distribute, or dispense, a controlled substance . . . ". 21 U.S.C. §841. In addition, 21 U.S.C. §846 makes it a crime to conspire to violate 21 U.S.C. §841. A person is engaged in such a conspiracy when he or she knowingly agrees to engage in the distribution of marijuana with the intent to further that distribution. *United States v. Gil*, 58 F.3d 1414, 1423 (9th Cir. 1995). Debtors' various marijuana-related assets and business interests are used to cultivate, grow, and distribute, or otherwise invest in and fund the cultivation, growing, and distribution of, marijuana. As such, the assets and business interests are, were, and would be, considered being engaged in growing and/or selling marijuana, or a conspiracy to do so, in violation of 21 U.S.C. §§ 841, 846.
>
> If the case were allowed to remain open, it would need to immediately be dismissed because the Court should not condone, or be

used to further, illegal conduct. Section 1307(c) of the Bankruptcy Code authorizes the bankruptcy court to dismiss a chapter 13 case for "cause." *See* 11 U.S.C. § 1307(0). Section 1307(c) provides eleven non-exhaustive statutory examples of "cause." See 11 U.S.C. § 1307(0); 11 U.S.C. § 102(3) (construing the term "including" as being "not limiting").

The Ninth Circuit has not defined "cause" to dismiss under section 1307(c), but it has recognized that "cause" for dismissal is not limited to the eleven examples in the statute. *Leavitt v. Soto* (*In re Leavitt*), 171 F.3d 1129, 1224 (9th Cir. 1999); *Nelson v. Meyer* (*In re Nelson*), 343 B.R. 671, 674-75 (9th Cir. BAP 2006). A two-part analysis, similar to the analysis employed in a chapter 11 case, is used to review questions of conversion and dismissal in chapter 13 cases. *In re Nelson*, 343 B.R. at 674-75. First, it must be determined whether there is "cause" for the Court to act. *Id.* Then, if cause exists, the Court must determine whether dismissal or conversion is in the best interest of creditors and the estate. *Id.*

While not specifically enumerated, a finding of bad faith based on egregious behavior can be cause for dismissal under § 1307(c). *In re Leavitt*, 171 F.3d at 1224. In determining bad faith, a bankruptcy court is to use a totality of the circumstances analysis that considers (1) whether the debtor misrepresented facts in his petition or plan, unfairly manipulated the Bankruptcy Code, or otherwise filed his chapter 13 petition or plan in an inequitable manner; (2) the debtor's history of filings and dismissals; (3) whether the debtor only intended to defeat state court litigation; and (4) whether egregious behavior is present. *Id.*

The seminal case in analyzing the import of marijuana-related assets in a case is *In re Arenas*, 514 B.R. 887 (Bankr. D. Colo. 2014); aff'd 535 B.R. 845 (10th Cir. BAP 2015). The debtors in that case were engaged in the business of producing and distributing marijuana in the state of Colorado and possessed all of the required licenses and permits necessary to engage in that business under state law. *Arenas*, 514 BR. at 888. Relying on the prior Chapter 11 case of *Rent-Rite Super Kegs West*, Ltd, 484 B.R. 799, 803-04 (Bankr. D. Colo. 2012), the Bankruptcy Court in that case granted the United States Trustee's motion to dismiss the case pursuant to section 707(a), concluding that the administration of the case and the non-exempt assets under chapter 7 was impossible without inextricably involving the Court and the chapter 7 trustee in the debtors' ongoing criminal violations of the Controlled Substances Act (the "CSA," 21 U.S.C. § 101 et. seq). *Id.* at 892. The *Arenas* court explained,

> To allow the Debtors to remain in a chapter 7 bankruptcy case under circumstances where their Trustee is unable to administer valuable assets for the benefit of creditors would allow them to receive discharges without turning over their non-exempt assets to the Trustee. That would give the Debtors all of the benefits of a chapter 7 bankruptcy discharge while allowing them to avoid the attendant burdens. The impossibility of lawfully administering the Debtors' bankruptcy estate under chapter 7 constitutes

cause for dismissal of the Debtors' case under I I U.S.C. § 707(a).

Id.

In affirming the Bankruptcy Court's decision, the Bankruptcy Appellate Panel summarized the prejudicial impact in chapter 7 proceedings as follows: "Administering the debtors' Chapter 7 estate would require the Trustee to either Violate federal law by possessing and selling the marijuana assets or abandon them. If he did the former, the Trustee would be at risk of prosecution; if he did the latter, the creditors would receive nothing while the debtors would retain all of their assets and receive a discharge as well. Either amounts to prejudicial delay that is sufficient to demonstrate cause to dismiss their Chapter 7 case under § 707(a)." In re Arenas, 535 B.R. 845, 854 (10th Cir. BAP 2015).

In the chapter 13 context, the Ninth Circuit Bankruptcy Appellate Panel recently found dismissal of a chapter 13 case under § 1307(c) is appropriate where the continuation of the case would likely require the trustee or the court to become involved in administering proceeds of an illegal business or illegal assets. *Burton v. Maney* (*In re Burton*), 610 B.R. 633, 638-39 (9th Cir. BAP 2020). The specific rationale for dismissal here, the illegality of administration of the estate, is not more specifically addressed in any section of the Bankruptcy Code. A person cannot choose to engage in behavior that is criminal under federal law and then expect to receive relief under the federal Bankruptcy Code. See 1n re Johnson, 532 B.R. 53, 56—57 (Bankr. W.D. Mich. 2015) (finding that if a chapter 7 standing trustee is precluded by federal criminal law from using estate property in a certain manner, a chapter l3 debtor, as debtor in possession, is similarly precluded); *see also In re Burton*, 610 BR. at 63 8. And, bankruptcy courts cannot place themselves in positions of condoning criminal activity by affording those who are engaged in criminal activity relief under the Code. *See, e.g., In re Rent-Rite Super Kegs W. Ltd.*, 484 B.R. at 805 (recognizing that "a federal court cannot be asked to enforce the protections of the Bankruptcy Code in aid of a Debtor whose activities constitute a continuing federal crime").

The Debtors indicated they sought to reopen this case in order to amend their schedules and "correct a previously omitted claim." Bankr. No. 14-20156, Dkt. No. 102. The primary revisions to the amended Schedules resulted in the disclosure of marijuana-related assets Debtors had long-concealed from the Court while they operated under the Plan. While the Debtors have included the State Court Lawsuit in their amended Schedules, administration of the litigation claim, which relates to conduct violative of federal law, would be prohibited, and "allowing [a debtor] to schedule the claims while also requiring [a case trustee] to abandon them would confer a federal benefit upon [the debtor] while [he] is engaged in an ongoing violation of federal law." *See In re Malul*, 614 B.R. 699, 713-14 (Bankr. D. Colo. 2020).

Debtors' previous non-disclosure of the marijuana-related assets resulted in the Chapter 13 Trustee and Court unwittingly overseeing and administering illegal businesses, assets, and the proceeds thereof. Debtors misrepresented the facts in their case by not disclosing the

marijuana-related assets, and unfairly manipulated the Bankruptcy Court, Code, and system to allow them to confirm and fund a Plan that allowed them to continue their illegal operations while under the protection of the 2014 Bankruptcy.

Further, the timing of the reopening of the 2014 Bankruptcy coincided with a motion for summary judgment, and the hearing thereon, filed by the opposing party in the State Court Lawsuit. With the entry of the Order, the State Court stayed the State Court Lawsuit. The Motion to Reopen the case, if not the initial bankruptcy filing, then, appears to have been intended to defeat state court litigation.

Debtors have sought to have their discharge rescinded. *See* Bankr. No. 14—20156, Dkt. No. 113. It is not clear what advantage Debtors intend to gain by the rescission. At the same time, they are the only party that could potentially be benefitted by the request. The 2014 Bankruptcy was Debtors' second bankruptcy in a short period, and Debtors had only two unsecured claims included in their Plan, with a combined total claims amount of $5,139.08. Both of those claims were paid in full under the Plan. The only cause for, or relief to be afforded by, Debtors" reopening of the case is for Debtors to receive whatever relief under the Code they believe might inure from the rescission. Any decision by the Court to leave the Order in place would condone Debtors' history of engaging in illegal conduct throughout this case, while concealing that conduct to complete their Plan. *See In re Way to Grow, Inc.*, 597 B.R. 111, 120 (Bankr. D. Colo 2018), aff'd 610 B.R. 338 (D. Colo. 2019) ("[A] bankruptcy case cannot proceed where the court, the trustee or the debtor-in-possession will necessarily be required to possess and administer assets which are either illegal under the CSA or constitute proceeds of activity criminalized by the CSA.").

CONCLUSION

The United States Trustee respectfully requests that the Court vacate the Order to reopen, discharge the chapter 13 trustee, and grant such other and further relief as the Court believes appropriate. The Motion to Rescind Discharge would then be moot.

Second Req. Judicial Notice, Ex. A, Acting United States Trustee's (1) Motion to Vacate Order Reopening Closed Case; and (2) Objection to Motion to Rescind Discharge as Moot 6-12.

As noted by the bankruptcy Trustee, Newell received a benefit from his deception to the bankruptcy Court, as the Trustee noted: "The only potential beneficiary of such action, however, is Debtors." *Id.* at 6. That alone is sufficient for this Court to ignore Newell's "*de minimis*" argument. The bankruptcy creditors did not benefit. The Bankruptcy Court did not benefit, but instead had a huge fraud perpetrated upon it.

Only Newell benefited. Years later, due to the operation of judicial estoppel, Black Hawk benefits, but not unfairly so.

In considering this *de minimis* argument, in deciding whether something is "*de minimis*" or not, case law considers the quantum or the magnitude of the benefit or the detriment to the party seeking to invoke judicial estoppel and the party seeking to avoid the application of judicial estoppel. However, this Court has found no case discussing the *de minimis* concept wherein that court ignores the overarching goal of judicial estoppel, to prevent fraud upon the Court. Certainly, Newell asks this Court to focus on the minimum detriment Newell's omission (of the claims in dispute in the present case) caused upon the creditor in the bankruptcy case, U.S. Bank, and its secured loan of $580,617.00. This was secured by Newell's real property, the only real asset Newell disclosed to the bankruptcy court and to U.S. Bank. Restructuring that loan via bankruptcy may indeed have resulted in a *de minimis* impact on U.S. Bank because U.S. Bank was eventually repaid, but over a longer period of time. In doing so, Newell also received a significant (not *de minimus*) benefit—he kept his real property and his residence, and Newell was not foreclosed upon by U.S. Bank. But most importantly, in the process thereof, a multi-faceted mockery was made of the bankruptcy court. It was multifaceted because Newell's actual assets that he came into during the bankruptcy were immense (as compared to the loan amount let alone the loan restructuring), they were immediate (in that they came into being very shortly after this bankruptcy began and well before discharge), and they were illegal. As *Clark* and the Trustee point out above, the impact on the judiciary must be kept in mind in considering this *de minimis* argument. The monetary impact to U.S. Bank may not have been great in the present case, but the benefit to Newell was great, and the quantum of the fraud perpetrated on the bankruptcy court was immense.

This Court makes clear that it is not granting summary judgment in favor of Black Hawk to the detriment of Newell because of the potentially illegal nature of the underlying businesses. Instead, this Court is granting summary judgment in favor of Black Hawk to the detriment of Newell because judicial estoppel should apply for a whole host of reasons, set forth above, only one of which is the potentially illegal nature of the underlying businesses. The Court makes that distinction in part because this Court is mindful that Black Hawk may be engaging in potentially illegal businesses. However, Black Hawk being involved in potentially illegal businesses is not the purpose of Newell bringing this lawsuit, nor is it the gravamen of Black Hawk's defense. Black Hawk's motion for summary judgment is based on judicial estoppel, only one aspect of which is the potential illegality of the underlying businesses vis-à-vis the bankruptcy court. Black Hawk was not before the bankruptcy court. Black Hawk did not defraud the bankruptcy court. Newell did. This Court finds that the way Newell defrauded the bankruptcy court was given the timing and amount of assets Newell had relative to Newell's bankruptcy proceeding. The Court finds Newell's sole reason for seeking bankruptcy protection was so that he could restructure the loan on his residence. That was patently the only thing Newell had to gain. The Court finds the primary reason he failed to disclose his sizeable assets to the bankruptcy court was he simply would not obtain the benefit of restructuring the loan were he to be honest about his assets. The Court finds that the secondary reason is really the "sequential" reason for not telling the truth to the bankruptcy court. The potentially illegal nature of those assets would only become a reason to lie to the bankruptcy court once the first lie was made, the lie about the extent of Newell's assets. Newell would only confront the secondary reason to lie after he had already made the first decision to defraud the bankruptcy court about the extent of those assets.

Judicial estoppel applies due to the fraud perpetrated by Newell upon the

bankruptcy court. Newell did not disclose his assets to the bankruptcy court because he wanted the benefit of the reorganization of his loan. Newell knew that a) disclosing millions in assets would disrupt that reorganization, and b) due to the illegal nature of these assets, disclosing those assets might not be a good idea. For either reason alone, a fraud was perpetrated by Newell on the bankruptcy court. This Court finds that both reasons existed. Accordingly, Newell is judicially estopped from bringing this claim against Black Hawk.

IV. CONCLUSION AND ORDER.

For the reasons stated above, this Court finds Newell is judicially estopped from bringing the claims brought in this case and that Black Hawk's motion for summary against Newell must be granted.

IT IS HEREBY ORDERED the Motion for Summary Judgment filed on June 2, 2021, by defendants Black Hawk Funding, Inc., Robert Newell, Individually and as President of Black Hawk Funding, Inc., against plaintiff Michael J. Newell is GRANTED.

IT IS FURTHER ORDERED this case is dismissed.

IT IS FURTHER ORDERED counsel for defendants Black Hawk shall prepare a judgment consistent with this decision.

Entered this 17th day of November, 2021.

John T. Mitchell, District Judge

Certificate of Service

I certify that on the 17th day of November, 2021, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

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