UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

RAJASHAKHER P. REDDY,

Plaintiff,

v.

MANJU MORRISEY,

Defendant.

Case No. 3:18-cv-00938-YY

FINDINGS AND RECOMMENDATIONS

YOU, Magistrate Judge:

FINDINGS

Plaintiff Rajashakher P. Reddy has filed this action against his sister, Manju Morrissey, for declaratory judgment, breach of contract, unjust enrichment, promissory estoppel, and fraud. Compl., ECF #1. The court has subject matter jurisdiction over this case due to diversity of citizenship pursuant to 28 U.S.C. § 1332(a)(1).[1]

Defendant moves for summary judgment on her defenses of judicial estoppel and unclean hands. Mot. Summ. J., ECF #44. The undersigned previously issued Findings and Recommendations (ECF #53) and defendant filed objections (ECF #55), to which plaintiff filed a

[1] Plaintiff is a citizen of Georgia, and defendant is a citizen of Oregon.

response, along with new evidence (ECF #56). Defendant thereafter filed a Motion to Strike and Motion for Sanctions (ECF #63).

The Findings and Recommendations were withdrawn so that they could be reconsidered in light of the new evidence and arguments of the parties. Upon reconsideration, the recommendation on the Motion for Summary judgment (ECF #44) remains the same—it should be DENIED. Additionally, defendant's Motion to Strike and Motion for Sanctions (ECF #63) should be DENIED.[2]

I. Background

This dispute arises over the ownership of Piper and Associates, LLC ("Piper"), a company holding real estate, specifically a beach lot in Walton County, Florida (hereafter "the Property"). Compl. ¶ 7, ECF #1. Plaintiff claims that he asked defendant, his sister, to manage the Property while he served a prison sentence, and that she agreed to return the Property to him when he was able to reassume management of it. *Id.* ¶¶ 13, 14. Plaintiff claims that in reliance on defendant's promise, he assigned his interest in Piper to defendant, thereby giving her effective control of the Property. *Id.* ¶ 15.

Defendant, on the other hand, claims that plaintiff assigned Piper to her as payment for an outstanding debt he owed to her and her ex-husband. Mot. Summ. J. 4, ECF #44.

A. The Civil *Qui Tam* Case and the Criminal Case

Plaintiff is a physician in Atlanta, Georgia, who specializes in radiology. Reddy Decl. ¶ 4, ECF #50. He founded Reddy Solutions, Inc. ("Reddy Solutions") in 2002 to provide teleradiology and related services to hospitals and clinics. *Id.* ¶ 5.

[2] Because the parties have filed exhaustive briefing on these matters, the court finds the matter suitable for decision without oral argument pursuant to L.R. 7-1(d)(1).

In August 2006, another radiologist and former employee, Tasha Foushee, M.D., filed a *qui tam* civil action under the False Claims Act (31 U.S.C. § 3729) in the Northern District of Georgia against plaintiff and Reddy Solutions. *U.S. ex Rel. Foushee v. Reddy Solutions, Inc.*, No. 1:06-cv-02072-TWT (N.D. Ga). The suit alleged that plaintiff had "signed and submitted reports to [Reddy Solutions] clients" without conducting interpretations of the underlying radiological images, resulting in false claims for his professional fees to Medicare, Medicaid, and TRICARE. Wang Decl., Ex. 3, at 2, ECF #45-3.

In November 2009, plaintiff was indicted and charged in the Northern District of Georgia with 37 counts of wire fraud, mail fraud, health care fraud, and falsifying records.[3] *United States v. Reddy*, No. 1:09-cr-00483-ODE-AJB-1 (N.D. Ga); Wang Decl., Ex. 5 (criminal docket), ECF #45-5. The *qui tam* action was stayed while plaintiff's criminal case was being resolved. Wang Decl., Ex. 8 (stay order), ECF #45-8.

B. Purchase of the Property

While plaintiff's *qui tam* and criminal cases were pending, plaintiff identified a vacant parcel of land in Florida that he wished to purchase, and formed Piper for the purpose of purchasing the Property. Wang Decl., Ex. 1 (Reddy Dep.), at 98-99, ECF #45-1.[4] The Property was in foreclosure, and plaintiff viewed it as a "good investment." *Id.* at 99. Plaintiff planned "to build a vacation home that could be used both personally and as a rental property." Reddy Decl. ¶ 10, ECF #50. Plaintiff was the sole member of Piper. Wang Decl., Ex. 1 (assignment), at 139.

[3] Plaintiff was originally charged with 28 counts, but a second superseding indictment issued on July 13, 2010, charged him with 37 counts. Wang Decl., Ex. 5, at 13, ECF #45-5.

[4] All deposition citations refer to the underlying deposition page numbers, not the exhibit page numbers.

Piper purchased the Property on February 25, 2011, for $123,895. Wang Decl., Ex. 1 (Reddy Dep.), at 198, 258, ECF #45-1. The money for the purchase came from one of the accounts for Digital Mammography Specialists ("DMS"), an entity that plaintiff originally owned but transferred to defendant in 2008 or 2009. *Id.* at 72, 75-76, 212, 261. Although the money came from a DMS account, plaintiff believed he was entitled to it because "DMS never paid a single penny for all of its services, capital contributions." *Id.* at 212.

C. Jury Verdict—Criminal Case

In July 2011, a jury found plaintiff guilty of twenty counts of wire fraud, seven counts of mail fraud, four counts of health care fraud, and one count of falsifying records in a federal investigation. Wang Decl., Ex. 5 (criminal docket), ECF #45-5; *Id.*, Ex. 9 (judgment), ECF #45-9. Plaintiff's sentencing was scheduled for December 8, 2011. *Id.*, Ex. 5 (criminal docket), ECF #45-5; *Id.*, Ex. 9 (judgment), ECF #45-9.

D. Assignment of Piper to Defendant

On September 4, 2011, plaintiff assigned his entire interest in Piper to defendant through a document titled "Assignment of Interest in Piper and Associates, Inc." Wang Decl., Ex. 1, at 139, ECF #45-1. The assignment, which is signed by both plaintiff and defendant, states "[plaintiff] believes it is in the best interest of [Piper] that his membership interest in [Piper] in whole be terminated and transferred to [defendant]" for consideration of $10 and "other good and valuable consideration." *Id.*

On December 21, 2011, plaintiff emailed his accountant[5]:

[5] After he was sentenced on December 8, 2011, plaintiff was ordered to voluntarily surrender on February 13, 2012. Wang Decl., Ex. 5 (criminal docket), ECF #45-5. Thus, plaintiff sent this email to his accountant after he was sentenced but before he began serving his sentence.

> Please note that I owed $95,000 to the Morrissey's and paid that debt by giving them the land lot in Florida. I discussed this with Frank Goldman, business attorney, and he thought the best thing was to assign my interest in Piper and Associates, LLC which holds the land to Manju Morrissey. This is now done.

Wang Decl. Ex 1, at 136, ECF #45-1.

E. Plaintiff's Financial Representations in 2011

Prior to his December 8, 2011 sentencing, plaintiff completed form PROB 48A, a district court form[6] titled "Declaration of Defendant Personal Financial Statement" (hereafter "2011 Forms"). Wang Decl., Ex. 1, at 129–35, ECF #45-1. The 2011 Forms were prepared for the presentence investigation report, which must contain information regarding a defendant's "financial condition" and "information that assesses any financial . . . impact on any victim." Fed. R. Crim. P. 32(c), (d)(2)(A)(ii), (iii). The 2011 Forms are undated, but plaintiff believes he completed them in "[p]robably September-October. September maybe." Wang Decl., Ex. 1 (Reddy Dep.), at 233, ECF #45-1.

On the 2011 Forms, plaintiff:

- entered his signature, "declar[ing] under penalty of perjury that the foregoing is true and correct" (Wang Decl., Ex. 1, at 129);
- did not list the Property or Piper in answer to the question: "Within the last three years, have you encumbered or disposed of any assets or property with a cost or fair market value of more than $1,000?" (*Id.* at 132);
- answered "no" to the question "Is anyone holding any assets on your behalf . . .?" (*Id.*);
- listed the Property as an asset (*Id.* at 133); and
- listed that he owed defendant and her ex-husband $95,000 (*Id.* at 135).

[6] The caption on the form states "United States District Court" but does not indicate the specific district. Wang Decl., Ex. 1, at 129, ECF #45-1.

As his deposition, plaintiff was questioned why he did not disclose the assignment of Piper on the 2011 Forms, and responded:

> I mean I owned the property. Transferred it for the management, but, to me, it was an asset that I owned. So I didn't claim as it—claimed it as being transferred, I claimed it as an asset that could be used by the court in whatever way they deemed necessary.

Wang Decl., Ex. 1 (Reddy Dep.), at 235–36. When asked why he answered "No" to the question whether anyone was holding any assets on his behalf, plaintiff replied:

> Because I wasn't in prison yet. I mean it was really meant to be during the time that I was gone. So I was still out. So I guess, in my mind, I was still out, I was still managing the businesses. And I, even though the businesses had been transferred, I was still managing them. So even though the property had been transferred, I still felt like I was the owner and didn't want the government to think I was hiding anything.

Id. at 236–37.

On December 8, 2011, the court sentenced plaintiff to 54 months in prison and ordered him to pay restitution of almost one million dollars. Wang Decl., Ex. 9 (judgment), at 2, ECF #45-9.

F. Plaintiff's Financial Representations in 2014

Plaintiff appealed his criminal case, and the Eleventh Circuit Court of Appeals reversed and remanded, holding the district court erred in excluding two of plaintiff's experts and finding the charges of health care fraud were legally insufficient. *See U.S. v. Reddy*, 534 F. App'x. 866, 870, 878 (11th Cir. 2013). Thereafter, the parties in the criminal case and *qui tam* action worked toward a "global resolution of [plaintiff's] criminal, civil, and administrative liability." Wang Decl., Ex. 2 (Mot. Re-Open Case), ¶ 4, ECF #45-2.

On June 17, 2014, plaintiff pleaded guilty to one count of destruction, alteration, or falsification of records in federal investigations in violation of 18 U.S.C. § 1519, a felony. Wang Decl., Ex. 10, ECF #45-10. Pursuant to the plea agreement, plaintiff:

- agreed to be sentenced to 20 months with credit for time served, if the court accepted the plea agreement (*Id.* ¶ 8);
- understood that the "Court may defer acceptance of this agreement until after it has reviewed a Pre-Sentence Investigation Report prepared by the U.S. Probation Office concerning [him] . . . [and] that the Government's recommendations incorporated within this Plea Agreement are not binding on the Court until the Court has determined whether it accepts the proposed sentencing terms" (*Id.* ¶ 10);
- "agree[d] to pay any fine and/or restitution imposed by the Court" (*Id.* ¶ 17); and
- "agree[d] to cooperate fully in the investigation of the amount of restitution and fine; [and] the identification of funds and assets in which he has any legal or equitable interest to be applied toward restitution and/or fine" (*Id.* ¶ 19).

Plaintiff further acknowledged that his "cooperation obligations" included: "fully and truthfully completing the Department of Justice Financial Statement of Debtor form," "providing any documentation within his possession or control requested by the Government regarding his financial condition," and "fully and truthfully answering all questions regarding his past and present financial condition. . . ." *Id.* ¶ 20.

Plaintiff thereafter submitted forms PROB 48 (a net worth statement) and PROB 48B (a monthly cash flow statement) (hereafter "2014 Forms") to the Probation Office for another presentence investigation. Wang Decl., Ex. 12, ECF #45-12. The instructions for completing the net worth statement provide:

> Having been convicted in the United States District Court, you are required to prepare and file with the probation officer an affidavit fully describing your financial resources, including a complete listing of all assets you own or control as of this date and any assets you have transferred or sold since your arrest.

Id. at 4. The instructions further admonished plaintiff that any assets he owned or controlled were "all relevant to the court's decision regarding the ability to pay," and cited 18 U.S.C. § 3663, which authorizes the court to order restitution. *Id.*

Unlike the 2011 Forms, in the 2014 Forms, plaintiff represented that he owned no "real estate" or "other asset." *Id.* at 6. Plaintiff also represented that he had not transferred any assets since the date of his arrest, he had no anticipated assets, and no one was holding any assets on his behalf. *Id.* at 6-7. The only debt that plaintiff disclosed was a tax liability he owed to the Internal Revenue Service; plaintiff did not include the $95,000 owed to defendant and her ex-husband that he listed on the 2011 Forms. *Id.* In other words, plaintiff did not disclose any ownership interest in Piper or the Property held by Piper, and he did not disclose any transfer of the ownership interest in Piper or the Property to defendant.

On July 28, 2014, plaintiff and Reddy Solutions entered into a settlement agreement with the United States,[7] Georgia, Alabama, and Idaho in the *qui tam* case. Wang Decl., Ex. 3, ECF #45-3. Plaintiff and Reddy Solutions agreed to a consent judgment in the amount of $564,817.16 and that they would be excluded from handling any claims under Medicare, Medicaid, and all other federal health care programs for four years. *Id.* ¶¶ 1, 18. The settlement agreement was dependent upon the court's acceptance of plaintiff's guilty plea in the criminal case. *Id.* ¶ 2.

The settlement agreement further states that the United States was relying on the accuracy and completeness of the sworn financial disclosure statements that plaintiff had provided, and that plaintiff and Reddy Solutions "warrant that the Financial Statements are complete, accurate, and current." *Id.* ¶ 21. If plaintiff failed to disclose an asset or made a

[7] The United States acted through the Department of Justice and on behalf of the Office of Inspector General of the Department of Health and Human Services and the Defense Health Agency.

misrepresentation that changed the estimated net worth in the financial statement by $10,000 or more, the United States could rescind the agreement or collect the full settlement amount plus 100% of the undisclosed asset. *Id*.

On September 3, 2014, the court sentenced plaintiff in the criminal case. Wang Decl., Ex. 13 (sentencing transcript), at 12-13, ECF #45-13. While the parties agreed restitution was "not a component" of the crime for which plaintiff was being sentenced, i.e., destruction, alteration, or falsification of records in federal investigations,[8] the sentencing judge said, "I'm a little worried about this issue. I think the government was cheated out of a lot of money. . . ." *Id.* at 7. The sentencing judge recognized plaintiff and the government had entered into "some type of civil agreement . . . which both sides were saying or suggesting would be a substitute for restitution." *Id*. at 8. However, the judge noted she had not seen the civil agreement, and said, "I think I should be fully informed about what's happening here. . . . I do think that the scheme that was employed in [plaintiff's office] did cost the government a lot of money." *Id*.

Plaintiff's criminal defense attorney assured the sentencing judge:

> Judge, the settlement amount in the separate civil suit that the parties incorporated, this plea as part of that global agreement obligates [plaintiff] to pay $576,000 to the various government agencies who were defrauded, both the federal agencies, agencies in Georgia, Alabama, Idaho, and there may be one other state as well.

Id. at 9. The sentencing judge asked if the "government, like Medicare, . . . [is] getting repaid under this civil agreement," and plaintiff's criminal defense attorney responded, "Absolutely." *Id.* Plaintiff's criminal defense attorney described the payment plan to the judge, and the

[8] Plaintiff's conviction pertained to the alteration of records and the subsequent destruction of a computer server. Wang Decl., Ex. 13, at 3-5, ECF #45-13. Plaintiff and the government both agreed that restitution could not be imposed for his conviction under 18 U.S.C. § 1519. Kish Decl., ECF #68.

prosecutor advised the judge if plaintiff did not pay, he would be excluded from handling Medicare and Medicaid cases in "perpetuity." *Id.* at 10.

The sentencing judge said, "I am willing to go and proceed today," and directed the prosecutor to bring the "packet of paper, including the judgment" to her office so it could be filed under seal as part of the record in the criminal case.[9] *Id*. The judge thereafter sentenced plaintiff and did not order any financial obligations, except a $100 special assessment fee to the United States. Wang Decl., Ex. 13, at 13, ECF #45-13.

As of plaintiff's deposition in January 2019, he still owed $400,000 on the settlement from the *qui tam* case. Wang Decl., Ex. 1 (Reddy Dep.), at 226, ECF #45-1.

G. Plaintiff's Actions Seeking Return of the Property

On December 16, 2015, plaintiff emailed defendant and asked her to sign paperwork transferring Piper to his wife. Pl.'s Ex. 13, at 2, ECF #51-13. Plaintiff said his wife would be wiring defendant $12,642 and paying the 2015 tax bill and the December 2015 HOA bill. *Id.* At his deposition, plaintiff explained that he "thought it best to put [Piper] in [his] wife's name just so that it wouldn't become part of anything associated with [his] medical practice" because "being a physician, you're always open to liability from cases." Wang Decl., Ex. 1, at 275, ECF #45-1.

Defendant responded by email:

> You sent me a text that you had the 90K that was owed and wanted to go ahead and have the lot back. The amount discussed was the 90K plus the taxes and fees which comes to $102,642.

Pl.'s Ex. 13, at 2, ECF #51-13. Plaintiff wrote back:

[9] From the docket, it does not appear that these documents made it into the record. *See* Wang Decl., Ex. 5, ECF #45-5.

> Yes, I have your $90,000 by selling the beach lot. That is what I was conveying when I said I had the $90,000 to pay you. Our text messages clearly indicated payment of the taxes. How else would I have $90,000? We are having to sell the beach property in order to satisfy debts. That's exactly what was discussed on the telephone call. We never discussed a payment of $102,000 in order to transfer the property back. If I had the $90,000, why would I need to sell the beach property?

Id. at 3. Plaintiff sent another email, elaborating: "I'm asking you to give me back the beach property so that I can take the proper steps to make my payment to not only you, but for other debts that I owe." *Id*. at 4.

In February 2016, plaintiff put the Property on the market, purportedly without defendant's knowledge. Wang Decl., Ex. 17, at 3, ECF #45-17; Pl.'s Ex. 8, at 5, ECF #51-8. On March 26, 2016, defendant emailed plaintiff, insisting that he repay her and her ex-husband for the original loan plus taxes and HOA fees that defendant had paid:

> We loaned you the money in good faith and you in turn gave us the land. I figured you would want it back so I held on to it and paid all the back fees when I acquired it and kept up on all the payments. . . . I've simply asked for repayment. . . . If you want it back, figure out a plan to get the money back to us. . . .

Pl.'s Ex. 8, at 3, ECF #51-8. In another email dated June 7, 2016, defendant noted:

> You wanted to purchase it back and we have asked for nothing more than the initial loan amount, and paid taxes and fees. You have had the last 3 years to come up with the money or a repayment plan. . . If you are not able to purchase it, we will simply sell it. While you took it upon yourself to list the property a few months ago, you had no authority to do so as you do not own the property.

Wang Decl., Ex. 17, at 3, ECF #45-17. Plaintiff countered that the land "more than 'covers'" the loan, and stated "[c]learly, any sale would require your signature." *Id*.

In 2017, plaintiff filed a lawsuit in Florida state court against defendant and Piper seeking return of Piper and the Property. Wang Decl., Ex. 1 (Reddy Dep.), at 195, ECF #45-1; *Id.*, Ex. 15 (Morrissey Dep.) 13, ECF #45-15. The case was removed to the Northern District of Florida. *Reddy v. Piper & Assocs., LLC*, No. 3:17-cv-04-RV/CJK (N.D. Fla.); Wang Decl., Ex. 1 (First

Amended Complaint), at 117–27, ECF #45-1. The district court dismissed defendant from that case for lack of personal jurisdiction, and later granted summary judgment on plaintiff's remaining claims of unjust enrichment, equitable lien, and constructive trust against Piper. Wang Decl., Ex. 19 (Order), ECF #45-19.

On May 30, 2018, plaintiff filed this lawsuit seeking a declaratory judgment (first claim), and alleging breach of contract (second claim), unjust enrichment (third claim), promissory estoppel (fourth claim), and fraud (fifth claim). Compl., ECF #1. In the Complaint, plaintiff alleges:

- After his July 2011 conviction, plaintiff "asked Defendant . . . if she would manage the [p]roperty for him while [he was in prison] and return the Property if and when he was able to reassume such duties subject to Plaintiff repaying Defendant the expenses she incurred relating to the Property during such period." *Id.* ¶ 13.

- "Defendant promised to do what Plaintiff proposed, *i.e.*, return the Property to Plaintiff upon Plaintiff paying Defendant the expenses she incurred related to the Property." *Id.*¶ 14.

- "In reliance on Defendant's promise, Plaintiff signed a document titled *Assignment of Interest in Piper and Associates, LLC*, which document purported to assign his membership interest in Piper to Defendant, thereby giving Defendant effective control of the Property." *Id.* ¶ 15.

- "Following the successful appeal of his criminal conviction, Plaintiff asked Defendant to return to him the membership interest in Piper and control of the Property, as she had promised to do. . . . Defendant, however, refused to return Piper and control of the Property back to Plaintiff." *Id.* ¶¶ 16, 20.

II. Motion for Summary Judgment (ECF #44)

A. Legal Standard

Under Federal Rule of Civil Procedure 56(a), "[t]he court shall grant summary judgment 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." The party moving for summary judgment bears the initial responsibility of informing the court of the basis for the motion and identifying portions of

the pleadings, depositions, answers to interrogatories, admissions, or affidavits that demonstrate the absence of a triable issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the moving party does so, the nonmoving party must "go beyond the pleadings" and "designate 'specific facts showing that there is a genuine issue for trial.'" *Id.* at 324 (citing Fed. R. Civ. P. 56(e)).

The court "does not weigh the evidence or determine the truth of the matter, but only determines whether there is a genuine issue for trial." *Balint v. Carson City, Nev.*, 180 F.3d 1047, 1054 (9th Cir. 1999). "Reasonable doubts as to the existence of material factual issue are resolved against the moving parties and inferences are drawn in the light most favorable to the non-moving party." *Addisu v. Fred Meyer, Inc.*, 198 F.3d 1130, 1134 (9th Cir. 2000).

B. Judicial Estoppel

Defendant argues that because plaintiff has taken conflicting, inconsistent positions with the court—i.e., representing to the court in 2014 that no one was holding any assets for him, but now contending that defendant was holding Piper and the Property for him—the doctrine of judicial estoppel bars his claims. Mot. Summ. J. 12, ECF #44. Because genuine issues of material fact exist, defendant's motion for summary judgment must be denied.

1. Relevant Law

Federal law governs the application of judicial estoppel in federal courts. *Rissetto v. Plumbers and Steamfitters Local*, 94 F.3d 597, 603 (9th Cir. 1996). "[J]udicial estoppel is an equitable doctrine invoked by a court at its discretion." *New Hampshire v. Maine*, 532 U.S. 742, 750 (2001) (citation and quotation marks omitted). "[I]ts purpose is to protect the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment." *Id.* at 749–50 (citation and quotation marks omitted).

Judicial estoppel "generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase." *Id.* at 749 (citation and quotation marks omitted). "The doctrine applies to positions taken in the same action or in different actions." *Samson v. NAMA Holdings, LLC*, 637 F.3d 915, 935 (9th Cir. 2011). "It also applies to a party's stated position whether it is an expression of intention, a statement of fact, or a legal assertion." *Id.* (citation and quotation marks omitted).

"Judicial estoppel enables a court to protect itself from manipulation. The interested party is thus the court in which a litigant takes a position incompatible with one the litigant has previously taken." *Rissetto*, 94 F.3d at 603. The court "invoke[s] judicial estoppel not only to prevent a party from gaining an advantage by taking inconsistent position[s], but because of general considerations of the orderly administration of justice and regard for the dignity of the judicial process." *Elston v. Westport Ins. Co.*, 253 F. App'x 697, 699 (9th Cir. 2007) (cited pursuant to Ninth Circuit Rule 36-3); *see also Johnson v. State, Oregon Dep't of Human Res., Rehab. Div.*, 141 F.3d 1361, 1369 (9th Cir. 1998) (holding when "a claimant's particular representations are so inconsistent that they amount to an affront to the court [that] judicial estoppel may apply"). The doctrine has been described as "'the perversion of the judicial machinery,' 'playing fast and loose with the courts,' 'blowing hot and cold as the occasion demands,' and 'having one's cake and eating it too.'" *Browning v. Levy*, 283 F.3d 761, 775 (6th Cir. 2002) (citations omitted).

Although the "circumstances under which judicial estoppel may appropriately be invoked are probably not reducible to any general formulation of principle," three factors "typically inform the decision":

> First, a party's later position must be clearly inconsistent with its earlier position. 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. . . . 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.

New Hampshire, 532 U.S. at 750–51. However, this is not "exhaustive formula" and "[a]dditional considerations may inform the doctrine's application in specific factual contexts." *Id.* at 751.

Judicial estoppel as inapplicable "when a party's prior position was based on inadvertence or mistake." *Milton H. Greene Archives, Inc. v. Marilyn Monroe LLC*, 692 F.3d 983, 995 (9th Cir. 2012); *New Hampshire*, 532 U.S. at 753 (noting "it may be appropriate to resist application of judicial estoppel when a party's prior position was based on inadvertence or mistake"). Additionally, "chicanery or knowing misrepresentation by the party to be estopped is a factor to be considered in the judicial estoppel analysis," but is not an 'inflexible prerequisite' to its application." *Milton H. Greene Archives*, 692 F.3d at 995.

2. Clearly Inconsistent

Plaintiff claims he assigned his interest in the Property to defendant for the purpose of managing it for him while he was incarcerated. Compl. ¶ 13, ECF #13. Yet, in the 2014 Forms that plaintiff submitted in conjunction with his criminal case, he did not include the Property as an asset—either as "real estate" or an "other asset"—or disclose that he had transferred it to his sister to hold for him. He completely omitted any mention of the Piper or the Property on the 2014 Forms. Wang Decl., Ex. 12, at 5–10, ECF #45-12. Thus, plaintiff's position in this case is clearly inconsistent with his earlier position in the criminal case.

Plaintiff contends that because "payment of a monetary penalty . . . was not contemplated as part of [his] sentence in 2014," this somehow shows he has not taken inconsistent positions.

Resp. 21, ECF #49. This argument, which is flawed for various reasons, is more pertinent to whether the court relied on or accepted plaintiff's prior position, discussed below.

Plaintiff also argues the court should sustain his attorney's objections to questions regarding the 2011 Forms that defendant's attorney posed to him during his deposition. Resp. 6–8, ECF 49 (citing Wang Decl., Ex. 1, at 235–36). However, there was nothing improper about defense counsel's questions, which were an attempt to clarify why plaintiff answered the way he did on the 2011 Forms. The questions were completely appropriate in light of the fact that plaintiff assigned Piper to defendant on September 4, 2011, but did not categorize Piper or the Property as having been transferred on the 2011 Forms, which he completed in "September or October" or "[m]aybe September." Wang Decl., Ex. 1, at 233, 236, ECF #45-1. Thus, the objections should be overruled.

3. Success in Persuading Court/Perception Court Was Misled

The court next considers whether the party "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." *New Hampshire*, 532 U.S. at 750. The Ninth Circuit "has restricted the application of judicial estoppel to cases where the court relied on, or 'accepted,' the party's previous inconsistent position." *Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 783 (9th Cir. 2001) (citations omitted). "[T]he doctrine is inapplicable unless the inconsistent assertion was actually adopted by the court in the prior litigation." *Milgard Tempering, Inc. v. Selas Corp. of Am.*, 902 F.2d 703, 716 (9th Cir. 1990). "[A]bsent judicial adoption of the prior position, there is no risk of inconsistent results." *Id.*

Here, the district judge in plaintiff's criminal proceeding relied on or accepted plaintiff's financial representations in the process of following the plea agreement and imposing the agreed-upon sentence. In his criminal plea agreement, plaintiff acknowledged that the court's acceptance of his plea was contingent upon its review of the presentence report prepared by the probation office:

> The Defendant understands that the Court may defer acceptance of this agreement until after it has reviewed a Pre-Sentence Investigation Report ("PSR") prepared by the U.S. Probation Office concerning the Defendant. Fed. R. Crim. P. 11(c)(3). However, *if the Court, upon consideration of the PSR, decides to reject this agreement*, the Defendant may withdraw his guilty pleas. Fed. R. Crim. P. 11(c)(5)(b). The Defendant understands and agrees that the Government's recommendations incorporated within this Plea Agreement are not binding on the Court *until the Court has determined whether it accepts the proposed sentencing terms*.

Wang Decl., Ex. 10, ¶ 10, ECF #45-10 (emphasis added). By law, the presentence report must contain information regarding the "defendant's financial condition." Fed. R. Crim. P. 32(d)(2)(A)(ii).

Further, as part of the plea agreement, plaintiff "agree[d] to cooperate fully in the investigation of the amount of restitution and fine" and "the identification of funds and assets in which he ha[d] any legal or equitable interest to be applied toward restitution and/or fine." Wang Decl., Ex. 10, ¶ 19, ECF #45-10. Plaintiff was required to "fully and truthfully answer[] all questions regarding his past and present financial condition." *Id.* ¶ 20. Plaintiff also agreed he would not hide any asset worth more than $5,000 before sentencing. *Id.* ¶ 18. The probation office directed plaintiff to complete the 2014 Forms, which included a net worth statement containing instructions for plaintiff "to prepare and file with the probation officer an affidavit fully describing your financial resources, including a complete listing of all assets you own or

control as of this date and any assets you have transferred or sold since your arrest."[10] Wang Decl., ECF #12, at 4, ECF #45-12. An email from plaintiff's criminal defense attorney confirms "[t]he information on the forms was then inserted into the PSR which was sent along to the Judge."[11] Wang Decl., Ex. 21, at 14, ECF #45-21.

During the plea colloquy, the district judge admonished plaintiff: "The plea agreement says that I am free to reject your agreed upon 20-month sentence if I wish to do so *once I look at the presentence report*." Wang Decl., Ex. 1 (plea transcript), at 5, ECF #62-1 (emphasis added). At sentencing, the judge began the hearing by stating, "I have read the presentence report." Wang Decl., Ex. 13 (sentencing transcript), at 2, ECF #45-13. Thus, the record reflects the sentencing judge relied on or accepted the presentence report, including the representations plaintiff had made about his financial condition, in imposing the agreed-upon sentence.

Moreover, it is apparent from the sentencing transcript that the judge was concerned about the financial impact of plaintiff's criminal conduct. The sentencing judge raised the restitution issue herself, noting she was "a little bit worried" about "restitution" because plaintiff had "cheated" the government "out of a lot of money." *Id.* at 7. She expressed her belief that the "scheme that was employed in [plaintiff's] office did cost the government a lot of money," and stated, "I think I should be fully informed about what's happening here." *Id.* at 8. Only after being assured that the government was "getting repaid" under the settlement agreement in the *qui tam* case did the sentencing judge say she was "willing to go and proceed" with sentencing consistent with the plea agreement. *Id.* at 9, 10.

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[10] Notably, probation officers are district court employees. *See* https://www.uscourts.gov/services-forms/probation-and-pretrial-services/probation-and-pretrial-officers-and-officer; 18 U.S.C. § 3602 (authorizing district courts to appoint probation officers).

[11] Plaintiff does not move to strike this email based on hearsay or any other objection.

In sum, plaintiff's inconsistent statement about his financial condition was included in the presentence report that the sentencing judge relied upon and accepted before imposing sentence. Otherwise stated, plaintiff "succeeded in persuading the court to accept [his] earlier position" when he provided the sentencing judge with inconsistent information regarding his financial assets and the judge imposed the sentence that he requested. *New Hampshire*, 532 U.S. at 750.

Contrary to plaintiff's suggestion, nothing more is required to establish that the sentencing court relied on or accepted his prior representation. It is not necessary that plaintiff "obtain an actual judgment based on [his] prior statement" or that the court "ruled upon the truth of plaintiff's claim." *Rissetto*, 94 F.3d at 604. Rather, "obtaining a favorable settlement . . . is equivalent to winning a judgment for purposes of applying judicial estoppel," *id.* at 604–05, which plaintiff did here by convincing the sentencing judge to follow the parties' recommended sentence.

In *Festinger v. Edrich*, 32 A.D.3d 412, 820 N.Y.S.2d 302, 303 (2006), a case with striking similarities to this case, the court reached the same conclusion. There, the plaintiff "allege[d] that he funded the purchase of certain real property which his sister acquired," and gave her large amounts of cash and valuable personal property "with the understanding that she would hold the property for his benefit." *Id.* at 412. At the time, "the plaintiff was the subject of federal criminal fraud prosecutions which resulted in his obligation to pay restitution in excess of $2,000,000 to various entities and individuals." *Id.* at 413. In 2000, when plaintiff was sentenced for probation violations relating to his failure to pay restitution, he claimed he was "broke" and had no money or assets. *Id.* Later, in 2004, he sued his sister's children and former husband in state court, alleging they refused to return the property to him after his sister died in 1999. *Id.* The New York Court of Appeals upheld the trial court's dismissal of the case on

judicial estoppel grounds, holding "the plaintiff's claim of an ownership interest in the subject real and personal property . . . is manifestly at odds with his representations to the United States District Court in 2000 that he had no money or assets[.]" *Id.* Moreover, the court found that "the lenient sentence which [the plaintiff] received constituted such a benefit for purposes of the doctrine of judicial estoppel." *Id*.

Other courts have applied judicial estoppel to statements made in connection with a guilty plea. *See e.g., Thore v. Howe*, 466 F.3d 173, 187 (1st Cir. 2006) (affirming application of judicial estoppel based on plea colloquy); *Lowery v. Stovall*, 92 F.3d 219, 224–25 (4th Cir. 1996) (same); *Caylor v. City of Seattle*, No. C11-1217RAJ, 2013 WL 1855739, at *8 (W.D. Wash. Apr. 30, 2013) (same and collecting cases). In fact, at least one other court has applied the doctrine of judicial estoppel against a plaintiff based on financial statements he provided for purposes of a presentence report. *Watkins v. J.C. Land Dev., Ltd.*, No. 30678-2007, slip op. 33278(U) (N.Y. Sup. Ct. Oct. 28, 2009), 2009 WL 8556896; *see also United States v. Watkins*, 623 F. Supp. 2d 514, 517 (S.D.N.Y. 2009) (granting motion to unseal portions of respondent's presentence report related to his financial condition for purpose of judicial estoppel, noting "it is . . . patent that disclosure of those portions of respondent's PSR and probation records concerning his financial condition is necessary to protect the judicial system").

Plaintiff argues the sentencing judge never inquired about his "financial worth," Resp. 17, ECF #49, and contends "there is no reason to believe that, but for the omission of the Assignment from the 2014 Forms, [the sentencing judge] would have imposed a separate monetary penalty as part of his criminal sentence." *Id.* at 23. However, as the plea agreement states and as plaintiff was advised at his plea hearing, the sentencing judge was under no obligation to follow the plea agreement. Wang Decl., Ex. 10 (plea agreement), at 4, ECF #45-

10; Wang Decl., Ex. 1 (plea transcript), at 5, ECF #62-1. The plea agreement states that "the Court may defer acceptance of this agreement until after it has reviewed a Pre-Sentence Investigation Report," and "if the Court, upon consideration of the PSR, decides to reject this agreement, the Defendant may withdraw his guilty plea. Wang Decl., Ex. 10 (plea agreement), at 4, ECF #45-10. While repayment was a requirement of the *qui tam* settlement agreement and not the criminal plea agreement, the parties represented to the sentencing judge that the *qui tam* "settlement agreement . . . is tied into" the negotiations in the criminal case, and "part of the settlement agreement calls for Dr. Reddy to enter the plea." Wang Decl., Ex. 1 (plea transcript), at 5-6, ECF #62-1; *see also id.* at 10 (plaintiff's criminal defense attorney noting restitution would be "component of the civil settlement"). In fact, the sentencing judge believed the *qui tam* settlement was so important, she wanted a copy of it included as part of the record in plaintiff's criminal case. Wang Decl., Ex. 13 (sentencing transcript), at 8, 10, ECF #45-13.

Further, the sentencing judge was led to believe plaintiff would repay the government through the *qui tam* case based on a "payment schedule" that was dependent on "when he gets his income stream back." *Id.*, Ex. 13, at 9, ECF #45-13. Plaintiff claimed to the sentencing judge that he owned no assets—no real property, no securities, no business holdings, no safe deposit boxes, no storage facilities, no jewelry, and no collectibles—other than a bank account and a car. *Id.*, Ex. 12, ECF #42-12. Had the sentencing judge known that plaintiff had rights to a piece of real property in Florida worth over $200,000,[12] it could have affected her decision to follow the plea agreement, particularly given her concerns about how plaintiff had "cheated" the government "out of a lot of money" and whether the government would be "repaid." *Id.* at 7, 9.

[12] *See* Wang Decl., Ex. 1, at 133 (2011 Forms), ECF #45-1 (indicating fair market value of property was $203,000).

Even though restitution could not be imposed for plaintiff's conviction under 18 U.S.C. § 1519, as the sentencing judge explained during the plea colloquy, she had authority to impose a fine of up to $250,000. Wang Decl., Ex. 1 (plea transcript), at 10, ECF #62-1; 18 U.S.C. § 3571(b)(3).

But more importantly, the decision to apply judicial estoppel is not dependent on whether the sentencing judge would have imposed a different sentence. To adopt this no harm, no foul approach would nullify the purpose of the judicial estoppel doctrine, which is to maintain "the dignity of the judicial process," *Elston*, 253 F. App'x at 699, and enable the "court to protect itself from manipulation." *Rissetto*, 94 F.3d at 603. Allowing a criminal defendant to make representations to the court, and not be bound by them, encourages litigants to "play fast and loose" with the court. *Browning*, 283 F.3d at 775.

Defendant also argues that the 2014 Forms were adopted by the court in the related *qui tam* action. Plaintiff's plea agreement required him to "fully and truthfully complet[e] the Department of Justice Financial Statement of Debtor form" in connection with the *qui tam* case. Wang Decl., Ex. 10, ¶ 20, ECF #45-10. The *qui tam* settlement agreement also refers to "Financial Statements." Wang Decl., Ex. 3, at 15-16. However, from this record, it is unclear whether the Department of Justice Financial Statement of Debtor form and the 2014 Forms (i.e., the probation forms that plaintiff completed for the presentence report) are the same

documents.[13] Thus, the court cannot conclude that the judge in the *qui tam* case relied upon or accepted inconsistent statements in the 2014 Forms.[14]

4. Unfair Advantage

With respect to the third factor, plaintiff would certainly derive an unfair advantage if the court allows his inconsistent positions to stand. Specifically, plaintiff would be permitted to proceed on the position he takes in this case, despite having taken a completely contrary position in a prior proceeding. Moreover, by failing to disclose the Property in the criminal action, plaintiff avoided the risk that the sentencing judge could have rejected his plea agreement.

5. Inadvertence or Mistake

Finally, the court considers whether plaintiff acted with inadvertence or mistake. *See Milton H. Greene Archives*, 692 F.3d at 995 (noting "judicial estoppel as inapplicable 'when a party's prior position was based on inadvertence or mistake'") (citation omitted); *New Hampshire*, 532 U.S. at 753 (noting "it may be appropriate to resist application of judicial estoppel when a party's prior position was based on inadvertence or mistake").

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[13] In fact, it does not appear that they are the same forms. *See* https://www.justice.gov/sites/default/files/usao-wdwa/legacy/2011/10/03/Fillable%20Form%20Financial%20statement%20individual.pdf. "Under Rule 201, the court can take judicial notice of '[p]ublic records and government documents available from reliable sources on the Internet,' such as websites run by governmental agencies." *Gerritsen v. Warner Bros. Entm't Inc.*, 112 F. Supp. 3d 1011, 1033 (C.D. Cal. 2015) (citing *Daniels–Hall v. National Education Association*, 629 F.3d 992, 999 (9th Cir. 2010) (taking judicial notice of information on the websites of two school districts because they were government entities).

[14] Plaintiff also contends that the judge in the *qui tam* action never approved the settlement agreement but simply entered the consent judgment one day after it was submitted. Resp. 16, ECF #49. It is unnecessary to reach that issue.

Plaintiff contends the omission on the 2014 Forms was merely "an inadvertent mistake that, under the circumstances, anyone could have made." Resp. 28, ECF #49. In support, plaintiff has submitted a declaration in which he states:

> Looking back over the 2014 forms as part of this case, I understand now that I should have disclosed the fact that I had assigned Piper to Defendant in response to the question inquiring about transfers of assets since my arrest. My failure to disclose this was an error and not an intentional attempt to hide this information. In fact, I had disclosed my ownership of the Property on the 2011 forms. Moreover, although Defendant had previously promised to return Piper to me upon my payment to her of the expenses she had incurred in managing the Property, at that point I had not reimbursed her for all those expenses, so I did not view Piper as a current asset of mine. Prior to seeing the 2014 forms as part of this case, I did not recall filling them out.

Reddy Decl. ¶ 19, ECF #50.

Defendant argues that plaintiff's conclusory, self-serving declaration cannot create a genuine issue of material fact. Reply 16-17, ECF #52. Generally, "[a] conclusory, self-serving affidavit, lacking detailed facts and any supporting evidence, is insufficient to create a genuine issue of material fact." *F.T.C. v. Publ'g Clearing House, Inc.*, 104 F.3d 1168, 1171 (9th Cir. 1997); *Nigro v. Sears, Roebuck & Co.*, 784 F.3d 495, 497 (9th Cir. 2015) ("The district court can disregard a self-serving declaration that states only conclusions and not facts that would be admissible evidence."). However, "declarations oftentimes will be self-serving—[a]nd properly so, because otherwise there would be no point in [a party] submitting [them]." *S.E.C. v. Phan*, 500 F.3d 895, 909 (9th Cir. 2007) (alteration in original, citation omitted, quotations marks omitted). Moreover, plaintiff's declaration is not merely conclusory; rather, he explains that when he completed the 2014 Forms, he had just been to prison, had spent six years fighting the criminal charges, had lost or spent virtually all of his assets to defend himself, and was living off of his wife's income. Reddy Decl. ¶¶ 17–18. In that context, he claims his failure to disclose the transfer was merely "an error and not an intentional attempt to hide the information." *Id.* ¶ 19.

He also claims that he did not view the Property as his asset because he had not yet repaid defendant the expenses for maintaining it. *Id.*

Defendant argues this explanation rings hollow in light of the fact that plaintiff had been admonished both in his plea agreement and in the instructions for the 2014 Forms about the importance of being truthful and complete. *See Marshall v. Honeywell Tech. Sys. Inc.*, 828 F.3d 923, 930–31 (D.C. Cir. 2016) (upholding dismissal based on judicial estoppel where instruction on the Statement of Financial Affairs to list all suits and administrative proceedings was "clear enough" and plaintiff "could not have overlooked these claims"). Given the Property was plaintiff's sole major asset, it arguably would be difficult to forget.

But to find that plaintiff's explanation is untrue would be to find that he is not credible. Even in the context of judicial estoppel, disputed issues regarding plaintiff's credibility and state of mind cannot be resolved on summary judgment. *See Aguilar v. Zep Inc.*, No. 13-CV-00563-WHO, 2014 WL 4245988, at *6 (N.D. Cal. Aug. 27, 2014) (denying summary judgment on judicial estoppel because there were material issues of fact regarding inadvertence or mistake); *Carbajal v. Dorn*, No. CV 09-0283-PHX-DGC, 2010 WL 892201, at *3 (D. Ariz. Mar. 9, 2010) ("The Court cannot, as a matter of undisputed fact, conclude that any change in position on the part of [the plaintiff] was based on 'chicanery' rather than inadvertence or mistake."); *Synopsys, Inc. v. Magma Design Automation, Inc.*, No. C-04-3923 MMC, 2006 WL 825277, at *6 (N.D. Cal. Mar. 30, 2006) (denying summary judgment because triable issue of material fact existed regarding state of mind of declarant when making statements relied upon for judicial estoppel). Rather, the question of whether plaintiff inadvertently or mistakenly omitted this information from the 2014 Forms must be left for a jury. *See Black v. State Farm Fire & Cas. Co.*, No. 1:12-CV-02240-CL, 2013 WL 4835041, at *3 (D. Or. Sept. 10, 2013) (denying motion for summary

judgment on judicial estoppel and holding that jury had to decide questions of fact regarding plaintiff's conduct); *Moore v. United States*, No. 13CV931-DMS (WVG), 2014 WL 12637954, at *3 (S.D. Cal. Oct. 28, 2014) (denying summary judgment on judicial estoppel because court was precluded from making credibility determinations and the "quintessentially personal fact of state of mind" had to "remain open for trial"); *Aguilar*, 2014 WL 4245988, at *10 (noting that a jury could find that the failure to disclose was not a calculated move); *Benjamin v. Nat'l R.R. Passenger Corp.*, No. CIV.A. 09-4885, 2011 WL 2036702, at *5 (E.D. Pa. May 23, 2011) (holding that the existence of bad faith for purposes of judicial estoppel "is generally a question of fact for the jury to decide").[15] If a jury finds that plaintiff inadvertently or mistakenly withheld information regarding the Property on the 2014 Forms, the court can thereafter exercise its discretion in deciding whether or not to apply judicial estoppel.

Defendant relies on cases in which the court applied judicial estoppel following a plaintiff's failure to make disclosures in prior bankruptcy proceedings. Mot. Summ. J. 14, ECF #44 (citing *Hay v. First Interstate Bank of Kalispell, N.A.*, 978 F.2d 555, 557 (9th Cir. 1992); *Hamilton*, 270 F.3d at 785). Defendant argues there is "no meaningful distinction as to why

[15] Some courts have observed that an "evidentiary hearing," rather than a jury trial, would resolve these issues. *Khair-Dorsey v. WellSpan Health*, No. 1:16-CV-1084, 2017 WL 770590, at *4 (M.D. Pa. Feb. 28, 2017) ("[T]hough a court may sometimes 'discern' bad faith without holding an evidentiary hearing, it may not do so if the ultimate finding of bad faith cannot be reached without first resolving genuine disputes as to the underlying facts.") (citation omitted); *Montrose Med. Grp. Participating Sav. Plan v. Bulger*, 243 F.3d 773, 780 n.5 (3d Cir. 2001) (holding "it would generally be inappropriate to make a finding of bad faith without first determining which of these conflicting accounts is true—something that could not be done without an evidentiary hearing"); *In re SLM Int'l, Inc.*, 248 B.R. 240, 249 (D. Del. 2000) (holding that "[a]t the very least, an evidentiary hearing would be required to" determine bad faith, and remanding for a full evidentiary hearing). However, the Ninth Circuit has held that "[i]ssues of credibility, including questions of intent, should be left to the jury." *Harris v. Itzhaki*, 183 F.3d 1043, 1051 (9th Cir. 1999).

financial disclosures in a criminal proceeding should be treated less seriously than bankruptcy proceedings." Reply 27, ECF #52.

In *Ah Quin*, the Ninth Circuit explained that there is a "presumption of deliberate manipulation" where the debtor fails to make a disclosure in a bankruptcy filing. *Ah Quin*, 733 F.3d at 273 (citing *Eastman v. Union Pacific R. Co.*, 493 F.3d 1151, 1159 (10th Cir. 2007) ("That he well knew of his pending lawsuit and simply did not disclose it to the bankruptcy court is the only reasonable inference to be drawn from the evidence."). This rule stems from "the strong need for full disclosure in bankruptcy proceedings." *Id*. However, where the plaintiff reopens the bankruptcy proceedings and corrects the error, the presumption of deceit no longer exists. *Id.*; *see* Fed. R. Bankr. P. 5010 (allowing bankruptcy proceedings to be reopened by the debtor).

No doubt, there is a strong need for full disclosure in criminal proceedings as well. However, any presumption of deceit, to the extent one arguably exists in this context, has been rebutted with plaintiff's declaration where he explains his inadvertent omission on the 2014 Forms. Moreover, it is unclear how plaintiff could have "reopened" his criminal case to cure the omission. *See United States v. Turman*, 574 F. App'x 747 (9th Cir. 2014) (noting that after entry of judgment, the district court lacks authority to modify the presentence report or judgment) (cited pursuant to Ninth Circuit Rule 36-3).

Finally, defendant contends plaintiff's declaration contradicts his previous deposition testimony. Def.'s Obj. 11, ECF #55. "The general rule in the Ninth Circuit is that a party cannot create an issue of fact by an affidavit contradicting his prior deposition testimony." *Kennedy v. Allied Mut. Ins. Co.*, 952 F.2d 262, 266 (9th Cir.1991)). "This sham affidavit rule prevents 'a party who has been examined at length on deposition' from 'rais[ing] an issue of fact simply by

submitting an affidavit contradicting his own prior testimony,' which 'would greatly diminish the utility of summary judgment as a procedure for screening out sham issues of fact.'" *Yeager v. Bowlin*, 693 F.3d 1076, 1080 (9th Cir. 2012) (quoting *Kennedy*, 952 F.2d at 266). The district court properly excludes a sham affidavit where "no juror would believe [the declarant's] weak explanation for his sudden ability to remember the answers to important questions about the critical issues of his lawsuit." *Id.* at 1081.

"But the sham affidavit rule should be applied with caution because it is in tension with the principle that the court is not to make credibility determinations when granting or denying summary judgment." *Id.* at 1080 (quotation marks and citation omitted). "In order to trigger the sham affidavit rule, the district court must make a factual determination that the contradiction is a sham, and the 'inconsistency between a party's deposition testimony and subsequent affidavit must be clear and unambiguous to justify striking the affidavit.'" *Id.* (quoting *Van Asdale v. Int'l Game Tech.*, 577 F.3d 989, 998-99 (9th Cir. 2009)). "[N]ewly-remembered facts, or new facts, accompanied by a reasonable explanation, should not ordinarily lead to the striking of a declaration as a sham." *Id.* at 1081 (citing *Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795, 806–07 (1999) (stating the general rule that parties may explain or attempt to resolve contradictions with an explanation that is sufficiently reasonable)). Thus, the sham affidavit rule does not apply where "a deponent's memory could credibly have been refreshed by subsequent events, including discussions with others or his review of documents, record, or papers." *Id.*

Here, defendant points to plaintiff's deposition in which he testified the assignment of Piper to defendant was "temporary," he "fully expected to get the property back," he "just needed someone to hold it," and he "always" had this "understanding," including in 2014 when he filled out the 2014 forms. Def.'s Obj. 10-11, ECF #55 (citing Wang Decl., Ex. 1 (Reddy

Dep.), at 203-04, 274, 276, ECF #45-1). Defendant contends this contradicts plaintiff's declaration in which he stated he "believed [he] had very little to disclose in 2014" and did not view the Property "as a current asset" when he was filling out the 2014 forms. Reddy Decl. ¶¶ 18, 19, ECF #50. Otherwise stated, defendant argues plaintiff's statements are inconsistent because his declaration says he did not view the Property as a "current asset" when he filled out the 2014 forms, but he testified at his deposition that he "always" believed he had an interest in the property, including when he filled out the 2014 forms.

To the extent an inconsistency, if any, exists, it is not so "clear and unambiguous" that the court must conclude as a matter of fact that plaintiff's declaration is a sham. *Yeager*, 693 F.3d at 1080. At his deposition, plaintiff also testified he and defendant had an agreement that "if [he] paid her the carrying costs, she would give [him] the property back." Reddy Dep. 223, 279. This is consistent with plaintiff's declaration in which he states he did not view the Property as a "current asset" because he "had not reimbursed [defendant] for all those expenses." Reddy Decl. ¶ 19, ECF #50. In responding to a motion for summary judgment, "the non-moving is not precluded from elaborating upon, explaining or clarifying prior testimony elicited by opposing counsel on deposition and minor inconsistencies that result from an honest discrepancy, a mistake, or newly discovered evidence afford no basis for excluding an opposition affidavit.'" *Van Asdale,* 577 F.3d at 999 (quoting *Messick v. Horizon Indus.*, 62 F.3d 1227, 1231 (9th Cir. 1995)). Therefore, whether or not plaintiff is telling the truth about why he omitted mention of the Property from the 2014 forms is a question for the jury.

C. Unclean Hands

Defendant contends that because plaintiff has "utilized judicial aid in furtherance of a fraudulent scheme designed to hide assets from the federal government," he comes to the case with unclean hands. Mot. Summ. J. 18, ECF #44.

"'Unclean hands' is an equitable doctrine under which the court, in order to protect its own integrity, will deny equitable relief to a party in a transaction if that party, relative to the same transaction, is 'guilty of improper conduct no matter how improper the [other party's] behavior may have been.'" *Welsh v. Case*, 180 Or. App. 370, 385 (2002) (quoting *Merimac Co. v. Portland Timber*, 259 Or. 573, 580 (1971)); *see also McKee v. Fields*, 187 Or. 323, 326 (1949) ("He who comes into equity must come with clean hands."); *North Pacific Lumber Co. v. Oliver*, 286 Or. 639, 650 (1979) ("[A party's] unclean hands will preclude him from obtaining equitable relief only when the wrongdoing is related to the transaction giving rise to the claim.").[16]

For the doctrine to apply, "the misconduct must be serious enough to justify a court's denying relief on an otherwise valid claim. Even equity does not require saintliness." *North Pacific Lumber*, 286 Or. at 651. "Examples of serious misconduct include crimes, fraud, disloyalty to an employer, and bad faith." *Welsh*, 180 Or. App. at 385 (citing *North Pacific Lumber*, 286 Or. at 651). Additionally, "a court will not invoke the maxim if doing so will work an injustice," and "the party in favor of whom the maxim is invoked must prove that he or she has suffered actual injury due to the alleged misconduct." *Id.* (citations and quotation marks omitted).

[16] The parties do not dispute that this court may apply Oregon law regarding unclean hands for purposes of resolving this issue. *See* Mot. Summ. J. 18, ECF #44; Resp. 28, ECF #49; Reply 23, ECF #52.

Here, again, the alleged misconduct is plaintiff's omission of information regarding the Property from the 2014 Forms. If plaintiff intentionally failed to disclose this asset, that would be sufficiently "serious" misconduct. *See Osborne v. Nottley*, 206 Or. App. 201, 205 (2008) ("A conveyance designed 'for the purpose of placing property beyond the reach of creditors' constitutes inequitable conduct sufficient to bar relief under the unclean hands doctrine.").

Moreover, if plaintiff falsely swore to those forms under oath, he committed perjury. *See* 79 U.S.C. § 1621(2) ("Whoever—in any declaration, certificate, verification, or statement under penalty of perjury . . . willfully subscribes as true any material matter which he does not believe to be true; is guilty of perjury. . . ."). There is no question that perjury amounts to conduct that is "serious enough." *See Kirkland v. Mannis*, 55 Or. App. 613, 617 (1982) ("Because of his acknowledged perjury, plaintiff brings this complaint with unclean hands and may not recover."); *accord Therasense, Inc. v. Becton, Dickinson & Co.*, 649 F.3d 1276, 1287 (Fed. Cir. 2011) (describing Supreme Court cases involving unclean hands as relating to "particularly egregious misconduct, including perjury"); *Nomadix, Inc. v. Hosp. Core Servs. LLC*, No. C 14–08256 DDP (VBKX), 2015 WL 3948804, at *12 (C.D. Cal. June 29, 2015) ("The defense of unclean hands . . . lowers the materiality threshold on a showing of 'egregious misconduct' like perjury or the suppression of evidence."); *C.C.S. Commc'n Control, Inc. v. Sklar*, Case No. 86-cv-7191-WCC, 1987 WL 12085, at *23 (S.D.N.Y. 1987) (applying the doctrine of unclean hands because plaintiff committed perjury).

However, for the same reasons discussed above, there is a genuine issue of material fact regarding whether plaintiff inadvertently or mistakenly provided false information regarding the Property on the 2014 Forms. This issue cannot be resolved on summary judgment. Therefore, defendant's motion must be denied.

III. Motion to Strike and Motion for Sanctions (ECF #63)

In her Motion to Strike and Motion for Sanctions, defendant asks the court to strike evidence that plaintiff submitted in his response to defendant's objections to the original Findings and Recommendations. *See* Pumpian Decl., Exs. A, B, ECF ##57-1, 57-2; Kish Decl., Exs A, B, ECF ##68-1, 68-2. Defendant also seeks sanctions on grounds this evidence was not disclosed during discovery.

The evidence at issue consists of emails by the attorneys on both sides of plaintiff's criminal case to the presentence report writer in which counsel "jointly object" to the "portions of the [presentence report] that discuss restitution." Kish Decl., Ex. A, ECF #68. The attorneys explained that restitution could not be imposed for plaintiff's crime of falsification or destruction of records in a federal investigation under 18 U.S.C. § 1519. *Id.* The emails are not critical to resolving defendant's motion for summary judgment. Even without the emails, it is evident from the restitution statute, 18 U.S.C. § 3663, and the elements of 18 U.S.C. § 1519[17] that restitution could not be imposed for plaintiff's crime.

Nevertheless, as plaintiff's counsel has explained, he learned of the emails only after the court raised the issue of restitution in the previously-issued Findings and Recommendations. Pl.'s Reply Def.'s Suppl. Briefing 2, ECF #69. On the face of the emails, it does not appear that plaintiff was copied on them. *See* Kish Decl., Exs. A, B, ECF ##68-1, 68-2. Additionally, the

[17] 18 U.S.C. § 1519 provides:

> Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11, or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both.

emails do not pertain to any previously-requested discovery in this case; they are not restitution orders or judgments or financial disclosure documents.

Also, these emails do not open the door to granting defendant access to a full copy of plaintiff's confidential presentence report.[18] This court previously outlined the discretionary standard that applies to the disclosure of presentence reports to third parties, and ordered disclosure of the 2011 and 2014 forms that plaintiff completed as part of the presentence investigation. *See* Order, ECF # 42. The newly-discovered emails contain merely an objection to the "portions of the [presentence report] that discuss restitution" because restitution could not be ordered for plaintiff's crime. Under these circumstances, further disclosure of plaintiff's presentence report is not "necessary to serve the ends of justice." *United States v. Schlette*, 842 F.2d 1574, 1579 (9th Cir. 1988), *amended*, 854 F.2d 359 (9th Cir. 1988).

Accordingly, the Motion to Strike and Motion for Sanctions should be denied. Additionally, the request for sanctions that plaintiff has made in his reply to defendant's supplemental briefing should be denied because it was not made by separate motion as required by Local Rule 7-1(b) ("Motions may not be combined with any response, reply, or other pleading.").

RECOMMENDATIONS

Defendant's Motion for Summary Judgment (ECF #44) should be DENIED, defendant's Motion to Strike and Motion for Sanctions (ECF #63) should also be DENIED, and plaintiff's request for sanctions made in his reply brief should be DENIED.

[18] Defendant initially argued these emails were inadmissible because they lacked a proper foundation and were unauthenticated. Supp. Br. 4-5, ECF #61. However, plaintiff thereafter submitted a declaration by his former criminal defense attorney, which appears to resolve those issues regarding admissibility.

SCHEDULING ORDER

These Findings and Recommendations will be referred to a district judge. Objections, if any, are due Monday, December 14, 2020. If no objections are filed, the Findings and Recommendations will go under advisement on that date.

If objections are filed, a response to the objections is due within 14 days after being served with a copy of the objections. When the response is due or filed, whichever date is earlier, the Findings and Recommendations will go under advisement.

NOTICE

These Findings and Recommendations are not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any Notice of Appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate Procedure, should not be filed until entry of a judgment.

DATED November 30, 2020.

/s/ Youlee Yim You
Youlee Yim You
United States Magistrate Judge