No. 15-15066

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TODD SHARP and MARIA SHARP,

Plaintiffs-Appellants,

v.

NATIONSTAR MORTGAGE, LLC, *Et Al*.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of California-San Jose Division

PLAINTIFFS-APPELLANTS, TODD AND MARIA SHARP'S OPENING BRIEF

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I. STATEMENT OF JURISDICTION

A. District Court Jurisdiction

By judgment dated January 8th, 2015, the United States District Court, Northern District of California-San Jose Division ("District Court") issued judgment in favor of all Defendants-Appellees ("Appellees") in this case after granting Appellees' Motion to Dismiss without Leave to Amend. [ER 2 and 3 respectively.] The District Court obtained subject matter jurisdiction pursuant to 28 U.S.C. §§ 1332 and 1441. [ER 467.]

This action was originally commenced in Monterey County Superior Court ("State Court") alleging state causes of action under California law. Plaintiffs-Appellants ("Appellants") are married and California citizens domiciled in the State of California. [ER 468.]

Defendant-Appellee, Nationstar Mortgage, LLC (hereinafter "Nationstar"), is not a citizen of the State of California. [*Id.*] Nationstar is a citizen of Delaware for diversity purposes. [*Id.*] Nationstar is an LLC with its members both limited liability companies domiciled in the State of Delaware with their owner domiciled in a state other than California. [*Id.*]

Defendant-Appellee, Aurora Commercial Corporation (hereinafter "Aurora"), is not a citizen of the State of California. [*Id.*] Aurora is a citizen of

Delaware and Colorado for diversity purposes. [*Id.*] Aurora is a Delaware Corporation with its principal place of business located in Littleton, Colorado. [*Id.*]

The amount in controversy exceeds $75,001.00 exclusive of interest and costs. [ER 282] On February 25th, 2014, Appellees timely removed this case to the District Court pursuant to 28 U.S.C. § 1441(a). [ER 467.]

B. Court of Appeal Jurisdiction

This Court has jurisdiction pursuant to 28 U.S.C. § 1291 because the order that Appellants are appealing was a final determination of Appellants' claims. By order dated January 7th, 2015, the District Court dismissed all of Appellants' claims without leave to amend. [ER 3.]

C. Timeliness of Appeal

This appeal satisfies the timeliness requirements of Fed. R. App. P. 4(a)(1)(A). On January 14th, 2015, Appellants timely filed a Notice of Appeal within thirty days from the January 8th, 2015 entry of judgment date, which applies to all Appellees. [ER 1 and 517.]

D. Appeal from Final Judgment

By final judgment dated January 8th, 2015, the District Court disposed of the matter as to all parties and claims. [ER 2.] Thus, this Appeal is properly before this Court.

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II. STATEMENT OF ISSUES PRESENTED FOR REVIEW

A. Whether the District Court erred in dismissing Plaintiffs-Appellants' Third Amended Complaint ("TAC") without leave to amend. This Court reviews *de novo* the granting of a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). *Stone v. Traveler's Corp.*, 58 F.3d 434, 436-37 (9th Cir. 1995)

B. Whether the District Court abused its discretion in holding that Plaintiffs-Appellants were judicially estopped from pursuing their claims in the District Court. This Court reviews the application of the doctrine of judicial estoppel to the facts of a case for an abuse of discretion. *Broussard v. University of California*, 192 F.3d 1252, 1255 (9th Cir.1999).

C. Whether the District Court abused its discretion in holding that the failure to disclose claims against Defendants-Appellees in bankruptcy schedules filed on Appellants' behalf was not based upon inadvertence or mistake. This Court reviews the application of the doctrine of judicial estoppel to the facts of a case for an abuse of discretion. *Broussard v. University of California*, 192 F.3d 1252, 1255 (9th Cir.1999).

D. Whether the District Court abused its discretion by applying a "presumption of deliberate manipulation" for Plaintiffs-Appellants' failure to disclose claims against Defendants-Appellees in bankruptcy schedules filed on Appellants' behalf. This Court reviews the application of the doctrine of judicial

estoppel to the facts of a case for an abuse of discretion. *Broussard v. University of California*, 192 F.3d 1252, 1255 (9th Cir.1999).

III. STATEMENT OF THE CASE

This appeal challenges the District Court's improper use of judicial estoppel to deprive Appellants ("the Sharps") from their day in Court. It is also much more than that. It also represents one family's unrelenting efforts to prevent their "forever home" from being wrongfully taken away from them. Although the Sharps were wrongfully removed from their home several months before the filing of this brief, it did not deter them from pursuing this appeal and seeking justice for the wrongs committed by Appellees ("Bank Entities").

The Sharps underlying action arose from the foreclosure of their home and subsequent eviction. [See generally ER 282-289.] In 2009 and 2010, the Sharps entered into various foreclosure alternative arrangements with their previous mortgage servicer, Aurora. [ER 284 and 285 at ¶¶ 24-32.] Aurora made representations that if the Sharps made workout payments, that their loan would be modified accordingly. [ER 285 at ¶ 33.] The Sharps made all workout payments as asked by Aurora which totaled in excess of $63,000.00. [*Id.* at ¶¶ 27-30.] However, Aurora, either by sheer negligence or purposeful deceit, did not make good on its promises. [ER 185-286 at ¶¶ 33-36.] The loan was not modified and was eventually transferred to Nationstar for servicing. [ER 286-287 at ¶¶ 37-40.]

Nationstar foreclosed on the property and later obtained a default judgment in an unlawful detainer action it initiated. [ER 287 at ¶¶ 43-44.]

The Sharps, in a desperate attempt to undo the wrongful foreclosure and remain in their home, hired an attorney to assist them. [*Id.* at ¶ 46.] The attorney filed a lawsuit in limited civil jurisdiction which does not have jurisdiction to determine real estate matters in the State of California. [*Id.* at ¶¶ 48-49.] The lawsuit sought equitable relief including: 1) a rescission of the wrongful foreclosure sale, 2) declaratory relief establishing each parties' rights in the property and 3) an injunction preventing the Bank Entities from taking further action with respect to the property. [ER 288 at ¶ 48 and ER 427-429.] The Sharps attorney failed to do anything with the limited civil filing and then bumbled a bankruptcy filed on behalf of Todd Sharp. [ER 288 at ¶¶ 50-51.]

The Sharps also paid for the services of a company called "Help U Stay" that vaguely promised it had a means for allowing the Sharps to regain their home and stay in it while the confusion with the Bank Entities was sorted out. [ER 288 at ¶¶ 52-53.] Help U Stay did nothing more than list Maria Sharp's name as an a.k.a. in three other bankruptcy petitions filed by other debtors. All bankruptcies were summarily dismissed and apparently filed for the sole purpose of invoking the automatic stay to delay enforcement of the unlawful detainer judgment. [*Id.*]

None of these bankruptcy filings assisted the Sharps in their efforts to rectify the missteps made by the Bank Entities. [ER 42 and 43.] Nor did any of the bankruptcy filings disclose the Sharps' "claims" against the Bank Entities. [*Id.*] They were skeletal and incomplete bankruptcy filings hastily prepared and filed by third parties. [ER 61-254.] The Sharps were unaware that that it would be prudent to set forth their "claims" against the Bank Entities in their bankruptcy schedules. They were not informed by counsel or by Help U Stay of this fact. Moreover, they would not have recognized these "claims" as a potential asset of the bankruptcy estate even if they had.

The Sharps' sole objective in initiating litigation was to make the Bank Entities honor the workout agreements that were promised. In other words, the Sharps wanted nothing more than to undo the wrongful foreclosure sale, retain their mortgage debt, continue to make their mortgage payments and remain in the property. Thus, the gravamen of their "claims" was to retain their mortgage debt.

The District Court used the Sharps' failure to list these "claims" in their bankruptcy schedules, ***which were solely designed to retain a debt***, as a means to dispose of their District Court action by concluding that they were judicially estopped for failing to list a potential asset of the bankruptcy estate. [ER 8-14.] However, the Sharps' "claims" were not realistically seeking redress that could be considered an asset of the estate. The Sharps were seeking the workout agreement

they were promised so that they could continue to make their mortgage payments and keep their home. The District Court improperly used the Sharps' failure to list a "claim," that would actually deplete the assets of the bankruptcy estate, to estop them from having their case decided on the merits.

The District Court also wholly disregarded the Sharps' affirmations that they did not know about the failure to list these potential "claims" in the bankruptcies filed on their behalf. The District Court, with the pre-conception caused by the taint of the unprosecuted bankruptcies, had already decided what it wanted to do with the Sharps' case. The District Court used judicial estoppel to dismiss the Sharps' claims without leave to amend. By doing so, the District Court abused its discretion and wrongly deprived the Sharps of their right to have their case decided on the merits by a finder of fact.

This appeal should garner particular attention from this Court because many issues presented herein are of importance to all district courts in the Ninth Circuit. This Court should set a precedent that establishes a limit as to how liberally the courts in the Ninth Circuit may apply judicial estoppel to deprive individuals from their day in court upon the inadvertent omission of a purported "claim" in an initial bankruptcy schedule. This is especially needed when the gravamen of the purported "claim" is to prevent a foreclosure or rescind a foreclosure sale—both of

which allow a Debtor to retain a debt and does not increase the assets of the bankruptcy estate.

In addition, this Court should set a clear precedent as to whether or not the benefit derived from an automatic stay is enough to provide an "unfair advantage" required to meet the third factor in determining whether to apply judicial estoppel as set forth in *New Hampshire v. Maine*, 532 U.S. 742, 750-751 (2001). A few district courts throughout the Ninth Circuit have been expanding this Court's decision in *Hamilton v. State Farm Fire & Cas. Co.* 270 F.3d 778 (9th Cir. 2001) by issuing orders holding that it does. This is without a single Ninth Circuit case affirmatively stating so.

Finally, this Court should establish a precedent as to whether or not a "presumption of deliberate manipulation" may be applied in a judicial estoppel analysis for the failure to amend bankruptcy schedules ***in a dismissed bankruptcy where it is not possible***. For all the above, this appeal presents interesting and unique issues for this Court to address and of which are of the utmost importance to the Sharps.

IV. STATEMENT OF FACTS AND PROCEDURAL HISTORY

On or about September 27th, 2006, Appellants, Todd and Maria Sharp ("the Sharps") obtained a mortgage loan secured by their home located at 25011 Hidden Mesa Court, Monterey, California. [ER 281and 283 at ¶¶ 1 and 15.] In 2009, after

experiencing difficulty making their mortgage payments, the Sharps were offered a forbearance agreement and various "workouts" by their mortgage servicer and Appellee, Aurora Commercial Corp. ("Aurora"). [ER 284 and 285 at ¶¶ 24-32.] The Sharps completed all terms of the forbearance agreement and made all payments requested by Aurora which totaled over $63,000.00. [*Id.* at ¶¶ 27-30.] However, the Sharps were never given the permanent modification they were promised. [*Id.* at ¶¶ 32-33.]

Aurora then service transferred the loan to mortgage servicer and Appellee, Nationstar Mortgage, LLC ("Nationstar"). [ER 286 at ¶ 38.] Nationstar foreclosed on the property and a trustee's deed upon sale was recorded on March 11th, 2013 that reflected a sale date of March 7th, 2013. [ER 287 at ¶ 41.] On March 25th, 2013, Nationstar filed an unlawful detainer action. [*Id.* at ¶ 44.] When the Sharps received notice of the unlawful detainer, it was the first time they realized that they would receive no foreclosure alternative or loan modification as promised by Aurora. [*Id.* at ¶ 42.]

On or about July 10th, 2013, a default judgment was entered against the Sharps in the unlawful detainer action. [*Id.* at ¶ 44.] The Sharps were not aware that they could respond to the unlawful detainer complaint and failed to file an answer. [*Id.* at ¶ 44.]

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On or about March 27th, 2013, the Sharps hired Greg Lowe ("attorney Lowe") from the Capital Law Offices to file a wrongful foreclosure suit on their behalf and in an effort to unwind the sale. [*Id.* at ¶ 47.] On July 17th, 2013 attorney Lowe filed a complaint seeking equitable relief including: 1) a rescission of the wrongful foreclosure sale, 2) declaratory relief establishing each parties rights in the property and 3) an injunction preventing Appellees from taking further action with respect to the property. [ER 288 at ¶ 48 and ER 427-429.] However, the complaint was inappropriately filed in limited jurisdiction court which does not have the jurisdiction to determine real estate matters within the State of California. [ER 288 at ¶ 49.] To the Sharps' knowledge said complaint was never served on the Bank Entities. [*Id.*]

On July 23rd, 2013, attorney Lowe filed an inadequate and incomplete bankruptcy on behalf of Todd Sharp in the USBC for the Northern District of California (Case #13-53591). [ER 288 at ¶ 50 and ER 62-102.] The bankruptcy filing was supposed to remedy attorney Lowe's failure to file an adequate wrongful foreclosure suit. [ER 288 at ¶ 50.] However, the bankruptcy proceeding was as equally mishandled as the limited jurisdiction wrongful foreclosure suit. [*Id*. at ¶¶ 50 and 51.]

Attorney Lowe failed to list the limited civil jurisdiction lawsuit, ***which he himself drafted and filed***, in the bankruptcy schedules that he filed on behalf of

Todd Sharp. [*Id.* at ¶ 50; ER 72 and 73; and ER 6, lines 5-11.] The bankruptcy proceeding was dismissed pre-confirmation due to the failure to file the requisite completion of credit counseling certificate. [ER 104-106 and ER 6, lines 5-11.] Attorney Lowe was found in contempt by the bankruptcy court and ordered to disgorge fees that were charged and found unjustified for the lack of services he provided to Sharp in the bankruptcy. [ER 288 at ¶ 51 and ER 431-432.]

Around the time that the Sharps hired attorney Lowe, they also came into contact with a company called "Help U Stay." [ER 288 at ¶ 52.] Under distress, Help U Stay persuaded the Sharps to pay $795.00 by representing that it had a way for the Sharps to save their home. [*Id.* and ER at 434-436] However, Help U Stay was nothing more than a scam outfit preying upon distressed homeowners. All Help U Stay did was file bankruptcy petitions under a debtor's name and added multiple individuals under "a.k.a.'s." [ER 107-149; ER 155-202 and ER 206-252.] ***The Sharps were not informed by Help U Stay that they would be filing these bankruptcies, nor were they aware of them.*** [ER 288 at ¶ 53.]

On July 23rd, 2013, Help U Stay filed its first bankruptcy petition listing Maria Sharp as an "a.k.a." in the USBC for the Central District of California (Case # 13-14864). [ER 288 at ¶ 53 and ER 107-149.] It was a skeletal bankruptcy devoid of any substantive information. [*Id.*] It did not list any information regarding Maria Sharp other than her name as an "a.k.a." [*Id.*] It did not list the

Sharps' property in the real property schedules. [*Id.*] It did not list the Bank Entities as secured creditors. [*Id.*] On September 18th, 2013, the first bankruptcy filed by Help U Stay was summarily dismissed for "failure of debtors to appear at the 341(a) meeting of creditors and/or to make pre-confirmation payments." [ER 288 at ¶ 53 and ER 153.]

Help U Stay promised the Sharps they would regain the property. [ER 288 at ¶ 53.] However, all Help U Stay then did was file two more shell bankruptcy petitions listing Maria Sharp as an "a.k.a." in the USBC for the Central District of California (Case ## 13-6426 and 14-11313) [ER 288 at ¶ 53; ER 155-202 and ER 206-252.] These bankruptcy petitions were filed on October 7th, 2013 and February 14th, 2014 respectively. [*Id.*]

Like the first bankruptcy petition and schedules, these bankruptcy petitions and schedules contained no information concerning Maria Sharp other than her name as an "a.k.a." [*Id.*] These schedules also failed to list any real property owned by the Sharps or any of their secured creditors. [*Id.*] On December 17th, 2013, the second Help U Stay bankruptcy was dismissed for "failure of debtors to appear at the 341(a) meeting of creditors and/or to make pre-confirmation payments." [ER 288 at ¶ 53 and ER 204.] On March 20th, 2014, the third Help U Stay bankruptcy was dismissed pre-confirmation. [ER 288 at ¶ 53 and ER 254.]

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On January 6th, 2014, the Sharps filed a complaint in pro per in the Superior Court of California for Monterey County. [ER 467 at ¶ 1 and ER 472-474.] On January 22nd, 2014, the Sharps, through new counsel, filed a First Amended Verified Complaint. [ER 467 at ¶ 1 and ER 475-499.] The First Amended Verified Complaint contained several equitable claims, including claims for: "Equitable relief for Wrongful Foreclosure," "Specific Performance," "Request for Injunctive Relief," "Cancellation of Deed Affecting Real Property," "Quiet Title of Real Property," "Promissory Estoppel," "Quantum Meruit," "Declaratory Relief," and "Accounting." [ER 475-499.] On February 25th, 2014, the Bank Entities removed the case to the District Court. [ER 466 and 512 at Doc. #1.] The Bank Entities filed a Motion to Dismiss the First Amended Complaint. [ER 512 at Doc. #5 and ER 6 lines 1-2.] The Sharps then filed a Second Amended Complaint mooting the Motion to Dismiss. [ER 513 at Doc. #8 and ER 6, lines 3-4.]

On April 8th, 2014, the Bank Entities moved to dismiss the Sharps' Second Amended Complaint. [ER 513 at Doc. ER 6, line 5.] Over the Sharps' Opposition, the Court granted the Bank Entities' Motion to Dismiss the Second Amended Complaint without prejudice. [ER 455 and ER 514 at Doc. #11.] The Court based its decision solely on the application of judicial estoppel finding that the Sharps were "judicially estopped from pursuing their claims in this case" because "none of [the Sharps'] four bankruptcy petitions, all of which were filed after March 2013,

disclosed any claims against Nationstar or Aurora." [ER 462, lines 21-22 and ER 463, lines 4-5 respectively.] However, the District Court did allow leave to amend to allow the Sharps to "plead facts to establish that the failure to disclose claims against [the Bank Entities] in [the Sharps'] bankruptcy petitions resulted from inadvertence or mistake." [ER 465, lines 15-17.] However, the District Court was just going through the motions stating "the Court is doubtful that the Sharps will be able to plead facts sufficient to avoid the application of judicial estoppel." [ER 465, lines 13-17.]

On September 24th, 2014, the Sharps filed their Third Amended Complaint and the Bank Entities again filed a Motion to Dismiss on October 17th, 2014. [ER 514-515 at Doc. ## 18 and 21 respectively; ER 280 and 255 respectively; ER 6, lines 15-16.] On October 31st, 2014, the Sharps filed their Opposition to the Motion to Dismiss the Third Amended Complaint. [ER 515 at Doc. #24; ER 34; and ER 6, lines 17-18.] On November 7th, 2014, the Bank Entities filed their Reply. [ER 515 at Doc. #25; ER 15; and ER 6 lines 18-19.]

On January 7th 2015, the District Court entered an Order granting the Bank Entities' Motion to Dismiss the Third Amended Complaint without leave to amend. [ER 3.] On January 8th, 2015, the District Court entered judgment on that Order in favor of the Bank Entities and against the Sharps. [ER 2.] The instant appeal followed.

V. SUMMARY OF THE ARGUMENT

The District Court erred in dismissing the Sharps' Third Amended Complaint without leave to amend. The District Court further abused its discretion by: 1) holding that the Sharps were judicially estopped from pursuing their claims; 2) concluding that an exception to the application of judicial estoppel for mistake and/or inadvertence did not apply; and 3) applying a presumption of deliberate manipulation.

What the District Court did was wrong and an abuse of discretion. It chose to summarily dispose of the Sharps' claims by overreaching in its application of judicial estoppel. The District Court wholly failed to evaluate the merits of the Sharps' claims, much less let those claims be adjudicated by a finder of fact. Instead, the District court penalized the Sharps for hiring inept bankruptcy counsel and falling prey to a scam outfit that victimizes homeowners in distress.

When the Sharps provided this ***verified*** explanation to the District Court, the District Court decided it did not like it. The District Court was "not convinced." [ER 12, line 24.] The District Court found that the Sharps allegation that they were unaware of the bankruptcies that Help U Stay filed was "simply not credible." [ER 13, lines 5-6.] However, the District Court should not have been weighing the credibility of the Sharps' allegations in such a manner. It was required to "accept factual allegations in the complaint as true and construe the pleadings in the light

most favorable to the nonmoving party." *Manzarek v. St. Paul Fire & Marine, Ins. Co.*, 519 F.3d 1025, 1031 (9th. Cir. 2008).

Admittedly, the District Court has some power to evaluate evidence in applying judicial estoppel. However, it was still improper for the District Court to flatly reject the Sharps' ***verified*** explanation without clear evidence to the contrary. This is especially true when the District Court did so at the motion to dismiss stage without judging the credibility of the Sharps' testimony, much less letting them supplement their explanation with declarations or further evidence.

The District Court wrongly adopted the application of other district court cases to justify its use of judicial estoppel. However, none of the cases relied upon by the District Court set a binding precedent that holds that the mere automatic stay protection afforded by a bankruptcy filing is enough to justify the application of judicial estoppel. ***There is no such Ninth Circuit case.*** Instead, the District Court relied upon two poorly reasoned district court decisions that support this proposition. However, both these decisions are overextensions of this Court's decision in *Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778 (9th Cir. 2001) and are fundamentally flawed. The District Court erred in its application of these cases and in its interpretation of *Hamilton*. This error alone justifies the granting of this appeal.

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Even if this Court holds that the District Court did not misapply *Hamilton*, and by so doing expands its breadth, the District Court's decision should still be overturned. Here, the factors for applying judicial estoppel were not met. The Sharps' claims centered on enforcing the modification that was promised to them and unwinding the wrongful foreclosure sale. In other words, if the Sharps succeeded on their "claims" it would allow them to rescind the foreclosure sale and modify their mortgage loan. If successful, they would increase their debt not add an asset to the bankruptcy estate. As such, it was an abuse of discretion for the District Court to conclude that the Sharps took a clearly inconsistent position by not listing claims against the Bank Entities in their bankruptcy schedules. Likewise, the second and third factors for applying judicial estoppel were not satisfied for similar reasons.

This is in addition to the fact that the Sharps took no position at all with respect to the bankruptcies. Their bankruptcies were filed by an inept attorney and a fly-by-night company who did so without their knowledge. As such, it was an abuse of discretion for the District Court to conclude that the Sharps took a clearly inconsistent position or were not entitled to invoke the inadvertence or mistake exception to the application of judicial estoppel.

Another error the District Court made was applying a "presumption of deliberate manipulation" to its judicial estoppel analysis. The District Court

concluded it could apply this presumption, since the Sharps failed to reopen the bankruptcies and amend the schedules to add their "claims" against the Bank Entities. However, here the bankruptcies were all summarily dismissed and not of the fashion where reopening them and amending the schedules was even plausible.

Finally, assuming *arguendo* that the District Court did not abuse its discretion in applying judicial estoppel, it still was an abuse of discretion for the District Court to preclude the Sharps from pursuing their equitable claims. If at all, it was the Sharps' claims that could potentially enrich the bankruptcy estate that should be precluded if judicial estoppel applies, not the Sharps' claims in equity for a determination of rights and enforcement of the promises made by the Bank Entities. At the very least, this Court should reverse and remand the case to the District Court with instructions to allow the Sharps to pursue their claims sounding in equity.

VI. ARGUMENT

A. The District Court erred in dismissing the Sharps' Third Amended Complaint without leave to amend and misapplied this Court's decision in *Hamilton v. State Farm Fire & Cas. Co.*[1]

The District Courts' decision dismissing the Sharps' Third Amended Complaint was in error. The District Court's ruling was based upon its misapplication of this Court's decision in *Hamilton v. State Farm Fire & Cas. Co.*

[1] 270 F.3d 778, 792 (9th Cir. 2001).

The District Court relied upon *Hamilton* and two other lower court decisions[2] that wrongly interpreted the same.

The District Court errantly concluded that *Hamilton* stands for the proposition that an individual who files a bankruptcy, and fails to list potential claims in his or her disclosures or schedules, is later judicially estopped from advancing those claims by having received the mere benefits of the automatic stay. However, the breadth of *Hamilton* is not this far reaching. ***Indeed no Ninth Circuit case holds this***. The instant District Court and a few lower courts in the Ninth Circuit have misapplied *Hamilton* to summarily dispose of claims at the pre-discovery stages. As such, this issue is not only of utmost importance to the Sharps, it is important to: 1) all individuals who may later find themselves in a similar situation; 2) bankruptcy practitioners and 3) courts throughout the Ninth Circuit.

Effectively what the District Court did, deprived the Sharps of having their case decided on the merits and by a trier of fact. Clearly, this Court does not believe that parties should have meritorious claims decided on arbitrary technicalities. This holds especially true in the context in which the bankruptcies arose. In other words, a desperate homeowner who is trying to save their home or

[2] *HPG Corp. v. Aurora Loan Services, LLC,* 436 B.R. 569 (E.D. Cal. 2010) and *Swendsen v. Ocwen Loan Servicing, LLC*, No 13-2082, 2014 WL 1155794 (E.D. Cal. Mar. 21, 2014)

remain in possession of it, after being wrongfully foreclosed on by a bank or creditor, should not be precluded from advancing his or her claims due to a mere omission in a bankruptcy schedule.

This Court is well aware of the reality that homeowners may use a bankruptcy to slow a creditor or bank in their snowballing effort to wrongfully obtain possession of an asset. Those homeowners, who are under extreme duress, should not be penalized for their failure, or their attorney's, to list a claim in their bankruptcy schedules. This is clearly unjust. Especially given that this is not even the precedential law in the Ninth Circuit.

Moreover, claims of these homeowners are primarily to unwind or stop a foreclosure sale or eviction for some alleged misstep of a creditor or bank. These are not claims that are *per se* pursuing monetary damages. As set forth in detail below, *Hamilton* should not be applied the way it has been by a handful of district courts in this Circuit. This Court should set clear parameters as to the reach of *Hamilton* so courts in this Circuit have a clear understanding of what *Hamilton* permits and forbids. More importantly, this Court should establish these limits so homeowners are not deprived their right to later advance meritorious claims due to arbitrary applications of *Hamilton*.

In *Hamilton*, this Court affirmed the district court's determination that the plaintiff's claim against his insurance company was barred by judicial estoppel

because the plaintiff had failed to list the claim as an asset in his Chapter 7 bankruptcy schedule. *Id.* at 785. Hamilton was a homeowner who suffered a property loss due to alleged vandalism of a property that he owned. *Id.* at 780-781. Hamilton filed a claim with State Farm under his homeowners' insurance policy. *Id.* State Farm was suspicious of the claim and opened up an investigation resulting in the eventual denial of Hamilton's claim. *Id.* Hamilton was experiencing financial difficulties and needed the insurance proceeds in order to make his mortgage payments. *Id.* When the proceeds were not forthcoming, Hamilton employed attorneys to threaten litigation and facilitate payment from State Farm. *Id.*

Hamilton eventually filed a Chapter 7 bankruptcy. *Id*. In his bankruptcy schedules, he listed "a $160,000 residential vandalism *loss* against his estate in his Chapter 7 Financial Statement, but fail[ed] to list the corresponding claims against State Farm as assets of the estate." *Id.* On April 6th, 1998, the bankruptcy court discharged Hamilton's debts based on the false information he provided in his Chapter 7 schedules and Financial Statement. *Id.*

Subsequent to the discharge, "the bankruptcy trustee noticed that Hamilton had listed a large vandalism loss and wrote Hamilton a May 30th, 1998 letter to determine whether Hamilton was pursuing any insurance claims to recover the amount of the loss." *Id.* In that letter, the trustee requested relevant

correspondence and writings with the insurance company. *Id.* On April 21st, 1998, the trustee sent Hamilton another letter requesting information regarding the vandalism loss. *Id.* Hamilton wrote a letter in return, but did not provide any additional information about the vandalism loss or claims against State Farm. *Id.* As a result, the trustee moved to dismiss the bankruptcy based on bad faith and untruthfulness under oath. *Id.* The bankruptcy court granted the motion to dismiss, dismissed the bankruptcy and vacated the discharge of Hamilton's debts. *Id.*

Hamilton later filed a civil suit against State Farm alleging breach of the covenant of good faith and fair dealing and breach of contract arising from State Farm's denial of the vandalism claim. *Id.* State Farm filed a motion for summary judgment wherein it argued that Hamilton's claims were "barred by judicial estoppel, because he had failed to list his insurance claim and pending lawsuit against State Farm on his Chapter 7 Bankruptcy schedules, [and because] the bankruptcy Court had discharged [his] debts because of his omissions." *Id.* at 782. The district court granted State Farm's motion, finding that Hamilton failed to raise a genuine issue of material fact as to the falsity of his representation. *Id.* The court also held that Hamilton's claims were barred by the doctrine of judicial estoppel. *Id.* Hamilton appealed the district court's decision to this Court. *Id.*

This Court upheld the district court's decision. *Id.* at 784. The Court held:

> Hamilton is precluded from pursuing claims about which he had knowledge, but did not disclose, during his bankruptcy proceedings,

> and that a discharge of debt by a bankruptcy court, under these circumstances, is sufficient acceptance to provide a basis for judicial estoppel, even if the discharge is later vacated. ***Our holding does not imply that the bankruptcy court must actually discharge debts before the judicial acceptance prong may be satisfied. The bankruptcy court may "accept" the debtor's assertions by relying on the debtor's nondisclosure of potential claims in many other ways.*** *See, e.g.*, *In re Coastal Plains*, 179 F.3d 197, 210 (C.A.5 1999) (finding that judicial acceptance was satisfied when the bankruptcy court lifted a stay based in part on the debtor's nondisclosure in its bankruptcy schedules and in a lift-stay stipulation); *Donaldson v. Bernstein*, 104 F.3d 547, 555–56 (3rd Cir.1997) (holding that judicial acceptance was satisfied when the court approved the debtor's plan of reorganization).

Id. (Emphasis Added.)

However, neither *In Re Coastal Plains* or *Donaldson v. Bernstein*, involved a debtor who was merely being afforded the protection of an automatic stay as the reason for applying judicial estoppel and then later barred potentially meritorious claims.

This Court set forth two sentences in *Hamilton* which has caused some district courts in this circuit to misapply it and overextend their application of judicial estoppel. Those two sentences are as follows: "The bankruptcy court may 'accept' the debtor's assertions by relying on debtor's nondisclosure of potential claims in many other ways" and "Hamilton did enjoy the benefit of both an automatic stay and a discharge in his Chapter 7 bankruptcy proceeding." *Id.* at 784-785. These district courts have relied upon an ambiguous, intricate, hyper-technicality to deprive individuals with meritorious claims from having those

claims decided by a finder of fact. The Sharps are included among those individuals who were deprived their right to have their claims fully adjudicated.

Of course, in *Hamilton*, the debtor's conduct was deceptive and markedly different from the underlying facts of the instant case. First and foremost, the claim that Hamilton possessed was monetary in nature. So much so, that he attributed a value of $160,000.00 to it. *Id.* Second, Hamilton listed the residential vandalism *loss* against his estate yet failed to include it as a claim. *Id.* That omission depleted the bankruptcy estate and the potential amount that could be paid to creditors. Third, Hamilton's bankruptcy was completed through discharge, not dismissed summarily. *Id.* Fourth, Hamilton was asked about the vandalism loss and related claims more than once by the trustee, yet omitted to provide truthful information in his response. *Id.* Fifth, there was a finding of bad faith by the bankruptcy court which dismissed the bankruptcy and vacated the discharged debts pursuant to the trustee's motion to dismiss "for bad faith, lack of truthfulness under oath and failure to cooperate." *Id.* Sixth, the court reached its decision on a motion for summary judgment, presumably allowing Hamilton to introduce evidence to contest why judicial estoppel should not apply.

As such, *Hamilton* has no applicability to the Sharps' underlying case and is inapposite. In *Hamilton*, the underlying facts were completely different and there is simply no similarity other than the omission of the Sharps' alleged "claims"

against the Bank Entities. Assuming *arguendo*, that this Court chooses to extend the breadth of *Hamilton* to the underlying facts here (and other similar cases) it should absolutely not bar the Sharps' claims arising in equity as they are not such that any creditor would be misled. Quite the contrary, the Sharps' potential equitable claims include declaratory relief, specific performance, injunctive relief, equitable estoppel and focus on unwinding the wrongful foreclosure sale and restoring possession to the Sharps.

HPG Corp. v. Aurora Loan Services, LLC, 436 B.R. 569 (E.D. Cal. 2010), was one of the two lower court cases that the District Court relied on it reaching its decision. In *HPG* the district court held that two litigants were judicially estopped from pursuing civil claims for wrongful foreclosure due to the failure to list the alleged claims in the schedules of their bankruptcy filings. *Id.* at 578-579. However, this decision showcases the exact overreaching and misapplication of *Hamilton* that the Sharps discussed above.

HPG, involved multiple plaintiffs, two of which were former bankruptcy debtors (Espinosa and Carolino), that filed a civil action against their deed of trust lender[3] for wrongful foreclosure. *Id.* at 573-574. Specifically, plaintiffs contended that their deed of trust lender foreclosed without having first obtained an assignment of the mortgage and the power of sale on the property it purported to

[3] Synonymously used with mortgage servicer who has authority to act on behalf of the deed of trust lender

foreclose. *Id.* The bankruptcies were filed in pro-se[4] and two of the bankruptcies were filed by Espinosa after he had filed and dismissed a previous civil suit alleging wrongful foreclosure arising from the same events. *Id.* None of the bankruptcies listed the alleged claims against the lender in the schedules and all bankruptcies were summarily dismissed. *Id.* The lender moved to dismiss the claims asserted by Carolino and Espinosa on the basis of judicial estoppel for failure to list those claims in their bankruptcy schedules. *Id.* at 576.

The *HPG* court, relying on *Hamilton*, concluded that the plaintiffs "asserted inconsistent position by failing to include a cause of action in their bankruptcy filings and subsequently attempting to sue on that claim outside of the bankruptcy proceeding." *Id.* at 579. "These claims were the property of the bankruptcy estate, and plaintiffs, whether by an act of attempted deceit ***or mere oversight***, failed to list the claims for relief when required to do so." *Id.* (Emphasis Added). The *HPG* court further stated "the individual plaintiffs enjoyed the benefit of these stays, not once, but twice, and, in *both* instances, failed to comply with the requirement of full, accurate disclosures." *Id.* Thus, "judicial estoppel in this case is necessary to protect the integrity of the bankruptcy process." *Id.*

HPG is a poorly reasoned decision and fundamentally flawed for several reasons. First, the *HPG* court seemed to be more concerned regarding "the

[4] See PACER Docket #23, RJN Exhibits ##8,10, 13 and 15 in *HPG Corp. v. Aurora Loan Services*, LLC USDC E.D. CA 2:10-CV-00374

integrity of the bankruptcy process" than it was in evaluating whether or not the plaintiffs had meritorious claims. Second, the decision does not set forth its reasoning as to why it expanded the breadth of *Hamilton*. Third, the Court clearly required the unsophisticated pro-se plaintiffs to meet an unrealistic standard, by expecting them to recognize that they may be required to list their potential claims against their deed of trust lender in their bankruptcy schedules or forever lose them. Fourth, the court explicitly recognized the very likely possibility that the failure to list the claims in their schedules could be based on "mere oversight," yet granted the motion to dismiss without leave to amend. *Id.* at 578. Thus, the plaintiffs were deprived the right to raise the mistake or inadvertence exception to the application of judicial estoppel. *Id.*

By all appearances, the *HPG* court was more concerned with disposing of the action summarily than it was in making sure that any potentially meritorious claims be fully evaluated. In doing so, *HPG* court fashioned an opinion that is punitive in nature and punishes those that are unsophisticated in litigation and unknowledgeable of the intricacies regarding judicial estoppel. Intricacies that even the majority of bankruptcy petitioners are likely unaware of and do not appreciate.

Even assuming this Court wants to adopt the poor reasoning in *HPG*, and expand the breadth of *Hamilton* by holding that merely receiving bankruptcy stay

protection is enough to provide a basis for applying judicial estoppel, it still has no applicability here. Here, the Sharps were not responsible for their own bankruptcy filings and provided the Court with a detailed ***verified*** explanation as to why the bankruptcy schedules failed to list the claims against the Bank Entities. Moreover, the claims asserted by the Sharps arise from the failure of the Bank Entities to honor the promises made regarding loan modifications and other workouts, not the widely discredited arguments regarding standing and assignment of the mortgage loan advanced by the *HPG* plaintiffs. *Id.* at 574. As such, *HPG* is inapposite to the instant case.

Swendsen v. Ocwen Loan Servicing, LLC 2014 WL 1155794 (E.D. Cal. Mar. 21, 2014) is the other district court case that the District Court relied on it reaching its decision. Like *HPG*, it is a decision from the United States District Court for the Eastern District of California. Like *HPG*, it over-expanded the breadth of *Hamilton*. Like *HPG*, it errantly failed to allow the plaintiff to raise the exception of mistake or inadvertence to argue against the application of judicial estoppel. The *Swendsen* court held that an individual, who previously filed bankruptcy and failed to list claims in his or her schedules, is judicially estopped from later advancing those claims for having received the mere benefit of the automatic bankruptcy stay. *Id.* at *6.

Swendsen involved a borrower that filed a civil suit against his lender and its agents for wrongful foreclosure and bad-faith conduct in evaluating his loan modification applications. *Id.* at 2. Prior to filing the civil suit, the borrower filed two Chapter 13 bankruptcies both of which were summarily dismissed. *Id*. The second bankruptcy did "schedule [the lender's] loan without dispute and did not schedule or disclose any of the claims" advanced in the civil action. *Id.*

The lender and its agents moved to dismiss the claims arguing that judicial estoppel barred them. *Id.* at *3. The *Swendsen* court, granted the motion to dismiss without leave to amend concluding that the benefit that is afforded a debtor by an automatic bankruptcy stay is enough to satisfy the unfair advantage prong in a judicial estoppel analysis. *Id.* at 6. Relying on *HPG*, the *Swendsen* court stated, "the law in this area is clear, a plaintiff who has received the benefit of an automatic stay under 11 U.S.C. § 362(a) would receive an unfair advantage by prosecuting those claims in his bankruptcy proceedings." *Id.*

However, as discussed above and as this Court is aware, the law in this area is not clear. There is not a single Ninth Circuit case explicitly holding that the benefit provided by an automatic stay is enough to satisfy the requirements to apply judicial estoppel. Moreover, *Swendsen* is inapposite to the instant case because it did not involve a situation where the debtor's attorney failed to include the civil lawsuit, he himself drafted and filed, in the debtor's bankruptcy schedules.

Nor did it involve an unscrupulous company that took advantage of distressed homeowners and filed bankruptcies without their knowledge. Such is the case here. Even if this court determines that it wants to adopt and uphold the *Swendsen* and *HPG* decisions, and thereby expand the breadth of *Hamilton*, neither of these cases apply to the facts at hand.

As stated comprehensively above, judicial estoppel should not be used to deprive individuals from bringing potentially meritorious claims. The Ninth Circuit should not embrace the lower court rulings that do so, including *Swendsen*, *HPG* and the District Court's decision from which the instant appeal arises. The holding of *Hamilton* was based upon a very specific set of facts that undeniably showed calculated deception and bad faith. The *Hamilton* court, in conducting its judicial estoppel analysis, was afforded the luxury of the bankruptcy court's order dismissing the debtor's bankruptcy and vacating the discharge of his debts based upon the debtor's bad faith and lack of truthfulness under oath.

The use of judicial estoppel for failure to include claims in a bankruptcy schedule should be reserved to facts similar, or more egregious, than *Hamilton* and only upon undisputable facts of manipulation or bad faith. It should not be liberally applied to dispose of claims filed by distressed and unsophisticated homeowners desperately fighting to save their residences. Any application of judicial estoppel should err on the side of allowing individuals to advance potentially meritorious

claims, not disposing of them summarily based upon the mere appearance of impropriety. For these reasons, the District Court erred in dismissing the Sharps' Third Amended Complaint without leave to amend. The Sharps' appeal should be granted accordingly and the District Court's decision reversed and remanded for this reason alone.

B. The District Court abused its discretion in holding that the Sharps were judicially estopped from pursuing their claims in the District Court

The District Court abused its discretion by applying judicial estoppel to dismiss the Sharps' Third Amended Complaint without leave to amend. Here, the three factors in the analysis of whether or not to apply judicial estoppel were not adequately met. Specifically, all three factors were lacking.

As set forth in *Hamilton*, the United States Supreme Court has set forth three factors that courts may consider in determining whether to apply the doctrine of judicial estoppel. *Hamilton* at 782.

> ***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." Absent success in a prior proceeding, a party's later inconsistent position introduces no "risk of inconsistent court determinations," and thus no threat to judicial integrity. 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. (Internal citations omitted).

In the instant case, the first factor was not satisfied because the Sharps did not take a clearly inconsistent position. Here, the gravamen of the Sharps' claims were centered on unwinding the foreclosure sale, enforcing the promise to provide a loan modification and remaining in possession of the property. The claims, in essence, are equitable in nature and not based upon monetary recovery or measured by dollar damages. As such, any failure to include these in a bankruptcy schedule should not be construed as inconsistent when advancing the same in a later civil action.

Here, the actual claims, if successful, would have allowed the Sharps to remain liable on the loan and in possession of the property. In other words, the claims would actually deplete the bankruptcy estate and potential proceeds, not increase them. As such, they were properly not included in the bankruptcy schedules. At a minimum, the District court should have concluded that monetary claims were precluded but that equitable claims were not. For those reasons, the first factor in the judicial estoppel analysis was not satisfied in the instant case.

For this same reason, the second factor was equally inadequate. Here, the failure to include the claims in the bankruptcy schedules does not mean that the Sharps succeeded in persuading the bankruptcy court to accept their clearly inconsistent earlier position. Nor would it create the "perception that either the first

or the second court was misled." Simply put, it would not impugn on judicial integrity because the claims should logically be omitted from the bankruptcy schedules as they provide no potential asset or benefit to the bankruptcy estate. As stated above, they would do the opposite.

The third factor was also lacking. Whether or not the Sharps derived an unfair advantage or imposed an unfair detriment on the Bank Entities, by receiving the protections of the automatic bankruptcy stay, is not conclusively decided in the Ninth Circuit. A mere bankruptcy stay does not provide such an advantage that the Court should allow the application of judicial estoppel to deprive potentially meritorious claims. This is especially true given that the bankruptcy code itself has inherent safe guards to protect against the abuse of debtors invoking bankruptcy stay protection.

This includes the ability for a potentially aggrieved creditor to move for relief from stay upon a valid showing. This also includes a limit on stay protection upon successive bankruptcy filings. Namely, 11 U.S.C § 362(c)(3) limits the automatic stay to thirty days if the debtor had a case pending within the preceding one year period that was dismissed. Likewise, 11 U.S.C. § 362(c)(4)(A)(i) sets forth that a debtor shall have no stay protection whatsoever if that debtor had two or more cases dismissed in the preceding year.

Finally, whether or not the Sharps received an unfair advantage upon the mere protection the automatic bankruptcy stay afforded them is ***necessarily dependent upon a determination of their underlying claims.*** Plainly put, if the Bank Entities wrongfully foreclosed and sought to gain possession of the property upon this basis, then the Sharps gained no unfair advantage at all by invoking the automatic stay through bankruptcy. They simply maintained the status quo as they rounded their wagons and made a decision on how to proceed and preserve their rights.

For the foregoing reasons, the District Court abused its discretion in ruling that the Sharps' Third Amended Complaint was barred by judicial estoppel. The three factor test was not satisfied. The Sharps' appeal should be granted and the decision reversed and remanded to the District Court with instructions for this reason alone.

C. The District Court abused its discretion by holding that the exception for mistake or inadvertence did not apply to preclude the use of judicial estoppel

The District Court abused its discretion by holding that the exception for mistake or inadvertence did not apply to preclude the use of judicial estoppel in the underlying case. In *New Hampshire v. Maine*, 532 U.S. 742 (2001), the Supreme Court held that "it may be appropriate to resist the application of judicial estoppel when a party's prior position was based on inadvertence or mistake." *Id.* at 753.

This Court first addressed the effect of an inadvertent or mistaken omission from a bankruptcy filing in *Ah Quin v. County of Kauai Dept. of Transp*., 733 F.3d 267 (9th Cir. 2013). This Court created a test for mistake or inadvertence that "requires an inquiry into whether the plaintiff's bankruptcy filing was, in fact, inadvertent or mistaken, as those terms are commonly understood." *Id.* at 276.

In *Ah Quin*, this Court set forth:

> 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.

Id. at 276-277.

In the instant case, the Sharps explained that they played no part in what was listed in the bankruptcy schedules submitted on their behalf. The bankruptcy filed on behalf of Todd Sharp was filed by hired counsel who neglected to include any potential claims against the Bank Entities in the schedules despite having drafted and filed a civil lawsuit against them. This is assuming that the listing of these claims was even necessary as the Sharps reasoned it was not as set forth in the preceding section.

Moreover, the bankruptcies filed on behalf of Maria Sharp by Help U Stay were without her knowledge. These schedules were not completed by Maria Sharp, were not signed by Maria Sharp, did not list a single asset of the Sharps or any of the Sharps' creditors. These were simply bogus filings filed by a fraudulent company who took advantage of the Sharps by promising them that they had solutions for the Sharps' problems. The way Help U Stay would achieve these purported solutions was never articulated to the Sharps.

Here, the Sharps had even more right to be afforded an exception to judicial estoppel. Their failure to include their potential claims against the Bank Entities in the bankruptcy schedules was not even based upon their own mistake or inadvertence. It was based upon the actions of third parties for which the Sharps were unknowledgeable and should be not penalized.

However, the District Court chose to wholly disregard the Sharps' ***verified*** explanation claiming it "was not convinced." [ER 12, line 24.] The District Court found that the Sharps' attestation that they were unaware of the bankruptcies that Help U Stay filed was "simply not credible." [ER 13, line 6.] The District Court opined that the Sharps had "changed their tune" because they previously stated that the failure to include the claims in their schedule was an "unintentional mistake" resulting from "not having adequate representation." [ER 12, lines 25-28.] How the District Court could reached the conclusion, that the additional information

provided by the Sharps did not correspond with their previous statement, is inexplicable and unjustified by the record.

The District Court discarded the Sharps' ***verified*** explanation despite having sufficient evidence supporting it and without any evidence to the contrary. Specifically, the Court had access to the bankruptcy schedules filed on behalf of Todd Sharp which showed that the filing attorney who failed to include the claims in the schedules was the same attorney responsible for preparing the first civil suit. [ER 64 and 429-432]. The District Court also had the bankruptcy court order ordering Sharp's bankruptcy attorney to disgorge fees. [ER 431-432.] The District Court further had before them the instructions Help U Stay sent the Sharps and an invoice that Help U Stay sent the Sharps proving the amount paid by the Sharps to it. [ER 434 and 436.]

The District Court then summarily disposed of the case on a motion to dismiss without the development of any further evidence to establish the falsity or truthfulness of the Sharps' *verified* explanation. The Sharps were precluded from testifying as to these events, offering their declarations in support, providing the declaration of the attorney who filed the Sharp bankruptcy or declarations from agents of Help U Stay. Moreover, the District Court erred on the side of early dismissal without irrefutable evidence supporting that mistake or inadvertence did not occur. By doing the above, the District Court disregarded the relevant evidence

before it and abused its discretion. Granting of this appeal and overturning the District Court's decision is therefore warranted for this reason alone.

D. The District Court abused its discretion by applying a presumption of deliberate manipulation

Finally, the District Court abused its discretion by applying a presumption of deliberate manipulation. In *Ah Quin*, the Court stated:

> …given the strong need for full disclosure in bankruptcy proceedings and the fact that the plaintiff-debtor received an unfair advantage in the bankruptcy court, it makes sense to apply a presumption of deliberate manipulation. But where, as here, the plaintiff-debtor reopens bankruptcy proceedings, corrects her initial error, and allows the bankruptcy court to re-process the bankruptcy with the full and correct information, a presumption of deceit no longer comports with *New Hampshire.*

Id. at 273.

Here, "because Plaintiffs [did] not allege that they ever corrected any of the four bankruptcy filings to include their claims against Defendants" the District court saw fit to apply a "presumption of deliberate manipulation." [ER 13, lines 7-11.] However, the bankruptcies were all summarily dismissed and three of which were unauthorized and devoid of any substantive information regarding the Sharps. As such, there were no bankruptcies to reopen and schedules to amend and the Court's application of this presumption was a clear abuse of discretion.

VII. CONCLUSION

Based on the foregoing, the Sharps have suffered an extreme injustice by being deprived the right to have their claims adjudicated. The district court erred and abused its discretion. The Sharps respectfully request that this Court grant their appeal, reverse and remand the District Court's decision and award the Sharps' costs and fees on appeal as allowed by law.

VIII. STATEMENT OF RELATED CASES

The Sharps and undersigned counsel are unaware of any cases related to this appeal as set forth in Ninth Circuit Rule 28-2.6.

RESPECTFULLY SUBMITTED this 26th Day of May 2015.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing, **Plaintiffs-Appellants, Todd and Maria Sharp's Opening Brief**, with the Clerk of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on May 26th, 2015. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the Appellate CM/ECF system.

Signature__/s/ Charles Tony Piccuta_____

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