NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

PDTW, LLC, Plaintiff and Appellant, v. DAVID SCHNIDER et al., Defendants and Respondents.	G059821 (Super. Ct. No. 30-2019-01115265) O P I N I O N

Appeal from judgments of the Superior Court of Orange County, William D. Claster, Judge. Affirmed. Request for judicial notice denied.

LDT Consulting, Inc. and Dimitrios P. Biller for Plaintiff and Appellant.

Kaufman Dolowich Voluck, Robert S. Silver and Jennifer E. Newcomb for Defendants and Respondents David Schnider, David Schnider dba Schniderlaw, and Nolan Heimann, LLP.

Hill, Farrer & Burrill, Kevin H. Brogan, Dean E. Ennis, and Elissa L. Gysi for Defendants and Respondents Greenberg Glusker and Andrew Apfelberg.

Chapman, Glucksman, Dean & Roeb, Andrew J. Wright and Steven J. Pearse for Defendants and Respondents KF Professional Group, Inc., Norman Ko, and Joseph Foster.

* * *

In 2015, Paula Thomas and her company, PDTW, LLC (PDTW), filed a lawsuit for various employment and business claims related to a 2014 business deal. While that lawsuit was pending, PDTW filed for chapter 7 bankruptcy. PDTW did not disclose any potential claims against third parties on its initial bankruptcy schedule of assets, nor did it ever supplement its schedules to disclose those claims.

In the present action, PDTW attempts to sue its former attorneys and accountants for professional malpractice, fraud, and related claims arising out of their involvement in and handling of the 2014 business deal, the 2015 employment lawsuit, and the 2016 bankruptcy petition. The trial court sustained defendants' demurrers for a variety of reasons, including the applicable statutes of limitations, res judicata, collateral estoppel, judicial estoppel, and lack of capacity to sue, and it entered judgments for defendants. We affirm those judgments, concluding PDTW's failure to disclose the present claims in the bankruptcy proceedings judicially estops it from pursuing the subject action.

FACTS

The facts underlying this action are convoluted; they involve multiple prior lawsuits and judicial rulings. Below we summarize the portions of those proceedings relevant to the issues on appeal.

"For purposes of reviewing a demurrer, we accept the truth of material facts properly pleaded in the operative complaint, but not contentions, deductions, or

conclusions of fact or law. We may also consider matters subject to judicial notice." (*Yvanova v. New Century Mortgage Corp*. (2016) 62 Cal.4th 919, 924.) In addition, "we accept as true . . . the contents of any exhibits attached to the complaint, and in the event of a conflict between the pleading and an exhibit, the facts contained in the exhibit take precedence over and supersede any inconsistent or contrary allegations in the pleading." (*Jibilian v. Franchise Tax Bd*. (2006) 136 Cal.App.4th 862, 864, fn. 1.)

With those principles in mind, the following facts are taken from the original and first amended complaints in this action, including the attached exhibits, and the voluminous judicially noticed court filings from four other cases.[1]

1. *The Thomas Wylde Brand*

Paula Thomas is a fashion designer. In 2006, she founded a brand of luxury women's apparel and accessories called Thomas Wylde, and she created PDTW to distribute the line. Thomas served as PDTW's president, chief executive officer, and chief creative director, and at all relevant times she has been a 99.5 percent owner of PDTW.

In 2013, Thomas created another company, Thomas Wylde Holdings, LLC (TWH), and she assigned her trademark and copyright rights in the Thomas Wylde line to TWH. TWH in turn licensed those rights to PDTW, which continued to distribute the Thomas Wylde line. Thomas owns 100 percent of TWH.

2. *The 2014 Deal*

Thomas's business underwent major structural changes in 2014. The parties dispute why and how those changes were made. According to Thomas, she decided to bring in a new person to handle the financial aspect of her business so she

[1] The record in this case is approximately 7,500 pages, unusually large considering its procedural posture.

could focus on the creative side. Other parties maintain the changes were made to rescue the business from financial difficulties.

Whatever the reason for the change, a new company called Thomas Wylde, LLC (TW) was formed in July 2014, and through a series of agreements, including various intellectual property assignments, Thomas transferred her business to TW. TW took over PDTW's role as distributor of the Thomas Wylde line, and TWH eventually filed a certificate of cancellation with the California Secretary of State. Thomas acquired a minority interest in TW in late 2014; she also became a salaried employee of TW and served as its chief creative officer and creative director.

Before and during negotiations for the 2014 deal and in early 2015, Thomas, PDTW, and TWH received legal advice on various corporate and employment matters from attorney Andrew M. Apfelberg and his law firm, Greenberg Glusker Fields Claman & Machtinger LLP (Greenberg Glusker). Attorney David Schnider, who had served as PDTW's in-house counsel in years past, was also involved in negotiations for the 2014 deal, representing TWH and PDTW. These attorneys' legal services gave rise to some of the malpractice and fraud claims in the subject action.

Around that same time, PDTW and TW received accounting and tax advice from KF Professional Group (KFP); KFP prepared tax returns for PDTW and TW for 2014 and 2015. KFP's accounting services are also at issue in the subject action.

3. *The Original Action*

In early 2015, months after TW's creation, Thomas's relationship with TW soured. TW terminated her employment in April 2015.

Thomas and PDTW retained the law firm of Kring & Chung, LLP (Kring & Chung) to sue TW and its leadership. In October 2015, Thomas and PDTW filed a verified complaint in Los Angeles County Superior Court against TW and others (the Original Action). (*Thomas v. Thomas Wylde, LLC* (Super. Ct. L.A. County, No. BC596495).) The complaint, filed by Kring & Chung, asserted numerous

employment claims, as well as causes of action for breach of contract, breach of fiduciary duty, conversion, and related claims. Essentially, Thomas and PDTW accused TW of mistreating Thomas during her tenure at TW, wrongfully terminating her employment, improperly ousting Thomas from the company, and misappropriating corporate funds.[2]

In response, TW and two of its members filed a cross-complaint against Thomas and PDTW, asserting causes of action for breach of fiduciary duty, breach of contract, unjust enrichment, and related claims. Among other things, they alleged Thomas had failed to perform her job duties and was now attempting to undermine TW and the Thomas Wylde brand.

4. *PDTW's Bankruptcy*

In June 2016, while the Original Action was still pending, PDTW filed a voluntary chapter 7 bankruptcy petition. (*In re PDTW, LLC,* Bankr. C.D. Cal. No. 6:16-bk-15889-SY.) According to PDTW, it did so at the recommendation of Kring & Chung, who had allegedly conspired with PDTW's bankruptcy counsel and with KFP (the accounting firm that prepared PDTW's tax returns) to put PDTW into bankruptcy proceedings even though PDTW was actually debt free.

In its initial bankruptcy schedules, which Thomas signed under penalty of perjury on PDTW's behalf, and which were filed with the bankruptcy court, PDTW reported that it then had about $1 million worth of personal property and over $2.7 million in unsecured debts. In the section of the schedules listing all "[c]auses of action against third parties (whether or not a lawsuit has been filed)," PDTW disclosed the Original Action as property of the estate. PDTW listed no other pending or potential claims, and PDTW never filed updated schedules disclosing any such claims.

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[2] The original complaint included derivate claims based on Thomas's status as a member of TW. Thomas later agreed to dismiss her derivative claims without prejudice. She and PDTW filed a first amended complaint in January 2016, this time with Thomas filing solely in an individual capacity.

The bankruptcy trustee filed an adversary action against Thomas, TW, and TWH in 2017. The trustee alleged PDTW was the rightful owner of Thomas's copyrights and trademarks, accused Thomas of self-dealing in her management of PDTW, and sought repayment of PDTW's loans to Thomas.

5. *The Original Action, Continued*

Meanwhile, in the Original Action, Thomas and PDTW fired their counsel, Kring & Chung. Their current counsel, Dimitrios P. Biller, substituted in as their counsel of record in May 2017. A few months later, the trial court stayed the proceedings due to PDTW's pending bankruptcy.

Thomas later dismissed her claims against TW and its management with prejudice. PDTW's claims against TW and its management, and their cross-complaint against Thomas and PDTW, all remained pending but were stayed.

6. *The First Malpractice Action*

In October 2017, evidently dissatisfied with the 2014 deal, the initial handling of the Original Action, and PDTW's bankruptcy, Thomas (still represented by attorney Biller) filed a complaint in Los Angeles County Superior Court for legal malpractice and fraud against PDTW's former in-house counsel David Schnider and his law practice (collectively, the Schnider Defendants),[3] and Kring & Chung and certain of its attorneys who had represented Thomas and PDTW in the Original Action (collectively, the Kring & Chung Defendants)[4] (the First Malpractice Action). (*Thomas v. Schnider* (Super. Ct. L.A. County, No. BC679247).) In her 172-page first amended complaint, which was filed that same month, Thomas asserted causes of action for legal

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[3] Specifically, the Schnider Defendants are David Schnider, the Law Offices of David Schnider, and Nolan Heimann, LLP.

[4] Specifically, the Kring & Chung Defendants are Kring & Chung, Kenneth W. Chung, Laura C. Hess, Allyson K. Thompson, and Laura Booth.

malpractice, fraud, unfair business practices, defamation, and related claims, alleging defendants had fraudulently induced her to transfer PDTW's business to TW, improperly represented her despite multiple conflicts of interest, and conspired to push her out of TW and force PDTW into bankruptcy.[5]

The bankruptcy trustee filed a notice in the First Malpractice Action concerning PDTW's bankruptcy, advising the court and parties in that case that any malpractice claims by PDTW belonged to the bankruptcy estate and that Thomas could not pursue claims for damages on PDTW's behalf.

Thomas settled her individual claims against the Kring & Chung Defendants in the First Malpractice Action in August 2018. After the trial court dismissed those claims with prejudice, Thomas's claims against the Schnider Defendants remained.

In September 2018, Thomas and TWH filed a second amended complaint in the First Malpractice Action without first obtaining leave to amend. The new pleading named the same defendants as before (including the dismissed Kring & Chung Defendants) and added as defendants Greenberg Glusker and certain of its attorneys who had represented Thomas and TWH in 2014 and 2015 (collectively, the Greenberg Defendants).[6] The Greenberg Defendants filed a motion to compel arbitration of Thomas and TWH's claims, citing the arbitration provisions in their engagement agreements. On

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[5] In 2017, Thomas also sued TW, David Schnider, and others in federal court for copyright and trademark infringement, fraud, Racketeer Influenced and Corrupt Organizations Act (RICO) violations, and related claims based on the defendants' alleged scheme to take over and destroy PDTW, steal Thomas's designs, and engage in tax evasion (the IP Action). (*Thomas v. Thomas Wylde, LLC*, C.D. Cal. 2:17-cv-04158-JAK-PJW). The IP Action remains pending and has involved at least one appeal to the Ninth Circuit. (No. 21-55069.)

[6] Specifically, the Greenberg Defendants are Greenberg Glusker, Andrew Apfelberg, Olivia Goodkin, Lee Dresie, and Joanna Blyth.

the day the motion to compel arbitration was scheduled to be heard, Thomas and TWH apparently dismissed the Greenberg Defendants from the First Malpractice Action without prejudice.[7]

7. *The Second Malpractice Action*

Meanwhile, in November 2018, while the Original Action and the First Malpractice Action were still pending, Thomas and TWH (again represented by attorney Biller) filed a second malpractice case in Los Angeles County Superior Court, this time asserting claims against the Kring & Chung Defendants, the Greenberg Defendants, KFP and certain of its employees (collectively, the KFP Defendants),[8] and others (the Second Malpractice Action). (*Thomas v. Kring & Chung* (Super. Ct. L.A. County, No. 18STCV05667).) The case was deemed related to the First Malpractice Action and was therefore assigned to the same judge who was presiding over that action.

The complaint in the Second Malpractice Action, which is nearly 500 pages long, again alleged that defendants had conspired to defraud Thomas in 2014 and force PDTW into bankruptcy, and again asserted causes of action for legal malpractice, fraud, negligence, breach of fiduciary duties, and related claims. The complaint also accused defendants of concealing evidence in the First Malpractice Action.

The Kring & Chung Defendants demurred and moved for terminating sanctions. The trial court sustained their demurrer without leave to amend in April 2019 based on (1) the expired statute of limitations, (2) TWH's lack of capacity to sue as a cancelled limited liability company, and (3) res judicata, citing Thomas's dismissal of Kring & Chung with prejudice in the First Malpractice Action. The court also granted

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[7] As best we can tell, this dismissal is not part of our record. However, according to a May 31, 2019 minute order in the Second Malpractice Action (discussed below), "Plaintiffs . . . dismiss[ed] the Greenberg Defendants from the first action on the day of the hearing for the Greenberg Defendants' Petition to Compel Arbitration."

[8] Specifically, the KFP Defendants are KFP, Norman Ko, and Joseph Foster.

terminating sanctions, finding the allegations against Kring & Chung were objectively unreasonable given their settlement of the First Malpractice Action. The court then dismissed the Kring & Chung Defendants from the Second Malpractice Action with prejudice.

The KFP Defendants also demurred. The trial court sustained their demurrer without leave to amend in April 2019 based on the expired statute of limitations, and it dismissed the KFP Defendants with prejudice.

The Greenberg Defendants filed another motion to compel arbitration, citing the arbitration provisions in their engagement agreements. The trial court granted their motion in May 2019.[9] TWH and Thomas never initiated arbitration proceedings, however, and the court later dismissed the Greenberg Defendants from the Second Malpractice Action without prejudice as a result.

8. *The PDTW Bankruptcy, Continued*

Meanwhile, in May 2019, the trustee and Thomas settled the adversary proceeding in the PDTW bankruptcy case with court approval. As part of the settlement, Thomas agreed to pay the trustee $30,000, and the trustee assigned PDTW's "litigation rights" on an "AS-IS, WHERE-IS BASIS" to Thomas.

Two months later, the bankruptcy court lifted the automatic stay of Thomas's claims in state and federal court so that "[Thomas] can pursue her litigation rights . . . that the Trustee . . . assigned to [Thomas]."

9. *The Third Malpractice Action*

That brings us to the present action. In December 2019, Thomas (individually and as the last known representative of TWH), TWH, and PDTW (collectively, Plaintiffs) filed the present action in Orange County Superior Court,

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[9] TWH and Thomas petitioned the Court of Appeal for a writ of mandate as to that ruling; our colleagues in the Second District denied their petition in August 2019.

asserting causes of action for legal malpractice, fraud, breach of contract, breach of fiduciary duty, and related claims against the Kring & Chung Defendants,[10] the KFP Defendants, the Greenberg Defendants,[11] the Schnider Defendants, and others (the Third Malpractice Action). (*PDTW v. Kring & Chung* (Super. Ct. Orange County, No. 30-2019-01115265).)

The current complaint is over 350 pages long and includes more than 900 pages of exhibits. Although the caption identifies 14 causes of action, the body of the pleading asserts 25 causes of action. The complaint includes a 15-page table of contents, followed by nearly 100 pages of disjointed facts and stream-of-consciousness legal arguments, and the actual causes of action do not begin until page 115. The allegations throughout the complaint are rambling, convoluted, nonchronological, and at times incoherent. As the trial court aptly put it, "if Plaintiffs' goal was to confuse [and] overwhelm the reader, then they have succeeded."

We have reviewed the complaint. At the risk of oversimplifying Plaintiffs' allegations, its gravamen seems to be that defendants were professionally negligent in representing Plaintiffs in the 2014 deal and the Original Action, improperly represented Plaintiffs despite numerous conflicts of interest, and engaged in an extensive "scheme" and conspiracy to transition PDTW's business to TW, steal Thomas's intellectual property, undervalue and destroy PDTW, dilute Thomas's interest in TW, undervalue and sabotage Thomas's claims in the Original Action, and force PDTW into bankruptcy when it was actually debt free. The complaint seeks over $31 million in compensatory damages for PDTW, $250 million in damages for the loss of intellectual property, and punitive damages.

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[10] Thomas did not assert any claims against the Kring & Chung Defendants; only TWH and PDTW asserted those claims.

[11] As to the Third Malpractice Action, the Greenberg Defendants include only Greenberg Glusker and Andrew Apfelberg.

10. *The First Round of Demurrers in the Third Malpractice Action*

Defendants all filed demurrers to the Third Malpractice Action on various grounds and sought judicial notice of what had transpired in the earlier lawsuits. In July 2020, the trial court issued a 73-page minute order granting their requests for judicial notice and sustaining their demurrers, largely without leave to amend.

The trial court sustained the Kring & Chung Defendants' demurrer without leave to amend based on (1) TWH's lack of capacity to sue and principles of collateral estoppel (TWH's lack of capacity having been fully litigated in the Second Malpractice Action), and (2) judicial estoppel as to PDTW based on its failure to schedule its present claims in the bankruptcy action. The court later entered a judgment of dismissal in favor of the Kring & Chung Defendants.

The trial court sustained the KFP Defendants' demurrer without leave to amend based on (1) res judicata as to Thomas and TWH based on the Second Malpractice Action (in which Thomas's and TWH's claims against the KFP Defendants were dismissed on statute of limitations grounds), and (2) collateral estoppel as to PDTW based on the Second Malpractice Action (concluding the judgment against Thomas on the statute of limitations issue was binding against PDTW).

The trial court sustained the Greenberg Defendants' demurrer, finding the claims against them were all barred by the statute of limitations. However, the court granted Plaintiffs leave to amend certain causes of action against the Greenberg Defendants to allege a diligent investigation between summer 2015 and fall 2017. In all other respects, the court sustained the Greenberg Defendants' demurrer without leave to amend.

Finally, the trial court sustained the Schnider Defendants' demurrer in large part. The court granted PDTW and Thomas leave to amend their twentieth cause of action for fraud by concealment to allege compliance with Civil Code section 1714.10's

prefiling requirements,[12] and the court stayed the demurrer as to Thomas's remaining claims pending the resolution of her claims against Schnider in the First Malpractice Action, finding those claims must be abated.[13] In all other respects the court sustained the Schnider Defendants' demurrer without leave to amend based on (1) TWH's lack of capacity to sue and (2) the various statutes of limitations applicable to PDTW's claims.

11. *The Second Round of Demurrers in the Third Malpractice Action*

The following month, Plaintiffs filed a first amended complaint. Despite the fact that the trial court had sustained the Kring & Chung Defendants' and the KFP Defendants' demurrers in their entirety without leave to amend, the first amended complaint alleged claims against all the same defendants and was nearly identical to the original complaint, except for the addition of certain allegations to the fifth, sixth, seventh, and twentieth causes of action for fraud.

The Greenberg Defendants and the Schnider Defendants again demurred. Plaintiffs opposed the demurrers and clarified in their opposition to the Greenberg

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[12] Subject to certain exceptions, before a plaintiff may sue an attorney for civil conspiracy with his client arising from an attempt to compromise a claim and based on the attorney's representation of the client, the court must determine that the plaintiff has a reasonable probability of prevailing on the claim; before filing, the plaintiff must file a petition, the proposed pleading, and supporting affidavits with the court; the proposed defendant must then be permitted to submit opposing affidavits. (Civ. Code, § 1714.10, subd. (a).)

[13] It appears Thomas had filed a request for dismissal of the Schnider Defendants without prejudice in the First Malpractice Action in November 2019. However, no dismissal was entered at that time, so her claims against the Schnider Defendants were still pending when the demurrers in the Third Malpractice Action were heard. After oral argument on those demurrers, Thomas dismissed the Schnider Defendants from the First Malpractice Action without prejudice. Shortly thereafter, the Schnider Defendants notified the court in the Third Malpractice Action of the dismissal and asked the court to issue the remainder of its ruling on their demurrer.

Defendants' demurrer that "Thomas, the individual, is not suing Greenberg in this action, and TWH dismisses its claims."

In October 2020, the trial court sustained the Greenberg Defendants' demurrer without leave to amend, ruling that (1) TWH's claims were dismissed without prejudice per TWH's request, (2) the remaining fraud claims by PDTW were barred by the statute of limitations, and (3) in any event PDTW was judicially estopped from making those claims based on its failure to schedule them in the bankruptcy.[14]

The trial court also sustained the Schnider Defendants' demurrer without leave to amend based on (1) Plaintiffs' failure to comply with Civil Code section 1714.10's prefiling requirements before filing the twentieth cause of action for fraud by concealment and (2) the statute of limitations.

The trial court entered judgments of dismissal as to the KFP Defendants, the Greenberg Defendants, and the Schnider Defendants. Plaintiffs filed two notices of appeal: one concerning the judgments entered in favor of the Schnider Defendants, the Greenberg Defendants, and the KFP Defendants (the present case), and another concerning the court's "decision" in favor of the Kring & Chung Defendants (the companion appeal, No. G059293).[15]

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[14] According to PDTW, the Greenberg Defendants raised the issue of judicial estoppel for the first time on appeal. PDTW is wrong. One of the bases for the Greenberg Defendants' demurrer to the first amended complaint was that "PDTW is judicially estopped from asserting its fraud claims because it failed to schedule its fraud claims in PDTW's Bankruptcy proceedings initiated on June 30, 2016." The trial court agreed, as reflected by the last paragraph of its October 2020 minute order sustaining the Greenberg Defendants' demurrer based on judicial estoppel.

[15] The notice of appeal in this case, much like the complaint, is no model of clarity. Although the notice suggests that all three Plaintiffs are appealing, the opening and reply briefs and the request for judicial notice were filed on behalf of only PDTW, and counsel confirmed at oral argument that PDTW is the only appellant. The notice of appeal also identified Kyu Hong Kim, CPA, Inc. as one of the respondents; however, that party never filed a brief or otherwise appeared in this appeal, and PDTW does not

DISCUSSION

1. *Governing Standards*

"'The function of a demurrer is to test the sufficiency of a pleading by raising questions of law.'" (*Nealy v. County of Orange* (2020) 54 Cal.App.5th 594, 599 (*Nealy*); see Code Civ. Proc., § 430.10.) "On an appeal from a judgment of dismissal entered after a demurrer has been sustained, the issue is whether, assuming the truth of all well pleaded facts and those subject to judicial notice, the complaint alleges facts sufficient to state a cause of action." (*Nealy*, at p. 600.)

Our standard of review is well settled. "When the trial court sustains a demurrer, we review the complaint de novo to determine whether it alleges facts stating a cause of action on any possible legal theory." (*Rossberg v. Bank of America, N.A*. (2013) 219 Cal.App.4th 1481, 1490 (*Rossberg*).) "'"[W]e give the complaint a reasonable interpretation, reading it as a whole and its parts in their context."' [Citation.] 'When conducting this independent review, [we] "treat the demurrer as admitting all material facts properly pleaded, but do not assume the truth of contentions, deductions or conclusions of law."'" (*Kahan v. City of Richmond* (2019) 35 Cal.App.5th 721, 730 (*Kahan*).)

"We also 'consider matters that must or may be judicially noticed.'" (*Rossberg*, *supra,* 219 Cal.App.4th at p. 1490; see Evid. Code, § 452, subd. (d) [permitting judicial notice of records of any state or federal court]; *id.*, § 459 [reviewing court must take judicial notice of each matter properly noticed by the trial court and may take judicial notice of records of any state or federal court].) In this case, those matters

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meaningfully address its claims against that party in its briefing. Accordingly, we conclude any appeal against that party has been abandoned.

include the voluminous pleadings and filings from the Original Action, the bankruptcy case, the First and Second Malpractice Actions, and the record in the companion appeal.[16]

"Although we review the complaint de novo, '"[t]he plaintiff has the burden of showing that the facts pleaded are sufficient to establish every element of the cause of action and overcoming all of the legal grounds on which the trial court sustained the demurrer . . . . [Citation.] We will affirm if there is any ground on which the demurrer can properly be sustained, whether or not the trial court relied on proper grounds or the defendant asserted a proper ground in the trial court proceedings."' [Citation.] It is the trial court's ruling we review, not its reasoning or rationale." (*Kahan*, *supra*, 35 Cal.App.5th at p. 730; see *Rossberg*, *supra*, 219 Cal.App.4th at p. 1490.)

2. *Judicial Estoppel of PDTW's Claims*

We first turn to the claims asserted by PDTW. As noted, in sustaining the Kring & Chung Defendants' and Greenberg Defendants' demurrers, the trial court concluded PDTW's failure to disclose its present claims in its bankruptcy schedules

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[16] PDTW contends the complaint is "[t]he only important document for a demurrer," and they fault the trial court for considering facts outside the complaint. PDTW is wrong.

Somewhat contradictorily, PDTW asks us to take judicial notice of about 5,000 pages of filings from the bankruptcy case, the IP Action, and the Ninth Circuit appeal in the IP Action. We deny this request, as none of those materials were before the trial court, and none are relevant to dispositive issues on appeal. (*Vons Companies, Inc. v. Seabest Foods, Inc*. (1996) 14 Cal.4th 434, 444, fn. 3 [absence exceptional circumstances, "[r]eviewing courts generally do not take judicial notice of evidence not presented to the trial court"]; *Verizon California Inc. v. Board of Equalization* (2014) 230 Cal.App.4th 666, 674, fn. 2 ["Because we review the judgment of the trial court, and the question posed is whether the trial court erred in sustaining the demurrer to the complaint, we ordinarily look only to the record made in the trial court"]; *Arce v. Kaiser Foundation Health Plan, Inc*. (2010) 181 Cal.App.4th 471, 482 [appellate court "may decline to take judicial notice of matters that are not relevant to dispositive issues on appeal"].)

judicially estopped it from pursuing the claims in the present action. We agree and conclude the doctrine of judicial estoppel bars PDTW's claims against the Greenberg Defendants, the Schnider Defendants, and the KFP Defendants.[17]

a. *Bankruptcy Disclosures*

A bankruptcy debtor has an express, affirmative duty to file with the bankruptcy court a schedule of assets and liabilities, which must disclose under penalty of perjury, among other things, all causes of action the debtor has or may have against third parties. (11 U.S.C. § 521(a)(1)(B)(i); Fed. Rules Bankr. Proc., rule 1007(b)(1)(A); Official Form 206A/B, § 74 [requiring debtor to list all "[c]auses of action against third parties (whether or not a lawsuit has been filed)," and to specify the "[n]ature of [the] claim" and the "[a]mount requested"].) "'[I]t is very important that a debtor's bankruptcy schedules and statement of affairs be as accurate as possible, because that is the initial information upon which all creditors rely.'" (*Hamilton v. State Farm Fire & Cas. Co*. (9th Cir. 2001) 270 F.3d 778, 785 (*Hamilton*).)

The debtor's duty to disclose any claims against third parties includes not only pending claims, but also contingent and unliquidated claims. (*Hamilton, supra,* 270 F.3d at p. 785.) """The debtor need not know all the facts or even the legal basis for the cause of action; rather, if the debtor has enough information . . . prior to confirmation to suggest that it may have a possible cause of action, then that is a 'known' cause of action such that it must be disclosed."""" (*In re Coastal Plains, Inc*. (5th Cir. 1999) 179 F.3d 197, 208 (*Coastal Plains*).)

"The debtor's duty to disclose potential claims as assets does not end when the debtor files schedules, but instead continues for the duration of the bankruptcy

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[17] The opening brief in this matter completely overlooked this issue and did not address judicial estoppel. However, PDTW briefly addressed judicial estoppel in its reply brief. PDTW also fully briefed the issue in the companion appeal involving Kring & Chung.

proceeding." (*Hamilton, supra,* 270 F.3d at p. 785.) If the debtor acquires an interest in a claim after filing its original schedule, the debtor must file a supplemental schedule within 14 days of discovering it has acquired that interest. (Fed. Rules Bankr. Proc., rule 1007(h).)

b. *Judicial Estoppel*

A debtor's failure to disclose actual or potential claims to the bankruptcy court can later bar the debtor from pursuing those claims under the doctrine of judicial estoppel. "'"[J]udicial estoppel is an equitable doctrine aimed at preventing fraud on the courts."'" (*Thomas v. Gordon* (2000) 85 Cal.App.4th 113, 118.) The doctrine "precludes a party from relying upon a theory in a legal proceeding inconsistent with one previously asserted." (*Nist v. Hall* (2018) 24 Cal.App.5th 40, 48.) In other words, it "'"precludes a party from gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position."'" (*Aguilar v. Lerner* (2004) 32 Cal.4th 974, 986 (*Aguilar*).)

Our Supreme Court has articulated the following test for applying judicial estoppel: "[t]he doctrine applies when '(1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake.'" (*Aguilar, supra,* 32 Cal.4th at pp. 986-987.) "[T]he trial court may sustain a demurrer on the ground of judicial estoppel where the facts pleaded and judicially noticed indicate as a matter of law the doctrine should be applied . . . ." (*The Swahn Group, Inc. v. Segal* (2010) 183 Cal.App.4th 831, 844.)

In the bankruptcy context, "[j]udicial estoppel will be imposed when the debtor has knowledge of enough facts to know that a potential cause of action exists during the pendency of the bankruptcy, but fails to amend his schedules or disclosure

statements to identify the cause of action as a contingent asset." (*Hamilton, supra,* 270 F.3d at p. 784.) The debtor's failure to disclose such claims to the bankruptcy court in his original or supplemental schedules estops him from pursuing those claims later on down the road. (See, e.g., *Thomas v. Gordon* (2000) 85 Cal.App.4th 113, 120 [party who signed documents under oath in bankruptcy case claiming to list all her assets, but who did not mention shares in two corporations, was judicially estopped from claiming ownership interest in those corporations in suit against accountants for breach of duty of care].)

The reason for applying judicial estoppel in such circumstances is "the plaintiff-debtor represented in the bankruptcy case that no claim existed, so he or she is estopped from representing in the lawsuit that a claim *does* exist." (*Ah Quin v. County of Kauai Dept. of Transp*. (9th Cir. 2013) 733 F.3d 267, 271.) The doctrine "'prevent[s] a party who failed to disclose a claim in bankruptcy proceedings from asserting that claim after emerging from bankruptcy'" because "'the *integrity of the bankruptcy system depends on full and honest disclosure by debtors of all of their assets*.'" (*Hamilton, supra,* 270 F.3d at p. 785; see *Payless Wholesale Distrib. v. Alberto Culver* (1st Cir. 1993) 989 F.2d 570, 571 ["Conceal your claims; get rid of your creditors on the cheap, and start over with a bundle of rights. This is a palpable fraud that the court will not tolerate, even passively"].)

"The courts will not permit a debtor to obtain relief from the bankruptcy court by representing that no claims exist and then subsequently to assert those claims for his own benefit in a separate proceeding. *The interests of both the creditors, who plan their actions in the bankruptcy proceeding on the basis of information supplied in the disclosure statements, and the bankruptcy court, which must decide whether to approve the plan of reorganization on the same basis, are impaired when the disclosure provided by the debtor is incomplete*.'" (*Coastal Plains, supra,* 179 F.3d at p. 208.)

c. *Application*

Applying those principles here, we conclude PDTW is judicially estopped from pursuing this action. The judicially noticed documents in the record[18] demonstrate that PDTW filed for bankruptcy in June 2016. In its bankruptcy schedules, which Thomas signed under penalty of perjury as a member of PDTW, in the section listing all "[c]auses of action against third parties (whether or not a lawsuit has been filed)," PDTW disclosed the Original Action as property of the estate. PDTW did not list any other pending or potential claims, and PDTW never filed updated schedules disclosing such claims. PDTW failed to disclose the subject claims against the KFP Defendants, the Schnider Defendants, and the Greenberg Defendants. That omission was tantamount to an affirmative assertion that no such claims existed.

PDTW settled the bankruptcy adversary proceeding in May 2019 with court approval, and as part of that settlement, the trustee assigned PDTW's litigation rights to Thomas in exchange for a payment of $30,000.[19] Six months later, PDTW filed the

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[18] In the companion appeal, PDTW contends the trial court erred in taking judicial notice of the contents of the filings in the bankruptcy case. However, PDTW did not oppose Kring & Chung's request for judicial notice in the trial court, thereby waiving any objection. (*Shuster v. BAC Home Loans Servicing, LP* (2012) 211 Cal.App.4th 505, 512, fn. 4.) And in any event, judicial notice of the filings in the bankruptcy court was proper. (Evid. Code, § 452, subd. (d); see *Hamilton v. Greenwich Investors XXVI, LLC* (2011) 195 Cal.App.4th 1602, 1608-1609, fn. 3 [in sustaining demurrer on judicial estoppel grounds, trial court properly took judicial notice of filings in bankruptcy case, including "the fact the documents were filed 'and that they say what they say'"]; *Patel v. Crown Diamonds, Inc*. (2016) 247 Cal.App.4th 29, 36, fn. 3 [taking judicial notice of debtor's bankruptcy filing]; see also *Hawkins v. SunTrust Bank* (2016) 246 Cal.App.4th 1387, 1393 ["Although a court cannot take judicial notice of hearsay allegations in a court record, it can take judicial notice of the truth of facts asserted in documents such as orders, findings of fact and conclusions of law, and judgments"].)

[19] The settlement agreement reads as follows: "In full and complete resolution of all disputes pending between Thomas and the Trustee, including the disputes at issue in the Adversary Proceeding, defendant Thomas shall pay to the Trustee, in good and sufficient funds, the sum of $30,000 (the 'Settlement Payment'). [¶] . . . In

instant action, seeking over $280 million in damages from the KFP Defendants, the Schnider Defendants, the Greenberg Defendants, and others.

These facts demonstrate that PDTW took two inconsistent positions in two different judicial proceedings: in the bankruptcy case, PDTW represented that it had no pending or anticipated claims aside from the Original Action, while in the present case PDTW has sued defendants claiming over $280 million in damages stemming from defendants' fraud, malpractice, and other malfeasance. The first, second, and fourth elements of judicial estoppel—i.e., that the same party has taken two totally inconsistent positions in judicial proceedings—are therefore satisfied. (See *Hamilton, supra,* 270 F.3d at p. 784 [finding chapter 7 debtor "clearly asserted inconsistent positions" because "[h]e failed to list his claims against State Farm as assets on his bankruptcy schedules, and then later sued State Farm on the same claims"].)[20]

The third element—that the party was successful in asserting the first position—is also satisfied. The trustee's motion to approve the settlement indicated he had determined based in part on PDTW's schedules "that entry into settlement with Thomas was the best way to maximize value to the Estate while minimizing ongoing administrative costs." And in approving the settlement, the bankruptcy court expressly "found that the relief sought by the Trustee" (which included assigning PDTW's

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exchange for the Settlement Payment, the Trustee agrees to: [¶] . . . [¶] b. Assign to Thomas, on an AS-IS, WHERE-IS BASIS, without any representations or warranties, all of the Estate's right, title, and interest in and to the following (collectively, the 'Assignment'): [¶] . . . [¶] . . . any litigation rights not at issue in the pending Adversary Proceeding."

[20] Apparently misunderstanding the trial court's ruling on judicial estoppel, PDTW devotes much of its briefing in the companion appeal to arguing that it had no obligation to identify its intellectual property rights on the bankruptcy schedule. PDTW's intellectual property rights and whether or not those were listed on the schedule have absolutely no bearing on PDTW's present claims against defendants for fraud and legal malpractice.

litigation rights to Thomas in exchange for $30,000) was "just and proper under the circumstances of this case."

We infer from these statements that both the trustee and the bankruptcy court accepted as true PDTW's representations concerning its lack of any other anticipated claims. Indeed, if the trustee had known about PDTW's anticipated claims for over $280 million against defendants, we cannot imagine he would have agreed to the settlement terms, nor would the bankruptcy court have found the settlement "just and proper under the circumstances." As the trial court in this case aptly put it, "[t]he paramount interest of PDTW's creditors would hardly be served by a settlement that signs away the right to $250 million or more in damages in exchange for a $30,000 check, particularly when the trustee cited depletion of the estate's assets as a reason to approve the settlement."[21] We agree with the trial court's conclusion that the third element of judicial estoppel is satisfied.[22]

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[21] The bankruptcy court need not "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 at 210 (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)." (*Hamilton, supra,* 270 F.3d at p. 784.)

[22] PDTW argues in the companion appeal that the trustee "clearly" knew about the potential claims against defendants because it assigned those litigation rights to PDTW in the settlement. That argument misconstrues the record: the settlement agreement in the adversary action did not specify any contemplated malpractice claim by PDTW against defendants; it merely stated that the trustee assigned PDTW's unspecified "litigation rights" on an "AS-IS, WHERE-IS BASIS" to Thomas. And in any event, even if the trustee was aware of PDTW's potential claims against defendants, that does not excuse PDTW's failure to file a supplemental disclosure identifying the precise causes of action, the nature of the claims, and the amounts requested. (See Official Form 206A/B, § 74; *Hamilton, supra,* 270 F.3d at p. 784 [trustee's alleged awareness of debtor's claims was "insufficient to escape judicial estoppel" because 11 U.S.C. § 521(1) expressly

The final element of judicial estoppel—that the litigant's position was not taken as a result of ignorance, fraud, or mistake—is also satisfied. PDTW's 99.5 percent owner, Thomas, was aware of PDTW's potential claims against defendants while PDTW's bankruptcy case was pending and before PDTW settled the adversary claim, as evidenced by the multiple malpractice lawsuits she filed in Los Angeles County Superior Court asserting similar claims against the same defendants. Thomas filed the First Malpractice Action for legal malpractice, fraud, unfair business practices, defamation, and related claims against the Schnider Defendants and the Kring & Chung Defendants in October 2017, while the bankruptcy was pending. Thomas and TWH filed the Second Malpractice Action against the Kring & Chung Defendants, the Greenberg Defendants, and the KFP Defendants in November 2018, again while the bankruptcy was pending.

Thus, Thomas knew about PDTW's potential claims against defendants while PTDW's bankruptcy was pending, and as PDTW's 99.5 percent owner, her knowledge was imputed to PDTW. Despite this knowledge, PDTW neglected to file a supplemental schedule in the bankruptcy case disclosing its anticipated claims against defendants. The fifth element required for judicial estoppel is present.[23]

For these reasons, we conclude PDTW is judicially estopped from pursuing those nondisclosed claims in the present action against the Greenberg Defendants, the

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required debtor to supplement his schedules, and because "both the court and [the debtor's] creditors base their actions on the disclosure statements and schedules"].)

[23] According to PDTW, the fifth element of judicial estoppel cannot be met here because PDTW's complaint in the Third Malpractice Action contains multiple causes of action for fraud. PDTW apparently misunderstands this element. The relevant question is not whether the plaintiff is bringing a claim for fraud in the pending action; it is whether the plaintiff took an inconsistent position in the earlier action as a result of fraud (or ignorance or mistake). PDTW has never argued that it failed to disclose its claims against defendants as a result of any ignorance, fraud, or mistake.

Schnider Defendants, and the KFP Defendants.[24] Because we affirm the judgments on judicial estoppel grounds, we need not address the other arguments raised by PDTW, such as the statute of limitations or collateral estoppel.

3. *Leave to Amend*

PDTW contends the trial court should have granted leave to amend the complaint. We cannot agree.

"'To determine whether the trial court should, in sustaining the demurrer, have granted plaintiff leave to amend, we consider whether on the pleaded and noticeable facts there is a reasonable possibility of an amendment that would cure the complaint's legal defect or defects.' [Citation.] "'The burden of proving such reasonable possibility is squarely on the plaintiff.'"" (*Nealy, supra,* 54 Cal.App.5th at p. 600.)

"[W]e review a decision not to grant further leave to amend for an abuse of discretion." (*Nealy, supra,* 54 Cal.App.5th at p. 600.) "Ordinarily, 'it is an abuse of discretion to sustain a demurrer without leave to amend if the plaintiff shows there is a reasonable possibility any defect identified by the defendant can be cured by amendment.'" (*Id.* at p. 608.) However, if the complaint shows on its face that it is incapable of amendment, and if there is no possibility of alleging facts under which

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[24] We recognize that the trial court only invoked judicial estoppel in sustaining the demurrers by the Kring & Chung Defendants and the Greenberg Defendants; it did not invoke the doctrine in sustaining the demurrers by the Schnider Defendants or the KFP Defendants, instead sustaining those demurrers based on the statute of limitations and collateral estoppel. There is no reason, however, why judicial estoppel should not apply equally to PDTW's claims against all defendants. As appellant, PDTW had ""the burden of . . . overcoming all of the legal grounds on which the trial court sustained the demurrer,"" and ""[w]e will affirm if there is any ground on which the demurrer can properly be sustained, whether or not the trial court relied on proper grounds or the defendant asserted a proper ground in the trial court proceedings."" (*Kahan, supra*, 35 Cal.App.5th at p. 730.) Accordingly, we affirm all the judgments against PDTW.

recovery can be obtained, denial of leave to amend is appropriate. (*Eghtesad v. State Farm General Ins. Co.* (2020) 51 Cal.App.5th 406, 411-412.)

PDTW has failed to explain how the complaint could have been amended to avoid the fatal defects described above. The trial court did not abuse its discretion in sustaining the demurrers without leave to amend.

4. *Judicial Bias*

PDTW insists that the trial judge was biased against it. Accusing a judge of bias is usually the dying gasp of a losing litigant. And so it is here. We have thoroughly examined the record, and we see no evidence of bias on the part of Judge Claster. To the contrary, we commend him for his lengthy and thoughtful rulings, which demonstrate that he applied considerable judicial acumen to a very complex case.

We remind PDTW's counsel of his duty to "maintain the respect due to the courts of justice and judicial officers." (Bus. & Prof. Code, § 6068, subd. (b).) Both in the proceedings below and now on appeal, attorney Biller has used demeaning, insulting, and inappropriate language in reference to the trial judge. In a declaration filed below, attorney Biller described Judge Claster as "my worst enemy." In his opening brief in this court, he described the trial court's order as "'creative writing'" rife with "fabricated statements"; he argued that Judge Claster acted with "zeal to misapply" the law and that his ruling was "embarrassing to the Judiciary." He also accused Judge Claster of being "a danger to the public" and of "legislating law to help himself and his friends."

Attacks on a trial judge's character are never well received in this court. As a widely read treatise on appellate practice advises, "[H]yperbole, exaggeration, belligerence, disrespect, and arguments belittling your opponent, the trial judge or the appellate court do nothing to advance your client's position; quite the contrary, a shrill and abusive tone is more likely to diminish the persuasive force of your brief and ultimately injure your client's case." (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2021) ¶ 9:29.) This is especially true of attacks on the trial

court. "Disparaging the trial judge is a tactic that is not taken lightly by a reviewing court. Counsel better make sure he or she has the facts right before venturing into such dangerous territory because it is contemptuous for an attorney to make the unsupported assertion that the judge was 'act[ing] out of bias toward a party.'" (*In re S.C.* (2006) 138 Cal.App.4th 396, 422.) Attorney Biller's briefing places him squarely in the heart of this dangerous territory. We caution him that such conduct in a future case may subject him to sanctions harsher than the current admonition.

DISPOSITION

The judgments are affirmed. Respondents shall recover their costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1).)

GOETHALS, J.

WE CONCUR:

O'LEARY, P. J.

ZELON, J.*

*Retired Justice of the Court of Appeal, Second Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.