Case No. 15-3265

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

DANTE A.R. COMBS and ADAM S. WILLIAMS,
Appellants,

vs.

THE CORDISH COMPANIES, *et alia*,
Appellees.

Appeal from the U.S. District Court
for the Western District of Missouri
Honorable Ortrie D. Smith, District Judge
Case No. 4:14-cv-00227

REPLY BRIEF OF THE APPELLANTS

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I. The district court erred in holding Mr. Combs was judicially estopped from bringing his claims.

In the first issue in the appellants' opening brief, Appellant Dante Combs explained that the district court erred in holding him judicially estopped from bringing his claims against the defendants for having failed to list them as "assets" in a Kansas Chapter 7 bankruptcy in April 2011 (Brief of the Appellants ("Aplt.Br.") 30-47).

This was because the only one of the claims that occurred ***before*** he filed the bankruptcy petition was Appellant Adam Williams's, not his, and, as the other two occurred ***after*** the petition, they did not legally qualify as "assets" (Aplt.Br.37-40). As well, even if he somehow had to list the claims, his failure was entirely mistaken and unknowing (Aplt.Br.41-44). Finally, regardless, there cannot have been an "acceptance of" the prior position or risk to judicial integrity within the meaning of *New Hampshire v. Maine*, 532 U.S. 742 (2001), because he was allowed to reopen and amend his bankruptcy to list the claims, upon which the trustee abandoned them to him (Aplt.Br.44-47).

Though the district court held Mr. Combs's claims against *all* defendants were estopped, Appellee First Response takes "no position" on this issue (Brief of Appellee First Response, Inc. ("F.R.Br.") 2 n.2). Instead, only Appellees Lounge KC, LLC, Entertainment Concepts Investors, LLC, Entertainment Consulting International, LLC, and the

Cordish Companies, Inc. ("the Cordish Defendants") respond (Brief of Cordish Defendants ("CordishBr.") 20-48). They argue:

- Applying judicial estoppel is reviewed only for abuse of discretion, without regard to its legal conclusions (CordishBr.19, 36);
- Mr. Combs cannot rely on the bankruptcy court's order reopening and amending the bankruptcy because it occurred (one day) after the summary judgment order below (CordishBr.31-32 n. 9,40);
- Mr. Combs did not preserve his argument that the claims did not qualify as "assets" in his bankruptcy (CordishBr.32-37);
- The bankruptcy court's reopening and amending is immaterial, as recently held in *Jones v. Bob Evans Farms, Inc.*, 811 F.3d 1030 (8th Cir. 2016) (CordishBr.40-42,44-46);
- Authorities on which Mr. Combs relied reversing a finding of judicial estoppel are distinguishable (CordishBr.42-43); and
- Mr. Combs consciously, purposefully omitted his claims against them in his bankruptcy in an effort to jilt his creditors (CordishBr.43-48).

The Cordish Defendants' arguments are without merit. Mr. Combs's claims against the defendants were not legally "assets." Even if they somehow were, he did not know he had to list them, and no harm was done as a result of his inadvertent failure. All facets of his argument are preserved, both the legal sufficiency of the district court's reasoning and the effect of his seeking to reopen and amend the bankruptcy properly are at issue, and *Jones* is entirely inapposite.

A. While a finding of judicial estoppel is reviewed for abuse of discretion, whether the district court properly applied the law in exercising its discretion is an important part of that review, and that question is reviewed de novo.

In his opening brief, Mr. Combs explained that, while application of judicial estoppel is reviewed for abuse of discretion – a "clear error of judgment … upon a weighing of the proper factors," whether the court based its discretionary "ruling on an erroneous view of the law" is a component of this, reviewed de novo (Aplt.Br.30) (quoting *Highmark, Inc. v. Allcare Health Mgmt. Sys., Inc.*, 134 S.Ct. 1744, 1748 n.2 (2014)).

Mr. Combs's first issue argues exactly that: the district court incorrectly concluded as a matter of law that his claims were "assets" that had to be reported; his failure to list them could not legally be tantamount to a knowing misrepresentation or fraud; and his proceedings to reopen and amend the bankruptcy obviated the *New Hampshire* factors as a matter of law. These arguments therefore are reviewed de novo.

In response, the Cordish Defendants ignore this entirely. They repeatedly invoke discretion, treating Mr. Combs's arguments as pure abuse-of-discretion review, as if a finding of judicial estoppel were essentially un-reversible (CordishBr.19, 36).

This is without merit. In *Stallings v. Hussmann Corp.*, despite holding that review of a summary judgment finding judicial estoppel was for abuse of discretion, the Court held it still required "a weighing

of the proper factors." 447 F.3d 1041, 1046-47 (8th Cir. 2006). The Court then weighed the *New Hampshire* factors for itself, determined that, indeed, the district court's conclusion was incorrect, and reversed. *Id.* at 1047-49.

This is the law of reviewing judicial estoppel everywhere: "abuse of discretion, … accepting the trial court's findings of fact unless they are clearly erroneous, and evaluat[ing] its answers to abstract questions of law de novo." *Knowlton v. Shaw*, 704 F.3d 1, 9-10 (1st Cir. 2013); *Milton H. Greene Archives, Inc. v. Marilyn Monroe LLC*, 692 F.3d 983, 992-93 (9th Cir. 2012).

B. Whether Mr. Combs's claims against the defendants were "assets" that had to be listed in his Chapter 7 bankruptcy is a question of law, and as a matter of law they were not.

In his opening brief, Mr. Combs explained that the first *New Hampshire* factor – his "later position [was] clearly inconsistent with his earlier position," 532 U.S. at 750 – cannot be met (Aplt.Br.37-40). This was because he cannot be faulted for failing to list his claims against the defendants as "assets" in his Chapter 7 bankruptcy petition for, as a matter of law, the only two incidents for which he could have a claim – the Mosaic and Tengo Incidents[1] – occurred *after* his bankruptcy petition (Aplt.Br.37-40).

[1] Mr. Combs conceded in his opening brief that he has no claim as to the Maker's Incident (Aplt.Br.39-40). The Cordish Defendants ignore this and continue to base their judicial estoppel argument on the fact that

In response, the Cordish Defendants initially argue this is not preserved because, "In his summary judgment opposition, [Mr.] Combs made no argument disputing that he had a legal obligation to disclose his discrimination claims" (CordishBr.33). This is untrue. Mr. Combs disputed entirely that he had to disclose the claims or that this in any way should estop him (Aplt.Appx.1405-06). Moreover, this is a purely legal issue that automatically is preserved.

"[W]hen the material facts" regarding a particular issue "are not in dispute" and instead the issue is "the interpretation of a purely legal question," it need not be stated below, especially where the district court decided the issue. *White Consol. Indus., Inc. v. McGill Mfg. Co.*, 165 F.3d 1185, 1189-90 (8th Cir. 1999) (citation omitted). Plainly, whether the claims qualified as "assets" was a purely legal question. It was uncontroverted that the Mosaic and Tengo Incidents occurred ***after*** Mr. Combs filed his bankruptcy petition, and that Mr. Combs did not list them in his bankruptcy petition (Aplt.Appx.1380,1385,1392-94).

Therefore, whether Mr. Combs's claims as to these two incidents qualified as "assets" was then and is now a pure question of law. As the summary judgment movants, the Cordish Defendants had to prove both that there was no genuine dispute of material fact *and* that they had the right to judgment as a matter of law. Fed. R. Civ. P. 56(c)(2).

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the Maker's Incident occurred before the bankruptcy petition (CordishBr.24,34).

Here, to prove their right to judgment as a matter of law on the basis of judicial estoppel, the Cordish Defendants had to prove the three *New Hampshire* factors. Whether they met this burden is reviewed *de novo*. *Torgerson v. City of Rochester*, 643 F.3d 1031, 1042 (8th Cir. 2011) (en banc). Thus, any issues of law in play remain reviewable de novo. *Id.*

In deciding the first two *New Hampshire* factors, the district court plainly treated Mr. Combs's claims for the Mosaic and Tengo Incidents as "assets" that he had to list in his bankruptcy petition (Aplt.Appx.1794-95). In his opening brief, Mr. Combs explained this was error as a matter of law: those claims did not occur until ***after*** his bankruptcy petition and thus could not legally qualify (Aplt.Br.37-40).

The Cordish Defendants concede that the Mosaic and Tengo Incidents occurred postpetition, but argue this does not matter, citing a variety of decisions (CordishBr.34-40). ***Each and every decision they cite*** to support this, however, either ***did not*** hold that a legal claim accruing post-petition must be listed as an asset, concerned only a cause of action that accrued pre-petition, or concerned a Chapter 13 proceeding, rather than a Chapter 7 proceeding as the Combses' was. *See*:

- *United States ex rel. Spicer v. Westbrook*, 751 F.3d 354, 362 (5th Cir. 2014) (did not concern whether a cause of action had to be listed, stated general rule that only "causes of action that the debtor could

have brought ***at the time of the bankruptcy petition***" are "property of the bankruptcy estate");

- *Brumfiel v. U.S. Bank*, 618 Fed.Appx. 933, 937 (10th Cir. 2015) (cause of action accrued pre-petition);
- *In re Coastal Plains*, 179 F.3d 197 (5th Cir. 1999) (same);
- *Stallings*, 447 F.3d at 1049 (Chapter 13 bankruptcy, failure to include cause of action that occurred postpetition led to no "unfair advantage" under *New Hampshire*; no analysis of whether claim qualified as "asset");
- *E.E.O.C. v. CRST Van Expedited, Inc.*, 679 F.3d 657, 677-80 (8th Cir. 2012) (causes of action accrued pre-petition; receiving "right to sue" letter from EEOC after filing petition did not change this);
- *Van Horn v. Martin*, 812 F.3d 1180, 1183 (8th Cir. 2016) (Chapter 13 proceeding, cause of action accrued during plan period);
- *Jones*, 811 F.3d at 1033 (Chapter 13 proceeding, cause of action accrued during plan period);
- *Aredese v. DCT*, 280 Fed.Appx. 691, 696 (10th Cir. 2008) (cause of action accrued pre-petition);
- *Autos, Inc. v. Gowin*, 244 Fed.Appx. 885, 891 (10th Cir. 2007) (Chapter 13 proceeding, cause of action accrued pre-petition, lawsuit was filed during plan period);
- *D'Antignac v. Deere & Co.*, 604 Fed.Appx. 875, 878 (11th Cir. 2015) (Chapter 13 proceeding, cause of action accrued during plan period);

- *Guay v. Burack*, 677 F.3d 10, 14 (1st Cir. 2012) (cause of action accrued before conversion of Chapter 11 bankruptcy to Chapter 7);
- *Moses v. Howard Univ. Hosp.*, 606 F.3d 789, 793 (D.C. Cir. 2010) (cause of action accrued and lawsuit was filed before filing of both Chapter 13 bankruptcy and subsequent Chapter 7 bankruptcy);
- *Robinson v. Tyson Foods, Inc.*, 595 F.3d 1269, 1274 (11th Cir. 2010) (Chapter 13 proceeding, cause of action accrued during plan period);
- *Jethroe v. Omnova Solutions, Inc.*, 412 F.3d 598, 600 (5th Cir. 2005) (Chapter 13 proceeding, cause of action accrued and lawsuit was filed pre-petition);
- *Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 784 (9th Cir. 2001) (cause of action accrued pre-petition); and
- *Tilley v. Anixter Inc.*, 332 B.R. 501, 507 (D.Conn. 2005) (same).

In short, the Cordish Defendants are unable to cite even a ***single*** decision from ***anywhere*** in the United States holding that a cause of action occurring entirely *after* filing a Chapter 7 bankruptcy petition is an "asset" that had to be listed, let alone one applying judicial estoppel to that cause of action as a result of the failure to list it.

Decisions involving Chapter 13 proceedings and causes of action accruing during the plan period are inapplicable. In a Chapter 13, during the plan period the debtor must "report to the trustee 'any events affecting disposable income,' specifically including lawsuits that were 'received or receivable' during the term of [the] plan …." *Jones*,

811 F.3d at 1031-32. Conversely, in a Chapter 7, the estate consists of "all legal or equitable interests of the debtor in property ***as of the commencement of the case***." 11 U.S.C. § 541(a)(1). Thus, to be an "asset" in a Chapter 7, a cause of action must be "sufficiently rooted in the pre-bankruptcy past and so little entangled with the bankrupt['s] ability to make an unencumbered fresh start." *Segal v. Rochelle*, 382 U.S. 375, 380 (1966).

This is due to the "difference between Chapter 13 (also Chapter 11) and Chapter 7:" "the difference between reorganization and liquidation." *Palomar v. First Am. Bank*, 722 F.3d 992, 995 (7th Cir. 2013). As Judge Posner explained in *Palomar*,

> In the [Chapter 7] bankruptcy the debtor surrenders his assets … and in exchange is relieved of his debts (with certain exceptions), thus giving him a "fresh start." But in a [Chapter 13] the assets are not sold … though ownership is transferred from the debtor to his creditors. Chapter 13 is only analogous to a reorganization; the debtor does not become a slave. But unlike what happens in a Chapter 7 …, his assets are not sold; instead he pays his creditors, over a three- or five-year period ….

Id.

Thus, as Mr. Combs explained in detail, at least certainly in the Tenth Circuit, where his bankruptcy court was located, if the events giving rise to the cause of action occur before filing of the bankruptcy petition ("prepetition"), it is an "asset" subject to listing in the petition and belongs to the estate, but if it occurs afterward ("postpetition"), it is

not (Aplt.Br.38) (citing *In re Parker*, 264 B.R. 685, 697 (B.A.P.10th Cir. 2001), *aff'd*, 313 F.3d 1267, 1269-70 (10th Cir. 2002)).

The Cordish Defendants do not address *Parker* ***at all***. This is because they cannot. In Mr. Combs's Chapter 7 bankruptcy filed in the Kansas bankruptcy court, the law was that his two post-petition claims against the defendants for the Mosaic and Tengo Incidents ***were not*** "assets" that he had to disclose. As a result, certainly the first *New Hampshire* factor could not have been met (Aplt.Br.37-40), and the third could not have, either. *Stallings*, 447 F.3d at 1049.

C. That the bankruptcy court did not issue its decision reopening and amending Mr. Combs's bankruptcy petition until the day after the district court's summary judgment order is immaterial.

In his opening brief, Mr. Combs explained that, because the bankruptcy court ultimately allowed him to reopen and amend his petition to disclose his claims against the defendants, which the trustee then abandoned to him, the second and third *New Hampshire* factors – accepting an inconsistent position and obtaining an unfair advantage – were obviated (Aplt.Br.44-47).

In response, the Cordish Defendants concede that this happened but argue Mr. Combs cannot rely on the bankruptcy court's reopening and amending the bankruptcy because it occurred (one day) after the district court's summary judgment order (CordishBr.31-32 n. 9,40). But it was plain at the time Mr. Combs responded to summary judgment

that he *was* seeking this relief (Aplt.Appx.1393-94,1405-06,1453-66). He attached to his summary judgment opposition the motions he had filed in the bankruptcy court (Aplt.Appx.1453-66). Indeed, the Cordish Defendants had notice of and attempted to participate in those proceedings (Aplt.Appx.1827-29).

Plainly, the district court knew this, too, and was following the bankruptcy proceedings. In its summary judgment order, filed June 15, 2015, the court remarked on Mr. "Combs's pending motion to reopen his bankruptcy" (Aplt.Appx.1793). It cited a document filed in the bankruptcy by its CM/ECF number (Aplt.Appx.1792). It laid out of a timeline including proceedings in the bankruptcy case that occurred after Mr. Combs's summary judgment response was filed and noted a "hearing was held in the Bankruptcy Court on June 5" on Mr. Combs's motion to reopen and amend the bankruptcy (Aplt.Appx.1792,1796-97).

Obviously, the district court was following the bankruptcy proceedings on PACER. It knew, then, that, at the hearing on June 5, 2015, the bankruptcy court had promised a ruling within the next week or so (Aplt.Appx.1961,1966). Without waiting, however, the district court went ahead and entered summary judgment for the defendants on June 15 (Aplt.Appx.1781). ***One single day later***, on June 16, the bankruptcy court issued its decision (Aplt.Appx.1979,1981). As a result, Mr. Combs then urged the district court to take that decision into account (Aplt.Appx.1806,1808-13).

Under these circumstances, that the bankruptcy court had not reached its actual decision until one single day after the district court's summary judgment order is immaterial. At the time of summary judgment, Mr. Combs *had* sought to reopen the bankruptcy, *had* sought to amend his original bankruptcy petition, *had* undergone the hearing for it, and the trustee *had* stated he would abandon the claims. The *only* piece of the puzzle left was the bankruptcy court's decision itself.

It is well-established that this Court "may avail itself of authentic evidence … of matters occurring since the decree of a trial court when such course is necessary …." *Schevenell v. Blackwood*, 35 F.2d 421, 423 (8th Cir. 1929) (citation omitted). This is especially true when, as here, the matter is "filings or developments in related proceedings which take place after the judgment appealed from," of which this Court may "take judicial notice …." *Werner v. Werner*, 267 F.3d 288, 295 (3d Cir. 2001).

More importantly, though, the bankruptcy court's decision in and of itself was not *ipso facto* necessary for Mr. Combs's arguments about the effect of reopening and amending the bankruptcy – either below or in this Court. At the time the district court entered its summary judgment order, it was a contingent, open question whether the bankruptcy court *would* grant leave to reopen and amend.

The point is that the mere act of Mr. Combs seeking to reopen and amend his bankruptcy, pending at the time of summary judgment, affects the *New Hampshire* factors if it *were* granted. If the bankruptcy

court allowed this, which the Cordish Defendants concede it did, judicial estoppel would be particularly inapplicable. *Stallings*, 447 F.3d at 1048. It would mean that two of the three *New Hampshire* factors could not be met. *Ah Quin v. Cnty. of Kauai Dept. of Transp.*, 733 F.3d 267, 272-74 (9th Cir. 2013).

Essentially, the Cordish Defendants concede Mr. Combs took the steps necessary to reopen and amend his bankruptcy to meet their concerns and concede it was successful, but waive it away because the district court played "Gotcha!" and entered summary judgment one day before the bankruptcy court's order. This is of no effect. The bankruptcy court's ruling is an undisputed "adjudicative fact … capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." *Werner*, 267 F.3d at 295 (citing Fed. R. Evid. 201(b)). It properly is before the Court.

D. *Jones v. Bob Evans Farms* is inapposite and does not support the district court's application of judicial estoppel.

The Cordish Defendants also argue that, per this Court's recent decision in *Jones*, 811 F.3d at 1030, the bankruptcy court's decision to reopen Mr. Combs's bankruptcy and amend his petition to include the claims against the defendants is of no consequence (CordishBr.32,41-42,44-46). Indeed, they rely on *Jones* for a great many of their arguments (CordishBr.22-26,37).

The Cordish Defendants' reliance on *Jones* is misplaced. The facts of *Jones* are entirely inapposite to this case. First, as noted *supra* at 7, *Jones* concerned a Chapter 13 bankruptcy, not a Chapter 7. *Id.* at 1031. In its order confirming the plaintiff's Chapter 13 reorganization plan, the bankruptcy court expressly required him "to report to the trustee 'any events affecting disposable income,' specifically including lawsuits that were 'received or receivable' during the term of their plan, which would not exceed five years." *Id.* at 1031-32.

During the plan period, the plaintiff was fired from his employment and filed a charge of discrimination with the EEOC. *Id.* at 1032. Still within the plan period, he received a "right to sue" letter. *Id.* Still within the plan period, he sued the employer for discrimination. *Id.* At no point, though, did he report any of this to the bankruptcy trustee. *Id.* While the lawsuit was ongoing, the plan period ended and the bankruptcy court terminated the bankruptcy and discharged the plaintiff's unsecured debts. *Id.*

The district court in the employment discrimination lawsuit held the plaintiff's claims were judicially estopped. *Id.* *Only then*, ***after*** the district court's order, did the plaintiff move the bankruptcy court to reopen the bankruptcy estate and amend his schedules, which was granted. *Id.* The plaintiff then sought relief from the district court's judgment on the basis that he had "cured" his longtime failure to disclose during the plan period, which the district court denied. *Id.*

This Court affirmed. It held that, in the Chapter 13 context, a post-petition cause of action that accrues during the plan period must be disclosed to the trustee, as the plaintiff expressly was required to do, and the plaintiff failed to do this over a long period of years, meeting the first *New Hampshire* factor. *Id.* at 1033. The second factor was met because, after the claims had accrued during the plan period without disclosure, the bankruptcy court discharged the plaintiff's debts. *Id.*

Finally, the third factor was met because of the particular circumstances of that case: receiving a right to sue letter during the plan period of a Chapter 13 bankruptcy and failing to disclose it as ordered, showing a motive to conceal his employment discrimination claims. *Id.* at 1034. Moreover, the plaintiff "knew he had to disclose pending legal claims because the trustee had previously moved to deny plan confirmation after he failed to include [his wife's] workers compensation claim." *Id.*

Plainly, nothing remotely like in *Jones* happened here. Mr. Combs's bankruptcy was a Chapter 7 proceeding, not Chapter 13, a decisive distinction. *Supra* at 8-10. The Mosaic and Tengo Incidents occurred after he filed his bankruptcy, and thus did not belong to the bankruptcy estate. 11 U.S.C. § 541(a)(1); *supra* at 9-10. His Chapter 7 bankruptcy was closed in only a handful of months, there were no "pending legal claims" during that time, *Jones*, 811 F.3d at 1034, and he brought his claims against the defendants some *three years* later.

More importantly, *no evidence* shows Mr. Combs in any way "knew he had to disclose" his claims against the defendants – which had not even yet occurred – at the time he filed his Chapter 7 bankruptcy petition. *Id.* In *Jones*, the only reason the Court found so was the express statement in the confirmation order about disclosing "lawsuits" and that the plaintiff already had seen the consequences of his failure to disclose his wife's worker's compensation claim. *Id.* Conversely, here, Mr. Combs's bankruptcy was a run-of-the-mill Chapter 7 proceeding, with no plan period, which was filed before the Mosaic and Tengo Incidents occurred, and was quickly disposed of (Aplt.Appx.667,718,1392,1394).

Only years later did Mr. Combs learn that what had happened to him in the postpetition Mosaic and Tengo Incidents was part of the defendants' far larger segregationist scheme to prevent African-American men from patronizing the LiveBlock (Aplt.Appx.1448,1465-66). During a deposition, he voluntarily and without hesitation disclosed that he had filed the bankruptcy back in 2011 (Aplt.Appx.1091). The Cordish Defendants' judicial estoppel arguments stem from discovering the bankruptcy through that open admission.

In *Jones*, the plaintiff waited until *after* the district court had found him judicially estopped to seek to reopen and amend his bankruptcy. 811 F.3d at 1032. Conversely, here, immediately upon receiving the Cordish Defendants' summary judgment motion, Mr.

Combs, while still explaining that his failure to disclose the claims had been unknowing, inadvertent, and, if anything, a mistake, quickly sought to remedy any possible problem by reopening the bankruptcy and amending his schedules (Aplt.Appx.1453,1465-66).

Plainly, this case is completely unlike *Jones*. Unlike in *Jones*, Mr. Combs's bankruptcy was under Chapter 7, not Chapter 13. Unlike in *Jones*, the Mosaic and Tengo Incidents occurred ***after*** the date on which property became part of the bankruptcy estate, not during a period when the estate's contents were still open. Unlike in *Jones*, nothing occurred in the bankruptcy to make Mr. Combs remotely think the incidents he had experienced were "assets." Unlike in *Jones*, after volunteering the bankruptcy and discovering the Cordish Defendants were considering his claims "assets," Mr. Combs ***immediately*** sought to rectify the situation, which ultimately was successful.

As a result, *Jones* is inapposite, and the Cordish Defendants' reliance on it is misplaced. Mr. Combs's postpetition claims as to the Mosaic and Tengo Incidents were not Chapter 7 "assets" under 11 U.S.C. § 541(a)(1) (Aplt.Br.37-40). Any failure to list them certainly was not "tantamount to a knowing misrepresentation or even fraud on the court." *Total Petroleum, Inc. v. Davis*, 822 F.2d 734, 737 n.6 (8th Cir. 1987) (Aplt.Br.41-44). In any case, Mr. Combs timely and properly amended his bankruptcy schedules to include those claims, after which they were abandoned to him, curing any problems (Aplt.Br.44-47).

E. The authorities on which Mr. Combs relied in his opening brief support that the district court erred in holding he was judicially estopped.

In his opening brief, Mr. Combs discussed a variety of authorities reversing findings of judicial estoppel in truly like situations (Aplt.Br.34-36,44). The Cordish Defendants argue that all of them are distinguishable, primarily on the notion that, in each, either the plaintiff sought to amend the bankruptcy petition *before* a defendant sought summary judgment, or the decision relied on some other factor (CordishBr.42-43).

The Cordish Defendants misread these decisions. *See*:

- *Stallings*, 447 F.3d at 1048-49: the Cordish Defendants argue that "quoted snippets" show a debtor can be estopped (CordishBr.42). While the Court did indeed hold that this may be true, it reversed the district court's finding in part because the facts resulting in the plaintiff's FMLA claim occurred ***after*** she filed her Chapter 7 petition, and thus the third *New Hampshire* factor could not be met.
- *Ah Quin*, 733 F.3d at 274-77: the Cordish Defendants argue *Ah Quin* is distinguishable because the plaintiff moved to reopen and amend the bankruptcy before the defendant moved for summary judgment. While that is true, the plaintiff's motion in *Ah Quin* came ***after*** the defendant notified the plaintiff it ***would*** seek to dismiss the lawsuit on the basis of judicial estoppel. There is no functional difference between *Ah Quin* and this case.

- *Spaine v. Cmty. Contacts, Inc.*, 756 F.3d 542, 546-48 (7th Cir. 2014): the Cordish Defendants argue that the "plaintiff had disclosed the discrimination claim to the bankruptcy court during the original bankruptcy." This is untrue. Just as in this case, ***after*** the bankruptcy was discharged, the plaintiff in *Spaine* did not seek to reopen it or amend its schedules until ***after*** the defendant sought summary judgment.
- *Ajaka v. Brooksamerica Mortg. Corp.*, 453 F.3d 1339, 1344-46 (11th Cir. 2006): the Cordish Defendants make the same argument as with *Spaine*. But the Eleventh Circuit *actually* held that the question was the plaintiff's *intent*, and this was subject to "a question of material fact," requiring reversal of summary judgment. There is no reason the same should not be true here.
- *Eubanks v. CBSK Fin. Group, Inc.*, 385 F.3d 894, 898-99 (6th Cir. 2004): the Cordish Defendants again make the same argument as with *Spaine* and *Ajaka*. This is untrue. The *Eubanks* claim occurred prepetition, was in the process of being filed as a lawsuit at the time the petition was filed, and the Chapter 7 bankruptcy was not amended to include it until after discharge.
- *Brooks v. Beatty*, 25 F.3d 1037 (Table), 1994 WL 224160 at *2-3 (1st Cir. 1994):[2] the Cordish Defendants argue that *Brooks* predates *New*

[2] The Cordish Defendants also disparage *Brooks* as being an "unpublished decision" (CordishBr.43), but do not explain how that

Hampshire. But they do not explain how that makes a difference. The timeline mirrors that here: the bankruptcy was filed, the claim occurred, the claim was not disclosed in the bankruptcy, the bankruptcy was discharged, the defendant moved for summary judgment arguing judicial estoppel, and the plaintiff reopened and amended the bankruptcy. The First Circuit reversed the summary judgment.

That the Cordish Defendants are unable to cite even ***one*** decision supporting judicial estoppel in a like circumstance to this case is unsurprising. In this case, like all these others, applying judicial estoppel does nothing to foster judicial integrity. Mr. Combs suffered two incidents of racial discrimination after filing a routine Chapter 7 bankruptcy. As he testified, he did not believe "filing a lawsuit was worth the trouble," and thought little more of it (Aplt.Appx.1169,1448). Years later, after discovering exactly the scheme by which the defendants had victimized him and that it went much further than simple discrimination, he decided it was very important that he file a lawsuit (Aplt.Appx.1448,1465-66). Immediately upon then discovering that the defendants sought to use his "failure" to list the claims as

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makes any difference. They, too, rely on a number of unpublished decisions throughout their brief (CordishBr.35 n.10,38-39,44,55) (citing *Brumfiel*, 618 Fed.Appx. at 937; *Aredese*, 280 Fed.Appx. at 696; *Autos*, 244 Fed.Appx. at 891; *D'Antignac*, 604 Fed.Appx. at 878; *Dunaway v. Cowboys Nightlife, Inc.*, 436 Fed.Appx. 386 (5th Cir. 2011)).

"assets" in the bankruptcy back in 2011 against him, he successfully sought to reopen and amend the bankruptcy.

The law of the United States is and must be that this does not amount to judicial estoppel. There was no inconsistency between the bankruptcy and this case because Mr. Combs's claims as to the Mosaic and Tengo Incidents were not then "assets." Even if they somehow were, his failure to list them was inadvertent, or at least there is a genuine dispute of material fact as to this. And in any case, Mr. Combs reopened and amended the bankruptcy, and thus the bankruptcy court did not accept his initial position and he obtained no unfair advantage.

Upholding the district court's judicial estoppel holding here would make "the only 'winner'" the defendants, the "bad actor in [this] estopped lawsuit." *Ah Quin*, 733 F.3d 272. Plainly, viewing the evidence in a light most favorable to the plaintiffs, the defendants instigated a pervasive racially segregationist scheme of which the plaintiffs were victims. The Court should not apply the inapplicable doctrine of "judicial estoppel" to let them get away with it.

II. The district court erred in granting the defendants summary judgment on the merits of the plaintiffs' claims under 42 U.S.C. § 1981.

In their second issue on appeal, the plaintiffs explained that the district court also erred in granting the defendants summary judgment on the merits of their claims under 42 U.S.C. § 1981 as to the three incidents of racial discrimination they suffered at the defendants' hands: the Maker's Incident (involving Mr. Williams and Cordish/ECI) and the Mosaic and Tengo Incidents (both involving Mr. Combs, First Response, and the Cordish Defendants) (Aplt.Br.48-63).

This was because, viewed in a light most favorable to the plaintiffs, the evidence established that, in each incident, the plaintiffs were members of a protected class and the defendants interfered with their ability to make and enforce contracts due to discriminatory intent against that class (Aplt.Br.52-63).

Viewing the evidence in a light most favorable to the non-movant means that "at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge …." *Id.* at 255. Thus, whereas the "evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor," *id.* the Court "must disregard all evidence favorable to the

moving party that the jury is not required to believe." *Reeves v. Sanderson Plumbing*, 530 U.S. 133, 151 (2000).

In response, the defendants, like the district court, entirely fail to obey this standard. Indeed, First Response largely bases its argument as to the Mosaic Incident on taking a factual dispute about when it occurred – either in 2010 or 2011 – and using only the fact in *its* favor: 2010 and not 2011, because it was not providing security services in the District in 2010 (F.R.Br.15-16). But Mr. Combs plainly testified that, while he could not be sure of the exact date of this incident, it occurred in the summer of 2011 (Aplt.Appx.1137). As a result, a jury could believe this and, for summary judgment purposes, it is this date that must be taken as true and any contrary date ignored.

Both defendants also ***entirely*** ignore the incredible volume of direct testimony, often couched in shocking, racist terms, that Cordish/ECI devised and implemented a massive, pervasive, racially-segregationist scheme to exclude African-American men from patronizing the LiveBlock, and First Response knowingly was complicit in executing it (Aplt.Br.6-15). As a jury could choose to believe this evidence and disbelieve any self-serving contrary testimony of the defendants' officers and agents, this Court thus must take it as true.

Indeed, First Response pooh-poohs the testimony *of its own officer*, Lisa O'Brien, that she ***burned*** its security logs for the LiveBlock from 2011 and 2012 ***specifically because*** "the numbers of blacks we eject"

"wouldn't look good" (F.R.Br.35-39;Aplt.Appx.788). It argues that this merely was done "in the ordinary course" of business (F.R.Br.35-39).

While that (arguably) is one explanation in her testimony, she *also* testified that she did this because she knew the number of African-Americans First Response ejected from the LiveBlock was disproportionate. A jury could believe *that* explanation and disbelieve her other. Moreover, First Response ignores the testimony of Glen Cusimano, Thomas Alexitch, and Garron Williams – which a jury also could believe – that it obeyed Cordish/ECI's orders to exclude blacks from the LiveBlock with full knowledge of the racist intent (Aplt.Br.7-13).

Given how § 1981 claims are decided, the overwhelming evidence of the existence of the defendants' intentionally racist scheme is vital. In a § 1981 proceeding, "[t]he order and allocation of proof set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-06" (1973) for Title VII proceedings apply. *Wilmington v. J.I. Case Co.*, 793 F.2d 909, 914 (8th Cir. 1986). Under that standard, "the plaintiff first must establish by a preponderance of the evidence a prima facie case of discrimination," "[t]he [defendant] then has the burden of articulating some legitimate, nondiscriminatory reason for its adverse treatment of the plaintiff," and finally "the plaintiff has the ultimate burden of proving that the [defendant]'s articulated reason was a pretext for discrimination." *Id.*

While this Court never has had occasion to apply this in the context of anything other than § 1981 employment discrimination, courts throughout America universally hold that this rubric equally applies in "disparate treatment" § 1981 cases like this one. *See Dunaway*, 436 Fed.Appx. at 389-90; *Christian v. Wal-Mart Stores, Inc.*, 252 F.3d 862, 869 (6th Cir. 2001); *Brown v. Am. Honda Motor Co., Inc.*, 939 F.2d 946, 949 (11th Cir. 1991).

Thus, to prove a prima facie case, the plaintiffs must show either "[d]irect evidence of discrimination," *Kim v. Nash Finch Co.*, 123 F.3d 1046, 1066 (8th Cir. 1997), or "an ongoing pattern of racial … discriminatory animus directly linked to" the defendants. *White v. Honeywell, Inc.*, 141 F.3d 1270, 1276 (8th Cir. 1998); *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 336 (1977) (to show pattern and practice of racial discrimination, evidence must "establish by a preponderance … that discrimination was the [defendant]'s standard operating procedure").

Unquestionably, viewing the evidence in a light most favorable to the plaintiffs, they established that here. In great detail, their evidence, both direct and circumstantial, shows that the Cordish Defendants and First Response intentionally and purposefully engaged in a pervasive, years-long, racist, segregationist scheme to prevent African-Americans from patronizing the LiveBlock, including through

the use of exactly the tactics used to exclude the plaintiffs in the three incidents here (Aplt.Br.6-15).

Plainly, this was both "[d]irect evidence of discrimination," *Kim*, 123 F.3d at 1066 ***and*** "an ongoing pattern of racial … discriminatory animus," *White*, 141 F.3d at 1276. It established "that discrimination" against African-American men seeking to patronize the LiveBlock was the defendants' "standard operating procedure." *Teamsters*, 431 U.S. at 336. As a result, the plaintiffs established a *prima facie* case of discrimination under § 1981, shifting the burden to the defendants to show legitimate, nondiscriminatory reasons for their individual actions against the defendants, which the plaintiffs then must show are pretextual. *Wilmington*, 793 F.2d at 914.

The defendants, however, do not argue any "legitimate, nondiscriminatory reasons" for their actions against the defendants. Instead, they simply contest that they could be liable in the first place. Viewing the evidence in a light most favorable to the plaintiffs, the defendants failed their burden under the *McDonnell Douglas* rubric.

In the Maker's incident, the Cordish Defendants argue solely that Cail Hendry was not a "rabbit" *because he* ***said*** *he was not*, and because they argue "rabbits" were not used in the LiveBlock until 2012, after the incident took place (CordishBr.50-51). First, as the Cordish Defendants recognize, the jury could disbelieve Mr. Hendry's self-serving testimony (CordishBr.50). Second, Mr. Hendry fit the physical

description of a "rabbit" and his actions fit those that "rabbits" took (Aplt.Br.11-13;Aplt.Appx.65,308,786-87). Third, Christina Martinez testified she had seen "rabbits" used throughout the district, including in 2011, and including at Maker's (Aplt.Appx.898-902). Finally, Glen Cusimano testified he learned at a Cordish-entity managers' meeting in Baltimore that the use of "rabbits" was a usual Cordish-entity tactic nationwide (Aplt.Appx.309,787).

From this evidence, it would not be "speculation" for a reasonable juror to conclude that Mr. Hendry was *lying* and, in fact, he was a "rabbit" working to exclude African-Americans at Cordish/ECI's behest. Rather, it would be a permissible inference from the overwhelming direct and circumstantial evidence of Cordish/ECI's discriminatory tactics and the particular circumstances of the incident, viewed in a light most favorable to the plaintiffs.

For the Mosaic Incident, First Response initially argues there is no proof that *its* security guards ejected Mr. Combs, because Mr. Combs only was assuming those guards were from First Response based on the color of the shirt they wore (F.R.Br.15-19).[3] But Mr. Combs testified the incident occurred in the summer of 2011 (Aplt.Appx.1137). First Response concedes that it "provided security services at the District … from December 31, 2010 to October 26, 2014," and its role included

[3] First Response does not contest its involvement in the Tengo Incident (F.R.Br.24-35).

"respond[ing] to calls for assistance concerning disturbances and altercations" (F.R.Br.5).

And there was a plethora of testimony – from Mr. Cusimano, Garron Williams, Ms. O'Brien, and others – that First Response was the ***primary*** security provider for the District and was directly complicit in Cordish/ECI's scheme to exclude African-American men from the LiveBlock, including being the primary entity whose personnel would eject them under pretext and as part of the "rabbit" scheme, and its officer, Ms. O'Brien, sought to destroy the evidence of this (Aplt.Appx.65,307-08,375,747,785-89,799,1424,1669-70,2081).

Plainly, regardless of the color of shirts, this was sufficient evidence, taken as true, from which a reasonable juror could infer that it was First Response's guards who ejected Mr. Combs after the Mosaic Incident due to his race, and entirely under the false pretext that he had been unruly (Aplt.Br.57-59).

For the Mosaic Incident, the Cordish Defendants mount hardly any counterargument, claiming in two pages at the end of their brief that Mr. Combs fails to explain how they should be held liable for the discrimination he suffered in the incident, comparing unearthing that to "pigs, hunting for truffles" (CordishBr.57-58) (quoting *Asarco, LLC. v. Union Pac. R.R. Co.*, 762 F.3d 744, 753 (8th Cir. 2014)). But the plaintiffs' brief explains in great detail exactly how the racially discriminatory actions taken against Mr. Combs in that incident were

the fruit of Cordish/ECI's longstanding segregationist policy, which they and their principals ordered on all establishments in the LiveBlock (Aplt.Br.6-15,57-59). The Cordish Defendants have no response besides an untenable "Nothing to see here, move along."

Finally, First Response argues as to both the Mosaic and Tengo Incidents, and the Cordish Defendants argue as to the Tengo Incident, that Mr. Combs cannot satisfy § 1981 because he either had not entered into a contract or was not seeking to enter into one at the time of the defendants' discriminatory actions (F.R.Br.19-35;CordishBr.54-58).

This is without merit. Both sets of defendants ignore that the LiveBlock itself was one large establishment, and to enter any of the individual bars or lounges inside of it, one first had to gain entrance to the LiveBlock itself, access which Cordish/ECI controlled and First Response enforced, and ejection from the LiveBlock precluded the ejectee from patronizing any bar within (Aplt.Br.4-5).

In their opening brief, the plaintiffs explained that, in the bar/restaurant context, *unlike* whatever the retail context may be, § 1981 liability lies when a defendant prevents the plaintiff from entering into a contract with the establishment, regardless of whether he yet had made a purchase, including if he had not yet entered the establishment (Aplt.Br.49-51). The defendants argue that this is untrue, and all the decisions the plaintiffs cited involved persons who already had entered the establishments at issue (F.R.Br.30-31;CordishBr.55-56 n.18).

The defendants have it wrong. *See, e.g.*, *Dunaway*, 436 Fed.Appx. at 387-88, 393-94 (§ 1981 granted relief to African-American men who had "attempted" to enter nightclub but were "refused entry" due to pretextual dress code). Here, in both incidents, Mr. Combs *already* was inside the LiveBlock and subject to Cordish/ECI/First Response's control of his ability to enter any establishment inside it.

In the Mosaic Incident, Lounge KC's agents, acting on longstanding orders of Cordish/ECI, initially racially discriminatorily prevented him from entering Mosaic under guise of a pretextual dress code. Then, First Response's guards, acting on the same longstanding orders, permanently racially discriminatorily prevented him from entering Mosaic by ejecting him from the LiveBlock entirely, under pretextual guise of a "disturbance." As a result, all defendants violated § 1981. *Dunaway*, 436 Fed.Appx. at 387-88.

In the Tengo Incident, a "rabbit" acting under longstanding Cordish/ECI racist policy caused a pretextual incident with Mr. Combs inside the LiveBlock as he was determining in which LiveBlock establishment his friends were, resulting in his pretextual ejection from the LiveBlock by First Response, preventing him from patronizing either Tengo (where his friends were) or any other establishment at they might have been. Again, all defendants violated § 1981. *Dunaway*, 436 Fed.Appx. at 387-88.

The defendants' arguments otherwise are without merit.

Conclusion

This Court should reverse the district court's judgment against Mr. Williams in favor of Cordish and ECI and its judgment against Mr. Combs in favor of all the defendants, and should remand this case for further proceedings.

Respectfully submitted,

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I further certify that the electronic copy of this Reply Brief of the Appellants filed via the Court's CM/ECF system is an exact, searchable PDF copy thereof, that it was scanned for viruses using Microsoft Security Essentials and, according to that program, that it is free of viruses.

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Certificate of Service

I certify that, on May 6, 2016, I electronically submitted the foregoing to the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit for review by using the CM/ECF system.

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