1367 (citing *New Hampshire*, 532 U.S. at 749). Thus, "[j]udicial estoppel is an equitable doctrine invoked at a court's discretion, designed to protect the integrity of the judicial process." *Stephens v. Tolbert*, 471 F.3d 1173, 1177 (11th Cir. 2006).

The adversary proceeding brought by the Trustee against Mr. and Mrs. Gosman and the adversary proceeding brought by the Trustee against Peabody occur within the same bankruptcy case–the bankruptcy case of Mr. Gosman. *See Educ. Credit Mgmt. Corp. v. Mersmann (In re Mersmann)*, 505 F.3d 1033, 1043 (10th Cir. 2007) ("An adversary proceeding is a subpart of a bankruptcy case that has all the trappings of civil litigation."); *In re Caldor Corp.*, 303 F.3d 161, 168-169 (2d Cir. 2002) (""Black's [Law Dictionary] indicates that a bankruptcy proceeding is a 'particular dispute or matter arising within a pending case–as opposed to the case as a whole.'"); *Cohen v. Bucci*, 905 F.2d 1111, 1112 (7th Cir. 1990) (stating that "[a]dversary proceedings in bankruptcy are not distinct pieces of litigation; they are components of a single bankruptcy case" and suggesting that law of the case may have applied but was not raised by the parties); *see also Martin v. Pahiakos (In re Martin)*, 490 F.3d 1272, 1275 (11th Cir. 2007) (stating that order is appealable if it resolves "a particular adversary proceeding or controversy rather than the entire bankruptcy litigation") (internal quotations omitted); *Christo v. Padgett*, 223 F.3d 1324, PIN (11th Cir. 1990) (in determining whether denial of remand was reviewable based on filing dates for "cases" in statute, court considered the filing date of bankruptcy petition, as opposed to the filing date of the civil case that was removed); *In re Terminal Cash Solutions, LLC*, 2007 WL 2774258, *1 (Bkrtcy. S.D. Fla. Sept. 23, 2007) ("a single bankruptcy case may have many different contested matters and adversary proceedings that are individually dealt with before the case is closed.") Therefore, for the purposes of

judicial estoppel, I consider the whether the doctrine should be applied to prevent the Trustee from prevailing in the prior adversary proceeding on an argument and then relying on a contradictory argument to prevail in a later adversary proceeding within the same bankruptcy case of Mr. Gosman. *See Allapattah Servs.*, 372 F.Supp. 2d at 1367.

In considering the flexible standard of the judicial estoppel doctrine, courts traditionally look at three factors: (1) whether a party's later position is clearly inconsistent with its earlier position; (2) whether a party succeeded in persuading a court to accept an earlier position, so that judicial acceptance of an inconsistent position creates the impression that either the first or the second court was misled; and (3) whether the party with an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped. *See, e.g., id.*; *Allapattah Servs.*, 372 F.Supp. 2d at 1367. The Supreme Court has held that this list of factors is not exhaustive, but rather, "in enumerating these factors, we do not establish inflexible pre-requisites or an exhaustive formula for determining the applicability of judicial estoppel. Additional considerations may inform the doctrine's application in specific factual contexts. *New Hampshire*, 532 U.S. at 750-51; *see Allapattah Servs.*, 372 F.Supp. 2d at 1368.

Under the law of this Circuit, "the doctrine of judicial estoppel is applied to the calculated assertion of sworn divergent positions, and is designed to prevent parties from making a mockery of justice by inconsistent pleadings." *Allapattah Servs.*, 372 F.Supp. 2d at 1367 (citing *Salomon Smith Barney, Inc. v. Harvey*, 260 F.3d 1302, 1308 (11th Cir. 2001). Pleadings are equivalent to sworn statements for the purposes of judicial estoppel. *See Allapattah Servs.*, 372 F.Supp. 2d at 1368, n.12 (finding that the Eleventh Circuit has recognized that by filing pleadings and later advocating positions consistent therewith, an

attorney makes representations to the court equivalent to an oath for purposes of judicial estoppel).

I find that the doctrine of judicial estoppel prevents the Trustee from arguing in the instant adversary proceeding that Peabody negligently failed to advise Gosman in connection with his transfers to Mrs. Gosman. First, the position the Trustee takes in this adversary proceeding against Peabody is inconsistent with the position the Trustee took in the prior adversary proceeding against Mr. and Mrs. Gosman. In the prior adversary proceeding, the Trustee succeeding in arguing to the Bankruptcy Court that Mr. Gosman had fraudulently transferred assets to Mrs. Gosman. Indeed, in the Third Amended Complaint for that adversary proceeding, the Trustee alleged that, "[a]t best, Gosman's counsel was no more than a 'rubber stamp' for a deal that had already been negotiated and drafted." Third Am. Compl. ¶ 77(b). The Trustee also alleged that "Gosman's counsel never independently inquired or investigated whether there were in fact any events of default under the 1996 Antenuptial Agreement. These are not the actions of an attorney that is zealously representing the interests of this client and, based upon the limited scope of the representation as conveyed by Gosman, this approach was clearly endorsed by and done with the approval of Gosman." Third Am. Compl. ¶ 77(a). Based on the allegations from the proceeding against Mr. and Mrs. Gosman[5], the Trustee's position in that phase of the litigation is clearly inconsistent with the position the Trustee takes in the proceeding before this Court.

Second, the Trustee succeeded in persuading the Bankruptcy Court that Mr.

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[5] More extensive quotations from the Third Amended Complaint in the adversary proceeding against Mr. and Mrs. Gosman are included in Part I of this Order.

Gosman had fraudulently transferred assets to Mrs. Gosman, and as reflected in the March 7, 2005 opinion by Judge Lessen, such a ruling requires a finding that Mr. Gosman intended to defraud creditors. After a trial, the Bankruptcy Court found that Mr. Gosman had fraudulently transferred his assets to Mrs. Gosman and voided the transfers. If this Court now accepted the Trustee's position that Mr. Gosman would not have transferred his assets to his wife if not for the advice of his lawyers, this would create the impression that either this Court or the Bankruptcy Court had been misled.

Third, the Trustee would derive an unfair benefit if allowed to take these inconsistent positions within the bankruptcy case of Mr. Gosman. The Trustee has already recovered the assets that were the subject of the fraudulent transfer proceeding, and the Trustee succeeded in convincing the Bankruptcy Court that Mr. Gosman intended to defraud his creditors. If the Trustee were to ultimately succeed in its proceeding against Peabody for malpractice, the Trustee would in effect be recovering twice in connection with the same transfers, by alleging opposite facts in two separate proceedings.

Therefore, I find that the three factors for judicial estoppel are met in this adversary proceeding. After considering those factors as well as all circumstances in the two adversary proceedings in the bankruptcy case of Mr. Gosman, I conclude that the Trustee is estopped from taking the position against Peabody that Mr. Gosman did not intend to defraud his creditors. The Trustee's allegations that Mr. Gosman would have acted differently if not for the advice of his lawyers are not consistent with Mr. Gosman's intent to defraud, and the Trustee is therefore barred from taking such a position. Therefore, I uphold the Bankruptcy Court's dismissal of Count I on this alternative ground.

In addition, I note that the allegations made by the Trustee in the adversary

proceeding against Mr. and Mrs. Gosman constitute judicial admissions in this adversary proceeding against Peabody. A party is bound by the admissions in its pleadings, and "judicial admissions are proof possessing the highest possible probative value. Indeed, facts judicially admitted are facts established not only beyond the need of evidence to prove them, but beyond the power of evidence to controvert them." *Best Canvas Prods. & Supplies, Inc. v. Ploof*, 713 F.2d 618, 621 (11th Cir. 1983).

Although "[n]ormally judicial admissions are binding for the purpose of the case in which the admissions are made, not in separate and subsequent cases," *Raiford v. Abney (In re Raiford)*, 695 F.2d 521, 523 (11th Cir. 1983), both of these adversary proceedings occur in the context of a single bankruptcy case–the bankruptcy of Mr. Gosman. *See In re Mersmann*, 505 F.3d at 1043; *In re Caldor Corp.*, 303 F.3d at 168-169; *Cohen*, 905 F.2d at 1112. Therefore, for the purposes of judicial admissions, the pleadings in the adversary proceeding against Mr. and Mrs. Gosman occurred within the same bankruptcy case–the bankruptcy of Mr. Gosman–as the adversary proceeding against Peabody. As such, the Trustee is bound by those judicial admissions and estopped from now taking a contrary position.

Therefore, based on the doctrines of *in pari delicto*, collateral estoppel, judicial estoppel and judicial admissions, I affirm the Bankruptcy Court's dismissal of the Trustee's claims against Peabody. Accordingly, it is hereby

ORDERED AND ADJUDGED that

1. The Order on appeal by the Bankruptcy Court is AFFIRMED.
2. This appeal is DISMISSED.
3. This case is CLOSED.

DONE AND ORDERED in Chambers in Miami, Florida this 10 day of December, 2007.

THE HONORABLE ALAN S. GOLD
UNITED STATES DISTRICT JUDGE

cc:
U.S. Magistrate Judge William C. Turnoff
All counsel of record