United States Bankruptcy Court
Central District of California
Santa Ana
Judge Erithe Smith, Presiding
Courtroom 5A Calendar

Thursday, August 13, 2020 **Hearing Room 5A**

10:00 AM
8:18-10727 Mark Douglas Holland **Chapter 13**

#1.00 CON'T'D Hearing RE: Motion for relief from the automatic stay [REAL PROPERTY]

U.S. BANK, NA

VS.

DEBTOR

FR: 7-16-20

Docket 67

Courtroom Deputy:

- NONE LISTED -

Tentative Ruling:

SPECIAL IMPORTANT NOTICE! In order to mitigate the spread of the COVID-19 virus, notice is hereby given that ALL hearings before Judge Smith will be by TELEPHONE APPEARANCE ONLY until further notice. The courtroom will be locked. Any party who wishes to appear must register in advance by contacting CourtCall at (866) 582-6878. It is suggested that parties register with CourtCall at least 30 minutes prior to the hearing. Through September 20, 2020, CourtCall is offering discounted registration for attorneys and free registration for parties without an attorney.

July 16, 2020

Grant motion with 4001(a)(3) relief.

Note: This matter appears to be uncontested. Accordingly, no court appearance by the Movant is required. Should an opposing party file a late opposition or appear at the hearing, the court will determine

10:00 AM
CONT... Mark Douglas Holland **Chapter 13**

whether further hearing is required and Movant will be so notified.

August 13, 2020

Grant with 4001(a)(3) waiver unless Movant has agreed to the terms of an adequate protection order or a further continuance. Available continued hearing dates are 8/20/20, 9/3/20, 9/10/20 and 9/17/20 at 10:00 a.m. A further continuance may be requested during the calendar roll call just prior to the hearing.

Party Information

Debtor(s):

Mark Douglas Holland	Represented By William P White

Movant(s):

U.S. Bank National Association	Represented By Eric P Enciso Sean C Ferry

Trustee(s):

Amrane (SA) Cohen (TR)	Pro Se

10:00 AM

8:19-12289 Douglas Paul Westfall and Jacqueline Ann Westfall **Chapter 13**

#2.00 CON'TD Hearing RE: Motion for relief from the automatic stay [REAL PROPERTY]

U.S. BANK NATIONAL ASSOCIATION

VS.

DEBTORS

FR: 7-16-20

Docket 44

Courtroom Deputy:

- NONE LISTED -

Tentative Ruling:

SPECIAL IMPORTANT NOTICE! In order to mitigate the spread of the COVID-19 virus, notice is hereby given that ALL hearings before Judge Smith will be by TELEPHONE APPEARANCE ONLY until further notice. The courtroom will be locked. Any party who wishes to appear must register in advance by contacting CourtCall at (866) 582-6878. It is suggested that parties register with CourtCall at least 30 minutes prior to the hearing. Through September 30, 2020, CourtCall is offering discounted registration for attorneys and free registration for parties without an attorney.

July 16, 2020

If Movant is agreeable, continue the hearing to August 13, 2020 at 10:00 a.m. to allow the parties to explore the possibility of an agreed adequate protection order.

10:00 AM

CONT... Douglas Paul Westfall and Jacqueline Ann Westfall **Chapter 13**

August 13, 2020

Grant with 4001(a)(3) waiver unless Movant has agreed to the terms of an adequate protection order or a further continuance. Available continued hearing dates are 8/20/20, 9/3/20, 9/10/20 and 9/17/20 at 10:00 a.m. A further continuance may be requested during the calendar roll call just prior to the hearing.

Note: If all parties accept the foregoing tentative ruling, appearances at this hearing are not required and Debtors will be deemed to have waived additional written notice of the continued hearing date and time.

Party Information

Debtor(s):

Douglas Paul Westfall	Represented By Don Emil Brand

Joint Debtor(s):

Jacqueline Ann Westfall	Represented By Don Emil Brand

Movant(s):

U.S. Bank National Association	Represented By Sean C Ferry

Trustee(s):

Amrane (SA) Cohen (TR)	Pro Se

10:00 AM
8:19-12841 Augusta Ayona **Chapter 13**

#3.00 CON'TD Hearing RE: Motion for relief from the automatic stay [REAL PROPERTY]

U.S. BANK NATIONAL ASSOCIATION

VS.

DEBTOR

FR: 7-16-20

Docket 46

Courtroom Deputy:

- NONE LISTED -

Tentative Ruling:

SPECIAL IMPORTANT NOTICE! In order to mitigate the spread of the COVID-19 virus, notice is hereby given that ALL hearings before Judge Smith will be by TELEPHONE APPEARANCE ONLY until further notice. The courtroom will be locked. Any party who wishes to appear must register in advance by contacting CourtCall at (866) 582-6878. It is suggested that parties register with CourtCall at least 30 minutes prior to the hearing. Through September 30, 2020, CourtCall is offering discounted registration for attorneys and free registration for parties without an attorney.

July 16, 2020

If Movant is agreeable, continue the hearing to August 13, 2020 at 10:00 a.m. to allow the parties to explore the possibility of an agreed adequate protection order.

10:00 AM
CONT... Augusta Ayona **Chapter 13**
August 13, 2020

Grant with 4001(a)(3) waiver unless Movant has agreed to the terms of an adequate protection order or a further continuance. Available continued hearing dates are 8/20/20, 9/3/20, 9/10/20 and 9/17/20 at 10:00 a.m. A further continuance may be requested during the calendar roll call just prior to the hearing.

Note: If all parties accept the foregoing tentative ruling, appearances at this hearing are not required and Debtors will be deemed to have waived additional written notice of the continued hearing date and time.

Party Information

Debtor(s):

Augusta Ayona	Represented By Jaime A Cuevas Jr.

Movant(s):

U.S. Bank National Association, as	Represented By Sean C Ferry

Trustee(s):

Amrane (SA) Cohen (TR)	Pro Se

10:00 AM
8:19-14426 Michael Alan Kohn **Chapter 13**

#4.00 CONT'D Hearing RE: Motion for relief from the automatic stay [REAL PROPERTY]

FIRST TECH FEDERAL CREDIT UNION

VS.

DEBTOR

FR 7-16-20

Docket 58

***** VACATED *** REASON: OFF CALENDAR: Order Granting Motion for Relief from the Automatic Stay (Settled by Stipulation) Entered 7/20/2020**

Courtroom Deputy:

OFF CALENDAR: Order Granting Motion for Relief from the Automatic Stay (Settled by Stipulation) Entered 7/20/2020 - td (8/4/2020)

Tentative Ruling:

SPECIAL IMPORTANT NOTICE! In order to mitigate the spread of the COVID-19 virus, notice is hereby given that ALL hearings before Judge Smith will be by TELEPHONE APPEARANCE ONLY until further notice. The courtroom will be locked. Any party who wishes to appear must register in advance by contacting CourtCall at (866) 582-6878. It is suggested that parties register with CourtCall at least 30 minutes prior to the hearing. Through August 31, 2020, CourtCall is offering discounted registration for attorneys and free registration for parties without an attorney.

July 16, 2020

If Movant is agreeable, continue the hearing to August 13, 2020 at 10:00 a.m. to allow the parties to explore the possibility of an agreed adequate protection order. If Movant does not agree to a continuance, grant the Motion without

10:00 AM

CONT... Michael Alan Kohn **Chapter 13**

4001(a)(3) waiver relief.

Note: If all parties accept the foregoing tentative ruling, appearances at this hearing are not required and Debtors will be deemed to have waived additional written notice of the continued hearing date and time.

Party Information

Debtor(s):

Michael Alan Kohn	Represented By Christopher J Langley

Movant(s):

First Tech Federal Credit Union	Represented By Heather Anderson Arnold L Graff

Trustee(s):

Amrane (SA) Cohen (TR)	Pro Se

10:00 AM
8:19-14528 Vishundyal Ramotar Mohabir **Chapter 13**

#5.00 CON'TD Hearing RE: Motion for relief from the automatic stay [REAL PROPERTY]

U.S. BANK, N.A.

VS.

DEBTOR

FR: 5-7-20; 6-18-20; 7-16-20

Docket 34

Courtroom Deputy:

- NONE LISTED -

Tentative Ruling:

SPECIAL IMPORTANT NOTICE! In order to mitigate the spread of the COVID-19 virus, notice is hereby given that, starting with the September 30, 2020 hearings, ALL hearings before Judge Smith will be by TELEPHONE APPEARANCE ONLY until further notice. The courtroom will be locked. Any party who wishes to appear must register in advance by contacting CourtCall at (866) 582-6878. It is suggested that parties register with CourtCall at least 30 minutes prior to the hearing. Through September 30, 2020, CourtCall is offering discounted registration for attorneys and free registration for parties without an attorney.

May 7, 2020

Grant motion with 4001(a)(3) waiver unless Debtor is postpetition current by the time of the hearing (in which case a standard "3 Strikes" adequate protection order will be granted) or if the parties have reached an alternate resolution. If more time is needed to reach resolution, Movant may request a continuance of the hearing at the time of the calendar roll call by the court clerk on the day of the hearing. Available continued dates are: 5/21, 6/4, 6/11

10:00 AM
CONT... Vishundyal Ramotar Mohabir **Chapter 13**

and 6/18/2020 at 10:00 a.m.

June 18, 2020

Grant with 4001(a)(3) waiver, unless there are on going discussions regarding the terms of an adequate protection order, in which case a request for a final continuance may be made during the calendar roll call prior to the hearing. Available dates are July 9, 2020 and July 16, 2020 at 10:00 a.m.

July 16, 2020

Grant motion with 4001(a)(3) waiver without prejudice to Movant submitting an agreed adequate protection order in lieu of an order granting immediatel relief from stay.

Note: If all parties accept the foregoing tentative ruling, appearances at this hearing are not required.

August 13, 2020

Grant with 4001(a)(3) waiver unless Movant has agreed to the terms of an adequate protection order or a further continuance. Available continued hearing dates are 8/20/20, 9/3/20, 9/10/20 and 9/17/20 at 10:00 a.m. A further continuance may be requested during the calendar roll call just prior to the hearing.

Note: If all parties accept the foregoing tentative ruling, appearances at this hearing are not required and Debtors will be deemed to have waived additional written notice of the continued hearing date and time.

Party Information

10:00 AM
CONT... Vishundyal Ramotar Mohabir **Chapter 13**

Debtor(s):

Vishundyal Ramotar Mohabir	Represented By Christopher J Langley

Movant(s):

U.S. Bank National Association	Represented By Sean C Ferry

Trustee(s):

Amrane (SA) Cohen (TR)	Pro Se

10:00 AM
8:20-10553 Heather Jane Andruss **Chapter 13**

#6.00 CON'TD Hearing RE: Motion for relief from the automatic stay [REAL PROPERTY]

SPECIALIZED LOAN SERVICING LLC

VS.

DEBTOR

FR: 7-16-20

Docket 37

Courtroom Deputy:

- NONE LISTED -

Tentative Ruling:

SPECIAL IMPORTANT NOTICE! In order to mitigate the spread of the COVID-19 virus, notice is hereby given that, starting with the March 19, 2020 hearings, ALL hearings before Judge Smith will be by TELEPHONE APPEARANCE ONLY until further notice. The courtroom will be locked. Any party who wishes to appear must register in advance by contacting CourtCall at (866) 582-6878. It is suggested that parties register with CourtCall at least 30 minutes prior to the hearing. Through September 30, 2020, CourtCall is offering discounted registration for attorneys and free registration for parties without an attorney.

July 16, 2020

If Movant is agreeable, continue the hearing to August 13, 2020 at 10:00 a.m. to allow the parties to explore the possibility of an agreed resolution. If Movant is not agreeable to a continuance, the motion will be granted without the waiver of 4001(b)(3).

Note: If all parties accept the foregoing tentative ruling, appearances at

10:00 AM
CONT... Heather Jane Andruss **Chapter 13**

this hearing are not required and Debtors will be deemed to have waived additional written notice of the continued hearing date and time.

August 13, 2020

Grant with 4001(a)(3) waiver unless Movant has agreed to the terms of an adequate protection order or a further continuance. Available continued hearing dates are 8/20/20, 9/3/20, 9/10/20 and 9/17/20 at 10:00 a.m. A further continuance may be requested during the calendar roll call just prior to the hearing.

Party Information

Debtor(s):

Heather Jane Andruss	Represented By Kevin Tang

Movant(s):

Specialized Loan Servicing LLC	Represented By Mukta Suri Kirsten Martinez

Trustee(s):

Amrane (SA) Cohen (TR)	Pro Se

10:00 AM
8:20-11977 SC Development Fund, LLC **Chapter 7**

#7.00 Hearing RE: Motion for relief from the automatic stay [REAL PROPERTY]

WILMINGTON SAVINGS FUND SOCIETY, FSB

VS.

DEBTOR

Docket 11

Courtroom Deputy:

- NONE LISTED -

Tentative Ruling:

SPECIAL IMPORTANT NOTICE! In order to mitigate the spread of the COVID-19 virus, notice is hereby given that, starting with the March 19, 2020 hearings, ALL hearings before Judge Smith will be by TELEPHONE APPEARANCE ONLY until further notice. The courtroom will be locked. Any party who wishes to appear must register in advance by contacting CourtCall at (866) 582-6878. It is suggested that parties register with CourtCall at least 30 minutes prior to the hearing. Through September 30, 2020, CourtCall is offering discounted registration for attorneys and free registration for parties without an attorney.

August 13, 2020

Deny the Motion without prejudice.

Basis for Tentative Ruling:

1. Service: A motion for relief from stay is a contested matter within the meaning of FRBP 9014 and, therefore, Debtor, a business entity, was required to be served in accordance with FRBP 7004(b)(3). The proof of service does not reflect service to the attention of an officer, managing or general agent, or other person authorized to accept service of process.

10:00 AM

CONT... SC Development Fund, LLC **Chapter 7**

Service on Debtor's attorney is insufficient unless the attorney has been authorized to accept such service of process.

2. LBR 9013-1(g)(4): This local rule provides that "new arguments or matters raised for the first time in reply documents *will not be considered.*" (emphasis added). Here, Movant has presented new arguments and evidence in its reply that could have and should have been presented within twenty-one days of the hearing and, in so doing, deprived the Trustee of the opportunity to respond.

For example, the email from the Rockport CRO re the condition of the property was sent on July 21, 2020, twenty-three days before the hearing and nine days before the Trustee's opposition was due. Movant could have either filed the new evidence within the regular 21-day service time or requested a continuance of the hearing. It did neither. Instead, Movant waited until the 7-day reply deadline to serve the new evidence. Even more egregious, Movant waited until August 11, 2020 (just two days before the hearing) to file and serve a second broker's exterior opinion prepared on August 6, 2020 that significantly contradicts the May 1, 2020 valuation attached to the Motion by nearly $4 million. Accordingly, the court will not consider the CRO email of July 21, 2020 and photos attached there or the broker's opinion/declaration filed August 11, 2020.

3. 362(d)(1): Without considering the late-filed evidence, Movant is left with its May 1, 2020 $6.58M valuation of the underlying real property and its 30% equity cushion. Adequate protection does not take into account junior liens as such liens do not affect the protection of the senior lienholder's interest. The 9th Circuit in *In re Mellor* cited with approval a case where a 10% equity cushion was held to be adequate. Further, there is no timely filed evidence that the property is declining in value and that Movant's equity cushion is insufficient to protect its interest from any decline.

4. 362(d)(2): This matter is nuanced by the fact that Debtor is a junior lienholder and has no ownership interest in the subject real property. A nuanced analysis is required. The question under 362(d)(2) is whether there is enough equity to reach the estate's lien interest. That is, if the value of the property exceeds the amount of Movant's secured claim, there is excess

10:00 AM

CONT... SC Development Fund, LLC **Chapter 7**

value for the estate's trust deed interest, even if only partially so. The court is not persuaded by the non-binding ruling in *In re A Partners LLC*, 344 BR 114 (Bankr.ED.Cal) that the the estate's junior lien interest is limited to state law remedies. The decision does not recognize that a chapter 7 trustee may monetize a junior lien interest by selling such interest to a willing buyer under 363(b) without curing the default of the senior lienholder or paying the claim of the senior lienholder at a foreclosure sale.

5. Additional observations: Though not germane to the disposition of the Motion, the court notes parenthetically that it appears from the Rockport docket that Movant has not moved for relief from stay in that case. The court is also aware that Judge Clarkson denied approval of the stipulation between the Trustee and the debtor in that case for the pursuit of a receiver in state court. However, such circumstances do not impact the court's decision regarding the Motion one way or the other.

Note: If all parties accept the foregoing tentative ruling, appearances at this hearing are not required.

Party Information

Debtor(s):

SC Development Fund, LLC	Represented By Keith S Dobbins

Movant(s):

Wilmington Savings Fund Society,	Represented By Lemuel Bryant Jaquez

Trustee(s):

Weneta M Kosmala (TR)	Represented By Beth Gaschen Jeffrey I Golden

10:00 AM
8:20-11173 Enrique Vergara **Chapter 7**

#7.10 CONT'D Motion for relief from the automatic stay [PERSONAL PROPERTY]

TOYOTA MOTOR CREDIT CORPORATION

VS.

DEBTOR

FR: 8-4-20, RM 5D

Docket 12

Courtroom Deputy:

- NONE LISTED -

Tentative Ruling:

SPECIAL IMPORTANT NOTICE! In order to mitigate the spread of the COVID-19 virus, notice is hereby given that, starting with the March 19, 2020 hearings, ALL hearings before Judge Smith will be by TELEPHONE APPEARANCE ONLY until further notice. The courtroom will be locked. Any party who wishes to appear must register in advance by contacting CourtCall at (866) 582-6878. It is suggested that parties register with CourtCall at least 30 minutes prior to the hearing. Through September 30, 2020, CourtCall is offering discounted registration for attorneys and free registration for parties without an attorney.

August 13, 2020

Grant with 4001(a)(3) waiver.

Note: This matter appears to be uncontested. Accordingly, no court appearance by the Movant is required. Should an opposing party file a late opposition or appear at the hearing, the court will determine whether further hearing is required and Movant will be so notified.

United States Bankruptcy Court
Central District of California
Santa Ana
Judge Erithe Smith, Presiding
Courtroom 5A Calendar

Thursday, August 13, 2020 **Hearing Room 5A**

10:00 AM
CONT... Enrique Vergara **Chapter 7**

Party Information

Debtor(s):

Enrique Vergara — Represented By Jacqueline D Serrao

Movant(s):

Toyota Motor Credit Corporation — Represented By Kirsten Martinez

Trustee(s):

Thomas H Casey (TR) — Pro Se

10:30 AM
8:20-10043 DzineSquare, Inc. **Chapter 7**

#7.20 CONT'D Hearing RE: Amended motion for entry of an order: Acknowledging rejection of the leases

FR: 8-4-20, Rm 5D

Docket 30

Courtroom Deputy:

- NONE LISTED -

Tentative Ruling:

SPECIAL IMPORTANT NOTICE! In order to mitigate the spread of the COVID-19 virus, notice is hereby given that, starting with the March 19, 2020 hearings, ALL hearings before Judge Smith will be by TELEPHONE APPEARANCE ONLY until further notice. The courtroom will be locked. Any party who wishes to appear must register in advance by contacting CourtCall at (866) 582-6878. It is suggested that parties register with CourtCall at least 30 minutes prior to the hearing. Through September 30, 2020, CourtCall is offering discounted registration for attorneys and free registration for parties without an attorney.

August 13, 2020

Continue hearing to September 10, 2020 at 10:00 a.m. to allow Movant to correct service issue: Debtor was not served with the Motion as required by LBR 9013-1(d). Further, as Debtor is a corporation, it must be served in accordance with Fed.R.Bankr.P. (FRBP) 7004(b)(3) as required by FRBP 9014 for contested matters such as this because Movant is seeking the surrender of property. Service to Debtor's attorney only is insufficient unless the attorney is authorized to accept service of process.

Party Information

Debtor(s):

DzineSquare, Inc. Represented By
Christian T Kim

United States Bankruptcy Court
Central District of California
Santa Ana
Judge Erithe Smith, Presiding
Courtroom 5A Calendar

Thursday, August 13, 2020 **Hearing Room 5A**

10:30 AM
CONT... DzineSquare, Inc. **Chapter 7**

Ann Chang

Trustee(s):

Weneta M Kosmala (TR) Pro Se

10:30 AM
8:20-10043 DzineSquare, Inc. **Chapter 7**

#7.30 CONT'D Hearing RE: Motion for entry of an order: Granting relief from the automatic stay pursuant to 11 U.S.C. section 362(d)(1) and Fed. R. Bankr.P.4001 to effectuate setoff pursuant to 11 U.S.C. section 533 and applicable non-bankruptcy law (RE: Lease Agreements for buildings located In Grand Prairie, Texas and Santa Fe Springs, California)

MOVANT: PROLOGIS, L.P. AND PROLOGIS TEXAS I LLC

FR: 8-4-20, Rm 5D

Docket 31

Courtroom Deputy:

- NONE LISTED -

Tentative Ruling:

SPECIAL IMPORTANT NOTICE! In order to mitigate the spread of the COVID-19 virus, notice is hereby given that, starting with the March 19, 2020 hearings, ALL hearings before Judge Smith will be by TELEPHONE APPEARANCE ONLY until further notice. The courtroom will be locked. Any party who wishes to appear must register in advance by contacting CourtCall at (866) 582-6878. It is suggested that parties register with CourtCall at least 30 minutes prior to the hearing. Through September 30, 2020, CourtCall is offering discounted registration for attorneys and free registration for parties without an attorney.

August 13, 2020

Continue hearing to September 10, 2020 at 10:00 a.m. to allow Movant to correct service issue: Debtor was not served with the Motion as required by LBR 4001-1(c)(1)(C). Further, as Debtor is a corporation, it must be served in accordance with Fed.R.Bankr.P. (FRBP) 7004(b)(3) as required by FRBP 9014 for contested matters. Service to Debtor's attorney only is insufficient unless the attorney is authorized to accept service of process.

10:30 AM

CONT... DzineSquare, Inc. **Chapter 7**

Tentative ruling for 9/10/20 hearing (if unopposed): Grant relief from stay request as set forth in motion filed as Docket #30.

Special note: For any future motions for relief from stay, counsel is admonished to comply with LBR 4001-1(b)(1) which requires that such motions be filed on court mandated forms.

Note: If Movant accepts the foregoing tentative ruling, appearance at this hearing is not required.

Party Information

Debtor(s):

DzineSquare, Inc.	Represented By Christian T Kim Ann Chang

Trustee(s):

Weneta M Kosmala (TR)	Pro Se

10:30 AM
8:20-10043 DzineSquare, Inc. **Chapter 7**

#7.40 CON'TD Hearing RE: Motion for entry of an order: Allowing and directing payment of administrative expense pursuant to 11 U.S.C. § 503(b)(1)

FR: 8-4-20, Rm 5D

Docket 36

Courtroom Deputy:

- NONE LISTED -

Tentative Ruling:

SPECIAL IMPORTANT NOTICE! In order to mitigate the spread of the COVID-19 virus, notice is hereby given that, starting with the March 19, 2020 hearings, ALL hearings before Judge Smith will be by TELEPHONE APPEARANCE ONLY until further notice. The courtroom will be locked. Any party who wishes to appear must register in advance by contacting CourtCall at (866) 582-6878. It is suggested that parties register with CourtCall at least 30 minutes prior to the hearing. Through September 30, 2020, CourtCall is offering discounted registration for attorneys and free registration for parties without an attorney.

August 13, 2020

Deny motion without prejudice.

Basis for Tentative Ruling

Aside from the service issue (Debtor was not served), the motion is not supported by sufficient evidence for entitlement administrative claim under Section 503(b)(1).

Standard under § 503(b)(1)

n *In re Goody's Family Clothing, Inc.*, 610 F.3d 812, 818 (3rd Cir. 2010), a case cited by Movant, the Third Circuit held that:

10:30 AM
CONT... DzineSquare, Inc. **Chapter 7**

"For a commercial lessor's claim to get administrative expense treatment under
§ 503(b)(1), *the debtor's occupancy of the leased premises must confer an actual and necessary benefit to the debtor in the operation of its business*. See *Calpine Corp. v. O'Brien Envtl. Energy, Inc. (In re O'Brien Envtl. Energy, Inc.)*, 181 F.3d 527, 532–33 (3d Cir.1999) (citing *Cramer v. Mammoth Mart, Inc. (In re Mammoth Mart, Inc.)*, 536 F.2d 950, 954 (1st Cir.1976)). Proving this is the lessor's burden. Id. at 533. Thus, the Landlords "must ... carry the heavy burden of demonstrating that the ['stub rent'] for which [they] seek[ ] payment provided *an actual benefit to the estate and that [incurring 'stub rent' was] necessary to preserve the value of the estate assets."* Id. (citation omitted)." (emphasis added).

As to the Texas Lease, Movant provides no evidence as to how Debtor's occupation of the premises is providing an actual benefit to the chapter 7 estate and why such occupation is necessary to preserve the value of the chapter 7 estate assets. As to the California lease, Movant admits that the premises is not occupied by Debtor at all, but by a subtenant, thereby making less likely that Movant can demonstrate benefit to the estate or necessity for the preservation of estate assets.

Even if Movant had provided evidence sufficient to meet its burden of proof under § 503(b)(1), the court would not order the immediate payment of its asserted administrative claim because 1) there is no evidence that there are funds in the estate sufficient to pay such the claim, and 2) there are other administrative expenses entitiled to priority (e.g., trustee's fees, professional fees, etc) that would have to be paid on a pro rata basis with Movant and the court has no evidence of the amount of such additional administrative expenses.

Special note: The denial of this motion does not preclude Movant from filing a proof of claim in the case, which claim would be presumed valid unless the trustee or other party in interest objects under § 502.

Note: If Movant accepts the foregoing tentative ruling, appearance at this hearing is not required and Movant shall lodge an order consistent with the same within seven days.

United States Bankruptcy Court
Central District of California
Santa Ana
Judge Erithe Smith, Presiding
Courtroom 5A Calendar

Thursday, August 13, 2020 **Hearing Room 5A**

10:30 AM

CONT... DzineSquare, Inc. **Chapter 7**

Party Information

Debtor(s):

DzineSquare, Inc.	Represented By Christian T Kim Ann Chang

Trustee(s):

Weneta M Kosmala (TR)	Pro Se

10:30 AM
8:19-14381 Lorne B Reyes and Elizabeth A Reyes **Chapter 7**

#7.50 CON'TD Hearing RE: Chapter 7 Trustee's Final Report and Account and Application for Final Fees and Expenses

[KAREN SUE NAYLOR, CHAPTER 7 TRUSTEE]

FR: 8-4-20, Rm 5D

Docket 35

Courtroom Deputy:

- NONE LISTED -

Tentative Ruling:

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August 13, 2020

Approve fees and expenses as requested.

Note: This matter appears to be uncontested. Accordingly, no court appearance by Applicant is required. Should an opposition party file a late opposition or appear at the hearing, the court will determine whether further hearing is required and Applicant will be so notified.

Party Information

United States Bankruptcy Court
Central District of California
Santa Ana
Judge Erithe Smith, Presiding
Courtroom 5A Calendar

Thursday, August 13, 2020 **Hearing Room 5A**

10:30 AM

CONT... Lorne B Reyes and Elizabeth A Reyes **Chapter 7**

Debtor(s):

Lorne B Reyes	Represented By John A Harbin

Joint Debtor(s):

Elizabeth A Reyes	Represented By John A Harbin

Trustee(s):

Karen S Naylor (TR)	Pro Se

2:00 PM
8:19-13858 Bruce Elieff **Chapter 11**
Adv#: 8:19-01205 Elieff et al v. Kurtin

#8.00 **CON'TD ORAL RULING Hearing RE**: Joint Motion for Summary Judgment on Claim for Mandatory Subordination of Claim Pursuant to 11 U.S.C. Section 510(b)

FR: 4-9-20; 4-23-20 (Rescheduled from 2:00 pm); 7-23-20; 7-24-20; 8-3-10

Docket 57

Courtroom Deputy:

- NONE LISTED -

Tentative Ruling:

April 23, 2020

This motion for partial summary adjudication as to the subordination claims shall be continued to July 23, 2020 at 2:00 p.m.(XX)

Basis for Tentative Ruling:

1. Defendant asserts he needs time to conduct discovery,

2. If the tentative ruling for #2 on today's calendar stands, Plaintiffs will be filing a third amended complaint.

August 13, 2020
Ruling:

The court's ruling regarding the Motion for Summary Judgment on the Subordination Claims is the Grant as to 11 U.S.C. 510(b) and Deny as to 11 U.S.C. 510(c)(2) based on the substantive analysis set forth in the Court's July 23, 2020 Tentative Ruling (see below).

2:00 PM
CONT... Bruce Elieff **Chapter 11**

Special Comments:

1. After reviewing all the pleadings, admitted evidence and caselaw, including unauthorized and late pleadings filed through August 12, 2020, as well as a close review of *In re Khan*, 846 F.3d 1058 (9th Cir. 2017) and *In re KIT Digital, Inc.*, 497 B.R. 170 (Bankr. S.D.NY.2013), the Court adopts the substance of its tentative ruling of July 23, 2020, which ruling will be memorialized in a Memorandum of Decision and/or Opinion which will also include the Court's ruling regarding the Plaintiffs' Motion for Reconsideration (Cal #9) and will be certified pursuant to FRCP 54(b)

2. The Court's Evidentiary Rulings will be set forth in a separate Order that will be issued concurrently with the Memorandum of Decision.

3. The Briefing on this Ruling is CLOSED. No party is to submit any pleading whatsoever.

4. The Memorandum of Decision and Order re Evidentiary Objections will be issued no later than the week of September 21, 2020.

5. THERE WILL BE NO ORAL ARGUMENT PERMITTED TODAY RE THE RULING.

Tentative Ruling from July 23, 2020

Grant the Motion as to 510(b); deny as to 510(c)(2)

Procedure for today's hearing: Plaintiffs will have up to 30 minutes for opening argument, followed by Defendant for 30 minutes and ending with 15 minutes of reply by Plaintiffs (plus any unused portion of the opening argument time).

Evidentiary Rulings will not be issued until the formal findings re the ruling are

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issued.

Basis for Tentative Ruling:

Bruce Elieff ("Elieff") filed a voluntary chapter 11 on October 2, 2019, and Morse Properties, LLC ("Morse") and 4627 Camden, LLC ("Camden") filed voluntary chapter 11 petitions on October 3, 2019. On October 15, 2019, Elieff, Morse, and Camden commenced an adversary proceeding against Todd Kurtin ("Kurtin") to avoid Kurtin's $34 million judgment lien and subordinate the claim (the "AP"). On December 11, 2019, Debtors filed a second amended complaint (the "SAC")[AP dkt. #11]. On January 9, 2020, Kurtin filed a motion to dismiss the SAC (the "Motion to Dismiss")[AP dkt. # 19]. On March 3, 2020, the order granting the Committee's motion to intervene as to the first claim for relief only was entered [AP dkt. #65]. On May 7, 2020, the order granting the Motion to Dismiss in part, and denying in part [dkt. 100]. Plaintiffs Elieff, Morse, Camden, and the Committee were granted leave to amend the SAC except for any claims under 11 U.S.C. § 510(c)(2). On May 14, 2020, the third amended complaint was filed (the "TAC")[dkt. 105].

Trustee and the Committee (collectively, "Plaintiffs") now move for summary judgment on all of the claims for relief -1st Claim (Elieff), 6th Claim (Morse), and 9th Claim (Camden)] seeking mandatory subordination of Kurtin's claims § 510(b) [AP dkt. #57]. Kurtin opposes the Motion.

Summary Judgment Standard

A party seeking summary judgment bears the initial responsibility of demonstrating the absence of a genuine issue of material fact, and establishing that it is entitled to judgment as a matter of law as to those matters upon which it has the burden of proof. *Celotex Corporation v. Catrett*, 477 U.S. 317, 323 (1986). The opposing party must make an affirmative showing on all matters placed in issue by the motion as to which it has the burden of proof at trial. *Id*. at 324. The substantive law will identify which

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facts are material. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986). Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. *Id.* A factual dispute is genuine where the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Id*. The court must view the evidence presented on the motion in the light most favorable to the opposing party. *Id*.

In the absence of any disputed material facts, the inquiry shifts to whether the moving party is entitled to judgment as a matter of law. *Celotex*, 477 U.S. at 323. Furthermore, where intent is at issue, summary judgment is seldom granted. *See, Provenz v. Miller*, 102 F.3d 1478, 1489 (9th Cir. 1996), *cert. denied*, 118 S. Ct. 48 (1997).

Judicial Notice of Facts set forth in the State Court Appellate Opinions

As a preliminary matter, the California Court of Appeals previously issued two opinions related to this matter: *Kurtin v. Elieff ("Kurtin I"),* 215 Cal.App.4th 455 019 (2013) and *Kurtin v. Elieff ("Kurtin II")*, 2019 WL 4594775 *1 (Cal. Ct. App. 4th Sep. 23, 2019). See, Debtors' RJN. [AP dkt. #61], Ex. 1-2. Plaintiffs argue that "there is no dispute over the material facts, which were established in Kurtin I and Kurtin II." Mot., p. 5:9-10; See, Debtors RJN, p. 3:1-2 ("Therefore, the Court may take judicial notice of both the existence and *content* [Kurtin I and Kurtin II]."). The Court is aware of the limitations on taking judicial notice, even as to the opinions of another court. Under Fed.R.Evid. 201, i.e., that a court may take judicial notice of facts that are not subject to reasonable dispute in that they are either "(1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned," See, *Lee v. City of Los Angeles*, 250 F.3d 668, 690 (9th Cir. 2001)(" when a court takes judicial notice of another court's opinion, it may do so "not for the truth of the facts recited therein, but for the existence of the opinion, which is not subject to reasonable dispute over its authenticity.") See also, *Mazzocco v. Lehavi*, 2015 WL 12672026, at *4 (S.D. Cal. Apr. 13,

2015)(declining to take judicial notice of facts within a state appellate court opinion)

In this matter, the Court may certainly take judicial notice of the Kurtin I and Kurtin II opinions and the adjudicated rulings therein. However, it would not be appropriate to take judicial notice of non-adjudicative factual characterizations in either opinion. For example, as noted by Kurtin, the issue of whether the Settlement Agreement "arose from" the purchase or sale of securities within the context of 11 U.S.C. § 510(b) was not before the California appellate court and, therefore, it's characterization of the Settlement Agreement as a "buy out" will not be judicially noticed.

The Undisputed Facts

On June 23, 2003, Kurtin filed an action for breach of fiduciary duty, constructive fraud, misappropriation and other claims in the Orange County Superior Court, case no. 03CC0022 (the "First Lawsuit"). An amended complaint was later filed. Kurtin RJN Ex. 1-2.

The First Lawsuit was settled by settlement agreement (the "Settlement Agreement") in August 2005, a copy of which is attached as Exhibit 1 to Bruce Elieff's declaration. Debtors' Statement of Uncontroverted Facts ("SUF") 12-13; Kurtin's Statement of Genuine Disputes of Material Facts ("SGI") 12-13.

Exhibit B to the Settlement Agreements lists several entities defined as the "Joint Entities." Per the Settlement Agreement, Elieff was to be paid $48.8 million in four installments: $21 million, $1.8 million, $13.1 million, and $12.9 million. Id.

Elieff and the Joint Entities were jointly and severally responsible for paying the first installment, but only the Joint Entities were responsible for paying the last three installments totaling $27.8 million. SUF 19; SGI 19.

The Settlement Agreement included the following distribution clause in Section 14, "Elieff shall not take any distribution from any of the Joint Entities if such distribution prevents satisfaction of payment of the Settlement

Payments." SUF 36; SUF 36.

Elieff made the $21 million first installment payment. SUF 25; SGI 25. The Joint Entities made the $1.8 million second installment, but only paid $3.5 of the $13.1 million third installment payment, and paid nothing on the final installment of $12.9 million. SUF 26; SGI 26.

When Kurtin sought to enforce the agreement against the Joint Entities under section 664.6 of the Code of Civil Procedure in the context of the 2003 litigation, the trial judge denied his request on the ground that the Joint Entities were not "parties" to Kurtin's 2003 litigation. SUF 29; SGI 29.

On May 12, 2007, Kurtin received an arbitration award an arbitration award amending the Settlement Agreement to allow Kurtin to obtain Elieff's interests in the Joint Entities (which secured the Settlement Payments) and apply the same towards the satisfaction of the Settlement Payment. See, Kurtin RJN, Ex. 5. The arbitration award did not preclude any other legal or equitable remedies that Kurtin may have held.

On December 10, 2007, Kurtin filed a second lawsuit in Orange County Superior Court against Elieff and the Joint Entities, case no. 00100307 (the "Second Lawsuit") and later filed a first amended complaint. See, Kurtin RJN Ex. 7-8; SUF 33; SGI 33.

On May 20, 2010, after a bifurcated jury trial, judgment was entered in in favor of Kurtin in the amount of $24.4 million (the "2010 Judgment"). See, SUF 37, 39; SGI 37, 39; Kurtin RJN, Ex. 9.

By published opinion dated April 16, 2013, the California Court of Appeal affirmed the 2010 Judgment's finding of liability against Elieff and the trial court's order granting a new trial as to damages only. *Kurtin I ,* 215 Cal. App. 4th 455.

On March 13, 2017, Kurtin's new trial as to damages was held. Kurtin RJN Ex. 11.

On November 20, 2017, the state court entered an amended judgment

in favor Kurtin in the amount of $20.3 million for Elieff's breach of the distribution provision in section ¶14 of the Settlement Agreement (the "2017 Judgment"). RJN Ex. 11.

On September 23, 2019, the California Court of Appeal reduced the principal amount of the 2017 Judgment by $3,546,862.07 and ordered that prejudgment interest calculated be based on the reduced damage award. *Kurtin II,* 2019 WL 4594775, at * 4 and 6.

Kurtin has filed proofs of claim against Debtors based on the 2017 Judgment, as subsequently amended on February 4, 2020. See, Kurtin RJN, Ex. 14-17.

Plaintiffs have Carried their Burden Establishing the Absence of Genuine Dispute Regarding the Material Fact of Whether the Settlement Agreement is an Agreement for the Purchase and Sale of Securities

The Ninth Circuit has adopted a broad interpretation of what constitutes "a claim arising from the purchase or sale of a security." *Am. Wagering, Inc.,* 493 F.3d at 1072. 1072. "[T]he statute sweeps broadly...and reaches even ordinary breach of contract claims so long as there is a sufficient nexus between the claim and the purchase of securities." *In re Tristar Esperanza Properties, LLC,* 782 F.3d 492, 495 (9th Cir. 2015); *Am. Wagering*, *supra,* at 1072 ("As noted above, a number of courts, including this one, have held that breach of contract claims may be subordinated under section 510(b) where there exists some nexus or causal relationship between the claim and the purchase of the securities....").

In assessing the "arising from" element, the courts focus upon the origin or source of the claim. "The phrase 'arising from' as employed in § 510(b) 'connotes, in ordinary usage, something broader than causation' and is instead 'ordinarily understood to mean originating from, having its origin in, growing out of, or flowing from or in short, incident to, or having connection with." *In re Del Biaggio*, 834 F.3d 1003, 1009 (9th Cir. 2016).

"[T]he status of the claim on the date of the petition does not end the §

510(b) inquiry," so the "critical question for purposes of § 510(b), then, is not whether the claim is debt or equity at the time of the petition, but rather whether the claim *arises from* the purchase or sale of a security." Tristar, 782 F.3d at 497 (emphasis in original). To that end, courts may "look behind" a judgment to determine whether the claim arises from the purchase or sale of securities. See, *Am. Wagering*, 493 F.3d at 1071 (analyzing the terms of the underlying consulting contract to determine whether a money judgment based on the value of stock arose from the purchase or sale of securities); *Betacom*, 240 F.3d at 831-32 (remanding to the bankruptcy court the determination of whether two promissory notes arose from the purchase or sale of stock because "there is little evidence in the record to explain their origin" and directing that if the promissory notes are "linked" to a merger agreement, they should be subordinated); See also, *In re SeaQuest Diving, LP*, 579 F.3d 411, 425 (5th Cir. 2009)("Rather, the court must look behind the judgment and examine the totality of the circumstances to determine whether the transaction is a 'rescission of a purchase or sale of a security of a debtor.'").

Here, Plaintiffs have carried their burden to demonstrate the lack of a genuine dispute over the material fact of whether the Settlement Agreements is an agreement to purchase or sale securities. The Settlement Agreement requires Kurtin to transfer his interest in the SunCal LLCs to Elieff, and transfer his interests in the trade name "SunCal". Moreover, that the Settlement Agreement includes a clause requiring Kurtin to not "solicit any SunCal employees for employment for a period of one year." See, Elieff Decl., Ex. 1 (the Settlement Agreement), p. 1-4. These terms would appear to support Plaintiffs argument that the Settlement Agreement was an agreement, at least in part, for the purchase or sale of securities.

As discussed above, to determine the "origin" of a claim, the Court may "look behind" the relevant documents to the circumstances giving rise to the claim at issue. And to the extent that both parties have, in either their pleadings or evidentiary objections, argued that the parol evidence should bar the Court's review beyond the Settlement Agreement (while, ironically, both offering parol evidence in the form of financial statements, deposition

transcripts, appellate briefs, etc. in support of a favorable interpretation of the Settlement Agreement), such argument is unpersuasive in light of Settlement Agreement terms appearing to support both positions (as discussed above).

Moreover, and more importantly, as cited above, Ninth Circuit law provides the Court should not limit its review to the face of the Settlement Agreement. See, *Am. Wagering*, 493 F.3d at 1071 (analyzing the terms of the underlying consulting contract to determine whether a money judgment based on the value of stock arose from the purchase or sale of securities); *Betacom*, 240 F.3d at 831-32 (remanding to the bankruptcy court the determination of whether two promissory notes arose from the purchase or sale of stock because "there is little evidence in the record to explain their origin" and directing that if the promissory notes are "linked" to a merger agreement, they should be subordinated); See also, *In re SeaQuest Diving, LP*, 579 F.3d 411, 425 (5th Cir. 2009)("Rather, the court must look behind the judgment and examine the totality of the circumstances to determine whether the transaction is a 'rescission of a purchase or sale of a security of a debtor.'").

In this case, the Court can look behind the Judgment to the Settlement Agreement and find that Settlement Agreement "arises" from the purchase and sale of securities. The undisputed fact is that the Settlement Agreement required Kurtin to transfer his interests in the Joint Entities to Elieff. See, SUF 12-13; SGI 12-13 (the Settlement Agreement). While Kurtin argues that the Settlement Agreement is not an agreement to purchase or sale securities but rather an agreement to end the partnership between Elieff and Kurtin (and a partnership interest is not a security under the Code), this argument ignores the plain language of § 510(b) which does not "require that the underlying agreement for a purchase and sale of the security need be solely an agreement for the purchase and sale of the security." Pl. Joint Reply [dkt. 127], p. 17. The undisputed fact remains that at least a part of the Settlement Agreement required Kurtin to transfer his interest in the Joint Entities, which Kurtin did via assignments to Elieff. See, Elieff Supp. Decl., p. 2-4, ¶¶8-22 and Ex. 1-15 (assignments from Kurtin to Elieff).

Moreover, Kurtin's reliance on *In re Khan*, 846 F.3d 1058, 1063 (9th Cir. 2017) to argue that there is not a sufficient nexus between Kurtin's damages and the purchase or sale securities if the Court only looks at "conduct" that gave rise to the Judgment (which was Elieff diversion of funds from the Joint Entities in violation of ¶14 of the Settlement Agreement) is unpersuasive because *Khan* is factually distinguishable. Kurtin Supp. Opp'n [dkt. 120], p. 17-20.

Unlike *Khan,* in which the court emphasized that the damages sought for securities that were converted years after the sale of the securities were sold "were not remotely related to the purchase, " 846 F.3d at 1064, here Kurtin's damages, in contrast, are directly related to the purchase of securities which was at least one part of the Settlement Agreement. Pl. Joint Reply [dkt. 127], p. 10-12. Moreover, unlike the damages in *Khan* that was based on a tort, Kurtin's damages in the Judgment were based on a breach of contract claim. See id., p. 13. Additionally, unlike Khan, in which the Court noted tortious conversion of stock is not one of the risks that a purchaser of stock assumes, the non-payment of Settlement Payments was a risk that Kurtin willingly assumed evidenced by the fact that the parties contracted to include ¶14 in the Settlement Agreement. See id.

The Court also need not necessarily adopt the "but for" test advocated by Plaintiffs because, even as Plaintiffs acknowledge, the Ninth Circuit has not adopted the "but for" test even though it has explicitly endorsed circuit court cases that do so in holding that "arising from" should be given an "expansive "some nexus" reading." See, Pl. Joint Reply [dkt. 127], p. 8-10 (citing *In re Del Biaggio*, 834 F.3d 1003, 1009 (9th Cir. 2016)). The Ninth Circuit, however, has stated that, "the statute sweeps broadly...and reaches even ordinary breach of contract claims so long as there is a sufficient nexus between the claim and the purchase of securities." *In re Tristar Esperanza Properties, LLC,* 782 F.3d 492, 495 (9th Cir. 2015); *Am. Wagering*, *supra,* at 1072 ("As noted above, a number of courts, including this one, have held that breach of contract claims may be subordinated under section 510(b) where there exists some nexus or causal relationship between the claim and the purchase of the securities...."). "The phrase 'arising from' as employed in §

510(b) 'connotes, in ordinary usage, something broader than causation' and is instead 'ordinarily understood to mean originating from, *having its origin in*, growing out of, or flowing from or in short, *incident to, or having connection with*." *Del Biaggio*, 834 F.3d at 1009.

Here, the Court finds that the Judgment has its origin, is incident to, and has a connection to the Settlement Agreement, which itself is an agreement, at least partially, to purchase and sale of securities of Debtors' affiliates, the Joint Entities. As discussed above, because § 510(b) does not require that the underlying agreement only and entirely be an agreement to purchase or sale securities, how much of the Settlement Payments can be allocated to the securities transferred (versus allocated to Kurtin's other obligations under the Settlement Agreement) is not a material fact that is determinative of the application of §510(b)

Kurtin's further argues that, even if the Settlement Agreement was partly an agreement to purchase or sale of securities, the "sale" of securities was completed after Kurtin transferred his interest and Kurtin made the first $21 million payment. See, Elieff Supp. Decl., p. 11. Thus, because Kurtin had no further personal liability for the remaining Settlement Payments, and the Judgment is ultimately based on non-payment of these remaining Settlement Payments, the Judgment is not an agreement to purchase or sale agreements. Id. However, "the June 11, 2007 Amended Arbitration Award, which constituted an amendment to the Settlement Agreement, provided that if the Joint Entities missed a buyout payment, Kurtin's remedy was to take back from Elieff the equity interests in the Joint Entities that he had sold to Elieff. ECF No. 59, Ex. 4." Pl. Joint Reply [dkt. 127], p. 14-15. This provision in the arbitration award did not create a lien on Kurtin's interests in the Joint Entities because it did not provide that Kurtin would need to foreclose on that lien. Instead, Kurtin held the "right to require" Elieff to transfer the Kurtin's interest in the Joint Entities, and Elieff was required to, back to Kurtin if the full Settlement Payments were not received. See, Elieff Decl. [dkt. 59], Ex. 4.

Judicial estoppel, also known as the doctrine of inconsistent positions, is a common law principle that "generally operates to preclude a party from

asserting a position in a legal proceeding inconsistent with a position taken by that party in the same or a prior litigation." § 6:1.Overview, Bankr. Evid. Manual § 6:1 (2018 ed.)(citation omitted). The purpose of judicial estoppel is to "protect the integrity of the judicial process by prohibit parties from deliberately changing positions according to the exigencies of the moment." *Ah Quin v. County of Kaui Dept. of Transp.*, 733 F.3d 267, 270-71 (9th Cir. 2013)(citing *New Hampshire v. Maine*, 532 U.S. 742, 749-50 (2001).

"Judicial estoppel is a discretionary doctrine, applied on a case-by-case basis." *Id.* While judicial estoppel "is 'probably not reducible to any general formulation of principle," the following factors "typically inform the decision" of whether to apply to judicial estoppel: (1) a party's later position is clearly inconsistent with its earlier position, (2) the party persuaded the court to accept the earlier position, so that the court's acceptance of the later position "would create the perception that either the first or the econ court was misled," and (3) the party asserting the inconsistent position will receive an "unfair advantage or impose an unfair detriment on the opposing party if not estopped." *Ah Quin, supra,* at 270. These factors, however, "do not establish inflexible prerequisites or an exhaustive formula for determining the application of judicial estoppel" and additional considerations may be appropriate in specific factual contexts. *Id.* at 270-72. Moreover, "it may appropriate to resist application of judicial estoppel when a party's prior position was based on inadvertence or mistake." *Ah Quin,* supra, at 271 (finding vacating and remanding district court's summary judgment because the determination of "mistake" and "inadvertence" within the context judicial estoppel required inquiry into the debtor's subjective intent when completing the bankruptcy schedules and omitting a litigation claim).

Here, Kurtin's alleged admissions that specifically reference the Settlement Agreement as "buy out" do appear to have been made in pleadings in the state court litigation. Though Plaintiffs make a strong argument for judicial estoppel, application of this equitable doctrine is not necessary for the Court to find as a matter of law that the Settlement Agreement involved the purchase and sale of a security within the meaning of §510(b). Stated otherwise, Plaintiffs have carried their burden to demonstrate

the absence of a material fact that the Settlement Agreement was, at least in part, an agreement for Kurtin to sell his securities in the Joint Entities, at least the directly owned Joint Entities, within the context of the Elieff and Kurtin ending their partnership.

Kurtin's Request for Further Discovery is Denied

Kurtin again requests that the Motion be denied because Kurtin has purportedly not had an opportunity to complete discovery related to Debtor's affiliations, how much of the Settlement Payments was allocated to any alleged "buyout" amount, and Kurtin's "old and cold" defense. See, Kurtin Supp. Opp'n [dkt. 120], p. 32-38. First, as discussed above, there is no dispute that at least the directly owned Joint Entities were affiliates of Debtor. Pl. Joint Reply [dkt. 127], p. 23-24. Also, as discussed above, there is no requirement that the entire agreement at issue be an agreement for the sale or purchase of securities. So, while the Court previously mentioned that it had a question on whether any amount of the Settlement Payments could be allocated to Kurtin's transfer of the SunCal's names (and Plaintiffs dispute that Kurtin had any interest in the SunCal names), a determination of how the Settlement Payments were allocated is not necessary. See, Committee Supp. Br., p. 6-8; Contra, Kurtin Supp. Opp'n [dkt. 120], p. 20-28.

With regards to Kurtin's "Old and Cold" defense, this defense has not been adopted by the Ninth Circuit so no discovery related to this defense is required. See, Committee Supp. Br., p. 8-9; Pl. Joint Reply [dkt. 127], p. 28-29 (top of page). Even Kurtin admits that Ninth Circuit has not adopted the "old and cold" defense. See, Kurtin Supp. Opp'n [dkt. 120], p. 38. At best, the Ninth Circuit discussed the defense in a footnote in *In re Tristar Esperanza Properties, LLC*, 782 F.3d 492 fn. 4. (9th Cir. 2015) and found that it did not need to decide whether the "old and cold" defense can ever be available. See, Pl. Joint Reply [dkt. 127], p. 28 (top of page), ln. 20-28. Further, no "subsequent published case from a court in the Ninth Circuit has even mentioned the so-called "old and cold" defense, much less applied it." Id. Accordingly, Kurtin's request to deny the Motion based on his need for

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further discovery should be denied.

Section 510(c)(2) does not apply to mandatory subordination under § 510(b)

In its ruling on the Motion to Dismiss, the Court dismissed the claims for relief based on § 510(c)(2) with prejudice. See, Order Granting in Part and Denying in Part Motion to Dismiss Second Amended Complaint and Scheduling Order (the "12(b)(6) Order") [dkt. 100], Ex A, p. 12-13 of the tentative ruling. The instant Motion requests relief under § 510(c)(2) but the Motion was filed before that ruling. The Court understands that Plaintiffs have filed a motion for reconsideration of the dismissal of the 510(c)(2) claim for relief that is set for hearing on August 6, 2020. I included it in this tentative ruling because it was part of the Motion.

Party Information

Debtor(s):

Bruce Elieff	Represented By Paul J Couchot

Defendant(s):

Todd Kurtin	Represented By Lewis R Landau

Plaintiff(s):

Bruce Elieff	Represented By Paul J Couchot
Morse Properties, LLC	Represented By Paul J Couchot
4627 Camden, LLC	Represented By Paul J Couchot

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8:19-13858 Bruce Elieff **Chapter 11**
Adv#: 8:19-01205 Elieff et al v. Kurtin

#9.00 CON'TD Hearing RE: Joint Motion for Reconsideration or, Alternatively, Entry of Partial Final Judgment Under FRCP 54(b) or Certification Under 28 U.S.C. Section 1292(b)

FR: 8-6-20

Docket 107

Courtroom Deputy:

- NONE LISTED -

Tentative Ruling:

August 13, 2020

Grant in part; deny in part: Grant request for partial final judgment under FRCP 54(b); deny all other relief.

Oral Argument Procedure for Today's Hearing:

1. If Movants wish to address the Tentative Ruling, they will have 30 minutes to do so and Respondent will have 30 minutes to respond. Movants may reserve a portion of the 30 minutes for final argument following Respondent's arguments.

2. If Movant wish to rest on the Tentative Ruling and only respond to any oral argument by Respondent, they may waive opening argument and use the 30 minutes to respond.

Additional Notes:

1. The ruling on the Motion will be set forth in a Memorandum of Decision and/or Opinion that will include the Court's ruling on the

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Motion for Summary Judgment (Cal. #8) and will be issued subsequent to this hearing but no later than the week of September 21, 2020.

2. Unless specifically authorized at today's hearing, no party shall file any subsquent substantive pleading without leave of the court.

3. The parties are encouraged to meet and confer regarding a mutual resolution.

Basis for Tentative Ruling.

On October 15, 2019, Elieff, Morse, and Camden filed an adversary complaint against Todd Kurtin ("Kurtin") to avoid Kurtin's $34 million judgment lien and subordinate the claim (the "AP"). On December 11, 2019, Debtors filed a second amended complaint (the "SAC")[AP dkt. #11]. On January 9, 2020, Kurtin filed a motion to dismiss the SAC (the "Motion to Dismiss")[AP dkt. #19]. On March 3, 2020, the order granting the Committee's motion to intervene as to the first claim for relief only was entered [AP dkt. #65].

On May 7, 2020, the order granting the Motion to Dismiss in part, and denying in part was entered [dkt. 100]. Plaintiffs Elieff, Morse, Camden, and the Committee were granted leave to amend the SAC except for any claims under 11 U.S.C. § 510(c)(2) (the "May 7 Order"). On May 14, 2020, the third amended complaint was filed (the "TAC")[dkt. 105].

The Court's oral ruling on Trustee and the Committee's motion for summary judgment on the § 510(b) mandatory subordination claim for relief (the "MSJ") is set for hearing with this motion.

A. Reconsideration

1. Legal standard for reconsideration under FRCP 59(a)

FRCP 59(a)(1), made applicable herein by Rule 9023, states that, after a nonjury trial, a new trial may be granted "on all or some of the issues . . . for any reason for which a rehearing has heretofore been granted in a suit in equity in federal court". "Rule 59 does not specify the grounds on which a

motion for a new trial may be granted." *Zhang v. Am. Gem Seafoods, Inc.*, 339 F.3d 1020, 1035 (9th Cir.2003). However, there are three well-recognized grounds for granting new trials in court-tried actions under FRCP 59(a)(2): (1) manifest error of law; (2) manifest error of fact; and (3) newly discovered evidence. *Brown v. Wright*, 588 F.2d 708, 710 (9th Cir. 1978); 6A Moore's Federal Practice P 59.07 at 59-94.

The Court's Prior Ruling Regarding § 510(c)(2) in the May 7 Order

In relevant part, the Court ordered the following in the May 7 Order: "Plaintiffs shall file any amended complaint… except as to Plaintiffs' claim under 11 U.S.C. §510(c)(2) which is dismissed without leave to amend." The dismissal of the relief requested under §510(c)(2) with prejudice was based upon the Court's conclusion that §510(c)(2) does not apply to the mandatory subordination provision of § 510(b). More specifically, the Court found that the natural and logical reading of 510(c) is that subsections (1) and (2) relate to *equitable* subordination only, to the exclusion of the mandatory subordination provisions of 510(b). Further, the Court found instructive the observation of the First Circuit in in *In re Merrimac Paper Co., Inc.*, 420 F.3d 53, 65 (1st Cir. 2005) that "a lien can only be transferred under [§ 510(c)(2)] when the underlying claim has been equitably subordinated."

Manifest Error

By the Motion, Trustee and the Committee (collectively, "Plaintiffs") argue that the Court committed manifest error by dismissing Plaintiffs' claims under §510(c)(2) in the SAC in part because § 510(c)(2) is a remedy, not a "cause of action" and, therefore, dismissal of such remedy at pleading stage is premature. See, Mot., p. 8-9. Plaintiffs also contend that the Court erred by relying on the *Merrimac* decision because the issue before the First Circuit was solely equitable subordination and not mandatory subordination. Finally, Plaintiffs maintain that the Court misread the plain language of § 510(c)(2). See, Reply, p. 3-7.

First, with respect to Plaintiffs' argument that it was improper to dismiss the remedy of § 510(c)(2) at the pleading stage, the Court agrees that

§ 510(c)(2) is a remedy and acknowledged as much in the May 7 Order. However, in the Court's view, § 510(c)(2) is a remedy only available for equitable subordination and Plaintiffs did not allege any equitable subordination causes of action in the SAC. See, May 7 Order, p. 12-13 (bottom of page); see generally, the SAC. Accordingly, this argument does not support reconsideration.

Second, while *Merrimac* is neither binding on this Court or on "all fours," in that the First Circuit was not called upon to decide the applicability of §510(c)(2) to § 510(b), the Court nevertheless finds its holding instructive as far as it goes, i.e., that "a lien can *only* be transferred under [§ 510(c)(2)] when the underlying claim has been *equitably* subordinated." 420 F.3d at 65.(emphasis added). Plaintiffs have not presented more persuasive authority. Ultimately, the Court's reference to te instructive value of *Merrimac* does not constitute manifest error.

Finally, having reviewed the Motion and Reply filed by the Plaintiffs, the Court is not persuaded that it erred in its interpretation of the interplay between 510(b) and 510(c)(2). Section 510(c) provides:

> (c) Notwithstanding subsections (a) and (b) of this section, after notice and a hearing, the court may—
>
> > (1) under principles of equitable subordination, subordinate for purposes of distribution all or part of an allowed claim to all or part of another allowed claim or all or part of an allowed interest to all or part of another allowed interest; or
> >
> > (2) order that any lien securing such a subordinated claim be transferred to the estate.

Section 510(c)(2) permits the transfer to the estate of any lien securing "such" a subordinated claim. This Court interprets "such" as referring back to a claim subordinated under the preceding subsection 510(c)(1). Indeed, as structured, 510(c) creates a subordination completely separate and different from mandatory subordination created under 510(b). The Court agrees with Kurtin that "the syntax of Section 510(c) is structured so that said section is

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read as a single sentence independently of subsections (a) and(b)." Opposition, p.9. This reading of 510(c) is supported by the subsection's preamble, "[n]othwithstanding subsections (a) and (b) of this section," which signals Congress' intent to provide a special remedy for equitably subordinated claims. Plaintiffs' argument might be more persuasive to the Court if 510(c)(2) simply read "order that any lien securing a subordinated claim . . . " or even "order that any lien securing any subordinated claim . . . ."

Rule 54(b) Certification

Under FRCP 54(b), made applicable herein by FRBP 7054, states that "[w]hen an action presents more than one claim for relief…or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay."

"Rule 54(b) controls the analysis of finality of judgments for purposes of appeal in federal civil actions, including bankruptcy adversary proceedings… Rule 54(b) reflects the federal policy against piecemeal appeals and waste of judicial resources." *In re Belli*, 268 B.R. 851, 855 (B.A.P. 9th Cir. 2001) (citing *Curtiss-Wright Corp. v. General Elec. Co.*, 446 U.S. 1, 8 (1980)). To make a Rule 54(b) certification, the court must make the "express determination that there is no just reason for delay, together with an express direction that judgment be entered." Id. "A mere reference to Rule 54(b) without both the express determination and express direction does not suffice… Either the so-called "Rule 54(b) certification" or "Rule 54(b) order" appears on the face of the record using mandated express language or it is absent." Id.

"If there is a Rule 54(b) certification, it is treated as a final order over which appellate jurisdiction exists "as of right" under 28 U.S.C. § 158(a)(1). If there is no Rule 54(b) certification, then the order is interlocutory, and appellate jurisdiction depends upon whether the appellate court grants leave to appeal under 28 U.S.C. § 158(a)(3)." *Belli*, 268 B.R. at 856.

To determine whether certification is appropriate under FRCP 54(b), the Supreme Court has "outlined the steps to be followed in making

determinations under Rule 54(b)." See, *Curtiss-Wright Corp. v. Gen. Elec. Co.*, 446 U.S. 1, 7 (1980). A court "must first determine that it is dealing with a 'final judgment'" in the "sense that it is a decision upon a cognizable claim for relief, and it must be 'final in the sense that it is 'an ultimate disposition of an individual claim entered in the course of a multiple claims action.'" *Id.*

After a finding of finality, the court must determine "whether there is any just reason for delay… It is left to the sound judicial discretion of the district court to determine the 'appropriate time' when each final decision in a multiple claims action is ready for appeal… This discretion is to be exercised 'in the interest of sound judicial administration.'" *Curtiss-Wright*, 446 U.S. at 8 (citations omitted). "[I]n deciding whether there are no just reasons to delay the appeal of individual final judgments in setting such as this, a district court must take into account judicial administrative interests as well as the equities involved." Id. "Certification is proper if it will aid 'expeditious decision' of the case." *In re Bowen*, 198 B.R. 551, 555 (B.A.P. 9th Cir. 1996)(citing *Texaco, Inc. v. Pensoldt*, 939 F.2d 794, 798 (9th Cir. 1991).

Thus, "[t]hree conditions must be satisfied before certification of a claim under Federal Rule of Civil Procedure 54(b): (1) multiple claims or parties are involved in the suit; (2) a final decision as to one or more claims or parties has been rendered; and (3) the court finds that there is no just reason for delaying an appeal." *Sitrick v. Dreamworks, LLC*, 2007 WL 9711434, at * 2 (C.D. Cal. Jan. 4, 2007)(citing *Curtiss-Wright, supra*, at 7-8).

Turning to the instant matter, the first condition is satisfied because the AP includes multiple claims against Kurtin- including claims under § 510(c) and avoidance causes of action. See generally, the SAC and TAC. The second condition is also satisfied because with the Court's oral ruling and granting of the MSJ, the Court will have rendered a final decision on all of the claims under §510 (the 1st, 7th, and 10th claims for relief in the SAC, and the 1st, 6th, and 9th claims for relief in the TAC). A judgment is final if the judgment "is an ultimate disposition of an *individual claim* entered in the course of a multiple claims action."

Wood v. GCC Bend, LLC, 422 F.3d 873, 878 (9th Cir. 2005) (emphasis added). Thus, all claims for relief or remedies alleged under § 510 will be

ultimately disposed of with the Court's ruling on the MSJ and this Motion.

Finally, the third condition is satisfied because the Court expressly determines that there is no that there is no just reason for delay. Kurtin's argument against certification under FRCP 54(b) is based on the argument that Plaintiffs' § 510(c) claims are inextricably intertwined with their § 510(b) claims and litigation will continue with regards to the § 510(c) claims. See, Opp'n, p. 19-21. This argument is no longer persuasive because the Court will be rendering a final order on the § 510(b) claim by granting the MSJ. See, Reply, p. 9.

Further, taking into account the judicial administrative interests and equities of this case, there is no just reason for delay because (assuming the MSJ is also appealed with the Court's ruling on the (c)(2) dismissal) the appellate court will be hearing all issues related to § 510 at the same time, so there is no possibility of piecemeal appellate litigation regarding the § 510 claims. See, Reply, p. 9:17-10:2. Moreover, certifying the May 7 Order will streamline the AP and the § 510(c) claims are "sufficiently severable factually and legally from the remaining matters" regarding avoidance actions. See, *Cont'l Airlines, Inc. v. Goodyear Tire & Rubber Co.*, 819 F.2d 1519, 1525 (9th Cir. 1987)(holding that FRCP 54(b) certification was proper because, in part, "the matters disposed of by the partial summary judgments were sufficiently severable factually and legally from the remaining matters[.]"). Plaintiffs also concede that a favorable ruling on the § 510(b) and (c) claims will likely streamline the AP because it will moot out the need for the estate to incur further fees litigating the avoidance claims. See, Reply, p. 10:3-9.

Finally, while Trustee has moved to convert the case to chapter 7, resolution of the § 510 claims will still be relevant for chapter 7 purposes. Indeed, Kurtin's Liens are clearly a barrier to any potential distribution to general unsecured creditors in chapter 7 (or 11). Indeed, this matter would already be an "asset" chapter 7 case since several of Debtor's real properties have been sold, and the status of Kurtin's Liens will need to be resolved in chapter 7 to determine whether there can be a distribution to general unsecured creditors. See also, Oppn, p. 21:20-22:5; Reply, p. 10:10-26.

In sum, the Court grants certification of the May 7 Order under FRCP

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54(b) to allow immediate appeal of the Court's dismissal of the § 510(c)(2) claims without leave to amend.

The Court will also, *sua sponte*, certify the order granting the MSJ under FRCP 54(b). "The court notes that a court may also issue a Rule 54(b) certification sua sponte." *In re Hughes*, 2008 WL 597276, at *2 (Bankr. E.D. Cal. Mar. 3, 2008)(citing 10 MOORE'S FEDERAL PRACTICE, § 54.21[1][a] (Matthew Bender 3d ed.)(construing defendant's opposition as a countermotion for certification under FRCP 54(b)); *In re New Bern Riverfront Dev., LLC*, 2015 WL 2358464, at *3 (Bankr. E.D.N.C. May 14, 2015) (certifying orders that were listed in exhibits under FRCP 54(b) *sua sponte*). As discussed above with regards to the § 510(c) claims, taken together, the May 7 Order and the forthcoming MSJ order are an ultimate disposition of the § 510 claims and there is no just reason for delaying the appeal of the Court's rulings on the § 510 claims.

Alternative Certification under 28 U.S.C. § 1292

Because the Court will certify the May 7 Order under FRCP 54(b), the Court declines to certify the May 7 Order under 28 U.S.C. § 1292(b) a the May 7 Order, after the Court rules on the MSJ, will be a final order as discussed above. The May 7 Order, together with the MSJ order, will be an ultimate disposition on the § 510 claims. The Court need not determine whether the May 7 Order alone should be certified as an interlocutory order. Also, as explained above, the Court will also immediately certify the MSJ order once entered under FRCP 54(b) so that the appellate court may hear the appeals of the § 510(b) and (c) claims together.

Plaintiffs' Request for Prospective Relief

The Motion requests that the Court certify that, "in the event of a reversal, the Court will transfer the Kurtin Liens to the Bankruptcy Estates pursuant to Section 510(c)(2)." See, Mot., p. 18:17-19. The Court denies this request for prospective relier and will follow the mandate of the appellate court.

United States Bankruptcy Court
Central District of California
Santa Ana
Judge Erithe Smith, Presiding
Courtroom 5A Calendar

Thursday, August 13, 2020 **Hearing Room 5A**

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Party Information

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Defendant(s):

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Plaintiff(s):

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Morse Properties, LLC	Represented By Paul J Couchot
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