

**United States Bankruptcy Court
Central District of California
Los Angeles
Neil Bason, Presiding
Courtroom 1545 Calendar**

Thursday, November 2, 2023

Hearing Room 1545

8:00 AM
2:00-00000

Chapter

- #1.00** Hearings in Judge Bason's courtroom (1545) are simultaneously:
- (1) in person in the courtroom, unless the Court has been closed (check the Court's website for public notices),
 - (2) via ZoomGov video, and
 - (3) via ZoomGov telephone.

You are free to choose any of these options, except that evidentiary hearings/trials must be in person in the courtroom (unless otherwise ordered). You do not need to call Chambers for advance approval or notice. ZoomGov appearances are free.

ZoomGov Instructions for all matters on today's calendar:

Meeting ID: 160 724 4253

Password: 785374

Meeting URL: <https://cacb.zoomgov.com/j/1607244253>

Telephone: +1 669-254-5252 or +1 646-828-7666 or 833-568-8864 (Toll Free)

Please connect at least 5 minutes before the start of your hearing, and wait with your microphone muted until your matter is called.

Chapter 13: Persons needing to contact the Chapter 13 Trustee's attorney, either prior to the hearing or during a recess, can call Kaleen Murphy, Esq. at (213) 996-4433.

Members of the public, including the press, are always welcome in person (except in rare instances when the courtroom is sealed) and they may also listen via telephone to non-evidentiary hearings, but must not view any hearings via video (per mandate of the AO).

Any audio or video recording is strictly prohibited. Official recordings are available for a small fee through the Clerk's Office.

Zoomgov hearing etiquette: (a) wait until the judge calls on you, so everyone is not talking at once; (b) when you first speak, state your name and, if you are an attorney, whom you represent (do not make your argument until asked to do so); (c) when you make your argument, please pause from time to time so that, for

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example, the judge can ask a question or anyone else can make an objection; (d) if the judge does not see that you want to speak, or forgets to call on you, please say so when other parties have finished speaking (do not send a "chat" message, which the judge might not see); and (e) please let the judge know if he mispronounces your name, uses the wrong pronoun, etc.

Docket 0

Tentative Ruling:

- NONE LISTED -

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8:30 AM

2:22-11182 Vernon David Harm Behrens

Chapter 13

#1.00 Hrg re: Motion under Local Bankruptcy Rule 3015-1 (n)
and (w) to modify plan or suspend plan payments

Docket 58

Tentative Ruling:

Appearances required, absent either (1) an agreement with the Chapter 13 Trustee's office to further continue this matter or (2) withdrawal of the motion. There is no tentative ruling, but the parties should be prepared to address the issues raised by the Chapter 13 Trustee (dkt. 60).

If you are making an appearance, you may do so (1) in person in the courtroom, unless the Court has been closed (check the Court's website for public notices), (2) via ZoomGov video, or (3) via ZoomGov telephone. For ZoomGov instructions for all matters on calendar, please see page 1 of the posted tentative rulings.

Party Information

Debtor(s):

Vernon David Harm Behrens

Represented By
Nima S Vokshori

Trustee(s):

Kathy A Dockery (TR)

Pro Se

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2:18-17619 Eugene Winters

Chapter 13

#2.00 Hrg re: Motion to excuse deceased debtor from completing course in personal financial management and from completing an application for entry of discharge

Docket 58

Tentative Ruling:

Grant the motion and waive the requirement for the deceased Debtor to file a certificate of compliance under 11 U.S.C. 1328(g)(1).

Proposed order(s): Unless otherwise ordered, Movant is directed to lodge proposed order(s) on the foregoing matter(s) via LOU within 7 days after the hearing date (per LBR 9021-1(b)(1)(B)).

Appearances are not required. (If you wish to contest the tentative ruling, see the Posted Procedures of Judge Bason, available at www.cacb.uscourts.gov, then search for "tentative rulings.")

If you are making an appearance, you may do so (1) in person in the courtroom, unless the Court has been closed (check the Court's website for public notices), (2) via ZoomGov video, or (3) via ZoomGov telephone. For ZoomGov instructions for all matters on calendar, please see page 1 of the posted Tentative Rulings.

Key documents reviewed (in addition to motion papers): N/A (no opposition on file as of the preparation of this tentative ruling)

Party Information

Debtor(s):

Eugene Winters

Represented By
William G Cort

Trustee(s):

Kathy A Dockery (TR)

Pro Se

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2:23-13507 Ano Meah

Chapter 13

#3.00 Hrg re: Motion to Disallow Claims Number 5
filed by Unifund CCR Partners

Docket 27

*** VACATED *** REASON: Voluntary Dismissal of Motion Filed
09/21/23 (Dkt. 29)

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

Ano Meah

Represented By
Michael E Clark

Trustee(s):

Kathy A Dockery (TR)

Pro Se

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8:30 AM

2:20-11621 Luis Hernandez

Chapter 13

#4.00 Hrg re: Motion for order disallowing the claim of
US Bank, National Association [Amended Claim no. 8-1]

Docket 62

***** VACATED *** REASON: Voluntary Dismissal of Motion Filed
10/17/23 (Dkt. 68)**

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

Luis Hernandez

Represented By
Rebecca Tomilowitz

Trustee(s):

Kathy A Dockery (TR)

Pro Se

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8:30 AM

2:23-15827 Philip Dennis Gardner and Andrea Ruth Bowen-Gardner

Chapter 13

#5.00 Cont'd Order to show cause re: Dismissal
due to simultaneous bankruptcy
fr. 10/3/23

Docket 18

Tentative Ruling:

Tentative Ruling for 10/3/23:

Discharge the Order to Show Cause ("OSC," dkt. 18), subject to any oral opposition at the hearing, based on Debtors' response (dkt. 21), and the fact that all creditors were served (see dkt. 21, 23, 25). Appearances required.

Unless otherwise ordered at the hearing, this Court will prepare any order discharging or otherwise addressing the OSC.

If you are making an appearance, you may do so (1) in person in the courtroom, unless the Court has been closed (check the Court's website for public notices), (2) via ZoomGov video, or (3) via ZoomGov telephone. For ZoomGov instructions for all matters on calendar, please see page 1 of the posted Tentative Rulings.

Party Information

Debtor(s):

Philip Dennis Gardner

Represented By
Roksana D. Moradi-Brovia
Matthew D. Resnik

Joint Debtor(s):

Andrea Ruth Bowen-Gardner

Represented By
Roksana D. Moradi-Brovia
Matthew D. Resnik

Trustee(s):

Kathy A Dockery (TR)

Pro Se

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2:22-12550 Therese Kiwi Foisia

Chapter 13

#6.00 Cont'd hrg re: Motion under Local Bankruptcy Rule 3015-1 (n) and (w) to modify plan or suspend plan payments fr. 10/5/23

Docket 59

Tentative Ruling:

Tentative Ruling for 11/2/23:

Appearances required.

At the hearing on 10/5/23 this Court was persuaded to continue this matter to today. There is no tentative ruling but the parties should be prepared to address the current status of this matter, and whether this Court should set any briefing schedules, any hearings, or any other procedures.

If you are making an appearance, you may do so (1) in person in the courtroom, unless the Court has been closed (check the Court's website for public notices), (2) via ZoomGov video, or (3) via ZoomGov telephone. For ZoomGov instructions for all matters on calendar, please see page 1 of the posted tentative rulings.

Tentative Ruling for 10/5/23:

Appearances required, absent either (1) an agreement with the Chapter 13 Trustee's office to further continue this matter or (2) withdrawal of the motion. There is no tentative ruling, but the parties should be prepared to address the issues raised by the Chapter 13 Trustee (dkt. 61).

If you are making an appearance, you may do so (1) in person in the courtroom, unless the Court has been closed (check the Court's website for public notices), (2) via ZoomGov video, or (3) via ZoomGov telephone. For ZoomGov instructions for all matters on calendar, please see page 1 of the posted tentative rulings.

Party Information

Debtor(s):

Therese Kiwi Foisia

Represented By

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CONT...

Therese Kiwi Foisia

Nima S Vokshori

Chapter 13

Trustee(s):

Kathy A Dockery (TR)

Pro Se

**United States Bankruptcy Court
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2:21-17649 Lina Baylosis

Chapter 13

#7.00 Cont'd hrg re: Motion under Local Bankruptcy Rule 3015-1 (n) and (w) to modify plan or suspend plan payments fr. 9/7/23, 10/5/23

Docket 60

Tentative Ruling:

Tentative Ruling for 11/2/23:

Appearances required.

At the hearing on 10/5/23 this Court was persuaded to continue this matter to today. There is no tentative ruling but the parties should be prepared to address the current status of this matter, and whether this Court should set any briefing schedules, any hearings, or any other procedures.

If you are making an appearance, you may do so (1) in person in the courtroom, unless the Court has been closed (check the Court's website for public notices), (2) via ZoomGov video, or (3) via ZoomGov telephone. For ZoomGov instructions for all matters on calendar, please see page 1 of the posted tentative rulings.

Tentative Ruling for 10/5/23:

Appearances required.

At the hearing on 9/7/23 this Court was persuaded to continue this matter to today. There is no tentative ruling but the parties should be prepared to address the current status of this matter, and whether this Court should set any briefing schedules, any hearings, or any other procedures.

If you are making an appearance, you may do so (1) in person in the courtroom, unless the Court has been closed (check the Court's website for public notices), (2) via ZoomGov video, or (3) via ZoomGov telephone. For ZoomGov instructions for all matters on calendar, please see page 1 of the posted tentative rulings.

Tentative Ruling for 9/7/23:

Appearances required, absent either (1) an agreement with the Chapter 13

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CONT... Lina Baylosis

Chapter 13

Trustee's office to further continue this matter or (2) withdrawal of the motion. There is no tentative ruling, but the parties should be prepared to address the issues raised by the Chapter 13 Trustee (dkt. 61).

If you are making an appearance, you may do so (1) in person in the courtroom, unless the Court has been closed (check the Court's website for public notices), (2) via ZoomGov video, or (3) via ZoomGov telephone. For ZoomGov instructions for all matters on calendar, please see page 1 of the posted tentative rulings.

Party Information

Debtor(s):

Lina Baylosis

Represented By
Sundee M Teeple

Trustee(s):

Kathy A Dockery (TR)

Pro Se

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2:23-15286 Karina Cardenas-Ruiz

Chapter 13

#8.00 Cont'd hrg re: Motion for order determining value of collateral [11 U.S.C. section 506(a), FRBP 3012] fr. 10/5/23

Docket 17

Tentative Ruling:

Tentative Ruling for 11/2/23:

Grant the motion and value the vehicle at \$13,557.00 based on this Court's review of Debtor's supplemental declaration. Dkt. 23. Appearances are not required on 11/2/23. (If you wish to contest the tentative ruling, see the Posted Procedures of Judge Bason, available at www.cacb.uscourts.gov, then search for "tentative rulings.")

Proposed order(s): Unless otherwise ordered, Debtor is directed to lodge proposed order(s) on the foregoing matter(s) via LOU within 7 days after the hearing date (per LBR 9021-1(b)(1)(B)).

If you are making an appearance, you may do so (1) in person in the courtroom, unless the Court has been closed (check the Court's website for public notices), (2) via ZoomGov video, or (3) via ZoomGov telephone. For ZoomGov instructions for all matters on calendar, please see page 1 of the posted Tentative Rulings.

Key documents reviewed (in addition to motion papers): N/A (no opposition on file as of the preparation of this tentative ruling)

Tentative Ruling for 10/5/23:

Continue 11/2/23 at 8:30 a.m., with a **deadline of 10/12/23** to file and serve the debtors' declaration addressing the following issue, and a deadline of 10/19/23 for any reply. Appearances are not required on 10/5/23. (If you wish to contest the tentative ruling, see the Posted Procedures of Judge Bason, available at www.cacb.uscourts.gov, then search for "tentative rulings.")

If you are making an appearance, you may do so (1) in person in the courtroom, unless the Court has been closed (check the Court's website for

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CONT... Karina Cardenas-Ruiz

Chapter 13

public notices), (2) via ZoomGov video, or (3) via ZoomGov telephone. For ZoomGov instructions for all matters on calendar, please see page 1 of the posted tentative rulings.

Reason: The KBB printout states that it is a "private party" value, but under 11 U.S.C. 506(a)(2) the value means "the price a retail merchant would charge for the property ..." (emphasis added) (which typically is higher than the "private party" value).

Party Information

Debtor(s):

Karina Cardenas-Ruiz

Represented By
Onyinye N Anyama

Trustee(s):

Kathy A Dockery (TR)

Pro Se

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2:19-10274 Luisa S Paredes

Chapter 13

#9.00 Cont'd hrg re: Motion under Local Bankruptcy Rule 3015-1 (n) and (w) to modify plan or suspend plan payments fr. 10/5/23

Docket 95

Tentative Ruling:

Tentative Ruling for 11/2/23:

Appearances required.

At the hearing on 10/5/23 this Court was persuaded to continue this matter to today. There is no tentative ruling but the parties should be prepared to address the current status of this matter, and whether this Court should set any briefing schedules, any hearings, or any other procedures.

If you are making an appearance, you may do so (1) in person in the courtroom, unless the Court has been closed (check the Court's website for public notices), (2) via ZoomGov video, or (3) via ZoomGov telephone. For ZoomGov instructions for all matters on calendar, please see page 1 of the posted tentative rulings.

Tentative Ruling for 10/5/23:

Appearances required, absent either (1) an agreement with the Chapter 13 Trustee's office to further continue this matter or (2) withdrawal of the motion. There is no tentative ruling, but the parties should be prepared to address the issues raised by the Chapter 13 Trustee (dkt. 98).

If you are making an appearance, you may do so (1) in person in the courtroom, unless the Court has been closed (check the Court's website for public notices), (2) via ZoomGov video, or (3) via ZoomGov telephone. For ZoomGov instructions for all matters on calendar, please see page 1 of the posted tentative rulings.

Party Information

Debtor(s):

Luisa S Paredes

Represented By

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CONT... Luisa S Paredes

Ali R Nader

Chapter 13

Trustee(s):

Kathy A Dockery (TR)

Pro Se

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**#1.00 PLEASE BE ADVISED THAT THE CHAPTER 13 9:30 AM
CONFIRMATION CALENDAR CAN BE VIEWED ON THE
COURT'S WEBSITE (www.cacb.uscourts.gov) UNDER:
JUDGES>BASON, N.>CHAPTER 13>CONFIRMATION HEARINGS CALENDAR**

Docket 0

Tentative Ruling:

- NONE LISTED -

**United States Bankruptcy Court
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Thursday, November 2, 2023

Hearing Room 1545

9:30 AM

2:22-16985 Diane Heesun Moon

Chapter 13

#2.00 Cont'd hrg re: Objection by Debtor to
Route 66 Holdings, Inc. Proof of Claim #1-1
fr. 5/4/23, 5/16/23, 7/13/23, 8/10/23, 10/5/23

Docket 46

Tentative Ruling:

Tentative Ruling for 11/2/23:

Overrule Debtor's Claim Objection, and allow Route 66's Claim in its entirety, as set forth below. Appearances required.

Proposed order(s): Unless otherwise ordered, Route 66 is directed to lodge proposed order(s) on the foregoing matter(s) via LOU within 7 days after the hearing date (per LBR 9021-1(b)(1)(B)) and attach a copy of this tentative ruling, thereby incorporating it as this Court's actual ruling.

If you are making an appearance, you may do so (1) in person in the courtroom, unless the Court has been closed (check the Court's website for public notices), (2) via ZoomGov video, or (3) via ZoomGov telephone. For ZoomGov instructions for all matters on calendar, please see page 1 of the posted Tentative Rulings.

Key documents reviewed (in addition to motion papers): Route 66's opposition to Claim Objection (dkt. 50), Declaration of Marc Aaron Goldbach in support of Claim Objection (dkt. 74), Route 66's objection to Debtor's First Amended Chapter 13 Plan (dkt. 78), Debtor's opposition to Route 66's objection to Chapter 13 Plan (dkt. 79)

At issue is whether a claim asserted against the estate by Route 66 Holdings, Inc. ("Route 66") is subject to 11 U.S.C. 502(b)(6), which imposes a cap upon "the claim of a lessor for damages resulting from the termination of a lease of real property" For the reasons set forth below, the tentative ruling is that Route 66's claim is not subject to the section 502(b)(6) cap.

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CONT... Diane Heesun Moon

Chapter 13

(1) Background

Route 66 asserts a claim in the amount of \$231,964.14 (the "Claim"), on account of attorney fees and costs awarded in an unlawful detainer action before the Los Angeles Superior Court (the "UD Action"). Debtor asserts that the entirety of the Claim is subject to 11 U.S.C. 502(b)(6), which imposes a cap upon "the claim of a lessor for damages resulting from the termination of a lease of real property" Route 66 takes the position that none of the Claim is subject to the section 502(b)(6) cap. Dkt. 78 at pp. 4–5.

Route 66 commenced the UD Action on 10/31/18, long before Debtor filed a Chapter 13 petition on 12/24/22 (the "Petition Date"). Appellate Division Opinion (dkt. 46, PDF pp. 19–27) at p. 2:11–14. Litigation of the UD Action was lengthy and contentious; the initial non-jury trial before the Los Angeles Superior Court involved the testimony of seventeen witnesses. *Id.* at p. 3 n. 3. The trial court entered judgment in favor of Debtor, but the Appellate Division reversed the trial court with directions to enter judgment in favor of Route 66. Among other things, the Appellate Division found that Debtor had committed a "material breach of the lease agreement" by causing an unlicensed contractor to remove "several feet of gas and water piping from the plumbing system ... without the consent of the landlord [Route 66]" *Id.* at p. 8:22–9:1.

On 7/25/23, the State trial court entered judgment in favor of Route 66 (the "UD Judgment") (Claim 1-2 at pp. 4–9). The trial court made the following findings regarding Route 66's entitlement to attorney fees in a Statement of Decision accompanying the UD Judgment:

Second, [Route 66] is entitled to the recovery of reasonable attorney fees as the prevailing party following its successful appeal to the appellate division of the Superior Court. The lease itself indicates [Route 66] is entitled to such fees where it is the prevailing party. (The court similarly found, despite the language in the lease, defendant is entitled to attorneys' fees where it is the prevailing party and stands by this finding....) ...

Here, paragraph 10 of the lease provides a default by the tenant ([Debtor]) shall entitle the landlord ([Route 66]) to pursue "rights and remedies which the Landlord may have against the Tenant by reason of such defaults as provided by law." In this case, "Tenant will be responsible of all Attorney and Legal Fees associated with this understanding."

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Diane Heesun Moon

Chapter 13

As a successor on the lease, plaintiff [Route 66] is responsible for these fees where defendant Diane H. Moon is the prevailing party. This is so even though paragraph 10 of the lease appears to be a unilateral fee provision. See CCC section 1717; *Fairchild v. Park* (2001) 90 Cal.App.4th 919, 923-924, 929-930.]

Similarly, as the successor in interest to the original lessor, [Route 66] is entitled to recover reasonable attorney's fees where it is the prevailing party, as [Route 66] is here following a successful appeal.

The court finds [Route 66] is entitled to a total of \$216,173.18 in attorney's fees. This is the total number of hours expended on the case through the date of filing its motion for attorney fees. The court finds the hourly rates indicated in the various attorney declarations to be reasonable in view of plaintiff's counsel expertise and experience....

Similarly, the costs demanded by [Route 66] for both trial and appeal are found to be reasonable. In total, plaintiff is awarded \$216,173.18 in attorney fees and \$15,790.96 in costs. [Statement of Decision (Claim 1-2, PDF pp. 6-9) at pp. 2-3.]

On 4/6/23, the State trial court denied Debtor's motion for relief from forfeiture of the lease. 4/6/23 Ruling on Submitted Matter (dkt. 50, PDF pp. 14-16). Debtor's appeal of that ruling apparently remains pending, although the current status of the appeal is not clear from the record. See dkt. 78, p. 2:9-15 (stating that the appeal remained pending as of 9/5/23). On 10/5/23, this Bankruptcy Court lifted the automatic stay to allow Route 66 to enforce its remedies to obtain possession of the premises from Debtor. Dkt. 81. In lifting the stay, this Court determined that there was no point in waiting for resolution of Debtor's appeal of the State trial court's refusal to relieve Debtor from the forfeiture of the lease, since Debtor could not afford to make the cure payments necessary to assume the lease. Dkt. 81, Ex. 1 (PDF pp. 5-7).

(2) Route 66's Claim for attorney fees arose prior to the Petition Date

Before examining whether the Claim is subject to the 502(b)(6) cap, this Court must first determine whether the Claim arose prior to the Petition Date. The question matters because the treatment that must be afforded to a

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claim under a Chapter 13 plan varies depending upon whether that claim arose before or after the filing of the petition. The tentative ruling is that, although Route 66 incurred some of its attorney fees after the Petition Date, and its attorney fees were not liquidated until after the Petition Date, the attorney fees in their entirety constitute a prepetition claim.

Under the Bankruptcy Code, a "claim" is defined to include a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." 11 U.S.C. 101(5). "[F]ederal law determines when a claim arises under the Bankruptcy Code." *In re SNTL Corp.*, 571 F.3d 826, 839 (9th Cir. 2009). As the Ninth Circuit has explained, under some circumstances a creditor may have a pre-petition claim for attorney fees even when the creditor incurred those fees post-petition:

For instance, where the debtor and creditor have entered into a contract that includes an attorneys' fees agreement, the creditor may be deemed to have a contingent claim for payment of attorneys' fees even before any fees are incurred. See *id.* at 843 & n.18 ("[W]hen a creditor's right to payment for fees exists prepetition [in a Chapter 7 case], the right to payment constitutes a 'claim,' within the meaning of § 101(5)(A), albeit an unliquidated, unmatured claim." (quoting *In re New Power Co.*, 313 B.R. 496, 508 (N.D. Ga. 2004))). Such a contingent claim would then include attorneys' fees incurred during and after the bankruptcy case. [*In re Castellino Villas, A. K. F. LLC*, 836 F.3d 1028, 1034 (9th Cir. 2016).]

The "fair contemplation" test determines whether a claim arose pre-petition. *Id.* "Under this test, 'a claim arises when a claimant can fairly or reasonably contemplate the claim's existence even if a cause of action has not yet accrued under nonbankruptcy law.'" *Id.* (internal citation omitted). Notwithstanding the breadth of the test, "attorneys' fees incurred by a creditor pursuant to an agreement will not always be in the 'fair contemplation' of the parties." *Id.* Attorney fees incurred post-petition fall outside the "fair contemplation" of the parties if the party incurring the post-petition fees did so by "voluntarily pursu[ing] a whole new course of litigation, commenc[ing] litigation, or return[ing] to the fray voluntarily." *Id.*

The tentative ruling is that Route 66's claim for post-petition attorney fees could have been fairly contemplated by Debtor prior to the Petition Date,

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and as a consequence amount to a pre-petition claim. The entire dispute between Route 66 and Debtor dealt with the question of whether Debtor had a continued right to occupy the premises under its lease with Route 66. To the extent that Route 66 incurred attorney fees post-petition, it did so in furtherance of its effort to establish that the lease had terminated—which was Route 66's objective from the onset of the UD Action. Post-petition attorney fees incurred by Route 66 cannot reasonably be characterized as having resulted from "a whole new course of litigation" or "returning to the fray." *Id.*

(3) Debtor's argument that the State Court erred in awarding Route 66 attorney fees is without merit

Debtor advances various reasons for why the State Court's decision to award Route 66 attorney fees was erroneous, and seeks to disallow the Claim based upon those reasons. Dkt. 46 at pp. 7–11. The tentative ruling is that because the judgment of the State Court awarding attorney fees remains valid and enforceable, it is not appropriate for this Bankruptcy Court to examine the merits of that judgment.

The Supreme Court has explained:

Property interests are created and defined by state law. Unless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding. Uniform treatment of property interests by both state and federal courts within a State serves to reduce uncertainty, to discourage forum shopping, and to prevent a party from receiving "a windfall merely by reason of the happenstance of bankruptcy." [*Butner v. United States*, 440 U.S. 48, 55 (1979).]

Debtor's attempt to have this Bankruptcy Court re-evaluate the correctness of the State Court judgment is inconsistent with *Butner*, which requires this Court to respect and enforce judgments rendered by the courts of the State of California. Debtor has not cited any authority demonstrating that this Court has the ability to disregard an unstayed and enforceable judgment rendered by a State Court.

In the alternative, the tentative ruling is that none of Debtor's collateral attacks upon the State Court's judgment awarding attorney fees have merit.

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Diane Heesun Moon

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(4) Route 66's Claim is not subject to the section 502(b)(6) cap

Section 502(b)(6) imposes a cap upon "the claim of a lessor for damages resulting from the termination of a lease of real property" In *In re El Toro Materials Co., Inc.*, 504 F.3d 978 (9th Cir. 2007), the debtor, a mining company, used the Bankruptcy Code to reject a property lease. At issue was whether the lessor's claim against the debtor-tenant for "allegedly leaving one million tons of its wet clay 'goo'" on the lessor's property was subject to the section 502(b)(6) cap. *Id.*, 504 F.3d 978, 979. In determining that the claim was not capped by section 502(b)(6), the Ninth Circuit developed the following test:

The cap applies to damages "resulting from" the rejection of the lease. 11 U.S.C. § 502(b)(6). [The lessor's] claims for waste, nuisance and trespass do not result from the rejection of the lease—they result from the pile of dirt allegedly left on the property. Rejection of the lease may or may not have triggered [the lessor's] ability to sue for the alleged damages. But the harm to [the lessor's] property existed whether or not the lease was rejected. A simple test reveals whether the damages result from the rejection of the lease: Assuming all other conditions remain constant, would the landlord have the same claim against the tenant if the tenant were to assume the lease rather than rejecting it? Here, [the lessor] would still have the same claim it brings today had El Toro accepted the lease and committed to finish its term: The pile of dirt would still be allegedly trespassing on [the lessor's] land and [the lessor] still would have the same basis for its theories of nuisance, waste and breach of contract. The million-ton heap of dirt was not put there by the rejection of the lease—it was put there by the actions and inactions of [the debtor/mining company] in preparing to turn over the site. [*In re El Toro Materials Co., Inc.*, 504 F.3d 978, 980–81 (9th Cir. 2007).]

El Toro explained the rationale for its test as follows:

The structure of the cap—measured as a fraction of the remaining term—suggests that damages other than those based on a loss of future rental income are not subject to the cap. It makes sense to cap damages for lost rental income based on the amount of expected rent: Landlords may have the ability to

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mitigate their damages by re-leasing or selling the premises, but will suffer injury in proportion to the value of their lost rent in the meantime. In contrast, collateral damages are likely to bear only a weak correlation to the amount of rent: A tenant may cause a lot of damage to a premises leased cheaply, or cause little damage to premises underlying an expensive leasehold.

One major purpose of bankruptcy law is to allow creditors to receive an aliquot share of the estate to settle their debts. Metering these collateral damages by the amount of the rent would be inconsistent with the goal of providing compensation to each creditor in proportion with what it is owed. Landlords in future cases may have significant claims for both lost rental income and for breach of other provisions of the lease. To limit their recovery for collateral damages only to a portion of their lost rent would leave landlords in a materially worse position than other creditors. In contrast, capping rent claims but allowing uncapped claims for collateral damage to the rented premises will follow congressional intent by preventing a potentially overwhelming claim for lost rent from draining the estate, while putting landlords on equal footing with other creditors for their collateral claims. [*In re El Toro Materials Co., Inc.*, 504 F.3d 978, 980 (9th Cir. 2007).]

In *In re Kupfer*, 852 F.3d 853 (9th Cir. 2016), the court adapted the test first articulated in *El Toro* to a lease that had terminated pre-petition. The debtor-tenants in *Kupfer* ceased paying rent on two commercial properties and eventually vacated the premises. *Id.* at 855. The lessors sued debtor-tenants for breach of the leases, and an arbitrator awarded the lessors damages of approximately \$1.3 million. *Id.* The debtor-tenants did not seek bankruptcy protection until after the lease had been terminated and they had vacated the premises. *Id.* Modifying the *El Toro* test so that it could be used in cases involving "not a post-petition rejection of a lease, but a pre-petition termination of a lease," the *Kupfer* court held that damages do not result from the termination of the lease—and therefore are not subject to the section 502(b)(6) cap—if the landlord would "have the same claim against the tenant had the lease not been terminated." *In re Kupfer*, 852 F.3d 853, 858.

Neither *El Toro* or *Kupfer* are directly on point. In contrast to the instant case, the debtor-tenants in both *El Toro* and *Kupfer* were not seeking

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to remain in possession of the leased premises—in *El Toro*, the debtor-tenant stipulated to reject the lease after seeking bankruptcy protection, and in *Kupfer*, the lease had been terminated and the debtor-tenant had vacated the premises prior to seeking bankruptcy protection. Here, Debtor's hope has always been to continue operating her business from the leased premises. As recently as 8/14/23, Debtor filed a Chapter 13 Plan proposing to assume the lease. Dkt. 75 at p. 12. Debtor's hope was not finally extinguished until 10/5/23, when this Bankruptcy Court lifted the automatic stay to authorize Route 66 to evict Debtor from the premises based upon a finding that "it appears impossible for Debtor to afford to cure the lease." Dkt. 81, p. 6 at ¶ (c).

The factual differences between this case and *El Toro* and *Kupfer* matters for purposes of determining whether Route 66's Claim is one "for damages resulting from the termination of a lease of real property," 11 U.S.C. 502(b)(6). *El Toro* and *Kupfer* present facts more typical of a dispute over performance under a commercial lease. In both those cases, the primary breach was the failure of the debtor-tenants to pay rent. Presumably, the preferred outcome, from the standpoint of the lessors, would have been for the debtor-tenants to continue paying rent under the leases. That is, the majority of the damages to the lessors "resulting from the termination of [the] lease" took the form of lost rental income.

The facts of the present case are very different. Debtor's ability and willingness to pay rent at the lease rate (and perhaps even at the market rate) was never a significant issue. Instead, the dispute was over whether Debtor had materially breached the lease by (A) modifying the premises without authorization and (B) permitting dangerous conditions to exist on the premises. See *generally* Appellate Division Opinion (dkt. 46, PDF pp. 19–27). For example, during the trial conducted by the State Court, Route 66's principal testified that in his view, Route 66 had no choice but to pursue termination of the lease because Debtor "was 'dismantling the place.'" *Id.* at p. 5 (quoting testimony of Andrew Ritholz). The challenge facing this Bankruptcy Court is to apply *El Toro* and *Kupfer* to the instant case, in which the facts differ in meaningful respects from the facts that lead to the creation of the tests articulated in *El Toro* and *Kupfer*.

Superficially, *Kupfer* and not *El Toro* appears to more closely resemble the present case, in that both *Kupfer* and the present case involve a lease that terminated pre-petition. But upon more searching inquiry, it is *El Toro*, not

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Kupfer, that is the more direct analogue. The reason is that, as discussed above, it was not until recently that Debtor was forced to abandon her objective of assuming the lease. Indeed, Debtor is still apparently attempting to obtain a ruling from the State appellate court relieving her from forfeiture of the lease (although as noted, the current status of Debtor's appeal is not clear from the record). What this means is that *El Toro*'s test (which requires this Court to ask whether the lessor Route 66 would have the same claim against Debtor if Debtor were to assume the lease rather than rejecting it) is a better fit than the modified test set forth in *Kupfer* (which requires this Court to ask whether lessor Route 66 would have the same claim against Debtor had the lease not been terminated).

Applying the *El Toro* test, the tentative ruling is that Route 66's Claim is not capped by section 502(b)(6). Assuming counterfactually that Debtor were to assume the lease, Route 66 would still have the same claim for attorney fees against Debtor. That is because in order to assume the lease, Debtor would be required to cure her defaults thereunder by either paying Route 66 the attorney fees awarded by the State Court, or providing adequate assurance of her ability to promptly pay such fees. Said another way, Route 66's Claim for attorney fees would still exist if Debtor somehow gained the right to continue to occupy the premises under the lease.

This result is also consistent with the plain language of section 502(b)(6) and the reasoning of *El Toro*. Route 66 incurred the attorney fees comprising the Claim by prosecuting litigation to establish that it had lawfully exercised its right to terminate the lease. It can hardly be said that fees incurred to obtain the termination of a lease qualify as "damages resulting from the termination of a lease," 11 U.S.C. 502(b)(6) (emphasis added). This point was aptly made by *In re Wrigley*, a decision cited favorably in *Kupfer*: "Because the damages comprising the first element of Lariat's claim (unpaid rent, common area maintenance, and late fees) accrued prior to termination of the lease and thus cannot be said to have resulted from termination of the lease, the related attorney fees, costs, and disbursements—and the pre-petition interest thereon—likewise cannot be said to have resulted from termination of the lease." *In re Wrigley*, 533 B.R. 267, 272 (8th Cir. BAP 2015).

In the excerpts quoted at greater length above, *El Toro* explained that the structure of the section 502(b)(6) cap "suggests that damages other than those based on a loss of future rental income are not subject to the cap." *In*

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re El Toro, 504 F.3d 978, 980. That structure further demonstrates why the attorney fees incurred by Route 66 in litigation to validate its right to terminate the lease are not capped. Those attorney fees cannot reasonably be characterized as akin to future rental income.

Party Information

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Docket 0

Tentative Ruling:

- NONE LISTED -