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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:)
) BAP No. CC-12-1340-KlPaDu
6 TRISTAR ESPERANZA PROPERTIES,)
LLC, a California Limited) Bk. No. SA 11-21095-TA
7 Liability Company,)
) Adv. No. SA 12-01041-TA
8 Debtor.)
)
9)
10 JANE O'DONNELL; PENSICO TRUST)
COMPANY, a New Hampshire)
Company,*)
11)
Appellants,)
12)
v.) **OPINION**
13)
14 TRISTAR ESPERANZA PROPERTIES,)
LLC, a California Limited)
Liability Company,)
15)
Appellee.)
16)

Argued and Submitted on February 22, 2013
at Pasadena, California

Filed - March 8, 2013

Appeal from the United States Bankruptcy Court
for the Central District of California

Honorable Theodor Albert, Bankruptcy Judge, Presiding

Before: KLEIN,** PAPPAS, and DUNN, Bankruptcy Judges.

* The caption is revised to reflect Jane O'Donnell as lead
appellant and real party in interest. Pensico Trust Company is
not separately represented and has not appeared in its own right.

** Hon. Christopher M. Klein, Chief Judge, U.S. Bankruptcy
Court, Eastern District of California, sitting by designation.

1 KLEIN, Bankruptcy Judge:

2
3 This is a mandatory subordination case. The "damages"
4 clause of 11 U.S.C. § 510(b) mandates subordination of claims for
5 "damages arising from the purchase or sale" of a security of the
6 debtor. The bankruptcy court concluded that § 510(b) mandatory
7 subordination applies to the claim of appellant, who withdrew as
8 a member of the debtor limited liability company ("LLC") and
9 obtained a judgment valuing her equity interest after the LLC did
10 not honor a provision in its operating agreement requiring buy-
11 back of the withdrawing member's interest.

12 We agree with the bankruptcy court that permitting a former
13 equity holder to recover the value of an equity-based claim on a
14 par with general unsecured creditors is the sort of bootstrapping
15 that § 510(b) mandatory subordination is designed to prevent.
16 Rejecting appellant's argument that "damages arising from the
17 purchase or sale" of a security does not encompass contract-based
18 awards to withdrawing LLC members, we AFFIRM.

19 FACTS

20 The debtor, Tristar Esperanza Properties, LLC, is a
21 California limited liability company whose sole asset is real
22 property in Orange County, California. Tristar's organic
23 governing document is in the form of an operating agreement.

24 Appellant Jane O'Donnell acquired a membership interest in
25 Tristar (about 14 percent) in 2005 by means of a \$100,000 capital
26 contribution made through her investment retirement account with
27 appellant Pensco Trust Company, which entity is content to be
28 represented by O'Donnell and has not appeared in its own right.

1 In 2008, O'Donnell invoked the Tristar operating agreement's
2 withdrawal provision by giving written notice of such intent.

3 Under the buy-back provision in the Tristar operating
4 agreement, the notice of withdrawal triggered a process in which
5 Tristar and the withdrawing member would use best efforts to
6 agree upon the fair market value of the subject interest.

7 Tristar paid O'Donnell \$60,000 on account and, jointly with
8 O'Donnell, retained an appraiser who determined that the fair
9 market value of O'Donnell's interest was \$399,918 (\$305/sq.ft.)
10 as of the time of her withdrawal. Tristar contends that this
11 value is "absurd" because it was not adjusted to reflect \$2.69
12 million in secured debt against its sole asset, which, if
13 counted, would have reduced the recovery by about \$377,000.

14 After Tristar declined to accept the valuation, O'Donnell
15 initiated an arbitration that concluded in 2010 with a
16 determination that Tristar was bound by the \$399,918 value.

17 The arbitrator awarded O'Donnell damages of \$399,918, less
18 the \$60,000 that Tristar had already paid.

19 The arbitration award was confirmed by a California superior
20 court and reduced to judgment. The abstract of judgment was
21 recorded in Orange County in December 2010.

22 Tristar filed its chapter 11 case in the Central District of
23 California in August 2011 and filed this adversary proceeding
24 against O'Donnell and Pensco Trust, alleging three claims for
25 relief: (1) mandatory subordination under § 510(b); (2)
26 equitable subordination under § 510(c); and (3) avoidance of a
27 preference under 11 U.S.C. § 547(b).

28 The trial court disposed of all three claims for relief on

1 cross-motions for summary judgment. The net result was that
2 Tristar prevailed on the mandatory subordination count, while the
3 other two counts were resolved against Tristar.

4 With respect to mandatory subordination, the court reasoned
5 that the scope of § 510(b) is broad and leaves little discretion
6 where literal application is not demonstrably at odds with the
7 intent of Congress. It explained that § 510(b) is designed to
8 prevent equity holders from diluting the recovery of creditors
9 who deal with the debtor only on a credit basis with no
10 expectation of sharing in the value of the enterprise and with an
11 expectation of having rights senior to equity interests.

12 In particular, the court rejected the argument that the
13 confirmed arbitration award did not constitute a claim for
14 "damages" within the meaning of the § 510(b) damages clause and
15 emphasized that the arbitrator found that the debtor had breached
16 its operating agreement. Under these circumstances, the court
17 concluded that such an award qualified as § 510(b) "damages."

18 This timely appeal, limited to the § 510(b) issue, ensued.

19 JURISDICTION

20 Federal subject-matter jurisdiction exists under 28 U.S.C.
21 § 1334(b). The bankruptcy judge had authority to hear and
22 determine the matter under 28 U.S.C. §§ 157(b)(2)(A) and (O); no
23 party has questioned that authority. We have jurisdiction under
24 28 U.S.C. § 158(a)(1).

25 ISSUES

26 1) Whether a contractually-required buy-back of an LLC
27 membership interest from a withdrawing member constitutes a
28 "purchase or sale" of a "security" of the debtor within the

1 meaning of 11 U.S.C. § 510(b).

2 2) Whether the appellants' claim is for "damages" within the
3 meaning of 11 U.S.C. § 510(b).

4 3) Whether withdrawal as an LLC member prior to the
5 bankruptcy filing renders 11 U.S.C. § 510(b) inapplicable.

6 4) Whether judicial estoppel should be imposed.

7 STANDARD OF REVIEW

8 We review summary judgment de novo. Ghomeshi v. Sabban (In
9 re Sabban), 600 F.3d 1219, 1221-22 (9th Cir. 2010); Bendon v.
10 Reynolds (In re Reynolds), 479 B.R. 67, 71 (9th Cir. BAP 2012).
11 De novo review permits an appellate court to substitute its
12 judgment for that of the trial court. Barclay v. Mackenzie (In
13 re AFI Holding, Inc.), 525 F.3d 700, 702 (9th Cir. 2008). We
14 must determine whether, viewing the summary judgment evidence in
15 the light most favorable to the non-moving party, any genuine
16 issue of material fact remains for trial and whether Tristar was
17 entitled to a § 510(b) mandatory subordination judgment as a
18 matter of law. Gill v. Stern (In re Stern), 345 F.3d 1036, 1040
19 (9th Cir. 2003).

20 DISCUSSION

21 This appeal requires construction of 11 U.S.C. § 510(b).
22 After examining the applicable language of § 510(b), we tour the
23 statute's legislative history and policy objectives. This
24 inspection of the statute's underpinnings confirms that the
25 arbitration award falls in the zone of transactions requiring
26 mandatory subordination under § 510(b).

27 For us, this is a case of first impression in that we deal
28 for the first time with the § 510(b) "damages" clause in the

1 context of an LLC and an arbitration stemming from the withdrawal
2 provision of the LLC's operating agreement. The ultimate
3 question is: whether a judgment debt, based on a confirmed
4 arbitration award enforcing a buy-back provision in the debtor
5 LLC's operating agreement, constitutes a claim "for damages
6 arising from the purchase or sale of" a "security" of the debtor.
7 11 U.S.C. § 510(b). It does.

8 I

9 The Bankruptcy Code provides for three distinct forms of
10 subordination: (1) subordination by agreement; (2) mandatory
11 subordination of certain claims related to a security; and
12 (3) equitable subordination. The first is a matter of contract;
13 the second a matter of the nature of a transaction; and the third
14 a matter of inequitable conduct. We focus here on the second.

15 Subordination demotes a claim from its nominal priority. A
16 subordinated claimant receives a distribution junior in priority
17 to the nominal class. 4 COLLIER ON BANKRUPTCY ¶ 510.01 (Alan N.
18 Resnick & Henry J. Sommer eds., 16th ed.) ("COLLIER").

19 As our primary task is to interpret § 510(b) de novo, we
20 begin with its language:

21 (b) For the purpose of distribution under this
22 title, a claim arising from rescission of a purchase or
23 sale of a security of the debtor or of an affiliate of
24 the debtor, for damages arising from the purchase or
25 sale of such a security, or for reimbursement or
26 contribution allowed under section 502 on account of
such a claim, shall be subordinated to all claims or
interests that are senior to or equal the claim or
interest represented by such security, except that if
such security is common stock, such claim has the same
priority as common stock.

27 11 U.S.C. § 510(b) (emphasis supplied).

28 Thus, § 510(b) contemplates three types of claims -

1 rescission, damages, and reimbursement/contribution - that all
2 have a nexus with the purchase or sale of a security. Allen v.
3 Geneva Steel Co. (In re Geneva Steel Co.), 281 F.3d 1173, 1177
4 (10th Cir. 2002); see also COLLIER ¶ 510.04. Only the damages
5 clause is involved in this appeal.

6 A

7 At the threshold lies the question whether a membership
8 interest in an LLC is a "security" as defined by Bankruptcy Code
9 § 101(49). 11 U.S.C. § 101(49).

10 That statutory definition of "security" does not provide a
11 functional description. Rather, it merely lists positive and
12 negative examples. There is a fifteen-item list of examples of
13 securities. 11 U.S.C. § 101(49)(A). And, there are seven
14 examples of what is not a security. 11 U.S.C. § 101(49)(B).
15 Neither list mentions a membership interest in an LLC.

16 But, the omission of mention of a LLC membership interest
17 from the examples of "security" at § 101(49)(A) is not fatal to
18 the status of such an interest as a "security" because the
19 operative verb at the beginning of the list is "includes": "The
20 term 'security' - (A) includes -... ." 11 U.S.C. § 101(49)(A).

21 Section 102 of the Bankruptcy Code provides a statutory rule
22 of construction whereby the term "includes" is not restrictive.
23 See 11 U.S.C. § 102(3) ("In this title - ... (3) 'includes' and
24 'including' are not limiting"). Therefore, the statutory list of
25 what is a "security" at § 101(49)(A) is non-exclusive.

26 Since the fifteen-item list of what constitutes a "security"
27 is non-exclusive, we look for an analogous entry on the list. In
28 this regard, the statute is express that the "interest of a

1 produce a result demonstrably at odds with the intentions of its
2 drafters. United States v. Ron Pair Enters., Inc., 489 U.S. 235,
3 242 (1989); Snively v. Miller (In re Miller), 397 F.3d 726, 730
4 (9th Cir. 2005). If the text of a statute is ambiguous, we
5 resort to canons of construction, legislative history, and the
6 statute's purpose to discern Congress's intent. James v. City of
7 Costa Mesa, 700 F.3d 394, 399 n.8 (9th Cir. 2012).

8 2

9 The language of § 510(b) provides that "damages" requiring
10 subordination must arise from the purchase or sale of the
11 debtor's securities, but it does not otherwise purport to
12 describe the nature of the claim for relief or the types of
13 damages that may be recovered.

14 "Damages" is not a defined term in the Bankruptcy Code, but
15 it has a well-understood general definition in the law. It
16 generally means money "claimed by, or ordered to be paid to, a
17 person as compensation for loss or injury." BLACK'S LAW DICTIONARY,
18 445 (9th ed. 2009) ("Damages").

19 The classic hornbook on damages likewise describes "damages"
20 as "primarily how much can be recovered" on any basis for
21 liability and as the preferred remedy over specific performance.
22 Charles T. McCormick, HANDBOOK OF THE LAW OF DAMAGES § 1 (1935).
23 Professor McCormick adds that an agreement to arbitrate all
24 controversies arising from dealings under a contract empowers the
25 arbitrator to determine all claims for damages, direct and
26 consequential, from any breach of contract. Id. at § 4.

27 We perceive no ambiguity in the use of the term "damages" in
28 § 510(b). Nothing has been presented to us to suggest that the

1 term has a narrower or specialized meaning in § 510(b).

2 In particular, we are not persuaded by the appellants'
3 argument that § 510(b) "damages" connote some sort of actionable
4 wrongdoing or malfeasance and not merely enforcing a contract
5 term. The decision they cite for the proposition merely held
6 that simple recovery of principal due under the promissory note
7 in question did not constitute § 510(b) "damages" even though a
8 "note" may be within the Bankruptcy Code definition of a
9 "security." In re Blondheim Real Estate, Inc., 91 B.R. 639, 640
10 (Bankr. D.N.H. 1988). We do not read that decision to narrow the
11 meaning of "damages" and, in any event, are not persuaded that
12 § 510(b) "damages" require wrongdoing or malfeasance.

13 3

14 Having concluded that § 510(b) "damages" include all forms
15 of "damages" known to the law so long as they arise from the
16 purchase or sale of a security of the debtor, the question
17 becomes whether, on our facts, there are § 510(b) "damages."

18 O'Donnell acquired her membership interest in Tristar in
19 exchange for cash. This was the purchase of a security. She
20 later invoked the buy-back process established by the Tristar
21 operating agreement for withdrawal by members from the LLC. The
22 subsequent disagreement over the purchase price determined by a
23 jointly retained appraiser led to the arbitration proceedings.

24 After considering the details of the parties' course of
25 conduct, including the applicable language of Tristar's operating
26 agreement, the arbitrator determined that Tristar was obligated
27 to repurchase the appellants' equity interest for the appraised
28 price. The arbitrator found that Tristar had breached the

1 operating agreement and awarded the appellants "damages"
2 commensurate with the appraisal. When Tristar still did not pay
3 what was due, the appellants obtained a state-court judgment
4 confirming the arbitration award.

5 Given that the arbitration award was an order to pay money
6 to the appellants as a matter of contractual right, and achieved
7 the status of a judgment debt once the award was confirmed, the
8 arbitration award and judgment qualify as § 510(b) "damages."

9 The record also shows the arbitrator concluded that Tristar
10 breached both "the letter and spirit" of the Tristar operating
11 agreement, and, for that reason, was bound by the appraiser's
12 determination. It is immaterial that appellants did not style
13 the arbitration demand as being for breach of contract, fraud, or
14 any other wrongful conduct. The purpose of the proceeding was to
15 enforce a contract in circumstances in which Tristar's
16 recalcitrance constituted breach of contract.

17 C

18 The next question is whether the appellants' claim arises
19 from the "purchase or sale" of Tristar's securities.

20 1

21 Section 510(b) is limited to claims "arising from the
22 purchase or sale of" a debtor's securities. What constitutes
23 "arising from" has been considered and found ambiguous by the
24 Second, Third, Fifth, Ninth, and Tenth Circuits.¹ No circuit has

25
26 ¹ Ninth Circuit cases on the scope of § 510(b) mandatory
27 subordination are: Racusin v. Am. Wagering, Inc. (In re Am.
28 Wagering, Inc.), 493 F.3d 1067, 1073 (9th Cir. 2007) (rescission
of a purchase or sale of a security of debtor); Am. Broad. Sys.,
(continued...)

1 taken a contrary view.

2 The factual scenarios in which investor claims have arisen
3 from the purchase or sale of a debtor's securities are diverse.
4 The LLC membership interest in this appeal is a new wrinkle.

5 The appellants characterize their claim as an ordinary debt
6 obligation. They emphasize that O'Donnell withdrew as a member
7 well before the bankruptcy proceedings, shed her equity status,
8 and thereafter became a general creditor of the debtor. Although
9 appellants argue that the claim is not one "stemming from alleged
10 fraud or wrongdoing relating to the purchase or sale of a
11 security," the weight of precedent has applied a broader
12 construction of the "arising from" language.

13 The ambiguity in § 510(b) permits competing narrow and broad
14 interpretations. A narrow reading would require that the injury
15 flow from the actual purchase or sale. A broad reading would
16 require that the purchase or sale be part of a causal link even
17 though the injury may flow from a subsequent event. Fair
18 arguments support each view. An influential case adopting the
19 broad view is In re Granite Partners, L.P., 208 B.R. 332, 339

21 ¹(...continued)
22 Inc. v. Nugent (In re Betacom of Phoenix, Inc.), 240 F.3d 823,
23 828 (9th Cir. 2001) (failure to deliver stock pursuant to merger
24 agreement). Other circuits have addressed § 510(b): SeaQuest
25 Diving, LP v. S&J Diving, Inc.(In re SeaQuest Diving, LP), 579
26 F.3d 411, 419 (5th Cir. 2009) (rescission arising from post-
27 issuance conduct); Rombro v. Dufrayne (In re Med Diversified,
28 Inc.), 461 F.3d 251, 258-59 (2d Cir. 2006) (exchange of stock
provision in termination agreement); Baroda Hill Invs., Ltd. v.
Telegroup, Inc. (In re Telegroup, Inc.), 281 F.3d 133, 144 (3d
Cir. 2002) (provision in stock purchase agreement to use best
efforts to register stock); Geneva Steel, 281 F.3d at 1178 (10th
Cir.) (fraudulent retention).

1 (Bankr. S.D.N.Y. 1997).

2 The Ninth Circuit favors the broad view and has expressed
3 its approval of the Granite Partners analysis. Betacom, 240 F.3d
4 at 828, citing with approval, Granite Partners, 208 B.R. at 333.
5 It has concluded that § 510's legislative history does not reveal
6 an intent to tie mandatory subordination exclusively to
7 securities fraud claims. Id. at 829. Accordingly, we apply the
8 broad view as the law of the circuit.

9 We now turn to the legislative history.

10 2

11 In drafting § 510(b), Congress relied on an influential
12 article by John J. Slain and Homer Kripke: John J. Slain & Homer
13 Kripke, The Interface Between Securities Regulation and
14 Bankruptcy – Allocating the Risk of Illegal Securities Issuance
15 Between Securityholders and the Issuer's Creditors, 48 N.Y.U. L.
16 REV. 261 (1973) ("Slain and Kripke"). The House Committee Report
17 contains an extended discussion of Slain and Kripke in connection
18 with § 510(b). H.R. Rep. No. 95-595, 1st Sess., at 194-96
19 (1977), reprinted in 1978 U.S.C.C.A.N. at 6154-56 ("House
20 Report"), cited with approval, Betacom, 240 F.3d at 829.

21 Confronting the historical problem of investors recovering
22 fraud claims pari passu with general creditors in bankruptcy
23 cases, Slain and Kripke emphasized the dissimilar expectations of
24 investors and creditors. They recognized that both creditors and
25 investors "accept the risk of enterprise failure." Slain and
26 Kripke at 286. The two constituent risks, however, are based on
27 different assumptions. In the event of insolvency, the creditor
28 expects higher priority vis-a-vis the investor, but, unlike the

1 investor, does not expect to participate in the profits of the
2 enterprise. House Report at 194-96; Betacom, 240 B.R. at 830-31.

3 The Ninth Circuit takes these dissimilar expectations into
4 account in setting a standard for mandatory subordination because
5 it is unfair to shift all of the risk to creditors who extend
6 credit in reliance on the cushion of investment provided by the
7 shareholders. Betacom, 240 F.3d at 829-31.

8 Section 510(b) was spawned by uncertainty under prior law
9 whether claims relating to securities transactions should enjoy
10 an equal footing with the claims of general unsecured creditors:
11 a "difficult policy question" in business bankruptcy concerns the
12 relative status of a security holder who seeks to rescind a
13 purchase of securities or to sue for damages based on such a
14 purchase and wants to be treated as a general unsecured creditor.
15 House Report, at 195.

16 Embracing the Slain and Kripke analysis, Congress explicitly
17 resolved the dilemma in favor of subordination when it enacted
18 § 510(b). It was persuaded that it was appropriate to focus on
19 the risk of insolvency as well as the risk of unlawful issuance
20 of the debtor's securities. Id. at 196. The intent was to
21 subordinate the distribution priority of rescission claims to all
22 claims that are senior to the claim or interest on which the
23 rescission claims are based. Id.

24 Although Congress focused on rescission claims, it enacted
25 more comprehensive language. The Ninth Circuit has described how
26 the scope of § 510(b) has gradually expanded to include claims
27 based on contract law and other actions. Am. Wagering, Inc., 493
28 F.3d at 1072. Beyond the realm of rescission and investor fraud

1 claims, there is judicial consensus that the phrase "arising
2 from" in § 510(b) should be construed broadly to encompass claims
3 other than fraud claims, such as claims for breach of contract.
4 Id. (collecting cases); Betacom, 240 F.3d at 828-29.

5 The broad interpretation of § 510(b) was cemented into the
6 law of the Ninth Circuit in Betacom. There, shareholders of the
7 debtor, who were to receive their shares through a merger
8 agreement entered into between the debtor and another entity,
9 brought a pre-petition action against the debtor for the debtor's
10 failure to deliver the stock as required by the merger agreement.
11 Betacom, 240 F.3d at 826. The court held the claim should be
12 subordinated under § 510(b). Id. at 832.

13 Central to the Betacom court's analysis was a careful
14 consideration of the rationales identified in the legislative
15 history. The Ninth Circuit explained that there are two main
16 rationales for mandatory subordination: "(1) the dissimilar risk
17 and return expectations of shareholders and creditors; and (2)
18 the reliance of creditors on the equity cushion provided by
19 shareholder investment." Id. at 830. As to the reliance
20 rationale, the court proposed, without deciding the issue, that
21 creditors of a distressed enterprise be presumed to have relied
22 upon each prior investment in equity and junior debt, subject to
23 rebuttal to the extent that the investor can prove nonreliance.
24 Id. at 831 n.3.

25 The Betacom precedent dictates that we reject the
26 appellants' argument that, to be subordinated, their claim must
27 sound in fraud or some sort of actionable wrongdoing. We cannot
28 ignore the Ninth Circuit's reasoning in Betacom that nothing in

1 the Slain and Kripke analysis suggests that Congress's concern
2 with creditor expectations and equitable risk allocation was
3 limited to cases of debtor fraud. Id. at 829.

4 Likewise, in Am. Wagering, the Ninth Circuit looked
5 favorably upon a linking test requiring a nexus or causal
6 relationship between the claim and the purchase or sale of the
7 securities. Am. Wagering, 493 F.3d at 1072. In its view, this
8 test showed that courts were concerned with claims that tried to
9 recharacterize what would otherwise be subordinated securities.
10 Id. Bootstrapping to a higher status in the bankruptcy
11 distribution scheme is blocked by § 510(b).

12 Applying the two rationales underlying § 510(b) to the facts
13 presented here, we conclude that the appellants' claim is subject
14 to mandatory subordination. O'Donnell was in fact an equity
15 holder before she withdrew. During her tenure as a member of
16 Tristar, she enjoyed the potential for profit based on the value
17 of real estate. In fact, she enjoyed a considerable return: she
18 contributed \$100,000 initially and received an arbitration award
19 for nearly \$400,000. The confirmed arbitration award is directly
20 linked to her ownership of a membership interest in the debtor;
21 indeed, it is nothing other than her cashing out her equity (at a
22 value that the debtor insists is highly inflated).

23 The second rationale for subordinating investor claims is
24 the reliance of creditors on the so-called "equity cushion"
25 created by an investor's contribution of capital. We presume
26 that creditors relied on this equity cushion in deciding to
27 extend credit to the debtor. By withdrawing as a member and
28 liquidating her interest, O'Donnell altered the Tristar balance

1 sheet by extracting or, more appropriately, attempting to extract
2 her initial contribution. This would effectively deflate the
3 equity cushion to which trade creditors and the like would look
4 in recovering their claims for fixed debt. The creditors of
5 Tristar, by virtue of their status, were never to enjoy the
6 returns of increased value.

7 The appellants have not attempted to rebut the presumption
8 that creditors of Tristar relied on O'Donnell's contribution as a
9 source of recovery. As such, the second rationale is also
10 applicable. But even if appellants had argued that there was a
11 lack of reliance, the presence of merely one of the dual
12 rationales is sufficient. Waltzer v. Nisselson (In re MarketXT
13 Holdings Corp.), 346 Fed. Appx. 744, 746 (2d Cir. 2009).

14 We hold that § 510(b) is sufficiently broad to encompass a
15 claim that arose from the withdrawal of a member from an LLC,
16 which withdrawal triggered a repurchasing process whereby the
17 debtor-issuer was to buy back the interest from the investor.

18 II

19 The appellants, urging that the withdrawal from the LLC and
20 the fixing of the claim before bankruptcy should prevent
21 mandatory subordination, brand their claim as a "fixed debt."
22 This is a familiar strategy for equity holders (current or
23 former) in the bankruptcy arena. The appellants assert that
24 O'Donnell traded the risks and rewards of an equity holder for
25 the risks and rewards of a general creditor.

26 To be sure, the appellants are "creditors" who have "claims"
27 against Tristar. A "creditor" includes anyone who holds a
28 "claim" against the debtor that arose before the order for

1 relief. 11 U.S.C. § 101(10)(A).

2 The judgment confirming the arbitration award requiring the
3 debtor to pay the fair market value of the former membership
4 interest is a "claim." See 11 U.S.C. § 101(5).

5 The purpose of subordination, however, is to adjust the
6 place in line of certain claims in the bankruptcy distribution
7 scheme. Bankruptcy policy affords a priority to general
8 creditors that is superior to equity interests. As Professors
9 Slain and Kripke explained in their seminal article, appropriate
10 allocations of risk among general creditors and equity-type
11 creditors should reflect the dissimilar risks regarding
12 enterprise insolvency those creditors undertake. Granite
13 Partners, 208 B.R. at 336.

14 Whatever might be said of a transformation of equity into
15 debt in a transaction that is old and cold and that has long been
16 treated as part of the enterprise's debt structure, this is not
17 such a case. Rather, the buy-back transaction was a disputed
18 issue until shortly before the chapter 11 case was filed and was,
19 doubtless, a material factor in the need for chapter 11 relief.
20 The dispute over the buy-back amount and the chapter 11 filing
21 were sufficiently proximate in time to warrant the conclusion
22 that this is an effort by equity to capture paper (and arguably
23 mythical) profits via a judgment for money damages.

24 Treating an equity investor on a par with unsecured
25 creditors disregards the principles underlying the absolute
26 priority rule in a manner that undermines this basic bankruptcy
27 concept. Granite Partners, 208 B.R. at 344; 11 U.S.C.
28 § 1129(b)(2)(B)(ii).

The appellants' argument that they extricated themselves from the equity position before the bankruptcy filing does not necessarily militate against the application of mandatory subordination. The Bankruptcy Code definition of "security" extends far beyond holders of stock. 11 U.S.C. § 101(49)(A). The text of § 510(b) does not require that a subordinated claimant be a shareholder. Betacom, 240 F.3d at 829. What matters is the type of claim, not the type of claimant. Id.

In short, the claim is so firmly rooted in O'Donnell's equity status that subordination is mandatory.

III

Finally, we reject the arguments that the appellee is barred by principles of judicial estoppel from asserting that the claim is for § 510(b) "damages" and that Tristar filed for bankruptcy as a bad faith collateral attack on the arbitration award.

A

The appellants posit that Tristar's statement in the arbitration that it "still owes O'Donnell money to complete the liquidation of her membership interest" should now estop Tristar from asserting that the claim is for § 510(b) "damages."

This is an assertion of the form of the equitable doctrine of judicial estoppel known as the estoppel of inconsistent positions, which prevents one from gaining advantage by taking one position and later seeking to reap another advantage from an inconsistent position. New Hampshire v. Maine, 532 U.S. 742, 749-51 (2001); United States v. Ibrahim, 522 F.3d 1003, 1009 (9th Cir. 2008); Hamilton v. State Farm Fire & Cas. Co., 270 F.3d 778, 782-85 (9th Cir. 2001); Alary Corp. v. Sims (In re Associated

1 Vintage Grp., Inc.), 283 B.R. 549, 565-67 (9th Cir. BAP 2002).

2 While there are not inflexible prerequisites for judicial
3 estoppel, the Supreme Court has emphasized the importance of a
4 "clearly inconsistent" position, coupled with acceptance of the
5 first position in circumstances that would create the perception
6 that one of the tribunals was misled, plus some form of unfair
7 advantage or detriment. New Hampshire v. Maine, 532 U.S. at 750-
8 51; Alary Corp., 283 B.R. at 566.

9 The appellants claim that Tristar is "playing fast and loose
10 with the courts" by admitting a debt obligation in one instance,
11 and later arguing that the obligation is one for "damages."
12 There are two flaws in this argument.

13 The first flaw is that there is no material inconsistency
14 between the concession that something remains to be paid to
15 complete the liquidation of the membership interest and the
16 assertion that whatever sum is owed to liquidate that interest
17 constitutes § 510(b) "damages." This amounts to missing the
18 forest for the trees; here, "damages" refers to a forest, not a
19 single tree.

20 Second, and independently fatal, is the absence of any
21 advantage that was gained by Tristar in the earlier arbitration
22 on account of the putatively inconsistent statement. New
23 Hampshire v. Maine, 532 U.S. at 750-51.

24 We perceive no material inconsistency between an admission
25 that a debt is owed and claiming that the debt owed is one for
26 § 510(b) "damages." Nothing suggests that the appellee gained
27 any advantage by the first statement. Nor do we perceive an
28 unfair advantage or unfair detriment. Hence, we reject the

1 appellants' argument based on judicial estoppel.

2 B

3 We also reject the appellants' claim -- first raised in the
4 reply brief -- that the appellee filed its chapter 11 case with
5 the sole intent of avoiding paying the remainder of the value of
6 O'Donnell's membership interest. Debtors have numerous motives
7 for filing a bankruptcy case. The goal of the federal bankruptcy
8 laws is the adjustment of the debtor-creditor relationship. The
9 resulting adjustment -- in this case subordination -- may not be
10 welcomed by the appellants. But it is certainly permitted.

11 Nor is chapter 11 an impermissible collateral attack on the
12 validity of a state court judgment. The amount that is owed is
13 not questioned. The issue is priority and terms of payment.

14 Hence, there is no genuine issue of material fact that there
15 was an arbitration award, confirmed by judgment, for that amount.

16 CONCLUSION

17 The bankruptcy court correctly granted summary judgment in
18 favor of the appellee on its § 510(b) claim. There is no genuine
19 issue of material fact and the appellee is entitled to judgment
20 as a matter of law. The appellants' right to payment, based on a
21 confirmed arbitration award valuing the membership interest in
22 the LLC, constitutes a claim for damages arising from the sale of
23 the appellee's securities that is subject to mandatory
24 subordination by virtue of § 510(b). We AFFIRM.