UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA

Honorable Fredrick E. Clement
Fresno Federal Courthouse
2500 Tulare Street, 5th Floor
Courtroom 11, Department A
Fresno, California

PRE-HEARING DISPOSITIONS

DAY: WEDNESDAY
DATE: JULY 18, 2018
CALENDAR: 10:00 A.M. CHAPTER 7 ADVERSARY PROCEEDINGS

Each matter on this calendar will have one of three possible designations: No Ruling, Tentative Ruling, or Final Ruling. These instructions apply to those designations.

No Ruling: All parties will need to appear at the hearing unless otherwise ordered.

Tentative Ruling: If a matter has been designated as a tentative ruling it will be called. The court may continue the hearing on the matter, set a briefing schedule or enter other orders appropriate for efficient and proper resolution of the matter. The original moving or objecting party shall give notice of the continued hearing date and the deadlines. The minutes of the hearing will be the court's findings and conclusions.

Final Ruling: Unless otherwise ordered, there will be no hearing on these matters. The final disposition of the matter is set forth in the ruling and it will appear in the minutes. The final ruling may or may not finally adjudicate the matter. If it is finally adjudicated, the minutes constitute the court's findings and conclusions. If the parties stipulate to continue the hearing on the matter or agree to resolve the matter in a way inconsistent with the final ruling, then the court will consider vacating the final ruling only if the moving party notifies chambers before 4:00 pm at least one business day before the hearing date: Department A-Kathy Torres (559)499-5860; Department B-Jennifer Dauer (559)499-5870. If a party has grounds to contest a final ruling because of the court's error under FRCP 60 (a) (FRBP 9024) ["a clerical mistake (by the court) or a mistake arising from (the court's) oversight or omission"] the party shall notify chambers (contact information above) and any other party affected by the final ruling by 4:00 pm one business day before the hearing.

Orders: Unless the court specifies in the tentative or final ruling that it will issue an order, the prevailing party shall lodge an order within 14 days of the final hearing on the matter.

1. 17-13133-A-7 **IN RE: ISABELLA CAMACHO**
17-1084 FEC-1

PRETRIAL CONFERENCE RE: COMPLAINT - PRE-TRIAL HEARING
11-13-2017 [1]

R. ALEXANDER ACOSTA, SECRETARY
OF LABOR, UNITED ST V. CAMACHO
JESSICA FLORES/ATTY. FOR PL.
RESPONSIVE PLEADING

Final Ruling

The adversary dismissed, the pretrial conference is concluded.

2. 18-10239-A-7 **IN RE: JEREMY/JENNIFER HILL**
18-1025

STATUS CONFERENCE RE: COMPLAINT
5-12-2018 [1]

HILL ET AL V. WESTLAKE
SERVICES, LLC
TIMOTHY SPRINGER/ATTY. FOR PL.

No Ruling

3. 17-14347-A-7 **IN RE: AMY AGTARAP**
18-1003

PRETRIAL CONFERENCE RE: COMPLAINT
1-19-2018 [1]

AYALA V. AGTARAP
RONALD CALHOUN/ATTY. FOR PL.
RESPONSIVE PLEADING

No Ruling

4. 09-62348-A-7 **IN RE: DAVID/ROSALINA FERRER**
18-1023

CONTINUED STATUS CONFERENCE RE: COMPLAINT
5-2-2018 [1]

SALVEN V. PLAINTIFF FUNDING
HOLDING, INC. ET AL
PETER SAUER/ATTY. FOR PL.
RESPONSIVE PLEADING

Final Ruling

The status conference is continued to August 29, 2018, at 10:00 a.m. The parties shall lodge judgment, in the form as to the Stipulation for Judgment, June 29, 2018, ECF # 19, at their earliest convenience. In the event a judgment is not in the file, not later than August 15, 2018, the parties shall file a joint status report.

5. 17-14766-A-7 **IN RE: JACQUELINE SILVA**
18-1013

CONTINUED STATUS CONFERENCE RE: COMPLAINT
3-15-2018 [1]

CLOETERS V. SILVA
DINA CLOETERS/ATTY. FOR PL.
CONT'D TO 7/18/18 PER ECF ORDER #25

No Ruling

6. 17-14766-A-7 **IN RE: JACQUELINE SILVA**
18-1013 ALG-2

CONTINUED MOTION TO DISMISS ADVERSARY PROCEEDING/NOTICE OF REMOVAL
5-15-2018 [13]

CLOETERS V. SILVA
JANINE OJI/ATTY. FOR MV.
CONT'D TO 7/18/18 PER ECF ORDER #25

No Ruling

7. 18-10784-A-7 **IN RE: ANDREW/VIRGINIA BERGSTROM**
18-1028

STATUS CONFERENCE RE: COMPLAINT
5-23-2018 [1]

HONARCHIAN V. BERGSTROM
JAMES MAKASIAN/ATTY. FOR PL.

No Ruling

8. 17-12389-A-7 **IN RE: DON ROSE OIL CO., INC.**
17-1086

CONTINUED STATUS CONFERENCE RE: COMPLAINT
11-17-2017 [1]

KODIAK MINING & MINERALS II
LLC ET AL V. DRO BARITE, LLC
VONN CHRISTENSON/ATTY. FOR PL.

Tentative Ruling

The status conference is continued to September 19, 2018, at 10:00 a.m.

9. 17-12389-A-7 **IN RE: DON ROSE OIL CO., INC.**
17-1086 LAK-1

CONTINUED MOTION TO DISMISS ADVERSARY PROCEEDING/NOTICE OF REMOVAL AND/OR MOTION TO TRANSFER SECOND CLAIM FOR RELIEF PURSUANT TO 28 U.S.C. § 1404(A)
2-28-2018 [46]

KODIAK MINING & MINERALS II
LLC ET AL V. DRO BARITE, LLC
LORI EROPKIN/ATTY. FOR MV.

Tentative Ruling

Motion: Motion to Dismiss Adversary Proceeding and/or Transfer of Adversary Proceeding
Notice: LBR 9014-1(f)(1); written opposition required
Disposition: Granted in part, denied in part; all claims dismissed without prejudice
Order: Civil minute order

Defendant Sallyport Commercial Finance, LLC (“Sallyport”) moves to dismiss the complaint filed by Kodiak Mining and Minerals II, LLC (“Kodiak”) and Hellenic Petroleum, LLC (“Hellenic,” and together

with Kodiak, the "Plaintiffs"). It does so on that basis that this court lacks jurisdiction and that the existence of a forum-selection clause in an agreement between defendant Sallyport and defendant Hellenic Petroleum makes venue improper.

In the alternative, Sallyport asks that if its motion to dismiss is not granted, the court transfer the second cause of action to the state or federal courts in the County of Harris, Texas. The motion is opposed by the Plaintiffs and, to a limited extent, by chapter 7 trustee Trudi G. Manfredo.

THE COMPLAINT

The complaint describes the rights to approximately 200 acres of barite minerals located in San Bernardino County, California (the "barite mineral rights"). The bone of contention between the parties is whether the Plaintiffs own the barite mineral rights or have certain rights to the proceeds of their sale. The dispute has two parts.

First Cause of Action for Declaratory Relief (Ownership of Barite Mineral Rights)

As pertinent here, the complaint alleges that the barite mineral rights were originally owned by Consolidated Resources, Inc. ("Consolidated"), which was wholly owned by Don Rose individually. Don Rose was the founder and owner of Don Rose Oil ("DRO").

In 2012, the complaint claims, Consolidated borrowed $2 million from Kodiak. Don Rose pledged 100% of the shares of Consolidated as security for this loan. Compl. for Declaratory Relief, ¶ 18-19. When Consolidated failed to pay, Kodiak exercised its rights under the pledge agreement to acquire 100% of the stock of Consolidated by re-issuing Consolidated stock in its own name, leaving Don Rose without ownership of CRI. *See id.* ¶ 23-24.

After Kodiak had acquired full ownership of Consolidated, various transactions occurred affecting the barite mineral rights (the "disputed transactions"). These disputed transactions are as follows:
(1) Don Rose mortgaged the barite mineral rights to secure a $7 million obligation that the complaint alleges was fake. *See id.* ¶ 13.
(2) Later, in July 2015, Don Rose purportedly conveyed for no consideration the barite mineral rights to Don Rose Oil, Inc. ("DRO") at John Castellucci's urging. *See id.* ¶ 14.
(3) Once the barite mineral rights had been obtained by DRO, DRO pledged them to Siena, a lender. Siena then assigned its purported security interest in the barite mineral rights to Sallyport. *Id.* ¶ 15. (4) In late 2016, the barite mineral rights were transferred by DRO to DRO Barite, LLC, at the demand of either Siena or Sallyport. (5) Siena took what it believed was a first lien on the barite mineral rights, and later assigned that lien to Sallyport.

The Plaintiffs allege that the disputed transactions were void as having been made without Kodiak's authority as the owner of

Consolidated. DRO and its creditor dispute these contentions, arguing that the four transactions were valid, or at least not void, and that they own or are valid encumbrancers of the mineral rights. The complaint arising from these contentions is simple, seeking declaratory relief that Kodiak "acquired and owns the barite mineral rights" free and clear of an claim of DRO or related entities.

In short, if the allegations in the complaint are true, then Kodiak would have owned Consolidated (1) before Consolidated and Don Rose encumbered and then transferred Consolidated's barite mineral rights and (2) before any of the other disputed transactions affecting the barite minerals occurred, including encumbrances against the barite mineral rights. As a result, the Plaintiffs request a declaratory judgment that Kodiak owns the barite mineral rights and that its interest in them is superior to the defendants.

Second Cause of Action for Declaratory Relief (Validity of Agreements)

After these events, state-court litigation ensued between DRO, Consolidated, Don Rose, and others. Four-months before DRO sought the protections of this court, the parties settled that action. The settlement was memorialized in at least two different writings: (1) a Settlement Agreement ("Settlement Agreement") executed by the parties to the action, including Consolidated, and (2) an Inter-creditor, Subordination and Waterfall Payment Agreement ("Inter-creditor Agreement") executed solely between Sallyport and Hellenic but acknowledged by DRO.

Together, these two agreements are intricate, calling for many different performances by various parties. But they include an agreement that Consolidated's rights would be subordinated to Sallyport's security interest, that the barite mineral rights would be sold, that the proceeds of such sale would be used first to repay DRO's loans to Sallyport followed by payment to Consolidated and associated parties. Only if this sale yields sufficient monies to repay Sallyport's loan to DRO *and* pay $3 million to Consolidated and associated parties, then the excess of sale proceeds would be remitted to DRO, the debtor in the underlying bankruptcy case.

The second claim for relief seeks adjudicate the validity and enforceability these two agreements. It further requests that the court determine the Inter-creditor Agreement to be non-preferential and non-avoidable. Compl. ¶ 41. And Hellenic also seeks declaratory relief, subject to Kodiak's rights, determining that it may enforce its rights pursuant to these agreements so that it may receive 50% of up to $6,000,000 of the proceeds of the sale of the debtor's propane business or the barite mineral rights. *Id.* ¶ 42.

DISCUSSION

First Cause of Action: Lack of Standing

Sallyport argues that Kodiak lacks standing for two reasons. First, Sallyport argues that if Kodiak is successful in its action, i.e., if it obtains a declaration that the disputed transactions are void,

the barite mineral rights will be returned to Consolidated, not to DRO. Second, Sallyport argues that Kodiak seeks redress for the rights of a third party, Consolidated, not Kodiak itself. Kodiak responds that it has suffered a sufficiently concrete and particularized injury when Consolidated's stock value was depleted by the unlawful transfer of its most valuable asset, the barite mineral rights.

Standing has two parts: constitutional standing and prudential standing. As to the former, "In order to invoke the jurisdiction of the federal courts, a plaintiff must establish the irreducible constitutional minimum of standing, consisting of three elements: injury in fact, causation, and a likelihood that a favorable decision will redress the plaintiff's alleged injury." *Lopez v. Candaele*, 630 F.3d 775, 785 (9th Cir. 2010) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)) (internal quotation marks omitted); *accord Sprint Communications Co., L.P. v. APCC Servs., Inc.*, 554 U.S. 269, 273-74 (2008). The first element, an injury in fact, means that the plaintiff must have suffered "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 2136, 119 L. Ed. 2d 351 (1992) (citations omitted) (footnote omitted) (internal quotation marks omitted). The second element requires "a causal connection between the injury and the conduct complained of," meaning that "the injury has to be fairly trace[able] to the challenged action of the defendant, and not th[e] result [of] the independent action of some third party not before the court." *Id.* at 560 (alterations in original) (internal quotation marks omitted) (ellipses omitted). Under the third element, "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.* at 561 (internal quotation marks omitted).

The burden of establishing these three elements falls on the party who invokes federal jurisdiction. *Id.* "Since they are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.,* with the manner and degree of evidence required at the successive stages of the litigation." *Id.*

As to constitutional standing, Kodiak has the better side of the argument. Shareholders suffer injury and obtain Article III standing when the corporation suffers an injury that harms the value of its shares. *Franchise Tax Bd. of Cal. v. Alcan Aluminum Ltd*, 493 U.S. 331, 338 (1990); O'Connell and Stevenson, *Federal Civil Procedure Before Trial* § 2:4195 (Rutter Group 2018).

But as to prudential standing, Sallyport prevails. In *Alcan Aluminum*, the Supreme Court explained: "The more difficult issue is whether respondents can meet the prudential requirements of the standing doctrine. One of these is the requirement that 'the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.' Related to this principle we think is the so-

called **shareholder standing rule**. As the Seventh Circuit observed, **the rule is a longstanding equitable restriction that generally prohibits shareholders from initiating actions to enforce the rights of the corporation unless the corporation's management has refused to pursue the same action for reasons other than good-faith business judgment."** *Alcan Aluminum,* 493 U.S. at 336 (emphases added) (citations omitted).

"Shareholders suffer injury in the Article III sense when the corporation incurs significant harm because the value of their shares is affected. Even so, the prudential requirements of the standing doctrine prohibit shareholders from initiating actions against third parties to enforce the rights of the corporation. [*Franchise Tax Bd. of Cal. v. Alcan Aluminium Ltd.* (1990) 493 US 331, 335-36, 110 S. Ct. 661, 665. But note: If the corporation's management has refused to pursue the same action for reasons other than good faith business judgment, a shareholders' derivative suit may lie (see ¶ 10:950 ff.). [*Franchise Tax Bd. of Calif. v. Alcan Aluminum Ltd.*, supra, 493 US at 336, 110 S.Ct. at 665]." O'Connell and Stevenson, *Federal Civil Procedure Before Trial* § 2:4195 (Rutter Group 2018).

In a different section, the same treatise explains: "Actions asserting the rights of a corporation ordinarily must be brought by the corporation itself. [See *CCC Information Services, Inc. v. American Salvage Pool Ass'n* (7th Cir. 2000) 230 F3d 342, 346-347]. Individual shareholders (even controlling shareholders) ordinarily are not the real parties in interest. [*Whelan v. Abell* (DC Cir. 1992) 953 F2d 663, 672; see *Shell Petroleum, N.V. v. Graves* (9th Cir. 1983) 709 F2d 593, 595-'shareholder must be injured directly and independently of the corporation']. *Compare—derivative suits:* Under certain circumstances, however, shareholders may be permitted to maintain a 'derivative suit' *on the corporation's behalf*." *Id.* at 7:9.5.

Here, no derivative suit has been presented, nor have the Plaintiffs pled that Consolidated's board of directors failed to act to bring this suit for reasons other than proper exercise of business judgment. Accordingly, the Plaintiffs lack prudential standing as to the first cause of action. The court will dismiss the first cause of action with leave to amend.

Second Cause of Action: Lack of Related to Jurisdiction

Rule 12(b)(1) Standards

A party may challenge jurisdiction by motion. Fed. R. Civ. P. 12(b)(1), incorporated by Fed. R. Bankr. P. 7012(b). The plaintiff bears the burden of proof. *Kokkonen v. Guardian Life Ins. Co. of America*, 511 US 375, 376-378 (1994); *In re Wilshire Courtyard,* 729 F3d 1279, 1284 (9th Cir. 2013).

"A Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction may be made on the basis that the complaint (together with documents attached to the complaint and any judicially noticed facts) fails to establish grounds for federal subject matter

jurisdiction as required by Rule 8(a)(1)—i.e., lack of federal jurisdiction appears from the 'face of the complaint.' [*Warren v. Fox Family Worldwide, Inc.* (9th Cir. 2003) 328 F3d 1136, 1139; *Ctr. for Biological Diversity, Inc. v. BP America Production Co.* (5th Cir. 2013) 704 F3d 413, 423-424*; Li v. Chertoff* (SD CA 2007) 482 F.Supp.2d 1172, 1175." O'Connell and Stevenson, *Federal Civil Procedure Before Trial* § 9:80 (Rutter Group 2018).

"There is an important difference between 12(b)(1) motions attacking the complaint on its face ('facial attacks') and 12(b)(1) 'speaking motions': Under the former, the court must consider the allegations of the complaint as true . . . whereas under the latter, the court determines the facts for itself. [*Gould Electronics Inc. v. United States* (3rd Cir. 2000) 220 F3d 169, 176; *Carrier Corp. v. Outokumpu Oyj* (6th Cir. 2012) 673 F3d 430, 440; *Leite v. Crane Co.* (9th Cir. 2014) 749 F3d 1117, 1121—court resolves facial attack as it would FRCP 12(b)(6) motion to dismiss]." *Id.* at § 9:84.

"Related to" Jurisdiction

Sallyport argues that this court lacks "related to" jurisdiction because the Inter-creditor Agreement only controls the rights of Sallyport and Hellenic. This court disagrees.

"At the outset of a chapter 11 case, the bankruptcy court's subject matter jurisdiction extends not only to the case but also to civil proceedings arising under title 11 or arising in or related to the case. The court also has broad subject matter jurisdiction over all property of the debtor as of the commencement of the case and all property of the estate." *In re Oakhurst Lodge, Inc.*, 582 B.R. 784, 790 (Bankr. E.D. Cal. 2018) (citations omitted).

More specifically, bankruptcy jurisdiction is established by 28 U.S.C. § 1334, which provides in relevant part:

> (a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.
>
> (b) Except as provided in subsection (e)(2), and notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.
>
> . . . .
>
> (e) The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction--(1) of all the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate; and (2) over all claims or causes of action that involve construction of section 327 of

> title 11, United States Code, or rules relating to disclosure requirements under section 327.

28 U.S.C. § 1334(a)-(b), (e).

Generally, a bankruptcy court's "related to" jurisdiction is broad, "including nearly every matter directly or indirectly related to the bankruptcy." *Sasson v. Sokoloff (In re Sasson)*, 424 F.3d 864, 868 (9th Cir. 2005) (citation omitted) (internal quotation marks omitted).

The test for determining "related to" jurisdiction is "whether the outcome of the proceeding could conceivably have any effect on the estate being administered in bankruptcy." *Fietz v. Great W. Sav. (In re Fietz)*, 852 F.2d 455, 457 (9th Cir. 1988) (emphasis omitted) (citation omitted) (internal quotation marks omitted). "An action is related to bankruptcy if the outcome could alter the debtor's rights, liabilities, options, or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankrupt estate." *Id.*

Hellenic's second cause of action for declaratory relief requests that if, and only if, the court finds against Kodiak on the first cause of action (declaratory relief regarding ownership of the mineral rights), the court declare that the Settlement Agreement and the Inter-creditor Agreement are valid, non-preferential and enforceable. Compl. ¶¶ 41-42.

Though separate documents, the Settlement Agreement and the Inter-creditor Agreement are related but separate agreements. Settlement Agreement ¶ 2(j). The obligations of the debtor to Hellenic Petroleum under the settlement are confirmed in the Inter-creditor Agreement referenced in the complaint. Recital D of the Inter-creditor Agreement states, "Debtor and Hellenic had disputes which were resolved pursuant to a Settlement Agreement of substantially even date herewith wherein Debtor, together with DRO Barite, agreed to pay Hellenic up to $3,000,000.00 from the sale of the DRO Barite assets, including, without limitation the Mining Rights . . . ." Inter-creditor Agreement at Recitals ¶ E. In the Inter-creditor Agreement, Hellenic agrees to subordinate its claims against the debtor to Sallyport's claims. This agreement provides, moreover, a framework for the division of proceeds from the sale of the barite mineral rights. Inter-creditor Agreement ¶ 11.

More importantly, the outcome of a declaratory judgment determining the validity and enforceability of these agreements could conceivably impact the estate of DRO, the debtor in the underlying bankruptcy case. It would also affect DRO's rights, liabilities, options, or freedom of action. This is true because the agreements contain provisions affecting DRO's estate and altering DRO's rights, liabilities, options, or freedom of action. Numerous examples exist. The agreements:

1. obligate DRO to pay proceeds of the sale of the barite mineral rights to Hellenic; *see* Inter-creditor Agreement at Recitals ¶ E ("Debtor and Hellenic had disputes which were

resolved pursuant to a Settlement Agreement of substantially even date herewith wherein Debtor, together with DRO Barite, agreed to pay Hellenic up to $3,000,000.00 from the sale of the DRO Barite assets, including, without limitation the Mining Rights . . . .");

2. affect DRO's secured and unsecured debt structure by, *inter alia*, subordinating Hellenic's secured claims against DRO to Sallyport's secured claims against DRO, *see* Inter-creditor Agreement § 2, and establishing the relative priorities of the liens / security interests of these two creditors on the collateral, which collateral comprises assets of both DRO and assets of DRO's wholly owned subsidiary (the barite mineral rights); *see* Inter-creditor Agreement § 1, 3-4, Recital C;
3. prioritize DRO's right to any surplus of the proceeds of the sale of the barite mineral rights, even as to parties who do not hold consensual liens, e.g., the Plaintiffs; *see* Settlement Agreement ¶ 2(j) ("If any funds remain after Hellenic Petroleum receives its $3 million from the Barite Mine Claims, and after any financial obligations to Sallyport are satisfied, then DRO shall receive the balance.");
4. entitle DRO or its subsidiary to retain direct costs of sale of the barite mineral rights subject to certain conditions with respect to the timing of such sale; *see* Inter-creditor Agreement § 11(a)
5. provide for DRO's assumption of credit card liability of $100,000 owed to Wells Fargo, *id.* at ¶ 2(e);
6. assign causes of action held by DRO to others, *Id.* at ¶ 2(f);
7. provide for transfer of DRO's two automobiles to others, *id.* at ¶ 2(g);
8. provide for DRO's assumption of SBA loan ($170,000), *id.* at ¶ 2(h);
9. assign interests in shares of common stock of DRO held by the Hellenic Parties to DRO, estimated to total approximately 15% of outstanding shares; *id.* at ¶ 2(c).
10. provide for the Castellucci Parties—which term includes DRO-to open an escrow for the sale of certain real property and deliver into that escrow $720,000, which is the "Settlement Amount"; *id.* at ¶ 2;
11. give DRO the right to receive a grant deed for real property located at 361 Terry Avenue, Farmersville, CA; *id.* at 2(b); and
12. obligate DRO as one of the Castellucci Parties to release all claims against the Hellenic Parties; *id.* at ¶ 3.

These provisions, which are not intended to be exhaustive, have an impact on DRO's estate (which includes its interest in its subsidiary that owns the barite mineral rights). They also alter DRO's rights, liabilities, options, and freedom of action in some significant way. So any declaratory relief on the validity or enforceability of the agreements containing these provisions would also do so. The second claim for relief, therefore, falls within the court's "related to" jurisdiction.

Second Cause of Action: Lack of Constitutional Ripeness

Sallyport argues that the second cause of action for declaratory relief is not constitutionally ripe because it is contingent on a future event. The future event to which it refers is a decision on Kodiak's first claim for relief that Kodiak's rights to the mineral rights are not superior to Sallyport and the other defendants' rights. Compl. ¶ 40.

"The ripeness doctrine is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction." *Golden v. Cal. Emergency Physicians Med. Grp.*, 782 F.3d 1083, 1086 (9th Cir. 2015) (quoting Nat'l Park Hospitality Ass'n v. Dep't of Interior, 538 U.S. 803, 808 (2003)).

"Ripeness has two components: constitutional ripeness and prudential ripeness. The constitutional ripeness of a declaratory judgment action depends upon whether the facts alleged, under all the circumstances, show that there is a **substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment**." *In re Coleman*, 560 F.3d 1000, 1004–05 (9th Cir. 2009) (footnote omitted) (citation omitted) (internal quotation marks omitted). "The issues presented must be 'definite and concrete, not hypothetical or abstract.' *Id.* at 1005 (citations omitted).

Where a dispute hangs on 'future contingencies that may or may not occur,' it may be too "impermissibly speculative" to present a justiciable controversy. 'The constitutional component of ripeness is a jurisdictional prerequisite.'" *Id.* (citations omitted) (emphasis added). Stated differently, "**ripeness is peculiarly a question of timing, and a federal court normally ought not resolve issues involving contingent future events that may not occur as anticipated**, or indeed may not occur at all. In the absence of an immediate and certain injury to a party, a dispute has not matured sufficiently to warrant judicial intervention." *Clinton v. Acequia, Inc.*, 94 F.3d 568, 572 (9th Cir. 1996) (citations omitted) (internal quotation marks omitted).

By contrast, the two-part test for prudential ripeness in the administrative context requires determining (1) the fitness of the issue for judicial review and decision, and (2) the hardship to the parties of withholding a judicial decision. *In re Coleman*, 560 F.3d at 1006.

The Ninth Circuit has held that the **prudential ripeness standard has been eliminated from ripeness determinations in private party contract disputes**." *In re Coleman*, 560 F.3d 1000, 1006 (9th Cir. 2009). This holding has been confirmed in subsequent decisions. In 2015, the Ninth Circuit reaffirmed that it does "not analyze the prudential component of the ripeness inquiry in private contract litigation." *Golden v. California Emergency Physicians Med. Grp.*, 782 F.3d 1083, 1086 (9th Cir. 2015).

So the prudential ripeness standard does not apply in declaratory relief actions involving contract disputes, *Principal Life Ins. Co.*

v. Robinson, 394 F.3d 665, 669-71 (9th Cir. 2005) **or in ordinary contract disputes concerning a contract's enforcement or validity**, *Golden*, 782 F.3d at 1087-88 (emphases added).

In this case, the complaint's second claim for relief in essence requests a declaratory judgment regarding the validity and enforceability of two contractual agreements. Because of the contractual nature of the dispute, the prudential ripeness standard does not apply. Instead, the court applies only the constitutional ripeness standard.

The Ninth Circuit decision *Principal Life Ins. Co. v. Robinson* establishes the ripeness standards that apply in declaratory relief actions to resolve contract disputes. 394 F.3d 665. In *Robinson*, the parties disputed the interpretation of a pivotal rent recalculation provision in a ground lease. *Id.* at 668. This provision provided for rent adjustments in the thirty-first year and the sixty-first year of the lease term. *Id.* The dates that the rent adjustments became effective were well into the future—the Ninth Circuit decision was submitted in 2004 and the first rent adjustment under the disputed provision became effective in 2008. *See id*. Nothing in the ground lease or its amendment required the parties to wait until 2008 to resolve this dispute. *Id.* at 672.

The district court ruled that the case was not ripe for adjudication and, as a result, that it lacked subject-matter jurisdiction. *Id.* at 668. The Court of Appeals for the Ninth Circuit reversed the district court's jurisdictional determination, finding that the district court applied the incorrect "prudential ripeness standard" derived from the context of administrative agencies. *Id.*

The Ninth Circuit held that the declaratory relief action was ripe for adjudication. *Id.* at 672. The court applied the traditional, constitutional standard for ripeness. *Id.* at 671.

Applying the constitutional ripeness standard to the contract-interpretation dispute, the court found that the dispute over the contract's provision was sufficiently immediate to warrant court resolution. *See id.* at 671-72. In reaching this conclusion, the court aptly explained the measurable financial consequences of the dispute that existed in the present. The court cited to the following facts in determining that the dispute had sufficient immediacy: one party's difficulty in selling its interest, a failed attempt by a possible buyer at resolving the dispute and in seeking a price reduction based on the dispute, the inability of the ground lessee to accurately estimate the value of its interest given the uncertainty about the interpretation of the rent-adjustment provision, and the difficulty of the ground lessee to determine whether developing its interest or selling it would be most profitable. *Id.*

In this case, the second claim requests declaratory relief that (1) the Inter-creditor Agreement is valid, non-preferential, and non-avoidable, and (2) the Settlement Agreement is valid and enforceable.

In the prayer for relief, though, Hellenic focuses its request more specifically. In the prayer for relief, it asks the court to enforce its rights pursuant to these two agreements—if the DRO propane business is sold prior to the sale of the barite mineral rights-so that it will receive 50% of up to $6 million of the proceeds of sale after provision is made for the actual sales expenses incurred by DRO and DRO Barite, LLC. Even though the two agreements at issue contain numerous terms and conditions, the substance of the second claim for relief is to declare Hellenic's enforceable right to the sale proceeds of the barite minerals. Compl. ¶¶ 32-33, Prayer for Relief.

Unlike the court in *Robinson*, the court cannot determine whether the second claim for declaratory relief has sufficient immediacy and reality to be ripe. The court only has before it the complaint and its exhibits to review. The assertions of counsel unsupported by evidence, such as the statement that the propane division of DRO has been sold, cannot be given weight. *See* Pls.' Limited Resp. 57, ECF No. 57.

Given that the gist of the second claim is Hellenic's asserted right to the barite mineral rights, the court has reviewed the provisions of the Settlement Agreement and the Inter-creditor Agreement that relate to such right. These provisions contemplate a future sale of the barite mineral rights and a division of the proceeds of such sale between Hellenic and Sallyport depending on a variety of contingencies including (1) the price obtained at the sale of the barite mineral rights, (2) the proceeds of the sale of DRO's propane assets, and (3) the remaining debt balance owed to Sallyport after application of the sale proceeds of the propane assets to such remaining balance. These contingencies also affect whether DRO receives any surplus balance. *See* Settlement Agreement ¶ 2(j); Inter-creditor Agreement § 11(a).

Without more specific factual allegations, the court cannot ascertain the immediacy of the contractual controversy presented by the complaint's second claim for relief. The two agreements involved contain a variety of contingent future events on which Hellenic's rights depend, not least of which is the sale of the barite mineral rights. It is unclear whether such a sale is in prospect or whether the other contingencies may or may not occur.

The court notes that declaratory relief is not necessarily unwarranted when the dispute hangs on contingent future events as *Principal Life Ins. Co. v. Robinson*, 394 F.3d 665 (9th Cir. 2005) aptly illustrates. But in *Robinson*, the Ninth Circuit could point to a variety of measurable and immediate financial consequences of the dispute presented. But this court cannot do so.

The court will dismiss the second claim for relief for lack of ripeness with leave to amend this claim. An amendment should add specific factual allegations showing that (1) the resolution of this contractual dispute has immediate, measurable financial consequences for Hellenic and the defendants, and (2) detailing the likelihood of the contingent future events affecting any right Hellenic may have to the proceeds of sale of the barite mineral rights.

Rule 12(b)(3) and Transfer of Venue

The court need not decide the request for dismissal under Rule 12(b)(3) given the court's disposition of the second claim for relief. The court notes that a Rule 12(b)(3) motion is improper when venue is not in the wrong forum under applicable venue statutes. One treatise provides:

> **A forum-selection clause is properly enforced by a Rule 12(b)(3) motion to dismiss** (or by a motion to transfer to the contractually-designated forum under 28 USC § 1406(a)) **only when venue is otherwise "wrong" in the forum where suit was commenced** (*see* ¶ 4:575 ff.). **But venue is *not "wrong"* simply because plaintiff's chosen forum defied a forum-selection clause.** [*Atlantic Marine Const. Co., Inc v. United States Dist. Ct. for Western Dist. of Texas* (2013) US , , 134 S.Ct. 568, 577; *see ¶ 4:151*]. **Thus, when original venue is *proper* under applicable federal venue laws** (typically, the general venue statute, 28 USC § 1391), **a defendant desiring to enforce a valid forum-selection clause must proceed by way of a § 1404(a) motion to transfer to the contractually-designated forum**—*not* by a motion to dismiss.

Federal Civil Procedure Before Trial at § 9:130.1 (Rutter Group 2018) (emphases added).

The court also will not address Sallyport's motion to transfer venue under 28 U.S.C. § 1404 given that the second claim for relief has been dismissed.

As a result, the court will deny the motion in part, without prejudice, as to the motion to dismiss under Rule 12(b)(3) and the motion to transfer venue.

Dividing Second Claim into Two Claims

Here, the second cause of action seeks declaratory relief as to the Settlement Agreement (which is among multiple parties) and as to the Inter-creditor Agreement (which is between Sallyport and Hellenic only). These agreements, while related, are separate agreements.

Aggregating claims for relief is presumptively proper. "A party must state its claims or defenses in numbered paragraphs, each limited as far as practicable to a single set of circumstances. A later pleading may refer by number to a paragraph in an earlier pleading. **If doing so would promote clarity, each claim founded on a separate transaction or occurrence--and each defense other than a denial--must be stated in a separate count or defense.**" Fed. R. Civ. P. 10(b), incorporated by Fed. R. Bankr. P. 7010.

If the second claim is to be amended, the court will require that the second claim be divided into two separate claims based on the two related transactions that are evidenced by separate agreements

(the Settlement Agreement and the Inter-Creditor Agreement) that form the basis of the second claim.

CIVIL MINUTE ORDER

The court shall issue a civil minute order that conforms substantially to the following form:

Sallyport Commercial Finance, LLC’s motion has been presented to the court. Having considered the well-pleaded facts of the complaint, motion to dismiss, opposition and reply thereto,

IT IS ORDERED that the motion is granted in part and denied in part. Both claims of the complaint are dismissed without prejudice to refiling them after amendment. The motion to dismiss for improper venue or to transfer venue is denied without prejudice.

IT IS FURTHER ORDERED that the plaintiffs may file and serve an amended complaint no later than August 8, 2018. Any amended complaint shall address the issues raised by the court in this ruling that are applicable to the claims in the amended complaint, and be accompanied by a redline copy showing all amendments, modifications and deletions.

IT IS FURTHER ORDERED that any amended complaint containing the substance of the original complaint’s second claim for relief shall divide such claim into two separate claims based on the two related transactions that are evidenced by separate agreements (the Settlement Agreement and the Inter-Creditor Agreement).

IT IS FURTHER ORDERED that if defendant files a motion under Rule 12(b) or otherwise, rather than an answer, the motion shall be set for hearing consistent with LBR 9014-1(f)(1) and set for hearing on September 19, 2018.

IT IS FURTHER ORDERED that no later than the time required by Rule 7012, each defendant, including those that have previously filed answers, shall file and serve a responsive pleading or motion. The parties shall not enlarge time for the filing of a responsive pleading or motion without order of this court. Such an enlargement may be sought by ex parte application, supported by stipulation or other admissible evidence.