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: OCTOBER 31, 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.

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. 15-11835-A-7 **IN RE: JAMES/JAMIE CANNON**
18-1002

CONTINUED COMPLAINT
1-16-2018 [1]

CANNON V. WILLIAMS ET AL
RONALD MAKAREM/ATTY. FOR PL.

Final Ruling

The adversary proceeding dismissed, the status conference is concluded.

2. 18-11235-A-7 **IN RE: MITCHELL/COURTNEY CASALE**
18-1055

STATUS CONFERENCE RE: COMPLAINT
8-28-2018 [1]

CASALE ET AL V. LEVITON LAW
FIRM LTD. ET AL
KYLE SCHUMACHER/ATTY. FOR PL.

Final Ruling

The status conference is continued to January 3, 2019, at 10:00 a.m. Forthwith and without delay, the plaintiffs shall seek the entry of defendant's default and, therefore, shall move to prove up that default. The prove up may be prosecuted by ex parte application, (without noticing the matter for hearing), but shall be served on the defendants. Not later than 14 days prior to the continued status conference, the plaintiff shall file a status report, if judgment has not been entered or the adversary proceeding dismissed.

3. 17-12389-A-7 **IN RE: DON ROSE OIL CO., INC.**
17-1086

CONTINUED STATUS CONFERENCE RE: AMENDED COMPLAINT
9-5-2018 [131]

KODIAK MINING & MINERALS II
LLC ET AL V. DON ROSE OIL CO.,
VONN CHRISTENSON/ATTY. FOR PL.

Tentative Ruling

The court intends to continue the status conference to December 19, 2018, at 10:00 a.m. to ascertain whether the adversary proceeding is then at issue.

4. 17-12389-A-7 **IN RE: DON ROSE OIL CO., INC.**
17-1086 DB-1

MOTION TO DISMISS IDEMITSU APOLLO CORPORATION
9-26-2018 [150]

KODIAK MINING & MINERALS II
LLC ET AL V. DON ROSE OIL CO.,
JAMIE DREHER/ATTY. FOR MV.
RESPONSIVE PLEADING

Tentative Ruling

Motion: Dismiss Adversary Proceeding
Notice: LBR 9014-1(f)(1); written opposition required
Disposition: Motions to dismiss--granted with leave to amend as to all counts
Order: Civil minute order

Defendant Idemistu Apollo Corporation ("Idemitsu") joins Sallyport Commercial Finance, LLC ("Sallyport") motion to dismiss the Second Amended Complaint, September 5, 2018, ECF # 131, filed by Kodiak Mining and Minerals II, LLC ("Kodiak"), Hellenic Petroleum, LLC ("Hellenic") and Consolidated Resources, Inc. ("Consolidated," and together with Kodiak and Hellenic the "Plaintiffs"). It also adds its own, and independent grounds, for dismissal. The Plaintiffs oppose the motion.

SUMMARY

This is a dispute over 200 acres of barite minerals in San Bernardino, California. The facts are complex but are set forth in more detail in the court' ruling on Sallyport' motion to dismiss Plaintiff's complaint. Civil minutes pp. 2-4, July 18, 2018, ECF # 102.

In short, it is a three-party dispute. The first parties are pre-petition creditors of Don Rose Oil, and affiliated entities. The first parties are the Plaintiffs. They contend that they acquired ownership of the barite mineral rights from an affiliate of the debtor as early as 2012-2014 by virtue of transactions between the Plaintiffs and Don Rose Oil and/or its founder Don Rose and that their interests precede (and have superior rights to) those of the defendants.

The second parties are pre-petition consensual lenders, and creditors, of Don Rose Oil. Those parties, defendants herein are Sallyport, Happy Rock Merchants Solutions and Apollo. They dispute the Plaintiff's claims of ownership and contend they acquired rights to the barite minerals in 2015, as collateral for loans made to Don Rose Oil. These warring creditors, and the debtor, settled their differences in prior to Don Rose bankruptcy petition but (potentially) within the preference period of 11 U.S.C. § 547.

The third party is chapter 7 trustee Trudi G. Manfredo ("Manfredo"). Manfredo has filed a counter-claim asserting her avoidance powers,

seeking damages and requesting declaratory relief as to the validity of the party's pre-petition settlement agreement.

RULE 12(b)(6)

Under Federal Rule of Civil Procedure 12(b)(6), a party may move to dismiss a complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6), *incorporated by* Fed. R. Bankr. P. 7012(b). "A Rule 12(b)(6) dismissal may be based on either a lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." *Johnson v. Riverside Healthcare Sys., LP*, 534 F.3d 1116, 1121–22 (9th Cir. 2008); *accord Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001).

The Supreme Court has established the minimum requirements for pleading sufficient facts. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556).

In ruling on a Rule 12(b)(6) motion to dismiss, the court accepts all factual allegations as true and construes them, along with all reasonable inferences drawn from them, in the light most favorable to the non-moving party. *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001); *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337–38 (9th Cir. 1996). The court need not, however, accept legal conclusions as true. *Iqbal*, 556 U.S. at 678. "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Id.* (quoting *Twombly*, 550 U.S. at 555).

In addition to looking at the facts alleged in the complaint, the court may also consider some limited materials without converting the motion to dismiss into a motion for summary judgment under Rule 56. Such materials include (1) documents attached to the complaint as exhibits, (2) documents incorporated by reference in the complaint, and (3) matters properly subject to judicial notice. *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003); *accord Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007) (per curium) (citing *Jacobson v. Schwarzenegger*, 357 F. Supp. 2d 1198, 1204 (C.D. Cal. 2004)). A document may be incorporated by reference, moreover, if the complaint makes extensive reference to the document or relies on the document as the basis of a claim. *Ritchie*, 342 F.3d at 908 (citation omitted).

<u>First through Fourth Counts</u>

The court granted Sallyport's motion to dismiss the Second Amended Complaint with leave to amend as to the first four counts. Indemitsu joins Sallyport's motion and will be granted to the same

extent and for the same reasons. As a consequence, the court need not reach Idemitus' additional grounds for dismissal.

Fifth Count

The Plaintiff's fifth count seeks declaratory relief as to the parties' rights and duties under the Settlement Agreement and, broadly read, the Inter-creditor Agreement. Second Amended Complaint, fifth count, September 5, 2019, ECF # 131.

But since Idemitsu signed neither agreement and, in fact, is not mentioned in the fifth cause of action, the Plaintiffs have failed to state plausible facts by which this court can determine the existence of a cause of action against Idemistu. And the motion will be granted.

Leave to Amend

Leave to amend should be granted liberally. Fed R. Civ. P. 15(a), *incorporated by* Fed. R. Bankr. P. 7010. *National Council of La Raza v. Chegavske*, 800 F.3d 1032, 1041 (9th Cir. 2015). Generally, a plaintiff must be given at least one opportunity to amend the complaint before a dismissal with prejudice. *Id. see also*, O'Connell & Stevenson, *California Practice Guide: Federal Civil Procedure Before Trial, Calif. & Ninth Circuit edits.*, Attacking the Pleadings § 9:287 (Rutter Group March 2018).

This is the second time this court has granted Sallyport's motion to dismiss. Because the court cannot say with conviction that the opportunity to amend would be futile as to any of the four counts for which the motion was granted the court will give the Plaintiffs one final opportunity to plead a viable complaint.

CIVIL MINUTE ORDER

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

Idemistu Apollo Corporation's motion to dismiss has been presented to the court. Having considered the motion, oppositions, and replies, if any, and having heard oral argument presented at the hearing,

Motion to Dismiss (Rule 12(b)(6)

IT IS ORDERED that the motion to dismiss is granted as to all counts of the Second Amended Complaint, September 5, 2018, ECF # 131.

IT IS FURTHER ORDERED that the plaintiffs may file and serve a Third Amended Complaint not later than November 21, 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 shall not aggregate into a single count claims based on separate transactions or occurrences, Fed. R. Civ. P. 10(b), *incorporated by* Fed. R. Bankr. P. 7010.

IT IS FURTHER ORDERED that all defendants (including those that have filed an answer to the original, First Amended Complaint and the Second Amended Complaint) shall file an answer or motion under Rule 12 not later than December 12, 2018.

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 January 23, 2019.

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.

5. 17-12389-A-7 **IN RE: DON ROSE OIL CO., INC.**
17-1086 LAK-3

MOTION TO DISMISS ADVERSARY PROCEEDING/NOTICE OF REMOVAL, MOTION TO STRIKE, MOTION TO TRANSFER FIFTH CLAIM FOR RELIEF
9-26-2018 [142]

KODIAK MINING & MINERALS II
LLC ET AL V. DON ROSE OIL CO.,
LORI EROPKIN/ATTY. FOR MV.
RESPONSIVE PLEADING

Tentative Ruling

Motion: Dismiss Adversary Proceeding and/or Transfer of Adversary Proceeding
Notice: LBR 9014-1(f)(1); written opposition required
Disposition: Motions to dismiss--granted with leave to amend as to counts 1-4, denied as to count 5; motion to transfer--denied with prejudice.
Order: Civil minute order

Defendant Sallyport Commercial Finance, LLC (“Sallyport”) moves to dismiss the Second Amended Complaint, September 5, 2018, ECF # 131, filed by Kodiak Mining and Minerals II, LLC (“Kodiak”), Hellenic Petroleum, LLC (“Hellenic”) and Consolidated Resources, Inc. (“Consolidated,” and together with Kodiak and Hellenic the “Plaintiffs”). In the alternative, Sallyport moves to transfer the fifth cause of action to the state or federal courts in the County of Harris, State of Texas.

The Plaintiffs oppose the motion. The trustee also opposes the motion, but only to the extent that it seeks to transfer the fifth count to the County of Harris, State of Texas.

SUMMARY

This is a dispute over 200 acres of barite minerals in San Bernardino, California. The facts are complex but are set forth in more detail in the court' ruling on Sallyport' motion to dismiss Plaintiff's complaint. Civil minutes pp. 2-4, July 18, 2018, ECF # 102.

In short, it is a three-party dispute. The first parties are pre-petition creditors of Don Rose Oil, and affiliated entities. The first parties are the Plaintiffs. They contend that they acquired ownership of the barite mineral rights from an affiliate of the debtor as early as 2012-2014 by virtue of transactions between the Plaintiffs and Don Rose Oil and/or its founder Don Rose and that their interests precede (and have superior rights to) those of the defendants.

The second parties are pre-petition consensual lenders, and creditors, of Don Rose Oil. Those parties, defendants herein, are Sallyport, Happy Rock Merchants Solutions and Apollo. They dispute the Plaintiff's claims of ownership and contend they acquired rights to the barite minerals in 2015, as collateral for loans made to Don Rose Oil. These warring creditors, and the debtor, settled their differences prior to the Don Rose bankruptcy petition but (potentially) within the preference period of 11 U.S.C. § 547.

The third party is chapter 7 trustee Trudi G. Manfredo ("Manfredo"). Manfredo has filed a counter-claim asserting her avoidance powers, seeking damages and requesting declaratory relief as to the validity of the parties' pre-petition settlement agreement.

RULE 12(b)(6)

Under Federal Rule of Civil Procedure 12(b)(6), a party may move to dismiss a complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6), *incorporated by* Fed. R. Bankr. P. 7012(b). "A Rule 12(b)(6) dismissal may be based on either a lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." *Johnson v. Riverside Healthcare Sys., LP*, 534 F.3d 1116, 1121–22 (9th Cir. 2008); *accord Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001).

The Supreme Court has established the minimum requirements for pleading sufficient facts. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556).

In ruling on a Rule 12(b)(6) motion to dismiss, the court accepts all factual allegations as true and construes them, along with all reasonable inferences drawn from them, in the light most favorable to the non-moving party. *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001); *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337–38 (9th Cir. 1996). The court need not, however, accept legal conclusions as true. *Iqbal*, 556 U.S. at 678. "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Id.* (quoting *Twombly*, 550 U.S. at 555).

In addition to looking at the facts alleged in the complaint, the court may also consider some limited materials without converting the motion to dismiss into a motion for summary judgment under Rule 56. Such materials include (1) documents attached to the complaint as exhibits, (2) documents incorporated by reference in the complaint, and (3) matters properly subject to judicial notice. *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003); *accord Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007) (per curium) (citing *Jacobson v. Schwarzenegger*, 357 F. Supp. 2d 1198, 1204 (C.D. Cal. 2004)). A document may be incorporated by reference, moreover, if the complaint makes extensive reference to the document or relies on the document as the basis of a claim. *Ritchie*, 342 F.3d at 908 (citation omitted).

First Count (Declaratory Relief)

Bankruptcy courts may give declaratory relief if the matter otherwise falls within bankruptcy court jurisdiction, 28 U.S.C. § 1334. 28 U.S.C. § 2201. Declaratory relief will only lie where there is an actual controversy. *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1555 (9th Cir. 1989).

As Sallyport correctly points out, that (1) the Settlement Agreement (Exhibit H) is part of the complaint for all purposes, Fed. R. Civ. P. 10(c), *incorporated by* Fed. R. Bankr. P. 7010, and (2) both Don Rose, president, and Panagiotis Kechagias, "Managing Director" executed the Settlement Agreement on behalf of Consolidated. In the Second Amended Complaint Consolidated pleads that prior to execution of the settlement it had become the sole shareholder of Don Rose Oil and that Don Rose, president, lacked authority to "bind" the corporation. Second Amended Complaint ¶¶ 85-88, September 5, 2018, ECF # 131.

The Plaintiffs face two hurdles with any argument that the settlement was unauthorized and, therefore, unenforceable. First, in most instances neither shareholder, nor board of director, approval of a contract is required for a Nevada corporation to enter into a binding contract. Consolidated is a Nevada corporation. Second Amended Complaint ¶ 3, September 5, 2018, ECF # 131. Nevada Revised Statute 78.070 gives corporations great latitude in conducting it business without the approval of the board of director:

> **Subject to such limitations, if any, as may be contained in its articles of incorporation,** every corporation has the following powers:
>
> 1. **To borrow money and contract debts** when necessary for the transaction of its business, or for the exercise of its corporate rights, privileges or franchises, or for any other lawful purpose of its incorporation and to issue bonds, promissory notes, bills of exchange, debentures, and other obligations and evidences of indebtedness, payable at a specified time or times, or payable upon the happening of a specified event or events, whether secured by mortgage, pledge or other security, or unsecured, for money borrowed, or in payment for property purchased or acquired, or for any other lawful object.
>
> . . .
>
> 4. **To conduct business,** have one or more offices, and hold, purchase, lease, mortgage, convey and take by devise or bequest real and personal property in this State, and in any of the several states . . . .
>
> . . .
>
> **7. To enter into any relationship with another person in connection with any lawful activities.**

NRS 78.070 (emphasis added).

Settlement of litigation appears to fall within § 78.070, and there is no suggestion in the pleadings that the articles of incorporation have restricted those decisions to the board of directors and/or shareholders.

Second, even if Don Rose acting as president of Consolidated lacked actual and apparent authority to execute the Settlement Agreement, that agreement was also signed by Panagiotis Kechagias, "Managing Director." From the title "Managing Director," the court infers authority to act and, in the absence of the plausible fact pleading otherwise, required by *Iqbal* and *Twombly*, this court has no basis to find the signature of Panagiotis Kechagias insufficient to enforce the agreement.

Since the first count alleges no other factual basis for an actual dispute, the court will grant the motion.

Second Count (Fraud)

Sallyport asserts three grounds to dismiss the second count.

Failure to plead with particularity

Since this is a claim alleging fraud, Rule 9(b) applies. *See, e.g.*, *Chase Bank, U.S.A., N.A. v. Vanarthos (In re Vanarthos)*, 445 B.R.

257, 264 (Bankr. S.D.N.Y. 2011). This rule's heightened pleading standard requires a plaintiff to "state with particularity the circumstances constituting fraud." Fed. R. Civ. P. 9(b), incorporated by Fed. R. Bankr. P. 7009. This standard means that "the complaint must set forth what is false or misleading about a statement, and why it is false." *Rubke v. Capitol Bancorp Ltd.*, 551 F.3d 1156, 1161 (9th Cir. 2009) (quoting *Yourish v. Cal. Amplifier*, 191 F.3d 983, 993 (9th Cir. 1999)) (internal quotation marks omitted). The facts constituting fraud must be pleaded specifically enough to give a defendant sufficient "notice of the particular misconduct" so that defendant may defend against the charge. *Vess v. Ciba-Geigy Corp. U.S.A.*, 317 F.3d 1097, 1106 (9th Cir. 2003). A plaintiff must include the "who, what, when, where, and how" of the fraud. *Id.*

The allegations of fraud are set forth in paragraphs 13 and 106 of the Second Amended Complaint. On this subject the complaint is conclusory, and does not satisfy the plausibility standard of *Iqbal* and *Twombly*, much less the particularity standard applicable to fraud described in Rule 9(9b) and in *Ciba-Geigy Corp. U.S.A.*. As a result, the motion will be granted.

Statute of limitations

The statute of limitations for fraud is three years. Cal Code of Civ. Proc. 338(d). The statute commences to run from discovery. *Id.*

Here, Sallyport suggests that the cause of action accrued on July 31, 2014. Absent an intervening bankruptcy, the statute of limitations may have run as early as July 31, 2017. And since this action was filed November 17, 2017, it would be untimely.

But bankruptcy extends the statute of limitations. Section 108 provides:

> Except as provided in section 524 of this title, **if applicable nonbankruptcy law, an order entered in a nonbankruptcy proceeding, or an agreement fixes a period for commencing or continuing a civil action in a court other than a bankruptcy court on a claim against the debtor**, or against an individual with respect to which such individual is protected under section 1201 or 1301 of this title, and such period has not expired before the date of the filing of the petition, **then such period does not expire until the later of--(1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or (2) 30 days after notice of the termination or expiration of the stay under section 362, 922, 1201, or 1301 of this title, as the case may be, with respect to such claim.**

11 U.S.C. § 108(c) (emphasis added).

Because the stay has not expired, 11 U.S.C. § 362(c), subdivision (c)(2) has not been triggered, and the action is timely.

Condition precedent

This court cannot yet ascertain whether the Plaintiffs have not satisfied the conditions precedent for relief set forth in the Second Amended Complaint. The Plaintiffs concede that the second count is viable if, and only if, Consolidated is "deemed not bound" by the terms of the Settlement Agreement. Second Amended Complaint, Count 2 (fraud), September 5, 2018, ECF # 131. This court has ruled that the first count of the Second Amended Complaint has not raised a plausible claim to relief and, accordingly, that count does not make this count viable.

But the Chapter 7 trustee has raised such a claim. Counter-claim, Ninth Count (declaratory relief as to the validity and enforceability of the Settlement Agreement), February 28, 2018, ECF # 45. To date no counter-defendant has challenged the trustee's' counter-claim, and its assertions. As a consequence, the lack of a condition precedent is not a basis to grant this motion.

Because the second count fails to plead the fraud with particularity, as required by Rule 9(a) the court will grant the motion.

Third Count (Declaratory Relief)[1]

Two separate theories are alleged in the third count: (1) invalidity of the promissory note, deed of trust and bill of sale based on lack or failure of consideration; and (2) invalidity of the post-Settlement Agreement November 30, 2017, deed of trust.[2] See Fed. R. Civ. P. 10(b), *incorporated by* Fed. R. Bankr. P. 7010 (requiring separate transactions or occurrences to be plead as separate counts where required for clarity).

Actual controversy

Sallyport contends that there is no "actual controversy" because it was not a signatory to the Settlement Agreement. Second Amended Complaint, Exhibit H pp. 51-53, September 5, 2018, ECF # 133.

As to the invalidity of the promissory note, deed of trust and bill of sale, an actual controversy exits. Consolidated contends that any attempt to alienate or encumber the barite mineral rights was void because Don Rose no longer had the authority to execute such

[1] Sallyport appears to have violated Ninth Circuit Federal Rule of Appellate Procedure 32.1 (citation to unpublished cases prior to 2007, by citing *StreamCast Networks, Inc. v. IBIS, LLC*, 2006 WL 5720345 (C.D. Cal. May 2, 2006), and *Household Fin. Servs., Inc. v. N. Trade Mortg. Corp.*, 1999 WL 782072 (N.D. Ill. September 27, 1999). Memorandum of Points and Authorities pp. 15-16, September 26, 2018, ECF # 144. Counsel for Sallyport is cautioned to comply with applicable federal and local rules.

[2] The court presumes this is a reference to the Second Amended Complaint ¶ 32 & Exhibit P, September 5, 2018, ECF # 131, 133. But the Second Amended Complaint is unclear on this point.

documents on Consolidated's behalf. Second Amended Complaint ¶ 110, September 5, 2018, ECF # 131. Sallyport, a downstream encumberancer of the mineral rights and whose lien's might be avoided if Consolidated prevails on such a theory, disputes that fact. This is the species of dispute of which *Hal Roach Studios* spoke. As a consequence, even without consideration of the validity of the post-Settlement Agreement November 30, 2017, deed of trust a cause of action for declaratory relief has been plead.

Ultra-vires acts

As set forth in this ruling with respect to the first count (declaratory relief), Nevada law recognizes a corporation's right to enter contracts without board of director or shareholder approval. Moreover, the settlement was also signed by Panagiotis Kechagias, "Managing Director." As a consequence, as to the first (ultra-vires) theory of relief, the motion will be granted.

Lack/Failure of Consideration

It is well settled that absent fraud in the inception, failure of consideration is not a basis to void a deed. *Lavely v. Nonemaker*, 212 Cal. 380, 383 (1931); *Wooster v. Dep't of Fish & Game*, 211 Cal.App.4th 1020, 1030 (2012). As the court in *Lavely*, stated, "It is settled that a deed without fraud in its inception conveys the title, and is not void for any failure of consideration, either in whole or in part. [Citation.] Acts done subsequent to the execution and delivery of a deed cannot affect its integrity, and a subsequent failure of consideration or breach of a personal covenant not amounting to a condition, will not avoid the deed, if there was no fraud or false representation." p. 383.

Here, the Plaintiffs have plead (unsuccessfully) a cause of action for fraud. *See* Ruling, Count 2. Had they done so, this might well satisfy the standards enunciated in *Lavely*. *See* Second Amended Complaint ¶¶ 13, 106, September 5, 2018, ECF # 131. But having failed to plead fraud with particularity, a cause of action has not been stated, and the motion will be granted as to the second (failure of consideration) theory of relief.

Condition precedent

This court cannot yet ascertain whether the Plaintiffs have not satisfied the conditions precedent for relief set forth in the Second Amended Complaint. The Plaintiffs concede that the second count is viable if, and only if, Consolidated is "deemed not bound" by the terms of the Settlement Agreement. Second Amended Complaint, Count 2 (fraud), September 5, 2018, ECF # 131. This court has ruled that the first count of the Second Amended Complaint has not raised a plausible claim to relief and, accordingly, that count does not make this count viable.

But the Chapter 7 trustee has raised such a claim. Counter-claim, Ninth Count (declaratory relief as to the validity and enforceability of the Settlement Agreement), February 28, 2018, ECF # 45. To date no counter-defendant has challenged the trustee's'

counter-claim and its assertions. As a consequence, the lack of a condition precedent is not a basis to grant this motion.

Because the third count pleads no viable cause of action, the motion will be granted.

Fourth Count (Fraudulent Transfer)

The fourth count advances a claim by Kodiak for the fraudulent transfer of the barite minerals to Don Rose Oil.

Failure to plead with particularity

Since this is a claim alleging fraud, Rule 9(b) applies. Cal. Civ. Code § 3439.12; *see also, e.g.*, *Chase Bank, U.S.A., N.A. v. Vanarthos (In re Vanarthos)*, 445 B.R. 257, 264 (Bankr. S.D.N.Y. 2011). This rule's heightened pleading standard requires a plaintiff to "state with particularity the circumstances constituting fraud." Fed. R. Civ. P. 9(b), incorporated by Fed. R. Bankr. P. 7009. This standard means that "the complaint must set forth what is false or misleading about a statement, and why it is false." *Rubke v. Capitol Bancorp Ltd.*, 551 F.3d 1156, 1161 (9th Cir. 2009) (quoting *Yourish v. Cal. Amplifier*, 191 F.3d 983, 993 (9th Cir. 1999)) (internal quotation marks omitted). The facts constituting fraud must be pleaded specifically enough to give a defendant sufficient "notice of the particular misconduct" so that defendant may defend against the charge. *Vess v. Ciba-Geigy Corp. U.S.A.*, 317 F.3d 1097, 1106 (9th Cir. 2003). A plaintiff must include the "who, what, when, where, and how" of the fraud. *Id.*

The guts of this claim are the misrepresentations as to Don Rose's debt to Don Rose Oil. Second Amended Complaint, September 5, 2018, ECF # 131. The headwaters of the deception is the allegation of a $3.9 million debt. *Id.* at ¶ 13. The remainder of the deceptions merely carry forward and enlarge that misrepresentation. *Id.* at ¶¶ 14-20. But the Plaintiffs have not plead any of the Rule 9(b) and *Ciba-Geigy Corp. U.S.A.*, particulars as to the headwater misrepresentation.

Kodiak's standing

Creditors, and only creditors, have standing to pursue claims under the California Uniform Fraudulent Transfers Act. Cal. Civ. Code § 3439 et seq. Cal. Civ. Code § 3439.07(a). Creditors are those who hold claims. Cal. Civ. Code § 3439.01(c). Claims are rights to payment. Cal. Civ. Code § 3439.01(b). Equity holders, including shareholders, are not creditors. *In re Riverside-Linden Inv. Co.*, 925 F2d 320 (9th Cir. 1991) (partnership is not a claim under 11 U.S.C. § 101).

As of March 8, 2013, Kodiak was a shareholder, not a creditor, of Consolidated. Second Amended Complaint ¶¶ 39-45, September 5, 2018, ECF # 131. The transfers of which the Plaintiff complains occurred on or after 2014. *Id.* at ¶ 13.

For each of these reasons, the motion will be granted.

Fifth Count (Declaratory Relief)

The fifth count advances a claim for declaratory relief regarding the rights of Hellenic vis-à-vis other defendants, including Sallyport. The rights of the parties purport to be defined by (1) the Settlement Agreement and Release, Second Amended Complaint, Exhibit H, September 5, 2018, ECF # 131; and (2) the Inter-creditor Agreement between Hellenic and Sallyport, *Id.* at Exhibit I.

Sallyport argues that neither the Settlement Agreement, nor the Inter-creditor Agreement, were signed by DRO Barite, and the Plaintiffs are barred by the Statute of Frauds.

Affirmative defenses must be affirmatively pled to avoid waiver. *John R. Sand & Gravel Co. v. United States*, 552 US 130, 133 (2008). *Arizona v. California*, 530 US 392, 410 (2000). The statute of frauds is such an affirmative defense. Fed. R. Civ. P. 8(c)(1), *incorporated by* Fed. R. Bankr. P. 7008. DRO Barite, LLC is represented by Belden Blaine Raytis, LLP. Answer September 24, 2018, ECF # 136 (not raising the statute of frauds). Neither Sallyport, nor its counsel, Levinson Arshonsky & Kurtz, LLP, have authority to assert that defense on behalf of DRO Barite, LLC.

Moreover, that DRO Barite might not be bound by the Settlement Agreement or the Inter-creditor Agreement does not mean that the other parties, *viz*. Sallyport, are not so bound, if those agreements are not deemed avoidable preferences.

The motion to dismiss will be denied.

Leave to Amend

Leave to amend should be granted liberally. Fed R. Civ. P. 15(a), *incorporated by* Fed. R. Bankr. P. 7010. *National Council of La Raza v. Chegavske*, 800 F.3d 1032, 1041 (9th Cir. 2015). Generally, a plaintiff must be given at least one opportunity to amend the complaint before a dismissal with prejudice. *Id. see also*, O'Connell & Stevenson, *California Practice Guide: Federal Civil Procedure Before Trial, Calif. & Ninth Circuit edits.*, Attacking the Pleadings § 9:287 (Rutter Group March 2018).

This is the second time this court has granted Sallyport's motion to dismiss. Because the court cannot say with conviction that the opportunity to amend would be futile as to any of the four counts for which the motion was granted, the court will give the Plaintiffs one final opportunity to plead a viable complaint.

Rule 12(b)(1)

Sallyport argues that the fifth count lacks constitutional ripeness as of the date of the complaint and must be dismissed.

Questions of subject matter jurisdiction must be challenged by Rule 12(b)(1). Fed. R. Bankr. P. 12(b)(1), *incorporated by* Fed. R. Bankr. P. 7012. Ripeness is such a challenge to subject matter jurisdiction. *Chandler v. State Farm Mut. Auto. Ins. Co.*, 598 F3d 1115, 1122 (9th Cir. 2010); *Stalley ex rel. United States v. Orlando*

Regional Healthcare System, Inc., (11th Cir. 2008) 524 F3d 1229, 1232 (11th Cir. 2008).

As this court said previously:

> "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).

Civil minutes p. 10, July 18, 2018, ECF # 102.

Ordinarily, ripeness must exist at every stage of the proceeding. *Amana Refrigeration, Inc. v. Quadlux, Inc.*, 172 F3d 852, 854 (Fed. Cir. 1999); O'Connell & Stevenson, *California Practice Guide: Federal Civil Procedure Before Trial, Calif. & Ninth Circuit edits.*, Actions with Special Procedural Requirements, Declaratory Relief § 10:23.5 (Rutter Group March 2018).

A small but notable exception exists for declaratory relief actions that ripen post-filing:

> **Compare—cases "unripe" when filed:** Some courts may allow a declaratory judgment claim based on developments after commencement of the action although the claim was

> "arguably unripe when filed." [*See Foundation for Interior Design Ed. Research v. Savannah College of Art & Design* (6th Cir. 2001) 244 F3d 521, 526—even if complaint did not allege justiciable case or controversy, defendant's counterclaims did]

Id. at § 10:23.6 (emphasis original)

Though *Savannah College* has been criticized, this court finds it persuasive and, were the court to dismiss the Second Amended Complaint on that basis, the Plaintiff would simply re-file the now-ripe declaratory relief action. *Frigard v. United States*, 862 F.2d 201, 204 (9th Cir. 1988) (Rule 12(b)(1) ordinarily without prejudice).

For this reason, the motion to dismiss will be denied.

28 U.S.C. 1404(a)

Venue of this adversary proceeding is presumptively proper in the Eastern District of California, Fresno Division because the underlying case, *In re Don Rose Oil Co., Inc.*, No. 17-12389 (Bankr. E.D. Cal. 2017), was filed here. 28 U.S.C. § 1409(a).

Sallyport seeks to transfer the case under 28 U.S.C. § 1404, which provides:

> For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented.

28 U.S.C.A. § 1404(a).

Here, the Settlement Agreement, signed by Hellenic and others (but not Sallyport), contains a forum selection of the Tulare County Superior Court. Second Amended Complaint, Exhibit H ¶ 13, September 5, 2018, ECF # 133. The Inter-creditor, Subordination and Waterfall Agreement, signed by Sallyport and Hellenic, contains a forum selection clause of Harris County, State of Texas. *Id.* at Exhibit I ¶ 26. Sallyport seeks to enforce the forum selection clause as to Count 5.

A bankruptcy court may decline to enforce a forum selection clause where it would "contravene a strong public policy of the forum in which suit is brought." *Petersen v. Boeing Co.*, 715 F3d 276, 280 (9th Cir. 2013). In the context of bankruptcy matters the Ninth Circuit has instructed us as to the circumstances in which a bankruptcy court may decline to enforce a forum selection clause:

> One of the Bankruptcy Code's primary objectives is "centralization of disputes concerning a debtor's legal obligations." *In re Eber*, 687 F.3d 1123, 1131 (9th Cir.2012); see also *In re Rader*, 488 B.R. 406, 416 (B.A.P. 9th Cir.2013). **Thus, courts in which a bankruptcy**

> **proceeding is pending have declined to honor contractual selections of other forums where the matters at issue constitute core proceedings and are not inextricably intertwined with non-core proceedings.** See, e.g., *In re Iridium Operating LLC*, 285 B.R. 822, 836–37 (S.D.N.Y.2002) (citing cases).

Kismet Acquisition, LLC v. Icenhower (In the Matter of Icenhower), 757 F.3d 1044, 1051 (9th Cir. 2014) (emphasis added).

Resolution of claims against the estate, whether arising under federal or state law, are core proceedings. 28 U.S.C. § 157(b)(2)(A)-(B),(D)- (E),(G),(I)-(J). *Katchen v. Landy*, 382 U.S. 323 (1966). Sallyport has filed a claim, contending that it is at least partially, or perhaps wholly, secured in the amount of $3.567 million. Claim # 52. Hellenic has filed an unsecured claim for $3 million. Claim # 92.

Ordinarily, these claims would be resolved by reference to 11 U.S.C. §§ 502, 506. But here, there is an added layer of complexity: the Inter-creditor, Subordination and Waterfall Agreement. This triggers the subordination provisions of 11 U.S.C. § 510(a). As a consequence, the Inter-Creditor Agreement presents a core issue as it pertains to claim resolution as to Sallyport and Hellenic and impacts the distribution scheme of 11 U.S.C. § 726. It is not inextricably intertwined with non-core proceedings.

For this reason, the motion to transfer is denied.

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 motion, oppositions, and replies, if any, and having heard oral argument presented at the hearing,

Motion to Dismiss (Rule 12(b)(6)

IT IS ORDERED that the motion to dismiss is granted as to the first, second, third, and fourth counts, and denied as to the fifth count, of the Second Amended Complaint, September 5, 2018, ECF # 131.

If the Plaintiffs file a Third Amended Complaint

IT IS FURTHER ORDERED that the plaintiffs may file and serve a Third Amended Complaint not later than November 21, 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 shall not aggregate into a single count claims based on separate transactions or

occurrences, Fed. R. Civ. P. 10(b), *incorporated by* Fed. R. Bankr. P. 7010.

IT IS FURTHER ORDERED that all defendants (including those that have filed an answer to the original, First Amended Complaint, and the Second Amended Complaint shall file answer or motion under Rule 12 not later than December 12, 2018.

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 January 23, 2019.

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.

If the Plaintiffs do not file a Third Amended Complaint

IT IS FURTHER ORDERED that not later than December 12, 2018, any defendant that has not already filed an answer to the Second Amended Complaint shall file an answer to the fifth count only.

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.

Motion to Dismiss (Rule 12(b)(1)

IT IS FURTHER ORDERED that the motion to dismiss for lack of constitutional ripeness is denied without prejudice.

Motion to Transfer

IT IS FURTHER ORDERED that the motion to transfer the fifth count to the State of Texas, County of Harris is denied with prejudice.