



UNITED STATES BANKRUPTCY COURT  
CENTRAL DISTRICT OF CALIFORNIA  
LOS ANGELES DIVISION

In re: EPD Investment Co., LLC, and Jerrold S. Pressman, Consolidated Debtors.	Case No.: 2:10-bk-62208-ER Adv. No.: 2:12-ap-02424-ER
Jason M. Rund, solely in his capacity as Chapter 7 Trustee,  Plaintiff,  v.  John C. Kirkland and Poshow Ann Kirkland, solely in her capacity as Trustee of the Bright Conscience Trust Dated September 9, 2009,  Defendants.	<b>MEMORANDUM OF DECISION ON MOTIONS IN LIMINE</b>  Date: October 5, 2021 Time: 11:00 a.m. Location: Ctrm. 1568 Roybal Federal Building 255 East Temple Street Los Angeles, CA 90012

At the above-captioned date and time, the Court conducted hearings on eight Motions in Limine filed by the Bright Conscience Trust Dated September 9, 2009 (the "BC Trust") and one Motion in Limine filed by the Chapter 7 Trustee (the "Trustee").<sup>1</sup> For the reasons set forth

<sup>1</sup> The Court considered the following papers in adjudicating these matters:

- 1) BC Trust's Motion in Limine No. 1 of 7:
  - a) Defendant's Notice of Motion and Motion in Limine to Exclude Evidence Related to Unpleaded Claims [Adv. Doc. No. 514]
  - b) Plaintiff Chapter 7 Trustee's Opposition to Defendant's Motion in Limine to Exclude Evidence Related to Unpleaded Claims [Adv. Doc. No. 550]

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- c) Defendant's Reply in Support of Notice of Motion and Motion in Limine to Exclude Evidence Related to Unpleaded Claims [Adv. Doc. No. 557]
- 2) BC Trust's Motion in Limine No. 2 of 7:
    - a) Defendant's Notice of Motion and Motion in Limine to Exclude Evidence Pre-Dating December 14, 2009 [Adv. Doc. No. 515]
    - b) Plaintiff Chapter 7 Trustee's Opposition to Defendant's Notice of Motion in Limine to Exclude [Evidence] Pre-Dating December 14, 2009 [Adv. Doc. No. 542]
    - c) Defendant Poshaw Ann Kirkland, Trustee of the Bright Conscience Trust Dated September 9, 2009's Reply in Support of its Motion in Limine to Exclude Evidence Pre-Dating December 14, 2009 [Adv. Doc. No. 558]
- 3) BC Trust's Motion in Limine No. 3 of 7:
    - a) Defendant's Notice of Motion and Motion in Limine to Exclude Evidence Re: John Kirkland's Conduct After September 9, 2009; or, in the Alternative to Bifurcate the Trial [Adv. Doc. No. 516]
    - b) Plaintiff Chapter 7 Trustee's Opposition to Defendant's Notice of Motion and Motion in Limine to Exclude Evidence Re: John Kirkland's Conduct After September 9, 2009; or, in the Alternative, to Bifurcate the Trial [Adv. Doc. No. 551]
    - c) Defendant's Reply in Support of its Motion in Limine to Exclude Evidence Re: John Kirkland's Conduct After September 9, 2009; or, in the Alternative to Bifurcate the Trial [Adv. Doc. No. 559]
- 4) BC Trust's Motion in Limine No. 4 of 7:
    - a) Notice of Motion and Defendant's Motion in Limine to Exclude Evidence of Alleged Misconduct by Kirkland While at Greenberg Traurig or Luce Forward [Adv. Doc. No. 517]
    - b) Plaintiff Chapter 7 Trustee's Opposition to Defendant's Motion in Limine to Exclude Evidence of Alleged Misconduct by Kirkland While at Greenberg Traurig or Luce Forward [Adv. Doc. No. 552]
      - i) Request for Judicial Notice in Support of Plaintiff Chapter 7 Trustee's Opposition to Defendant's Motion in Limine to Exclude Evidence of Alleged Misconduct by Kirkland While at Greenberg Traurig or Luce Forward [Adv. Doc. No. 553]
    - c) Defendant's Reply in Support of Motion in Limine to Exclude Evidence of Alleged Misconduct by Kirkland While at Greenberg Traurig or Luce Forward [Adv. Doc. No. 560]
- 5) BC Trust's Motion in Limine No. 5 of 7:
    - a) Defendant Poshaw Ann Kirkland, Trustee of the Bright Conscience Trust Dated September 9, 2009's Notice of Motion and Motion in Limine to Exclude Matthew Gruenberg [Adv. Doc. No. 518]
    - b) Plaintiff Chapter 7 Trustee's Opposition to Defendant's Motion in Limine to Exclude Matthew Gruenberg [Adv. Doc. No. 541]
    - c) Defendant Poshaw Ann Kirkland, Trustee of the Bright Conscience Trust Dated September 9, 2009's Reply in Support of its Motion in Limine to Exclude Matthew Gruenberg [Adv. Doc. No. 561]
- 6) BC Trust's Motion in Limine No. 6 of 7:
    - a) Notice of Motion and Motion in Limine to Exclude Thomas Jeremiassen from Trial [Adv. Doc. No. 519]

below, the BC Trust's Motion in Limine No. 1 is **GRANTED**; the BC Trust's Motions in Limine Nos. 2, 3, 4, 5, 6, and 7 are **DENIED**; the BC Trust's Motion seeking to exclude exhibits designated by the Trustee is **DENIED**; and the Trustee's Motion in Limine seeking to exclude evidence previously claimed subject to the marital privilege is **DENIED IN PART**.

## **I. Facts and Summary of Pleadings**

### **A. Background**

Jason M. Rund serves as the Chapter 7 Trustee (the "Trustee") of the substantively consolidated estates of EPD Investment Co., LLC ("EPD") and Jerrold S. Pressman ("Pressman," and together with EPD, the "Debtors"). On October 31, 2012, the Trustee filed a complaint against Poshow Ann Kirkland ("Poshow"), solely in her capacity as the Trustee of the Bright Conscience Trust dated September 9, 2009 (the "BC Trust") and John C. Kirkland ("John," and together with Poshow, the "Kirklands").<sup>2</sup> The operative Fourth Amended Complaint [Adv. Doc. No. 234] (the "Complaint") was filed on October 14, 2016. The Complaint seeks to (1) disallow and/or equitably subordinate proofs of claim filed by the BC Trust and (2) avoid allegedly fraudulent transfers from the Debtors to both John and the BC Trust. On January 21, 2021, the Court entered a final judgment in favor of John. *See* Adv. Doc. No. 486.<sup>3</sup> Trial of the Trustee's equitable subordination claim is currently set for the week of

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- b) Plaintiff Chapter 7 Trustee's Opposition to Defendant's Motion in Limine to Exclude Thomas Jeremiassen from Trial [Adv. Doc. No. 540]
  - c) Reply in Support of Defendant's Motion in Limine to Exclude Thomas Jeremiassen from Trial [Adv. Doc. No. 562]
- 7) BC Trust's Motion in Limine No. 7 of 7:
- a) Defendant's Notice of Motion and Motion in Limine to Exclude Evidence Related to Non-Debtor Entities [Adv. Doc. No. 520]
  - b) Plaintiff Chapter 7 Trustee's Opposition to Defendant's Notice of Motion and Motion in Limine to Exclude Evidence Related to Non-Debtor Entities [Adv. Doc. No. 539]
  - c) Defendant's Reply in Support of Motion in Limine to Exclude Evidence Related to Non-Debtor Entities [Adv. Doc. No. 563]
- 8) Trustee's Motion in Limine Re: Exclusion of Testimony Previously Claimed as Subject to the Marital Privilege:
- a) Plaintiff Chapter 7 Trustee's Notice of Motion and Motion in Limine to Exclude Testimony Previously Claimed as Subject to the Marital Privilege by Defendant Poshow Ann Kirkland in Her Capacity as Trustee of the Bright Conscience Trust Dated September 9, 2009 [Adv. Doc. No. 531]
  - b) Defendant's Opposition to Motion in Limine to Exclude Poshow Ann Kirkland from Offering Testimony [Adv. Doc. No. 543]
  - c) Plaintiff Chapter 7 Trustee's ... Reply to ... Defendant's Opposition to Motion in Limine to Exclude Poshow Ann Kirkland from Offering Testimony [Adv. Doc. No. 566]

<sup>2</sup> Given names are used to distinguish Poshow from John. No disrespect is intended.

<sup>3</sup> Unless otherwise indicated, all "Adv. Doc." citations are to Adv. No. 2:12-ap-02424-ER; all "Bankr. Doc." citations are to Bankr. Case No. 2:10-bk-62208-ER; all "District Court Doc." citations are to Case No. 2:18-cv-08317-DSF; and all "Tr." citations are to the transcript of the jury trial conducted by the District Court in Case No. 2:18-cv-08317-DSF that commenced on

October 25, 2021. *See* Adv. Doc. No. 580. The full procedural history of this matter has been set forth at length in the Court's prior rulings<sup>4</sup> and is not repeated herein.

On October 29, 2020, the Court entered a *Memorandum of Decision Granting in Part and Denying in Part Cross-Motions for Summary Judgment Filed by the Chapter 7 Trustee and the BC Trust* [Adv. Doc. No. 460] (the "Memorandum") and an accompanying order [Adv. Doc. No. 461] (the "Order"). The Order provides in relevant part:

- 1) [paragraph omitted]
- 2) The BC Trust holds an allowed secured claim in the amount of \$1,950,613.41. This finding is without prejudice to the ability of the Trustee and the BC Trust to assert that the claim is subject to the following adjustments:
  - a) The BC Trust may assert that the claim should be increased by approximately \$75,000, based on the fact that the estate has received approximately \$75,000 in proceeds from a Court-approved settlement with Union Bank, and the estate is entitled to only a single satisfaction of avoided transfers under § 550(d).
  - b) The Trustee may assert that the claim is subject to being surcharged in the amount of \$309,166.70 under § 506(c), based on the fact that the Trustee was required to pay this amount to facilitate a settlement with Robert Geringer.
- 2) The BC Trust is not entitled to any interest on its claim because the Trustee is entitled to avoid the claim as an actually fraudulent transfer pursuant to § 548(a)(1)(A). Notwithstanding such avoidance, the BC Trust is entitled to a claim of \$1,950,613.41 because it has established that it acquired the claim in good faith and for value pursuant to § 548(c).
- 3) The BC Trust's claim **does not** attach to (a) \$3,886,650.83 in proceeds from the Trustee's settlement of avoidance actions or (b) \$1,250,000.00 in proceeds from the Trustee's settlements with Luce Forward and Greenberg Traurig. The BC Trust's claim **does** attach to (a) \$3,615,817.85 in proceeds from a settlement with Robert Geringer and (b) \$104,588.83 in proceeds from the sale of stock in Ice Skating Enterprises and Sidecreek Development.
- 4) The BC Trust is entitled to summary adjudication in its favor on the Trustee's constructively fraudulent transfer claims (claims four and five).
- 5) This Order does not dispose of all the claims for relief at issue in this action and is therefore an interlocutory order.
- 6) Neither party is entitled to summary adjudication with respect to the Trustee's equitable subordination claim.

Order at ¶¶ 1–6 (footnotes omitted).

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June 25, 2019. Page citations are to the docket pagination which appears at the top of each page, not to the document's internal pagination.

<sup>4</sup> *See* Final Ruling Denying Rule 9019 Motion [Bankr. Doc. No. 1389], Final Ruling Denying BC Trust's Motion to Disqualify Chapter 7 Trustee [Bankr. Doc. No. 1335-1], Final Ruling Granting Motion to Enter Final Judgment in Favor of Defendant John C. Kirkland [Adv. Doc. No. 487], and Memorandum of Decision Granting in Part and Denying in Part Cross-Motions for Summary Judgment Filed by the Chapter 7 Trustee and the BC Trust [Adv. Doc. No. 460].

After presiding over a jury trial of the Trustee's claims against John, the District Court returned the Trustee's claims against the BC Trust to the Bankruptcy Court [District Court Doc. No. 189] (the "Return Order"). The Return Order states in relevant part:

Counsel for the [BC Trust] represented that only approximately two additional hours of testimony would be required if this Court were to try the matter. The Court sees no reason why the Bankruptcy Court cannot also rely on the testimony provided during the jury trial. If the Bankruptcy Court determines that it needs substantial testimony from non-parties that would not be necessary if this Court were to try the matter (presumably because the Court observed the testimony given at the jury trial), the Bankruptcy Court should so advise the parties, and the parties may seek reconsideration of this ruling on that ground.

Return Order at 2.

On July 14, 2021, the Court granted a Motion in Limine filed by the Trustee which sought to prevent the BC Trust from supporting its case in chief by introducing transcripts of prior testimony offered by the Kirklands. *See* Adv. Doc. Nos. 579 (order granting motion) and 577 (final ruling granting motion). The Motion was made necessary because John and Kirkland stated that they would not appear to testify at trial. In opposing the Motion, the BC Trust stated that it would seek reconsideration of the Return Order if it was not permitted to support its case in chief by relying upon the transcripts of testimony that had previously been presented to the District Court. On July 14, 2021, the Court ordered the BC Trust to file a Motion for Reconsideration of the Return Order by no later than August 13, 2021. *See* Adv. Doc. No. 580.

On September 13, 2021, the District Court denied the BC Trust's Motion for Reconsideration of the Return Order. Among other things, the District Court stated:

[T]he Bankruptcy Court's discretion in excluding the partial trial transcripts and requiring additional testimony on the equitable subordination claim does not necessitate reconsideration of the Return Order. In precluding the use of partial trial testimony, the Bankruptcy Court determined that "[t]here is no merit to the BC Trust's contention that the transcripts of the Kirklands' prior testimony are admissible under FRE 804(b)" because "[t]he alleged unavailability of the Kirklands has been engineered by the BC Trust for purely strategic reasons." [Adv. Doc. No. 577 at 101–02.] Mrs. Kirkland is obviously still a party and Mr. Kirkland was only recently dismissed from this suit. *See* [Bankr. Doc. No. 486]. If either Mrs. or Mr. Kirkland fails to attend trial, the Bankruptcy Court is entitled to make whatever adverse findings it sees fit. In addition, the Bankruptcy Court is well within its discretion to determine (1) it must "assess the credibility of Poshow and John Kirkland" in evaluating the equitable subordination claim and (2) additional testimony is needed because "certain testimony relevant to the equitable subordination claim was not introduced at the jury trial overseen by the District Court." *Id.* at 102.

Order Denying Motion to (1) Reconsider Order Dated September 18, 2019 and (2) Withdraw the Reference of the Adversary Case [Adv. Doc. No. 599].

Before the Court are eight Motions in Limine filed by the BC Trust and one Motion in Limine filed by the Trustee. The BC Trust moves to preclude the Trustee from (1) introducing

evidence or argument in support of a new claim under § 510(b); (2) introducing any evidence of events occurring prior to December 14, 2009; (3) introducing any evidence of John's conduct after September 9, 2009 (the date upon which John assigned the Loan Documents to the BC Trust); (4) introducing any evidence of John's alleged wrongful conduct while he was an attorney at Greenberg Traurig LLP or Luce Forward Hamilton & Scrips LLP; (5) calling Matthew Gruenberg as a witness; (6) calling Thomas Jeremiassen as a witness; and (7) introducing any evidence of actions taken by John in connection with non-Debtor entities. In addition, the BC Trust filed a Motion in Limine asserting blanket evidentiary objects to almost every exhibit designated by the Trustee.

The Trustee moves to preclude the BC Trust from introducing any evidence supporting the BC Trust's assertion that the BC Trust is separate and distinct from John, or that John did not act on behalf of the BC Trust.

## **II. Findings and Conclusions**

### **A. The BC Trust's Motion in Limine No. 1 is GRANTED**

The Trustee has represented that at trial, he intends to present evidence and argument in support of a new cause of action—namely that the BC Trust's claim should be subordinated pursuant to § 510(b). Section 510(b) provides:

For the purpose of distribution under this title, a claim arising from rescission of a purchase or sale of a security of the debtor or of an affiliate of the debtor, for damages arising from the purchase or sale of such a security, or for reimbursement or 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.

§ 510(b).

The Ninth Circuit has held that the purpose of § 510(b) is to prevent shareholders from elevating their claims and diluting the recovery available to unsecured creditors:

Congress relied heavily on the analysis of two law professors in crafting the statute. *See* H. Rep. 95–595, at 195 (1977), U.S.Code Cong. & Admin.News 1978, 5787, 6155 (explaining that the argument for mandatory subordination is best described by Slain & Kripke, *The Interface Between Securities Regulation and Bankruptcy—Allocating Risk of Illegal Securities Issuance Between Securityholders and the Issuer's Creditors*, 48 N.Y.U. L.Rev. 261 (1973)); *see also* *Granite Partners*, 208 B.R. at 336 (“Any discussion of section 510(b) must begin with the 1973 law review article authored by Professors John J. Slain and Homer Kripke.”). According to Slain and Kripke, the dissimilar expectations of investors and creditors should be taken into account in setting a standard for mandatory subordination. Shareholders expect to take more risk than creditors in return for the right to participate in firm profits. The creditor only expects repayment of a

fixed debt. It is unfair to shift all of the risk to the creditor class since the creditors extend credit in reliance on the cushion of investment provided by the shareholders.

*Am. Broadcasting Sys. v. Nugent (In re Betacom of Phoenix, Inc.)*, 240 F.3d 823, 829 (9th Cir. 2001).

The BC Trust moves to exclude the Trustee from pursuing a § 510(b) claim at trial. The BC Trust argues that its due process rights would be denied if the Trustee were allowed to pursue such a claim, because § 510(b) was not pleaded in the Complaint. The Trustee asserts that the presentation of a § 510(b) claim would not prejudice the BC Trust. He states that the new § 510(b) claim will be supported by the same evidence that will already be introduced to support the existing § 510(c) claim.

The Court will not permit the Trustee to pursue a new claim for relief under § 510(b) at trial. As was their right, both the Trustee and the BC Trust have aggressively litigated this matter. This action alone has generated five published opinions, including an opinion issued by the Ninth Circuit.<sup>5</sup> Multiple additional unpublished opinions have also been issued.<sup>6</sup> Strategic decisions made by both parties throughout the course of the litigation were based upon the claims pleaded by the Trustee. After nine years of litigation, it would be unfair to the BC Trust to allow the Trustee to pursue at the last minute a new, unpleaded claim at trial—even if the Trustee does not intend to introduce any new evidence in support of the claim. The BC Trust might have made different strategic decisions during the course of the litigation had it been faced with a § 510(b) claim.

The operative Fourth Amended Complaint was filed four years after the litigation began. Therefore, the Trustee has had ample opportunity to amend the Complaint to present additional causes of action against the BC Trust. The Trustee has not offered a convincing explanation as to why the new § 510(b) claim was not presented at a prior stage of the litigation. This is especially the case given that the Trustee seeks to prove the new § 510(b) claim using the same evidence that will be introduced in support of the existing § 510(c) claim.

There is no merit to the Trustee's argument that he should be allowed to pursue his new § 510(b) claim because the Court has the ability to apply § 510(b) *sua sponte*. Whether the Court does or does not have the authority to *sua sponte* subordinate a claim under § 510(b) is not

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<sup>5</sup> See *Kirkland v. Rund (In re EPD Inv. Co., LLC)*, 821 F.3d 1146 (9th Cir. 2016) (finding that the claims asserted by the Trustee were not subject to mandatory arbitration); *Rund v. Kirkland (In re EPD Inv. Co., LLC)*, 587 B.R. 711 (C.D. Cal. 2018) (finding that the Trustee was not entitled to summary judgment in his favor); *Rund v. Kirkland (In re EPD Inv. Co., LLC)*, 594 B.R. 423 (C.D. Cal. 2018) (withdrawing the reference from the Bankruptcy Court based upon Kirkland's entitlement to a jury trial); *Rund v. Kirkland (In re EPD Inv. Co., LLC)*, 595 B.R. 910 (C.D. Cal. 2018) (finding that the Trustee was not entitled to reconsideration of the decision denying the Trustee's motion for summary judgment), *Rund v. Kirkland (In re EPD Inv. Co., LLC)*, 597 B.R. 899 (C.D. Cal. 2019) (finding that the Trustee was not entitled to entry of final judgment on his equitable subordination claim).

<sup>6</sup> See, e.g., 2013 WL 5352953 (C.D. Cal. Sept. 24, 2013), 2014 WL 12601025 (C.D. Cal. Apr. 9, 2014), 2014 WL 12597148 (C.D. Cal. Aug. 29, 2014), 2018 WL 947636 (Bankr. C.D. Cal. Feb. 17, 2018), 2019 WL 4233575 (C.D. Cal. Jun. 4, 2019), and 2020 WL 6937351 (Bankr. C.D. Cal. Oct. 29, 2020).

relevant, as that is not what is occurring here. It is not the Court who has sought to add a § 510(b) claim to this litigation; it is the Trustee, an interested party.

**B. The BC Trust's Motion in Limine No. 2 is DENIED**

In the Memorandum, the Court limited the scope of the Trustee's equitable subordination claim as follows:

To the extent that the Trustee's equitable subordination claim is predicated upon the imputation to the BC Trust of [John]'s conduct prior to December 14, 2009, the jury's good-faith finding has eliminated the claim. It is not possible for [John] to have engaged in inequitable conduct in good faith.

Memorandum at 31.

The BC Trust moves to exclude "any evidence of events that occurred before December 14, 2009," Adv. Doc. No. 515 at 2, on the ground that such evidence is irrelevant. The Trustee opposes the Motion, asserting that "certain acts and conduct after December 14, 2009 would not make sense to be presented at trial in the complete absence of background facts, documents and testimony that provide needed context for the post-December 14, 2009 actions." Adv. Doc. No. 542 at 2.

The Court declines to adopt a blanket prohibition on the introduction of "any evidence" of acts prior to December 14, 2009, as requested by the BC Trust. The Court agrees with the Trustee that background information may be necessary to contextualize post-December 2009 actions. However, the Court anticipates that the need for such background information will be minimal. The Court has already acquired extensive familiarity with this action through its review of the six-day jury trial conducted by the District Court. Therefore, the motion is **DENIED**; however, the Court reserves the right at trial to limit the background information presented by the Trustee in the event the Court determines that the information will not materially enhance the Court's ability to adjudicate the equitable subordination claim.

**C. The BC Trust's Motion in Limine No. 3 is DENIED**

The BC Trust moves to exclude any evidence of John's conduct after September 9, 2009—the date when John assigned his interest in the Loan Documents<sup>7</sup> to the BC Trust—unless and until the Trustee proves that John was the authorized or ostensible agent of the BC Trust. According to the BC Trust, because the Complaint seeks equitable subordination based solely upon John's conduct, the only way that the Trustee can obtain equitable subordination against the BC Trust is by first establishing that John was the BC Trust's agent, and that John was acting within the scope of his agency with respect to each act. In the alternative, the BC Trust moves to bifurcate the trial. Under the BC Trust's proposed bifurcation, the Trustee would first be required to establish that John was the BC Trust's actual or ostensible agent. A second phase pertaining to equitable subordination would take place only if the Trustee introduced sufficient evidence on the issue of agency. In support of the Motion, the BC Trust submits a declaration from Poshow, in which she testifies that John has never been an authorized agent of the BC Trust.

The Trustee objects to the Motion. He argues that it is improper within the context of a Motion in Limine for the BC Trust to seek to establish facts through declaration testimony. He

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<sup>7</sup> Capitalized terms not defined herein have the meaning set forth in the Memorandum.



further contends that the BC Trust will not be prejudiced if the Court conducts a trial on the totality of the equitable subordination claim. Finally, the Trustee asserts that bifurcation of the trial would not enhance judicial economy.

The Court **DENIES** the BC Trust's Motion. The Motion is premised upon the BC Trust's assertion that the Trustee can prove his equitable subordination claim against the BC Trust only if he first establishes that John was the actual or ostensible agent of the BC Trust. At this juncture, it would not be appropriate for the Court to rule upon whether the premise of the Motion is correct. The Court has not yet had the benefit of evaluating the evidence that will be presented at the trial. The application of an equitable remedy such as subordination under § 510(c) depends heavily upon the facts. The Court simply does not have sufficient information at this point to determine whether the BC Trust is correct when it asserts that a finding that John was the actual or ostensible agent of the BC Trust is a prerequisite to the equitable subordination of the BC Trust's claim.

For the same reasons, the Court declines to bifurcate the trial. The Court has "broad discretion" in determining whether to bifurcate. *David & Cox v. Summa Corp.*, 751 F.2d 1507, 1517 (9th Cir. 1985). "Factors to be considered when determining whether to bifurcate a trial include: avoiding prejudice, separability of the issues, convenience, judicial economy, and reducing risk of confusion." *Bates v. United Parcel Serv.*, 204 F.R.D. 440, 448 (N.D. Cal. 2001). As explained, adjudication of the Trustee's equitable subordination claim is a fact-intensive inquiry, and the Court is not in a position to determine the merits of the BC Trust's agency theory before it has heard all the evidence. Therefore, bifurcation would not serve the interests of convenience or judicial economy. In addition, there will be no prejudice to the BC Trust if it is required to defend against the Trustee's equitable subordination claim in a single trial. The Court notes that the Memorandum has significantly narrowed the issues that the BC Trust must defend against.

#### **D. The BC Trust's Motion in Limine No. 4 is DENIED**

The BC Trust moves to preclude the Trustee from introducing any evidence of alleged misconduct by John during that time he was an attorney at Greenberg Traurig LLP ("Greenberg Traurig") from January 2001 to December 31, 2007, or at Luce Forward Hamilton & Scripps LLP ("Luce Forward") from February 2009 to August 2010. The BC Trust argues that (1) the Trustee has already been compensated for alleged wrongful conduct of John through settlements with Greenberg Traurig and Luce Forward, and therefore is barred from seeking to equitably subordinate the BC Trust's claim based upon the same alleged conduct; and (2) that the respective settlement agreements have released any claims pertaining to John's actions while at the firms.

The Trustee opposes the Motion. He argues that the Motion improperly attempts to relitigate issues that have already been decided in the Memorandum, and further asserts that the settlements with Greenberg Traurig and Luce Forward contained a carve-out allowing the Trustee to pursue an equitable subordination claim against the BC Trust.

The Motion is **DENIED**. First, there is no merit to the BC Trust's argument that the Trustee is barred from seeking to equitably subordinate the BC Trust's claim as a result of the Trustee's settlements with Greenberg Traurig and Luce Forward. The BC Trust cites *ABF Capital Mgmt. v. Kidder Peabody & Co., Inc. (In re Granite Partners, LP)*, 210 B.R. 508 (Bankr. S.D.N.Y. 1997) for the proposition that the Trustee "cannot recover damages and obtain equitable subordination for the same wrong." 210 B.R. 508, 517 (Bankr. S.D.N.Y. 1997). The holding of

*Granite Partners* does not apply to the facts of this case. The plaintiffs in *Granite Partners* sought to equitably subordinate the defendant's claim while simultaneously suing the defendant for damages. The court held that although the plaintiffs could not recover damages and obtain equitable subordination, they could plead both claims for relief against the same defendant. *Granite Partners*, therefore, stands only for the proposition that a party cannot equitably subordinate a defendant's claim while at the same time obtaining a monetary recovery against that same defendant.

Here, the Trustee is *not* seeking both equitable subordination and monetary recovery from the *same* defendant. The Trustee obtained a monetary recovery from the law firms at which John was formerly employed, not from the BC Trust. The Trustee's equitable subordination claim against the BC Trust is not the type of double-recovery barred by *Granite Partners*.

Second, there is no merit to the BC Trust's contention that the Trustee has released claims predicated upon John's conduct while employed at the firms. The settlement agreements contained a carve-out permitting the Trustee to continue to pursue claims against John and the BC Trust. Specifically, on October 22, 2013, the Court approved a settlement agreement between the Trustee and McKenna Long & Aldridge LLP ("McKenna Long"), the successor-in-interest to Luce Forward by way of merger (the "Luce Forward Settlement").<sup>8</sup> Bankr. Doc. No. 750 (order approving Luce Forward Settlement). The Luce Forward Settlement released Luce Forward and McKenna Long from the Trustee's claims against the firms relating to (1) Luce Forward's post-petition representation of EPD, including claims that Kirkland had filed false and misleading pleadings and declarations on behalf of EPD and (2) Luce Forward's pre-petition representation of EPD, including claims relating to Kirkland's alleged conflicts of interest. Bankr. Doc. No. 670 (Trustee's description of claims resolved by the Luce Forward Settlement).<sup>9</sup> McKenna Long paid the estate \$750,000.00 in exchange for the releases set forth in the Luce Forward Settlement.

The Luce Forward Settlement released Kirkland from "[a]ll of the Trustee's claims or potential claims for professional negligence and/or legal malpractice and/or breach of fiduciary duty against Kirkland ... relating to or arising from the time period while Kirkland worked at, for, or was a partner or of counsel at, McKenna Long or its predecessor, Luce Forward" except for the following claims:

- 1) avoidance and recovery of transfers by EPD, Pressman, or any entity which Pressman had an ownership interest in, or for which Pressman was an officer, director, partner, limited partner, member or manager, made to or for the benefit of Kirkland, his family members and/or the Bright Conscience Trust (including but not limited to the transfers identified on Exhibits A through C of the First Amended Complaint against Kirkland and Poshov Kirkland, Adversary Proceeding No. 2:12-ap-02424-ER);
- 2) avoidance and recovery of the security interest(s), UCC-1 lien(s), and any amounts transferred to or for the benefit of the Bright Conscience Trust;
- 3) avoidance and recovery of the security interest(s), UCC-1 lien(s), and any amounts transferred to or for the benefit of HMB Holdings, LLC; and

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<sup>8</sup> McKenna Long & Aldridge LLP merged with Luce Forward Hamilton & Scripps LLP as of March 6, 2012. The McKenna Long Settlement released claims against McKenna Long and its predecessor Luce Forward.

<sup>9</sup> The Trustee did not file a complaint against McKenna Long because a settlement was reached at mediation prior to the Trustee's deadline to file a complaint.

- 4) disallowance and/or equitable subordination of any proof of claim(s) filed by or for the benefit of [the] Bright Conscience Trust, Kirkland, any family member of Kirkland, or by HMB Holdings, LLC (collectively, the “Remaining Kirkland Claims”).

Luce Forward Settlement at ¶ 3 [Bankr. Doc. No. 507, Ex. A].

In addition to the exclusion of the Remaining Kirkland Claims, the Luce Forward Settlement also excluded “the Trustee’s claims or potential claims against Kirkland ... for professional negligence and/or legal malpractice and/or breach of fiduciary duty and/or avoidance and recovery of preferential or fraudulent transfers relating to or arising from the time periods both before and after Kirkland worked at, for, or was a partner or of counsel at, McKenna Long ....” *Id.*

On October 16, 2013, the Court approved a settlement between the Trustee, on the one hand, and Greenberg Traurig LLP and Greenberg Traurig PA (collectively, “Greenberg Traurig”), on the other hand (the “Greenberg Traurig Settlement”). Bankr. Doc. No. 743 (order approving Greenberg Traurig Settlement). Greenberg Traurig paid the estate \$500,000.00 in exchange for the releases set forth in the Greenberg Traurig Settlement. Like the McKenna Long Settlement, the Greenberg Traurig Settlement released the Trustee’s claims against Kirkland arising from his conduct while employed at Greenberg Traurig, but excluded the Remaining Kirkland Claims from the release.<sup>10</sup> Bankr. Doc. No. 681, Ex. A at ¶ 4 (release provision of Greenberg Traurig Settlement). Specifically, the Greenberg Traurig Settlement released the Trustee’s claims “arising from or relating to ... Kirkland’s actions or failures to act as regard [to] the Debtors and relationships with and/or services provided to or for the benefit of the Debtors, including, but not limited to, any action for professional negligence, legal malpractice, breach of fiduciary duty, fraud, conspiracy, corporate waste or for avoidance and recovery of transfers arising under 11 U.S.C. §§ 544, 547, 548 and 550, California Civil Code § 3439, *et seq.*, and any other applicable state fraudulent transfer or fraudulent conveyance statutes.” *Id.*

The BC Trust argues that the carve-outs set forth above applied only to John’s *non-attorney* conduct. The BC Trust contends that the settlements should be so construed because at the time they were executed, the Trustee was pursuing claims against John based upon non-attorney conduct.

The BC Trust’s construction is not supported by the plain language of the settlements. The Court may not rely upon parole evidence to construe an unambiguous agreement. The BC Trust’s attempt to limit the scope of the carve-out based upon its characterization of matters going beyond the four corners of the agreements is **OVERRULED**.

#### **E. The BC Trust’s Motion in Limine No. 5 is DENIED**

The BC Trust moves to preclude the Trustee from calling Matthew Gruenberg (“Gruenberg”) as a witness. At the jury trial overseen by the District Court, Gruenberg testified that he performed legal work defending EPD against actions brought against EPD by its investors, and that this legal work was overseen by John. According to the BC Trust, Gruenberg’s testimony at the jury trial directly contradicted John’s testimony. The BC Trust argues that the jury’s finding that John acted in good faith with respect to his receipt of the Mortgage Transfers means that the jury did not believe Gruenberg. The BC Trust contends that “[b]ecause Mr. Gruenberg’s

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<sup>10</sup> The term “Remaining Kirkland Claims” is defined in substantially the same way in the McKenna Long Settlement and the Greenberg Traurig Settlement.

testimony has already been found to not be believable, allowing him to testify at this trial would be highly prejudicial.” Adv. Doc. No. 518 at 2.

The Trustee opposes the Motion. He asserts that the jury’s finding that John received the Mortgage Transfers in good faith says nothing about whether the jury believed Gruenberg.

The Motion is **DENIED**, and Gruenberg will be allowed to testify at trial. The Court has previously found that “all explicit and implicit findings made by the jury remaining binding with respect to the Trustee’s claims against the BC Trust.” Memorandum at 6. However, the jury made no findings—either explicit or implicit—regarding the credibility of Gruenberg’s testimony. The jury’s explicit findings all pertained to John; there were no explicit findings regarding Gruenberg.

The jury’s explicit findings pertaining to John are not sufficient to support an implicit finding with respect to Gruenberg’s credibility. To determine whether a finding is implicit in a verdict, courts review “the verdict, the instructions, and the trial record to interpret the scope of the jury’s factual findings.” *Id.* For example, in *Los Angeles Police Protective League v. Gates*, 995 F.2d 1469, 1473–74 (9th Cir. 1993), a jury found that a police officer had been wrongfully terminated for refusing to consent to an unlawful search and awarded damages. The trial court denied the officer’s request for reinstatement, finding that the officer would have been terminated for other misconduct even if he had consented to the search. The Ninth Circuit acknowledged that “the jury made no express finding on whether [the officer] would have been fired in any event,” but found it appropriate to “determine whether it can be inferred from the jury’s verdict that it found that the improper insubordination charge was the cause of [the officer’s] dismissal.” *Id.* at 1473. After examining the relevant jury instructions, the *Gates* court found that in “light of the causation instruction and the manner in which the case was presented to the jury, it could *not* have awarded the level of damages it awarded without finding that Gibson would not have been discharged except for his refusal to be illegally searched.” *Id.* at 1474.

None of the jury instructions required that the jury find that Gruenberg was not credible in order to find that John received the Mortgage Transfers in good faith. It is true that John and Gruenberg offered contradictory testimony regarding Gruenberg’s representation of EPD. But the jury could have believed Gruenberg and disbelieved John with respect to this testimony while still finding that John received the Mortgage Transfers in good faith.

Because the premise of the motion—that an impartial jury has found that Gruenberg was not credible—is not correct, the motion is **DENIED**.

#### **F. The BC Trust’s Motion in Limine No. 6 is DENIED**

The BC Trust moves to prohibit Thomas P. Jeremiassen (“Jeremiassen”) from testifying at trial. The Trustee designated Jeremiassen as an expert witness on the issue of whether EPD was a Ponzi scheme. The BC Trust argues that Jeremiassen’s testimony should be excluded because the issue of whether EPD was a Ponzi scheme is not relevant to the Trustee’s equitable subordination claim.

The Trustee opposes the Motion. He intends to call Jeremiassen to testify to EPD’s financial condition from December 14, 2009 through and including the date of the filing of the petition. The purpose of the testimony will be to support the Trustee’s contention that post-December 2009 representations made by John regarding EPD’s financial condition were either misleading or were made without a good-faith basis.

The Motion is **DENIED**. As explained in Section II.G., below, the Court has found that the Trustee may rely upon actions taken by John subsequent to September 9, 2009 (the date that

John assigned his interest in the Loan Documents to the BC Trust) in support of the Trustee's equitable subordination claim. Jeremiassen's testimony is intended to show that John engaged in inequitable conduct by making representations as to EPD's financial condition that were either misleading or not made in good faith. Jeremiassen's testimony is therefore relevant.

**G. The BC Trust's Motion in Limine No. 7 is DENIED**

In the Memorandum, the Court held that actions taken by John subsequent to his assignment of the Loan Documents to the BC Trust were still relevant to the Trustee's equitable subordination claim against the BC Trust:

Although [John] assigned his interest in the Loan Documents to the BC Trust on September 9, 2009, the Trustee may still rely upon actions taken by [John] subsequent to that date in support of his equitable subordination claim. [John]'s post-assignment actions may be imputed to the BC Trust for purposes of equitable subordination because [John] continued to act on behalf of the BC Trust post-assignment. [John] directed the filing of the May 2011 Financing Statement on behalf of the BC Trust, *see* Section III.F., above, and acted on behalf of the BC Trust by providing detailed testimony with respect to the trust at the May 27, 2011 Rule 2004 examination, *see* Section III.I., above.

Memorandum at 31.

Consistent with the Memorandum, the Trustee intends to introduce at trial evidence of actions taken by John which the Trustee contends will establish that John continued to act for the BC Trust after assigning the Loan Documents to the BC Trust on September 9, 2009. The evidence includes John's recordation of two financing statements in favor of the BC Trust and against non-Debtor entities.

The BC Trust seeks to preclude the Trustee from introducing such evidence. The BC Trust contends that the evidence is irrelevant because "[w]hat the BC Trust and/or Mr. Kirkland may have done as it relates to non-Debtor entities could not have harmed creditors in this case, and therefore cannot form a basis for equitable subordination." Doc. No. 520 at 1. The Trustee opposes the Motion, contending that the BC Trust is seeking to relitigate issues already decided by the Memorandum.

The Court finds that evidence pertaining to John's post-assignment actions, including the recordation of financing statements in favor of the BC Trust and against the assets of non-Debtor entities, is relevant to the Trustee's equitable subordination claim against the BC Trust. Accordingly, the BC Trust's motion to exclude such evidence is **DENIED**. As the Court explained in the Memorandum, the evidence is relevant because it supports the Trustee's contention that John continued to act for the BC Trust post-assignment. The Court has held that to the extent that John did continue to act for the BC Trust post-assignment, the Trustee may argue at trial that the BC Trust's claim should be equitably subordinated based upon an imputation of John's post-assignment acts to the BC Trust.

**H. The BC Trust's Motion to Exclude Exhibits Designated by the Trustee is DENIED**

On April 8, 2021, the Court entered an order establishing procedures for the adjudication of evidentiary objections at trial [Adv. Doc. No. 500] (the "Evidence Procedures Order"). The Evidence Procedures Order required all parties to stipulate to the admissibility of exhibits

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whenever possible. It further provided:

In the event any party cannot stipulate to the admissibility of an exhibit, that party must file a Motion in Limine which clearly identifies each exhibit alleged to be inadmissible and/or prejudicial. The moving party must set the Motion in Limine for hearing at the same time as the Pretrial Conference .... The Motion in Limine must contain a statement of the specific prejudice that will be suffered by the moving party if the Motion is granted. The Motion must be supported by a memorandum of points and authorities containing citations to the applicable Federal Rules of Evidence, relevant caselaw, and other legal authority. Blanket or boilerplate evidentiary objections not accompanied by detailed supporting argument are prohibited, will be summarily overruled, and may subject the moving party to sanctions. The failure of a party to file a Motion in Limine ... shall be deemed a waiver of any objections to the admissibility of an exhibit.

Evidence Procedures Order at ¶ 2.

The BC Trust objects to approximately 350 exhibits designated by the Trustee. The Motion does not contain a memorandum of points and authorities explaining the basis for each objection. Instead, the Motion asserts blanket objections to the admissibility of almost all the Trustee's exhibits, on the grounds that the exhibits are irrelevant, prejudicial, lack foundation, constitute hearsay, are contrary to the express or implied findings made by the jury, and/or violate the Court's order limiting the relevant time period for the trial. The Trustee objects to the Motion on the ground that it violates the Evidence Procedures Order.

The BC Trust's Motion to exclude the Trustee's exhibits is **DENIED**. The Evidence Procedures Order advised the BC Trust that "[b]lanket or boilerplate evidentiary objections not accompanied by detailed supporting argument are prohibited" and would be "summarily overruled." The Motion consists entirely of blanket and boilerplate evidentiary objections, and it is not supported by "a memorandum of points and authorities containing citations to the applicable Federal Rules of Evidence, relevant caselaw, and other legal authority" as required by the Evidence Procedures Order. The Evidence Procedures Order allows the Court to carefully consider evidentiary objections asserted by each party. The BC Trust has been afforded ample opportunity to assert evidentiary objections in the manner contemplated by the Evidence Procedures Order—in fact, the BC Trust has availed itself of that opportunity by filing seven motions in limine. The instant Motion is fundamentally inconsistent with the Evidence Procedures Order and is not well taken. The BC Trust's boilerplate evidentiary objections are summarily overruled.

**I. The Trustee's Motion in Limine to Exclude Evidence Previously Claimed Subject to the Marital Privilege is DENIED IN PART**

The Trustee moves to exclude any evidence supporting the BC Trust's assertion that the BC Trust is separate and distinct from John, or that John did not act on behalf of the BC Trust. The Trustee asks the Court to make an adverse inference based upon the Kirklands' prior assertion of the marital privilege. The BC Trust opposes the Motion. It argues that the Motion is unnecessary because the Kirklands do not intend to assert the marital communications privilege at trial.

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The Trustee filed a similar Motion in Limine before the District Court, which the District Court denied in part. The Court finds it appropriate to quote from the District Court's ruling at length:

In response to deposition questions regarding their communications about the BC Trust, the Kirklands invoked the marital communications privilege. That privilege protects information privately disclosed between spouses. *United States v. Banks*, 556 F.3d 967, 974 (9th Cir. 2009) (citing *United States v. Griffin*, 440 F.3d 1138, 1143-44 (9th Cir. 2006)). The privilege exists to “protect the integrity of marriages and ensure that spouses freely communicate with one another.” *Id.* (quoting *Griffin*, 440 F.3d at 1143). There are three prerequisites to assertion of the marital privilege: (1) a communication was made, (2) in confidence, (3) while the spouses were married. See *United States v. Vo*, 413 F.3d 1010, 1016 (9th Cir. 2005).

[The Trustee] concedes the Kirklands are entitled to the protection of this privilege. Dkt. 65, at 153 (“Under federal law, Defendants have the right to assert the marital communication privilege afforded to married couples.”). [The Trustee] does not argue that either improperly invoked the privilege. If [the Trustee] found the testimony unsatisfactory, or if he thought the marital privilege was being used to prevent the discovery of other non-privileged evidence, he could have sought to compel additional testimony/evidence. Instead, citing cases on the attorney-client privilege, [the Trustee] argues that Defendants seek to use the evidentiary privilege as both a sword and a shield. Dkt. 65, at 13-15. [The Trustee] therefore requests an order precluding Defendants from offering testimony or other evidence concerning any purported “separation” or “distinction” between John and the BC Trust. *Id.* at 15.

The Court agrees that Defendants cannot use the marital privilege as both a sword and shield by allowing argument and testimony that John had nothing to do with the BC Trust, but preventing cross-examination of the Kirklands on the issue. If the Kirklands argue or testify to the “separateness” of John and the BC Trust, [the Trustee] may ask relevant questions on cross-examination—even if such questions are likely to result in an invocation of the marital privilege. Further, the Court is likely to instruct the jurors that they may draw an adverse inference from that invocation. See *United States v. Premises Known as 281 Syosset Woodbury Road*, 892 F. Supp. 847, 860 (E.D.N.Y. 1994), *aff'd*, 71 F.3d 1067 (2d Cir. 1995) (“[B]ecause an adverse inference may be drawn in the Fifth Amendment context (which is based on the Constitution and not the common law)—there is no reason why an adverse inference could not be drawn from the invocation of the confidential marital communications privilege [in a civil action]”).

District Court Doc. No. 119 at 102–03.

The Court will follow the District Court's approach and will deny the Motion in part. That is, the Court will not prevent the BC Trust from introducing evidence intended to demonstrate that the BC Trust and John are completely separate, that John did not act on behalf of the BC Trust, and that John was not an actual or ostensible agent of the BC Trust. However, the Court will permit the Trustee to cross-examine the Kirklands as to this issue, and will draw an adverse inference to the extent that the Kirklands invoke the marital privilege.

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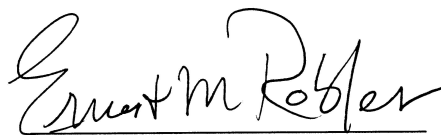
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### III. Conclusion

Based upon the foregoing, the BC Trust's Motion in Limine No. 1 is **GRANTED**; the BC Trust's Motions in Limine Nos. 2, 3, 4, 5, 6, and 7 are **DENIED**; the BC Trust's Motion seeking to exclude exhibits designated by the Trustee is **DENIED**; and the Trustee's Motion in Limine seeking to exclude evidence previously claimed subject to the marital privilege is **DENIED IN PART**. The Court will enter an order consistent with this Memorandum of Decision.

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Date: October 6, 2021

A handwritten signature in black ink, reading "Ernest M. Robles". The signature is written in a cursive, flowing style. The first name "Ernest" is written with a large, prominent "E". The middle initial "M" is smaller and positioned between the first and last names. The last name "Robles" is written with a large, prominent "R". The signature is written on a white background.

Ernest M. Robles  
United States Bankruptcy Judge