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UNITED STATES BANKRUPTCY COURT EASTERN DISTRICT OF CALIFORNIA

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FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA

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In re: ERIK SUNDQUIST and RENÉE)
SUNDQUIST,)
Debtors.)

Case No. 10-35624

ERIK SUNDQUIST and RENÉE)
SUNDQUIST,)
Plaintiffs,)

Adv. Pro. No. 14-02278

v.)

BANK OF AMERICA, N.A.;)
RECONTRUST COMPANY, N.A.; BAC)
HOME LOANS SERVICING, LP,)
Defendants.)

Docket Control No. PSZ-3

OPINION ON MOTION TO DISMISS

Before: Christopher M. Klein, Bankruptcy Judge

James I. Stang, Kenneth H. Brown, Pachulski Stang Ziehl & Jones
LLP, Los Angeles, California; Estela Pino, Sacramento,
California, for Plaintiffs.

Jonathan R. Doolittle, Brian A. Sutherland, Reed Smith LLP, San
Francisco, California; Jonathan D. Hacker, O'Melveny & Myers LLP,
Washington, D.C., for Defendants.

CHRISTOPHER M. KLEIN, Bankruptcy Judge:

This motion to dismiss began as a hostage standoff. Bank of
America, with a gun to the Sundquists' heads, said it would pay
them several million dollars more than the \$6,074,581.50 awarded
to them, but only if this court first dismisses the adversary
proceeding so as to vitiate the opinion in Sundquist v. Bank of
America (In re Sundquist), 566 B.R. 563 (Bankr. E.D. Cal. 2017).
There being no legal obstacle to Bank of America paying the
Sundquists without any judicial action, this was a naked effort
to coerce this court to erase the record. No chance. No dice.

Facts

1
2 A judgment for \$1,074,581.50 in actual damages and \$45
3 million of punitive damages was entered after trial of this
4 adversary proceeding for automatic stay violation damages under
5 11 U.S.C. § 362(k)(1). The net judgment in favor of the
6 Sundquists personally is \$6,074,581.50, including \$5 million in
7 punitive damages. They were enjoined to deliver the post-tax
8 residue of the remaining \$40 million to designated public-
9 interest entities, subject to remittitur to \$6,074,581.50 if Bank
10 of America made certain charitable contributions.

11 The judgment also cancelled the contingent fee contract of
12 the Sundquists' counsel pursuant to 11 U.S.C. § 329(b) and
13 awarded compensation of \$70,000.00 under lodestar principles.

14 The designated beneficiaries of the \$40 million (less taxes)
15 awarded to honor the public-interest facet of punitive damages
16 and to achieve the appropriate level of deterrence were granted
17 leave to intervene under the collective non-de-guerre Interested
18 Parties. Sundquist II, 570 B.R. at 96-98.

19 Timely dueling post-trial motions to strike evidence and to
20 retry damages suspended the time in which to appeal by virtue of
21 Federal Rule of Bankruptcy Procedure 8002(b)(1) until those
22 motions are resolved.

23 The Sundquists assert that in a reopened trial they could
24 prove actual and punitive damages exceeding \$9 million.

25 After mediation, Bank of America agreed to pay the
26 Sundquists, on the condition of expunging the record, a sum
27 exceeding the \$6,074,581.50 award by enough to validate their
28 assertion that at a retrial on damages they can prove more than

1 \$9 million in actual and punitive damages. This would amount to
2 immediate and complete victory for the Sundquists personally.

3 Although the settlement ignores the Intervenors and the
4 public-interest facet of punitive damages, the Sundquists have
5 committed themselves personally to make voluntary charitable
6 contributions to the same entities that reflect the post-tax
7 residue of about \$600,000.00 in recognition of the public
8 interest implicit in punitive damages.

9 The Intervenors note that they have no desire to impede
10 substantial and just compensation for the Sundquists and that
11 they are not motivated by a desire to receive funds that
12 otherwise would or should go to the Sundquists. But they argue
13 that this court's published decision should not be vacated or
14 withdrawn, that the public deserves to know the terms of the
15 settlement and, at a minimum, that this court should review the
16 settlement agreement in camera.

17

18 Analysis

19 The motion to vacate the judgment, erase the published
20 opinion, and dismiss the adversary proceeding takes precedence
21 because it could moot the other two motions.

22

23 I

24 A key point to bear in mind is that Bank of America is free
25 to pay the Sundquists in exchange for a release without any court
26 action. The Sundquists could thereafter leave the Intervenors
27 unaided with a challenging row to hoe in defending an appeal by a
28 well-funded bank determined to fight the public interest

1 component of punitive damages.

2

3

II

4 The motion to vacate and dismiss is a condition of the
5 initial settlement. Although the Sundquists made the motion,
6 which was joined by Bank of America, they were complying with a
7 demand by the bank. They need the money now without waiting for
8 years of appeals to end.

9 Vacating the judgment and dismissing is not necessary.

10 There is no legal impediment to voluntary settlement without
11 vacating a judgment. Indeed, the sooner Bank of America pays the
12 Sundquists, the better. By saying it would not pay until after
13 this court vacates the judgment and dismisses the adversary
14 proceeding, the bank was holding the Sundquists hostage.

15 The problem with expunging the judgment, opinion, and
16 adversary proceeding is that the situation is now bigger than the
17 Sundquists.

18

19

A

20 Issues remain open involving persons who have not settled
21 and are still entitled to appeal.

22

23

1

24 One component of the judgment not addressed by the
25 settlement invokes 11 U.S.C. § 329(b) to cancel the contingent
26 fee contract of the Sundquists' former counsel and, instead,
27 awards fees on a lodestar basis.

28 Judgment as to that issue has already been entered in this

1 Regardless of what critics may think of the merits of the
2 public-interest award, the law of the case is that the
3 Intervenor are party representatives of the public-interest
4 component of punitive damages with standing to appeal. Sundquist
5 II, 570 B.R. at 97-98.

6 Their interests on behalf of the public-interest component
7 cannot be ignored.

8

9

B

10 This court is mindful that Bank of America is loathe even to
11 acknowledge the Intervenor out of fear that any nod to them
12 might implicitly validate the public-interest punitive damage
13 component recognized in this case.

14 Nor is the bank of a mind to avail itself of the opportunity
15 provided in the judgment for remittitur of the \$40 million
16 public-interest component of punitive damages to zero by making
17 \$30 million in charitable contributions.

18 The Sundquists are voluntarily stepping into the breach.
19 Although they assert that the settlement amount fairly reflects
20 the damages they can prove such that they are not appropriating
21 to themselves the public-interest component, they promise to make
22 purely voluntary charitable contributions of \$300,000.00 to the
23 Intervenor from their settlement proceeds. This is the rough
24 economic equivalent of recognizing the public-interest component
25 of punitive damages at \$600,000.00 on a pre-tax basis.

26 The Sundquists' voluntary contributions operate as de facto
27 recognition of the public-interest component of punitive damages
28 while affording the bank plausible deniability.

C

1
2 The opinion also appears to have struck a chord in the
3 development of the law.

4 The findings of fact and conclusions of law expressed in the
5 opinion duly rendered by a court of competent jurisdiction have
6 entered the public realm as an official act suitable for
7 reference and citation to the extent the analysis has persuasive
8 value and is not disapproved on appeal. That is the most one can
9 expect for a mere trial court opinion. It binds nobody except
10 the parties, does not bind the same trial court in another case,
11 and has influence beyond the case only to the extent of its
12 persuasive value.

13 Appeal is the appropriate method for overturning a trial
14 court's judgment when, as here, that court is not persuaded to
15 change its mind. Bank of America has available to it two levels
16 of appeal as of right from a decision rendered by a bankruptcy
17 judge – either the District Court or the Bankruptcy Appellate
18 Panel, followed by the U.S. Court of Appeals. Thereafter, there
19 is the possibility of discretionary review by the U.S. Supreme
20 Court. This is ample opportunity to correct any error.

21 Voluntary settlement by the parties does not require that an
22 opinion and accompanying judgment be vacated. United States v.
23 Munsingwear, Inc., 340 U.S. 36, 40 (1950); American Games, 142
24 F.3d at 1167.

25 Rather, a trial court has equitable discretion to determine
26 what to do with a judgment and opinion when the parties, who were
27 free to settle before the trial court decided the case, settle
28 after the decision is entered. American Games, 142 F.3d at 1170.

1 Trials have consequences.

2

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III

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5 Vacatur under the trial court's equitable discretion
6 implicates larger public policy problems. This is no longer a
7 mere two-party dispute among private entities.

7

8

A

9 It is, of course, common for judges to acquiesce in
10 "confidential" settlements in the name of minimizing private
11 litigation and avoiding appeals. Implicit in such determinations
12 is the conclusion that the public interest does not outweigh the
13 desire for secrecy.

14 The strategy of secret settlement is vulnerable to the
15 criticism that some things are not appropriate to sweep under the
16 carpet. When a dispute is purely a private affair that does not
17 implicate larger questions of policy, practice, or public
18 interest, it makes sense to accommodate the parties and avoid
19 burdening trial and appellate courts with unnecessary work. But,
20 experience teaches that the presence of larger questions is
21 inherently difficult to predict.

22 The stage of the litigation affects the calculus regarding
23 confidential settlements. Before trial, a dispute is generally
24 more private than public. Unproven allegations and defenses are
25 discounted as no better than unreliable posturing puffery. Only
26 the parties know the facts. Settlements that operate to conserve
27 scarce public resources, such as trial time, are encouraged and
28 ordinarily subjected to little judicial scrutiny.

1 Confidential settlements in the midst of trial occupy the
2 middle of the spectrum. Some public trial-related resources have
3 been consumed, but the case presentation is usually incomplete.
4 Settlement with an undisclosed result satisfactory to the parties
5 can be an efficient measure.

6 The calculus changes once a public trial is completed.
7 Taxpayer resources have been consumed. The evidence is in public
8 view. Facts have been determined, subject to post-trial remedies
9 and appeals. Settlement on secret terms may still be expedient.

10 The further measure of asking a court to erase or modify a
11 duly-rendered judgment as a condition of settlement adds even
12 more complexity.

13 Requests by losers of lawsuits to "buy and bury" adverse
14 judgments once rendered and to erase the public record are viewed
15 with caution. The trial court must exercise equitable
16 discretion. American Games, 142 F.3d at 1170; cf. Mancinelli v.
17 Int'l Bus. Machines, 95 F.3d 799, 800 (9th Cir. 1996).

18 The nature of the litigation can make a difference. Causes
19 of action may implicate third-party interests or have independent
20 public importance. Other persons, in different arenas, may have
21 acted in reliance on the continuing validity of the judgment.

22 In bankruptcy, for example, compromise by a bankruptcy
23 trustee that affects the estate requires a hearing on notice to
24 all parties in interest to review whether the compromise is "fair
25 and equitable." Fed. R. Bankr. P. 9019; Protective Comm. for
26 Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson, 390
27 U.S. 414, 424 (1968) (Bankruptcy Act); Woodson v. Fireman's Fund
28 Ins. Co. (In re Woodson), 839 F.2d 610 (9th Cir. 1988); Martin v.

1 Kane (In re A&C Props.), 784 F.2d 1377, 1380-81 (9th Cir. 1986);
2 10 COLLIER ON BANKRUPTCY ¶ 9019.02 (Alan N. Resnick & Henry J.
3 Sommer, eds. 16 ed. 2014).

4

5

B

6 As this settlement does not affect the bankruptcy estate,
7 the appropriate judicial scrutiny is the American Games judicial
8 caution applicable to efforts by losers of lawsuits to "buy and
9 bury" adverse judgments.

10 This case implicates sufficient public interest that this
11 court is reluctant to exercise its discretion to sweep the matter
12 under the carpet because the parties in a secret compromise are
13 agreeing not to appeal. The parties availed themselves of
14 taxpayer resources in a public trial that produced a public
15 result. The public, correlatively, acquired an interest in
16 knowing the final outcome. Little about the record suggests that
17 the facts constitute an anomalous or isolated incident that might
18 unfairly besmirch an otherwise upstanding defendant.

19 In addition, as noted, the opinion and judgment invoke
20 Bankruptcy Code § 329(b) to cancel the fee contract of the
21 Sundquists' prior counsel in favor of "reasonable" lodestar
22 compensation. 11 U.S.C. § 329(b). This court, based on that
23 aspect of the judgment, has recently expunged the attorneys' fee
24 lien asserted by former counsel. Sundquist III, 576 B.R. at 883.

25 A public-interest component of punitive damages has been
26 recognized and is represented by the Intervenor, who have
27 standing under the law of the case to be heard and to represent
28 that interest unless and until finally reversed on appeal.

1 discussions, urge that the public notoriety of this case warrants
2 making the settlement public and, if not made public, that it be
3 reviewed by the court in camera. That argument has merit.

4 As this court cannot exercise equitable discretion without
5 knowing the actual terms, it will review the agreement in camera,
6 the results of which are described in part VI of this opinion.

7

8 B

9 The respective interests of the various parties boil down to
10 the following.

11

12 1

13 The settlement does not purport to resolve the § 329(b)
14 cancellation of former counsel's fee contract that is embedded in
15 the opinion and the judgment.

16 The Sundquists' former counsel has filed notices of appeal
17 from the judgment cancelling her fee contract and from the order
18 expunging her claimed attorneys' fee lien seeking more than the
19 \$70,000.00 awarded. That appeal still needs to be resolved.

20

21 2

22 The Sundquists would receive immediate full payment of the
23 \$6,074,581.50 judgment in their favor, plus a premium that amply
24 confirms the validity of their assertion that in a renewed trial
25 on damages they could prove actual and punitive damages exceeding
26 \$9 million. This would be immediate and total victory for them.

27 While the terms of the settlement require them to seek to
28 have the adversary proceeding dismissed, the judgment vacated,

1 and the opinion stricken from the books as a condition of payment
2 to them, they have no real desire for any of those measures.

3 Their alternative is to retry damages, perhaps achieving
4 more than the settlement amount, and thereafter to endure multi-
5 year process entailed in two levels of appeals as of right to
6 which Bank of America is entitled before collecting.

7 It would be little solace to them that Bank of America must,
8 to the extent the judgment is affirmed on appeal, pay the
9 Sundquists' appellate attorneys' fees as additional actual
10 damages. America's Servicing Co. v. Schwartz-Tallard (In re
11 Schwartz-Tallard), 803 F.3d 1095, 1101 (9th Cir. 2015).

12

13

3

14 Bank of America wishes to put this affair behind it and to
15 obliterate as much of the public record as possible. It does not
16 want to risk retrial on damages. And, it prefers to stop
17 hemorrhaging attorneys' fees for itself and, if they prevail on
18 appeal, the Sundquists' appellate attorneys' fees.

19 The bank expresses particular concern about secondary
20 effects based on the claim preclusion and issue preclusion rules
21 of res judicata. If the judgment might be deemed preclusive,
22 then the bank would have an incentive to appeal that outweighs
23 its own further fees and the risk of liability for Sundquist
24 appellate attorneys' fees. Schwartz-Tallard, 803 F.3d at 1101.

25 As it is no longer possible to hide the underlying facts,
26 the bank has no cognizable interest in confidentiality of facts
27 that have already been revealed as a result of a public trial.

28 The bank's alternative is to endure retrial on damages and

1 then to avail itself of the two levels of appeals as of right to
2 which it is entitled.

3 Nor does the bank have a cognizable interest in the aspect
4 of the judgment cancelling the fee contract of the Sundquists'
5 former counsel under § 329(b).

6

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8 The Intervenors representing the public-interest component
9 of punitive damages have no desire to impede substantial and just
10 compensation for the Sundquists for their ordeal and are not
11 motivated by a desire to receive funds that otherwise would or
12 should go to the Sundquists.

13 They articulate a public interest in exposing the terms of
14 the settlement to sunlight and urge that this court's opinion is
15 a valuable precedent that should not be expunged. They are
16 mindful that, as a mere trial court opinion, its precedential
17 effect is limited to its persuasive value.

18 They do stand to receive voluntary charitable contributions
19 from the Sundquists that (assuming a cumulative 50 percent state
20 and federal tax rate) is the equivalent of a \$600,000.00 public-
21 interest component of punitive damages.

22

23

v

24 The question becomes whether and how this court can assuage
25 Bank of America's discomfort that the judgment might pose
26 problems of claim and issue preclusion.

27 A brief survey of how preclusion rules might apply in this
28 case is in order.

1 would afford substantial protection for Bank of America from
2 further claims by the Sundquists. But claim preclusion is a
3 discretionary doctrine of uncertain application that does not
4 provide a perfect defense. The comprehensive release under the
5 settlement, however, solves that problem as between the parties.

6
7 1

8 The term "claim preclusion" is a shorthand for the operation
9 of the doctrines of merger and bar in extinguishing a claim. Its
10 essence is refusing to entertain causes of action that have never
11 been litigated.

12 It begins with the General Rule of Merger that a valid and
13 final judgment in favor of a plaintiff prevents the plaintiff
14 from thereafter maintaining an action on the original claim or
15 any part thereof. RESTATEMENT (SECOND) OF JUDGMENTS § 18(1).³

16 Its corollary is the General Rule of Bar. A valid and final
17 judgment in favor of a defendant bars another action by the
18 plaintiff on the same claim. RESTATEMENT (SECOND) OF JUDGMENTS § 19.⁴

19
20 ³§ 18. Judgment for Plaintiff - The General Rule of Merger
21 When a valid and final personal judgment is rendered in
22 favor of the plaintiff:

23 (1) The plaintiff cannot thereafter maintain an action on
24 the original claim or any part thereof, although he may be
25 able to maintain an action upon the judgment; and

26 (2) In an action upon the judgment, the defendant cannot
27 avail himself of defenses he might have interposed, or did
28 interpose, in the first action.

RESTATEMENT (SECOND) OF JUDGMENTS § 18.

⁴§ 19. Judgment for Defendant - The General Rule of Bar

A valid and final personal judgment rendered in favor of the

1 The "claim" extinguished under the General Rules of Merger
2 and Bar, also known as the Rule Concerning Splitting a Claim,
3 includes all rights of the plaintiff to remedies against the
4 defendant with respect to all or any part of the transaction, or
5 series of connected transactions, out of which the action arose.
6 RESTATEMENT (SECOND) OF JUDGMENTS § 24(1).

7 Imprecision infects the parameters of "claim." What
8 constitutes a "transaction" or "series" of transactions is
9 determined pragmatically, in light of whether the facts are
10 related in time, space, origin, or motivation, whether they form
11 a convenient trial unit, and whether their treatment as a unit
12 conforms to the parties' expectations, or business understanding
13 or usage. RESTATEMENT (SECOND) OF JUDGMENTS § 24(2).⁵

15 defendant bars another action by the plaintiff on the same
16 claim.

17 RESTATEMENT (SECOND) OF JUDGMENTS § 19.

18 ⁵§ 24. Dimensions of "Claim" for Purposes of Merger or Bar
19 - General Rule Concerning "Splitting"

20 (1) When a valid and final judgment rendered in an action
21 extinguishes the plaintiff's claim pursuant to the rules of
22 merger or bar (see §§ 18, 19), the claim extinguished
23 includes all rights of the plaintiff to remedies against the
24 defendant with respect to all or any part of the
25 transaction, or series of connected transactions, out of
26 which the action arose.

27 (2) What factual grouping constitutes a "transaction", and
28 what groupings constitute a "series", are to be determined
pragmatically, giving weight to such considerations as
whether the facts are related in time, space, origin, or
motivation, whether they form a convenient trial unit, and
whether their treatment as a unit conforms to the parties'
expectations or business understanding or usage.

RESTATEMENT (SECOND) OF JUDGMENTS § 24.

1 The Rule Concerning Splitting operates to extinguish a claim
2 by the plaintiff against the defendant in a second action even
3 though the plaintiff is prepared to present evidence, grounds, or
4 theories not presented in the first case or to seek remedies or
5 relief not requested in the first case. In other words, claims
6 that have never been litigated will not be entertained.

7 RESTATEMENT (SECOND) OF JUDGMENTS § 25.⁶

8 And, there are exceptions, including (among others):
9 agreement or acquiescence by the parties in splitting; express
10 authorization of splitting by the court in the first action; and
11 jurisdictional limitation that prevent a court from entertaining
12 theories, remedies, or forms of relief. RESTATEMENT (SECOND) OF
13 JUDGMENTS § 26(1)(a)-(c).⁷

14
15 ⁶§ 25. Exemplification of General Rule Concerning Splitting

16 The rule of § 24 applies to extinguish a claim by the
17 plaintiff against the defendant even though the plaintiff is
18 prepared in the second action

19 (1) To present evidence or grounds or theories of the case
20 not presented in the first action; or

21 (2) To seek remedies or forms of relief not demanded in the
22 first action.

23 RESTATEMENT (SECOND) OF JUDGMENTS § 25.

24 ⁷§ 26. Exceptions to the General Rule Concerning Splitting

25 (1) When any of the following circumstances exists, the
26 general rule of § 24 does not apply to extinguish the claim,
27 and part or all of the claim subsists as a possible basis
28 for a second action by the plaintiff against the defendant:

 (a) The parties have agreed in terms or in effect that
the plaintiff may split his claim, or the defendant has
acquiesced therein; or

 (b) The court in the first action has expressly
reserved the plaintiff's right to maintain the second
action; or

1 Finally, even if claim preclusion is available to be applied
2 to a particular situation, the application of the doctrine is not
3 mandatory. Rather, the decision whether actually to preclude
4 litigation lies in the discretion of the trial court. Robi v.
5 Five Platters, Inc., 838 F.2d 318, 321 (9th Cir. 1988); Khaligh
6 v. Hadaegh (In re Khaligh), 338 B.R. 817, 823 (9th Cir. BAP
7 2006), aff'd & adopted, 506 F.3d 956 (9th Cir. 2007); Christopher
8 Klein, et al., Principles of Preclusion and Estoppel in
9 Bankruptcy Cases, 79 AM. BANKR. L.J. 839, 883 (2005).

10 Thus, the standard of review on appeal is that whether

11
12 (c) The plaintiff was unable to rely on a certain
13 theory of the case or to seek a certain remedy or form of
14 relief in the first action because of the limitations on the
15 subject matter jurisdiction of the courts or restrictions on
16 their authority to entertain multiple theories or demands
17 for multiple remedies or forms of relief in a single action,
18 and the plaintiff desires in the second action to rely on
19 that theory or to seek that remedy or form of relief; or

20 (d) The judgment in the first action was plainly
21 inconsistent with the fair and equitable implementation of a
22 statutory or constitutional scheme, or it is the sense of
23 the scheme that the plaintiff should be permitted to split
24 his claim; or

25 (e) For reasons of substantive policy in a case
26 involving a continuing or recurrent wrong, the plaintiff is
27 given an option to sue once for the total harm, both past
28 and prospective, or to sue from time to time for the damages
incurred to the date of suit, and chooses the latter course;
or

(f) It is clearly and convincingly shown that the
policies favoring preclusion of a second action are overcome
for an extraordinary reason, such as the apparent invalidity
of a continuing restraint or condition having a vital
relation to personal liberty or the failure of the prior
litigation to yield a coherent disposition of the
controversy.

(2) In any case described in (f) of Subsection (1), the
plaintiff is required to follow the procedure set forth in
§§ 78-82.

1 preclusion is available to be applied is a question of law
2 reviewed de novo, but the decision to impose preclusion is
3 reviewed for abuse of discretion. E.g., Robi, 838 F.2d at 321.

4 The most one can say is that if the original judgment were
5 to become final, then claim preclusion could operate to
6 extinguish all the related causes of action. The modal auxiliary
7 verb is "could" because it is difficult to describe a precise
8 perimeter to the concept of "claim," the applicability of
9 exceptions, and how a court will exercise its discretion.

10

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13 The particular uncertainty for Bank of America in this case
14 lies in the state-law causes of action that the California Third
15 District Court of Appeals approved in the Sundquist's state-court
16 complaint, including deceit, promissory estoppel, aiding and
17 abetting breach of fiduciary duty, assumed liability of mortgage
brokers, unfair competition, and negligence.

18

19 This adversary proceeding litigated only their § 362(k)(1)
20 stay violation cause of action. In theory, the Sundquists could
21 pursue some or all of their state-law claims in federal court as
22 matters of supplemental jurisdiction under 28 U.S.C. § 1367 or in
state court. Sundquist I, 566 B.R. at 585 n.54.

23

24 It is not inevitable that a court in subsequent litigation
25 against Bank of America would conclude all of those causes of
26 action, especially the assumed liability theory focused on the
27 original mortgage transaction in which Bank of America did not
28 participate, would offend the Rule Concerning Splitting. Nor is
it inevitable that a court would exercise its discretion to

1 preclude subsequent litigation of a cause of action that lies in
2 the penumbra of the shadow of claim preclusion.

3 The comprehensive release of Bank of America by the
4 Sundquists under the settlement dispels potential uncertainties
5 of claim preclusion if the judgment were to remain in effect.

6 Thus, risks associated with claim preclusion do not provide
7 compelling argument for vacating the judgment.

8

9

C

10 Issue preclusion poses theoretical third-party risk for Bank
11 of America if a valid and final judgment remains in effect.

12 As with claim preclusion, the comprehensive release given as
13 part of the settlement eliminates the problem of issue preclusion
14 as between the Sundquists and Bank of America.

15 Rather, risk comes from third parties who might assert issue
16 preclusion to avert relitigation of issues of law or fact
17 established in the Sundquist litigation in their own lawsuits
18 against Bank of America. Remote risk, but not impossible.

19

20

1

21 Issue preclusion, if the judgment were to remain in effect,
22 is the effect of that judgment in precluding relitigation of an
23 issue in an action on a claim that is not precluded by the Merger
24 or Bar doctrines of claim preclusion. The operative principles
25 are flexible and tend to be narrowly applied when the primary
26 interest is encouraging settlements and discouraging appeals.

27 RESTATEMENT (SECOND) OF JUDGMENTS, Title E, Introductory Note.

28 The general rule of issue preclusion is that an issue of law

1 or fact that has been actually litigated and determined and that
2 is essential to the judgment will be conclusive in subsequent
3 litigation between the parties, even if not on the same claim.

4 RESTATEMENT (SECOND) OF JUDGMENTS, § 27.⁸

5 The exceptions are inherently elastic and imprecise. The
6 degree of relationship between the two claims, foreseeability,
7 changes in legal context, avoiding inequitable administration of
8 law, differences in quality of procedures or allocation of
9 jurisdiction between them, and adverse impact on third parties or
10 the public are all taken into account. RESTATEMENT (SECOND) OF
11 JUDGMENTS § 28.⁹

12
13 ⁸§ 27. Issue Preclusion - General Rule

14 When an issue of fact or law is actually litigated and
15 determined by a valid and final judgment, and the
16 determination is essential to the judgment, the
determination is conclusive in a subsequent action between
the parties, whether on the same or a different claim.

17 RESTATEMENT (SECOND) OF JUDGMENTS § 27.

18 ⁹§ 28. Exceptions to the General Rule of Issue Preclusion

19 Although an issue is actually litigated and determined by a
20 valid and final judgment, and the determination is essential
21 to the judgment, relitigation of the issue in a subsequent
action between the parties is not precluded in the following
circumstances:

22 (1) The party against whom preclusion is sought could not,
23 as a matter of law, have obtained review of the judgment in
24 the initial action; or

25 (2) This issue is one of law and (a) the two actions involve
26 claims that are substantially unrelated, or (b) a new
27 determination is warranted in order to take account of an
intervening change in the applicable legal context or
otherwise to avoid inequitable administration of the laws;
or

28 (3) A new determination of the issue is warranted by

1 Unlike claim preclusion, which applies between the same
2 parties, issue preclusion can be applied in litigation with third
3 parties. RESTATEMENT (SECOND) OF JUDGMENTS § 29.¹⁰

4
5 differences in the quality or extensiveness of the
6 procedures followed in the two courts or by factors relating
7 to the allocation of jurisdiction between them; or

8 (4) The party against whom preclusion is sought had a
9 significantly heavier burden of persuasion with respect to
10 the issue in the initial action than in the subsequent
11 action; the burden has shifted to his adversary; or the
12 adversary has a significantly heavier burden than he had in
13 the first action; or

14 (5) There is a clear and convincing need for a new
15 determination of the issue (a) because of the potential
16 adverse impact of the determination on the public interest
17 or the interests of persons not themselves parties in the
18 initial action, (b) because it was not sufficiently
19 foreseeable at the time of the initial action that the issue
20 would arise in the context of a subsequent action, or (c)
21 because the party sought to be precluded, as a result of the
22 conduct of his adversary or other special circumstances, did
23 not have an adequate opportunity or incentive to obtain a
24 full and fair adjudication in the initial action.

25 RESTATEMENT (SECOND) OF JUDGMENTS § 28.

26 ¹⁰§ 29. Issue Preclusion in Subsequent Litigation with
27 Others

28 A party precluded from relitigating an issue with an
opposing party, in accordance with §§ 27 and 28, is also
precluded from doing so with another person unless the fact
that he lacked full and fair opportunity to litigate the
issue in the first action or other circumstances justify
affording him an opportunity to relitigate the issue. The
circumstances to which considerations should be given
include those enumerated in § 28 and also whether:

(1) Treating the issue as conclusively determined would be
incompatible with an applicable scheme of administering the
remedies in the actions involved;

(2) The forum in the second action affords the party against
whom preclusion is asserted procedural opportunities in the
presentation and determination of the issue that were not

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The potential for issue preclusion does give Bank of America some basis for concern on the third-party front.

a

As between Bank of America and the Sundquists, any risk associated with issue preclusion if they were to attempt to proceed with causes of action recognized by the California appellate court that are not deemed to have merged into this court's judgment on claim preclusion theories is dispelled by the comprehensive release given in the settlement.

available in the first action and could likely result in the issue being differently determined;

(3) The person seeking to invoke favorable preclusion, or to avoid unfavorable preclusion, could have effected joinder in the first action between himself and his present adversary;

(4) The determination relied on as preclusive was itself inconsistent with another determination of the same issue;

(5) The prior determination may have been affected by relationships among the parties to the first action that are not present in the subsequent action, or apparently was based on a compromise verdict or finding;

(6) Treating the issue as conclusively determined may complicate determination of issues in the subsequent action or prejudice the interests of another party thereto;

(7) The issue is one of law and treating it as conclusively determined would inappropriately foreclose opportunities for obtaining reconsideration of the legal rule upon which it was based;

(8) Other compelling circumstances make it appropriate that the party be permitted to relitigate the issue.

RESTATEMENT (SECOND) OF JUDGMENTS § 29.

1 b

2 Third-party preclusion, while only a remote possibility, is
3 not so easily discounted. The release executed by the Sundquists
4 does not bind third parties.

5 The arguments against using issue preclusion to prevent Bank
6 of America from relitigating an issue of fact or law in future
7 disputes with other parties, viewed through the matrix of
8 Restatement § 29, appear to be strong. Few of the issues of fact
9 or law actually litigated in the Sundquist trial appear to apply
10 in third-party situations. Nevertheless, the reality that genius
11 of counsel knows few bounds could give the bank discomfort in
12 future cases.

13 This court can provide some insulation for the bank by
14 ruling that the issues of law and fact determined in this
15 adversary proceeding are not "sufficiently firm to be accorded
16 conclusive effect," within the meaning of Restatement (Second) of
17 Judgments § 13, in subsequent litigation with others.

18 It is plain that for purposes of claim preclusion, the court
19 in an initial action may expressly reserve the right of the
20 plaintiff to split a claim and prosecute a subsequent action.

21 RESTATEMENT (SECOND) OF JUDGMENTS § 26(1)(b).

22 It follows by analogy to § 26(1)(b) that a court in an
23 initial action, noting the role of the policy of encouraging
24 settlement and discouraging appeals described by the Introductory
25 Note to issue preclusion in the Restatement (Second), may
26 expressly determine that its rulings on issues of law and fact
27 are not "sufficiently firm to be accorded conclusive effect" in
28 subsequent litigation with others. RESTATEMENT (SECOND) OF JUDGMENTS,

1 Title E, Introductory Note.

2 The Restatement (Second)'s introductory notes have
3 sufficient force to be worthy of respect and citation.¹¹

4

5 D

6 There is an answer to Bank of America's concerns about issue
7 preclusion doctrines that does not require that the adversary
8 proceeding be dismissed or that the opinion be vacated.

9

10 1

11 Those concerns, which this court thinks are more theoretical
12 than real, would dissipate if the portion of the judgment
13 awarding damages to the Sundquists were to be vacated and the
14 adversary proceeding closed without dismissing the adversary
15 proceeding and without erasing the opinion.

16 If the damages judgment were to be vacated and thereafter
17 left unresolved, with the clarification that no adjudication in
18 the case regarding damages is intended to be sufficiently firm to
19 be accorded conclusive effect, then there would be no finality.

20

21 _____
22 ¹¹The role of Introductory Notes is described in chapter 1
of the Restatement (Second):

23 Finally, it may be noted that the Introductions to the
24 several Chapters are integral parts of the treatment of the
25 subject involved. These Introductions give a general view
26 of the problems to be considered and the concepts and
27 terminology used to deal with them. Just as a specific rule
of law should be understood as an element of a legal matrix,
so should a specific section of this Restatement be
understood as a part of the text as a whole. The
Introductions endeavor to further that understanding.

28

RESTATEMENT (SECOND) OF JUDGMENTS, Ch. 1, at 14-15.

1 Without finality, Bank of America has little to fear from
2 issue preclusion doctrine. RESTATEMENT (SECOND) OF JUDGMENTS § 13.

3
4 2

5 The adversary proceeding could be closed without a judgment
6 having been rendered with respect to stay violation damages.

7 Closing this adversary proceeding would be merely an
8 administrative matter relating to internal management of the
9 court and its records. Cf. Staffer v. Predovich (In re Staffer),
10 306 F.3d 967, 972-73 (9th Cir. 2002) (reopening bankruptcy case
11 "for purpose of maintaining nondischargeability action 'is purely
12 administrative matter for ease of management by the clerk's
13 office.'"), quoting Menk v. LaPaglia (In re Menk), 241 B.R. 896,
14 912 (9th Cir. BAP 1999).

15 Closing the adversary proceeding permits files to be deemed
16 inactive and archived by the Clerk of Court. The substantive
17 rights of parties are not affected. The adversary proceeding
18 could be reopened if judicial business needs to be conducted.

19 The stay violation damages issue would, as a formal matter
20 be unresolved, but the defendant would have the comfort of the
21 release executed by the plaintiffs as part of the settlement.

22 The court has discretion to "retain jurisdiction" over the
23 settlement agreement, which it will do in this instance.
24 Kokkonen v. Guardian Life Ins. Co., 511 U.S. 375, 381-82 (1994).

25 The fact of retention of jurisdiction over the settlement
26 agreement warrants the exercise of discretion to close the
27 adversary proceeding with unresolved counts.

1 VI

2 The question of confidentiality remains. Bank of America
3 and the Sundquists have agreed to keep the settlement agreement
4 confidential. The Intervenors urge that the settlement should
5 not be confidential and that, if not made public, the court
6 should at a minimum examine the settlement agreement in camera.
7 They also argue that the opinion should not be expunged.

8 The court agrees that the opinion should remain on the
9 public record. That result is being accomplished by not
10 dismissing the adversary proceeding and then by administratively
11 closing it in circumstances in which jurisdiction is retained
12 over the settlement agreement.

13 Further agreeing with the Intervenors, the court has
14 examined the settlement agreement in camera with particular
15 attention to the amount of the settlement, the effect on the
16 public-interest component of punitive damages, the
17 confidentiality provisions, and potential for post-settlement
18 enforcement disputes.

19 Aspects of the agreement were described by the parties in
20 open court during the hearing on the motion to dismiss.

21 It was explained that the parties had agreed to use their
22 "best efforts" to maintain confidentiality. And the settlement
23 agreement recognizes that statements at the hearing were
24 consistent with the "best efforts" obligation.

25

26 A

27 The settlement amount presents two concerns. How much?
28 What about the public-interest component of punitive damages?

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2 The settlement amount was described at the hearing as "a lot
3 more" than the \$6,074,581.50 allocated to the Sundquists.

4 As noted above in the facts, the Sundquist motion to reopen the
5 evidence asserts that they can prove substantially more than \$9
6 million in actual and punitive damages using a conventional
7 punitive damage multiplier. The actual confidential settlement
8 amount is amply consistent with the Sundquists' assertion.

9 The court will acquiesce in the request of the parties not
10 to state the precise amount. It is enough for the public to know
11 that the settlement to the Sundquists is for a substantial
12 premium over their \$6,074,581.50 share of the initial judgment.

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14 2

15 The public-interest component of punitive damages, which was
16 an important aspect of the court's damages award under 11 U.S.C.
17 § 362(k)(1), is indirectly honored in the settlement.

18 A challenge inherent in honoring the public-interest
19 component is the economic conflict of interests that plaintiffs
20 and defendants each have with the public. Plaintiffs want all
21 the value for themselves; defendants want to minimize the damages
22 they must pay and are happy to squeeze out the public.¹²

23 For that reason, the public-interest beneficiaries were
24 granted leave to intervene. Sundquist II, 570 B.R. at 96-98.
25 They have taken the position that they will not stand in the way

26
27 ¹²See Catherine M. Sharkey, Punitive Damages as Societal
28 Damages, 113 YALE L.J. 347 (2003); Note, An Economic Analysis of
the Plaintiff's Windfall From Punitive Damage Litigation, 105
HARVARD L. REV. 1900 (1992).

1 of full appropriate compensation for the Sundquists and defer to
2 the discretion of the court.

3 The disapprovals and reductions of punitive damage awards as
4 too large in the hands of plaintiffs that are common in appellate
5 jurisprudence tend systematically to reward defendants by
6 enabling them to profit by avoiding having to pay the social cost
7 of outrageous conduct. For that reason, this court is persuaded
8 that the Ohio Supreme Court was on the right track when it
9 diverted a portion of a large punitive damage award to a public
10 purpose. Dardinger v. Anthem Blue Cross & Blue Shield, 98 Ohio
11 St. 77, 102-04, 781 N.E.2d 121, 144-45 (2002). The Sundquist
12 decision builds on that concept.

13 The settlement finesses the problem by way of calculated
14 ambiguity. Although nothing is directly allocated to the
15 Intervenor, the voluntary contributions by the Sundquists to the
16 public-interest beneficiaries indirectly serve the purpose.

17 With knowledge of the precise amount of the settlement, this
18 court is satisfied that the Sundquists are de facto recognizing
19 the public-interest component by their voluntary contributions
20 and not appropriating too much of it to themselves.

21 In the end, this case lays down a marker for a concept.
22 While the facts may present a paradigm case for appeal, the
23 choice of the parties to avert a long-term and expensive appeal
24 deserves deference. Whether the idea of allocating a public-
25 interest component of punitive damages to public-interest
26 entities devoted to the relevant subject continues to take root
27 will have to be left to future development in future cases.

28

1 B

2 Confidentiality has two relevant facets. First, the
3 agreement requires that the parties use their "best efforts" to
4 maintain confidentiality of the settlement agreement and term
5 sheet, including the amount of the settlement. Second, there is
6 the extent to which the parties agree to be muzzled about the
7 overall situation.

8 The parties are mindful that this court is not bound by the
9 confidentiality clause and that revelation of terms by the court
10 following the review of the actual settlement agreement that it
11 has insisted upon does not violate the "best effort" obligation.

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14 The amount of the settlement is conceded to be "a lot more"
15 than the \$6,074,581.50 net award to the Sundquists. This is a
16 concession that Bank of America is paying the full net award,
17 plus a premium, the amount of which is not disclosed.

18 The factual evidence was disclosed during a public trial
19 with testimony, written evidence, and written findings of fact
20 that cannot be reeled in from public view. Well-founded facts
21 are not likely to be disapproved on appeal as clearly erroneous.

22 The further facts that the Sundquists assert they can prove
23 to establish actual damages sufficient to support a cumulative
24 award of actual and punitive damages exceeding \$9 million are at
25 this point unknown and could include personal and embarrassing
26 information the Sundquists would prefer to remain private. Every
27 exposure of intimate personal information risks exacerbating a
28 psychological toll in need of healing.

1 reflecting on the overall situation, this court is persuaded that
2 its equitable discretion should be exercised with a limited
3 adjustment to the status quo relating to the money judgment.

4 The court will vacate the money judgment against Bank of
5 America, without dismissing the adversary proceeding and will
6 close the adversary proceeding, leaving undisturbed the § 329(b)
7 judgment and all opinions and orders heretofore issued, and
8 reserving jurisdiction over the settlement agreement.

9 The interest of justice is being served because the
10 settlement gives the Sundquists total and immediate financial
11 victory without having to await the outcome of the multi-level,
12 multi-year appeal that ordinarily occurs in a case such as this.
13 It is consistent with the general policy of encouraging
14 settlement and discouraging appeals.

15 The Sundquists will receive, in addition to the
16 \$6,074,581.50 awarded by this court's judgment, a multi-million
17 dollar premium that fairly reflects the amount of the cumulative
18 award of actual and punitive damages this court regards as likely
19 to be proved in the retrial on damages that they are requesting.
20 In finance terms, it reflects the expected value of retrial.

21 As to the Intervenor Interested Parties, the act of vacating
22 will, de jure, eliminate the public-interest component of the
23 punitive damages award.

24 But, de facto, the public-interest component is honored by
25 the Sundquists' voluntary commitment to contribute to those same
26 entities the post-tax equivalent of a pre-tax public-interest
27 component of \$600,000.00. This court, which knows the precise
28 amount of the settlement, is satisfied that the voluntary

1 contribution eliminates the court's reservation that they might
2 be appropriating to themselves the legitimate public-interest
3 component of punitive damages.

4 An appropriate level of deterrence will be maintained by the
5 combination of the public knowledge of an immediate payment by
6 Bank of America of a multi-million dollar premium over the
7 \$6,074,581.50 award and by leaving on the books the adversary
8 proceeding and the opinions heretofore issued.

9 While, in theory, the Intervenors could appeal the order
10 vacating the damages portion of the judgment as an abuse of
11 discretion, no such appeal is likely. They have stated they have
12 no desire to impede substantial and just compensation for the
13 Sundquists or to receive any financial benefit at their expense.

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Conclusion

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The adversary proceeding will not be dismissed. Nor will
the opinion be withdrawn. The judgment cancelling the fee
contract of the Sundquists' former counsel pursuant to § 329(b)
will remain in effect.

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The motion by the Sundquists and Bank of America to dismiss
the adversary proceeding, vacate the opinion, and vacate the
judgment will be DENIED, with the proviso that the damages
component of the judgment will be vacated and the adversary
proceeding closed (subject to the pending § 329(b) appeal),
reserving jurisdiction over the settlement agreement.

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The order on that motion will include a ruling that "the
issues of law and fact determined in this adversary proceeding
are not 'sufficiently firm to be accorded conclusive effect,'

1 within the meaning of Restatement (Second) of Judgments § 13, in
2 subsequent litigation with others."

3 The cross-motions by the Sundquists to reopen the evidence
4 in order to prove more damages and by Bank of America to strike
5 the Renèe Sundquist diary from evidence will remain unresolved in
6 the closed case.

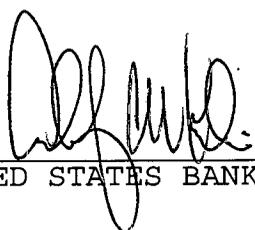
7 An appropriate order will issue.

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9 Dated: January 18, 2018

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UNITED STATES BANKRUPTCY JUDGE

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1 INSTRUCTIONS TO CLERK OF COURT
2 SERVICE LIST

3 The Clerk of Court is instructed to send the attached
4 document, via the BNC, to the following parties:

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7 Sacramento, California 95811

8 Orly Degani
9 12400 Wilshire Blvd #400
10 Los Angeles, CA 90025

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13 101 Second Street, Suite 1800
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