

FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF CALIFORNIA

In re:  
DON ROSE OIL, INC.,  
  
Debtor.

Case No. 17-12389-A-7

CONSOLIDATED RESOURCES, INC.,  
  
Plaintiff,  
  
v.  
  
DRO BARITE, LLC, et al.,  
  
Defendants.

Adv. No. 19-1137-A  
LAK-1, DB-1, SSN-1  
**AMENDED MEMORANDUM**

Argued and submitted on March 18, 2020  
at Fresno, California

Honorable Fredrick E. Clement, Bankruptcy Judge Presiding

Appearances: 

---

 Brian A. Paino, McGlinchey Stafford for Consolidated Resources, Inc.; Lori E. Eropkin, Levinson Arshonsky & Kurtz, LLP for Sallyport Commercial Finance, LLC; Jamie P. Dreher and Brian E. Hamilton, Downey Brand LLP for Idemitsu Apollo Corporation; Steven S. Newburgh, McLaughlin & Stern, PLLC, for Happy Rock Merchant Solutions, LLC; Hagop T. Bedoyan, McCormick, Barstow, Sheppard, Wayte & Carruth LLP for Happy Rock Merchant Solutions, LLC 

---

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

1           The claim splitting rule precludes an aggrieved party from  
2 pursuing two lawsuits arising from a single set of facts against the  
3 same defendants. Here, the plaintiff filed an action against the  
4 debtor and others, asserting its interest in barite mineral rights.  
5 This court granted the defendants' motion to dismiss the action, but  
6 gave the plaintiff leave to amend. Rather than doing so, the  
7 plaintiff re-filed the action in state court. May it do so?

8 **I.     FACTS**

9           This is a dispute over the ownership of 200 acres of barite  
10 minerals located in San Bernardino County, California. Barite is a  
11 commercially valuable mineral with medical and industrial  
12 applications.<sup>1</sup> Consolidated Resources, Inc. ("Consolidated  
13 Resources"), now wholly owned by Kodiak Mining & Minerals II, LLC  
14 ("Kodiak Mining & Minerals"), contends it owns those rights free and  
15 clear of encumbrances. Sallyport Commercial Finance, LLC  
16 ("Sallyport"), Indemitsu Apollo Corporation ("Indemitsu"), and Happy  
17 Rock Merchant Solutions, LLC ("Happy Rock") claim a perfected security  
18 interests in those rights.

19           The underlying facts are murky.

20 **A.     State Law Rights**

21           The barite mineral rights were originally owned by Consolidated  
22 Resources, which was wholly owned by Don Rose.

23           Don Rose was the founder, and also the then the sole owner, of  
24 Don Rose Oil Co., Inc. ("Don Rose Oil").

25 \_\_\_\_\_  
26 <sup>1</sup> "Barite" is "barium sulfate occurring as a mineral." *Webster's New Explorer*  
27 *Encyclopedic Dictionary* 143 (2006 ed.). "Barium sulfate" is "a colorless  
28 crystalline insoluble compound BaSO<sub>4</sub> that is used as a pigment and extender,  
as a filler, and as a substance opaque to X-rays in medical photography of  
the alimentary canal." *Id.*

1           In 2012, Consolidated Resources borrowed \$2 million from Kodiak  
2 Mining & Minerals. Don Rose pledged 100% of the shares of  
3 Consolidated Resources as security for that loan. When Consolidated  
4 Resources failed to pay off the loan, Kodiak Mining & Minerals  
5 exercised its rights under the pledge agreement and acquired all of  
6 Consolidated Resources stock by re-issuing it in its own name, leaving  
7 Don Rose without ownership of Consolidated Resources.

8           In 2014, Don Rose became entangled with John Castellucci  
9 ("Castellucci"). Apparently under the auspices of saving Don Rose Oil  
10 from what Don Rose believed to be impending financial danger,  
11 Castellucci convinced Don Rose to allow him to take control of that  
12 company. Castellucci acquired 51% of the stock of Don Rose Oil, took  
13 control of the board of directors and installed his wife and son,  
14 Linda Castellucci and Jason Castellucci, respectively, as officers  
15 and/or employees.

16           Thereafter, Don Rose--acting on Castellucci's instructions--made  
17 efforts to wrest the barite mineral rights from Consolidated  
18 Resources. He did so by twice attempting to encumber the barite  
19 mineral rights owned by Consolidated Resources. Consolidated  
20 Resources, Inc., and its parent company, Kodiak Mining & Minerals,  
21 contend both are "bogus" and "a complete fabrication." Second Amended  
22 Complaint at ¶¶ 13 n. 1, 17, *Kodiak Mining & Minerals II, LLC v. Don*  
23 *Rose Oil Co., Inc.*, No. 17-1086 (Bankr. E.D. Cal. 2017), ECF No. 131;  
24 Complaint ¶ 26, *Consolidated Resources, Inc. v. DRO Barite, LLC*, No.  
25 19-1137 (Bankr. E.D. Cal. 2019), ECF No. 1.

26           Don Rose first attempted to do so by way of a transaction between  
27 Don Rose, Don Rose Oil and Consolidated Resources. Under the terms of  
28 that agreement, Don Rose Oil loaned Consolidated Resources and Don

1 Rose, individually, \$3.9 million and Consolidated Resources gave Don  
2 Rose Oil a security interest in the barite mineral rights.<sup>2</sup>

3 Don Rose's second attempt was also a transaction between Don  
4 Rose, Don Rose Oil and Consolidated Resources. Under the terms of  
5 that agreement, Don Rose Oil loaned Consolidated Resources and Don  
6 Rose, individually, \$7 million and Consolidated Resources gave Don  
7 Rose Oil a security interest in the barite mineral rights. Complaint  
8 at ¶ 25, *Consolidated Resources, Inc.*, No. 19-1137, ECF No. 1.

9 Castellucci, acting on behalf of Don Rose Oil, then obtained a  
10 \$7.25 million revolving line of credit from Siena Lending Group, LLC  
11 using the \$7 million secured loan from Consolidated Resources as  
12 collateral. According to Consolidated Resources, Siena "had actual or  
13 constructive knowledge" that the \$7 million secured loan from  
14 Consolidated Resources, Inc., to Don Rose Oil, was fabricated. Second  
15 Amended Complaint at ¶ 21, *Kodiak Mining & Minerals II, LLC*, No. 17-  
16 108617), ECF NO. 131. Siena later assigned the loan to Sallyport.

17 Don Rose and Castellucci then informed Consolidated Resources  
18 that it was in default of the (non-existent) \$7 million loan.  
19 Thereafter, Don Rose, individually and acting in his capacity as  
20 president of Consolidated Resources, and Castellucci, acting on behalf  
21 of Don Rose Oil, entered into an agreement whereby Consolidated  
22 Resources gave, and Don Rose Oil accepted, a deed in lieu of  
23 foreclosure of the barite minerals. Consolidated Resources

24  
25 <sup>2</sup> According to Kodiak Mining & Minerals II, LLC there is no evidence that  
26 money changed hands or that a promissory note was executed. Second Amended  
27 Complaint at ¶ 15, *Kodiak Mining & Minerals II, LLC v. Don Rose Oil Co.,*  
28 *Inc.*, NO. 17-1086 (Bankr. E.D. Cal. 2017), ECF No. 131. A deed of trust was  
given. Exhibit J to Complaint, *Kodiak Mining & Minerals II, LLC v. Don Rose*  
*Oil Co., Inc.*, No. 17-1086 (Bankr. E.D. Cal. 2017), ECF No. 6. It is unclear  
whether the deed of trust was executed or recorded.

1 quitclaimed the barite mineral rights to Don Rose Oil.

2 Then, Don Rose Oil formed a wholly owned subsidiary, DRO Barite,  
3 LLC ("DRO Barite"), and transferred the barite mineral rights to it.  
4 Kodiak Mining & Minerals contends that the transfer was at the  
5 insistence of Siena Lending Group, LLC, and/or Sallyport and that the  
6 transfer was made for the express purpose of placing the barite  
7 minerals beyond the reach of Kodiak Mining & Minerals, Consolidated  
8 Resources and Don Rose Oil's creditors.

9 After those rights were transferred to DRO Barite, Indemitsu  
10 recorded a deed of trust against the mineral rights to secure a  
11 \$710,000 indebtedness by Don Rose Oil and Happy Rock recorded a deed  
12 of trust against the mineral rights to secure a \$1.3 million  
13 indebtedness by DRO Barite.

#### 14 **B. Pre-bankruptcy Settlement**

15 After these events, Don Rose Oil filed an action against Don  
16 Rose, his spouse Janice Rose, Panagiotis Kechagias, Consolidated  
17 Resources, and Hellenic Petroleum, LLC ("the Don Rose Oil action").<sup>3</sup>  
18 *Don Rose Oil Co., Inc. v. Hellenic Petroleum, LLC*, No. VCU267863  
19 (Tulare County Superior Court December 13, 2016). Don Rose, Janice  
20 Rose and Hellenic Petroleum, LLC filed a counterclaim and third-party  
21 claim. The precise contours of that litigation are unclear, but the  
22 dispute appears to be a control fight over Don Rose Oil between Don  
23 Rose, his spouse Janice Rose, Panagiotis Kechagias, Consolidated  
24 Resources, and Hellenic Petroleum, LLC, on one hand and Don Rose Oil

---

25 <sup>3</sup> The precise roles of Panagiotis Kechagias and Hellenic Petroleum, LLC in  
26 these transactions remain unclear. Panagiotis Kechagias appears to be an  
27 officer, member, and/or equity holder in Kodiak Mining & Minerals II, LLC and  
28 also in Hellenic Petroleum, LLC. Sallyport Commercial Finance, LLC's  
Counterclaim at ¶ 12, December 12, 2018, ECF No. 211, in *Kodiak Mining &  
Minerals, LLC v. Don Rose Oil Co., Inc.*, No. 17-1086 (Bankr. E.D. Cal. 2017).

1 Co. Inc., Castle Energy Inc.(a Castellucci company), Jason  
2 Castellucci, Robert Moore (an officer of Don Rose Oil), and John  
3 Castellucci on the other hand.

4         Shortly thereafter the parties entered into a global written  
5 settlement agreement. Complaint at Exh. H, *Kodiak Mining & Minerals*  
6 *II, LLC v. Don Rose Oil Co., Inc.*, No. 17-12389 (Bankr. E.D. Cal.  
7 November 17, 2017), ECF No. 6. In the pertinent part, the settlement  
8 called for Don Rose and his spouse to transfer all remaining shares of  
9 Don Rose Oil, and certain real property, 361 Terry Avenue,  
10 Farmersville, California, to Castellucci and/or his entities. In  
11 exchange, the Castellucci parties agreed to pay the Roses and  
12 affiliated entities \$720,000 and release them from specified corporate  
13 liabilities. That settlement contemplated a separate agreement  
14 between Hellenic Petroleum, LLC, and Sallyport with respect to the  
15 barite mineral rights. Signatories to the Settlement Agreement were  
16 Don Rose, Janice Rose, Panagiotis Kechagias, Hellenic Petroleum, LLC,  
17 Consolidated Resources, Don Rose Oil, Castle Energy, Inc., Robert  
18 Moore, Jason Castellucci and Castellucci.

19         At almost the same time, Sallyport and Hellenic Petroleum, LLC,  
20 executed a written "Intercreditor, Subordination and Waterfall Payment  
21 Agreement." *Id.* at Exh. I. Also intricate, that agreement provided  
22 for subordination of Hellenic Petroleum, LLC's interest to Sallyport's  
23 interest, sale of the barite minerals and payment of the first \$3  
24 million of that sale to Sallyport, the second \$3 million to Hellenic  
25 Petroleum and the remainder to Don Rose Oil. Signators to this  
26 agreement were Sallyport and Hellenic Petroleum, LLC. Don Rose Oil  
27 was not a signatory to this agreement but did sign an  
28 "Acknowledgement" of the agreement and agreed to "recognize all rights

1 granted thereby to the parties thereto" and not to "do any act or  
2 perform any obligation which is not in accordance with the agreements"  
3 therein.

## 4 **II. PROCEDURE**

### 5 **A. Don Rose Oil's Bankruptcies**

6 In 2017, Don Rose, Robert K. Moore and Kodiak Mining & Minerals,  
7 creditors, filed an involuntary Chapter 7 bankruptcy against Don Rose  
8 Oil. *In re Don Rose Oil Co., Inc.*, No. 17-12359 (Bankr. E.D. Cal.  
9 2017).

10 Don Rose Oil answered the involuntary petition and filed its own  
11 Chapter 11 petition. *In re Don Rose Oil Co., Inc.*, No. 17-12389  
12 (Bankr. E.D. Cal. 2017).

13 In light of the voluntary Chapter 11 petition, the petitioning  
14 creditors moved to dismiss their involuntary petition. With the  
15 acquiescence of Don Rose Oil the court granted the motion, but  
16 reserved the debtor's rights to seek damages arising from the  
17 involuntary petition. Order, *In re Don Rose Oil Co., Inc.*, NO. 17-  
18 12359, ECF No. 84.

19 Notwithstanding the appointment of a trustee in the voluntary  
20 Chapter 11, the case quickly converted to Chapter 7. Randell Parker  
21 was appointed the trustee.<sup>4</sup>

### 22 **B. The Kodiak Mining Action**

23 Consolidated Resources, Kodiak Mining & Minerals, and Hellenic  
24 Petroleum, LLC, brought an adversary proceeding against Don Rose Oil  
25 and its secured lenders (Sallyport, Idemitsu and Happy Rock). *Kodiak*  
26 *Mining & Minerals II, LLC*, No. 17-1086, ECF No. 1 ("the Kodiak

---

27 <sup>4</sup> Originally, Trudi G. Manfredo was appointed the trustee. When Ms. Manfredo  
28 resigned, Mr. Parker was appointed the trustee.

1 Action"). That adversary proceeding encompassed both the state law  
2 rights and pre-bankruptcy settlement components of the dispute. The  
3 plaintiffs were Kodiak Mining & Minerals, Hellenic Petroleum, LLC, and  
4 Consolidated Resources; the defendants were Don Rose Oil, DRO Barite,  
5 Sallyport, Idemitsu, Happy Rock, and Gifford's Markets, Inc.

6 The complaint had five counts: (1) Count I: Declaratory Relief  
7 regarding the Settlement Agreement (Consolidated Resources against all  
8 defendants); (2) Count II: Fraud in the Inducement (Consolidated  
9 Resources against Don Rose Oil, DRO Barite, Sallyport, Indemitsu and  
10 Happy Rock;<sup>5</sup> (3) Count III: Failure of Consideration (Consolidated  
11 Resources against Don Rose Oil, DRO Barite, Sallyport Commercial  
12 Finance, Apollo Indemitsu and Happy Rock Merchant Solutions);<sup>6</sup> (4)  
13 Count IV: Fraudulent Transfer (Kodiak Mining & Minerals against Don  
14 Rose Oil, DRO Barite, Sallyport, Indemitsu and Happy Rock); and (5)  
15 Count V: Declaratory Relief regarding the Settlement Agreement  
16 (Hellenic Petroleum against all defendants). Second Amended  
17 Complaint, *Kodiak Mining & Minerals II, LLC*, No. 17-1086, ECF No. 131.

18 Sallyport and Idemitsu moved to dismiss the complaint.  
19 Sallyport's motion to dismiss was granted with leave to amend as to  
20 the first four counts; it was denied as to the fifth count (Hellenic  
21 Petroleum LLC's request for declaratory relief as to the Settlement  
22 Agreement). Idemitsu's motion to dismiss the complaint was granted  
23 with leave as to all counts.

24 Kodiak Mining & Minerals, Hellenic Petroleum, LLC, and

---

25 <sup>5</sup> The second count was pled in the alternative, in the event Consolidated  
26 Resources, Inc. "[i]s [d]eemed [n]ot [b]ound by the [t]erms of the Settlement  
27 Agreement." Second Amended Complaint, Count 2 Fraud, *Kodiak Mining &*  
*Minerals, LLC v. Don Rose Oil, Inc.*, No. 17-1086 (Bankr. E.D. Cal. September  
28 5, 2018).

<sup>6</sup> The third count was also pled in the alternative. *Id.* at third count.



1 Consolidated Resources did not file an amended complaint, electing  
2 instead to stand on Hellenic Petroleum, LLC's fifth claim for  
3 declaratory relief with respect to the Settlement Agreement.

4 Trustee Parker answered the complaint and filed a counterclaim  
5 against Kodiak Mining & Minerals, Hellenic Petroleum, LLC,  
6 Consolidated Resources, Panagiotis Kechagias and Don Rose. The  
7 counterclaim contains eight claims for relief: (1) Count I:  
8 Preferential Transfer, 11 U.S.C. § 547, regarding the Settlement  
9 Agreement (against Hellenic Petroleum); (2) Count II: Fraudulent  
10 Transfer, 11 U.S.C. § 548(a)(1)(B), regarding the Settlement Agreement  
11 (against Hellenic Petroleum, LLC); (3) Count III: Strong Arm Powers,  
12 11 U.S.C. § 544 (against Hellenic Petroleum and Kodiak Mining &  
13 Minerals); (4) Count IV: Damages Arising from Wrongful Involuntary  
14 Bankruptcy, 11 U.S.C. § 303 (against Hellenic Petroleum, Kodiak Mining  
15 & Minerals, Panagiotis Kechagias and Don Rose); (5) Count V: Fraud in  
16 the Inducement of the \$7 million loan (against Consolidated Resources  
17 and Don Rose); (6) Count VI: Declaratory Relief regarding the  
18 Settlement Agreement (against all counter-defendants); (7) Count VII:  
19 Recovery of Avoided Transfers, 11 U.S.C. § 550 (against Hellenic  
20 Petroleum, LLC); and (8) Count VIII: Disallowance of Claim, 11 U.S.C.  
21 § 502 (against all counter-defendants).

22 Sallyport responded by answering the Second Amended Complaint and  
23 by counterclaiming against Kodiak Mining & Minerals; Hellenic  
24 Petroleum, LLC, and Consolidated Resources. The counterclaim  
25 contained three counts: (1) Count I: Breach of the Intercreditor,  
26 Subordination and Waterfall Payment Agreement (Sallyport against  
27 Hellenic Petroleum, LLC, Panagiotis Kechagias and Don Rose); (2) Count  
28 II: Declaratory Relief regarding the barite mineral rights and

1 Intercreditor, Subordination and Waterfall Payment Agreement  
2 (Sallyport against Hellenic Petroleum, LLC); and (3) Count III:  
3 Injunctive Relief (Sallyport against Hellenic Petroleum, Kodiak Mining  
4 & Minerals, Panagiotis Kechagias and Don Rose).

5 Citing Rules 41(b) and 60(b), Sallyport, Idemitsu and Happy Rock  
6 moved to amend the order granting their motions to dismiss the Second  
7 Amended Complaint to make clear that the dismissal of the first four  
8 counts ripened into "an adjudication on the merits." Mot. at 3,  
9 *Kodiak Mining & Minerals II, LLC*, NO. 17-1086, ECF No. 206. Citing  
10 *Lacey v. Maricopa Cty.*, 693 F.3d 896, 928 (9th Cir. 2012), this court  
11 denied the motion. Civil Minutes, *Kodiak Mining & Minerals II, LLC*,  
12 No. 17-1086, ECF No. 251. It explained that in this instance the  
13 failure to amend the complaint blocked appellate review of the order  
14 granting the motion but did not implicate the principles of res  
15 judicata. *Id.* at \* 5. But the court expressly recognized the order  
16 dismissing the Second Amended Complaint did not preclude further  
17 proceedings before this court:

18 In other words, *Lacey* does not preclude, for example, a  
19 challenge to the dismissal order under Rule 60(b) or a  
20 request for further leave to amend under Rule 15(a)(2).  
21 Civil Minutes, *Kodiak Mining & Minerals II, LLC*, No. 17-1086, ECF No.  
22 251.

23 Later, this court issued a scheduling order. Scheduling Order,  
24 *Kodiak Mining & Minerals II, LLC*, No. 17-1086, ECF No. 304. This  
25 adversary proceeding appears to be ready to set for trial.

### 26 **C. The Consolidated Resources Action**

27 Almost a year later, after the close of discovery in the Kodiak  
28 Mining Action, Consolidated Resources filed a quiet title action in  
state court. *Consolidated Resources, Inc. v. DRO Barite, LLC*, No.

1 CIVDS1931070 (San Bernardino County Superior Court 2019) (“the  
2 Consolidated Resources Action”). The factual grounds for that action  
3 all but mirror the allegations of the “State Law Rights” asserted in  
4 the Kodiak Mining Action. But the Consolidated Resources Action omits  
5 any reference to settlement agreement, notwithstanding that it was  
6 apparently a signatory to that agreement.

7 Sallyport removed the Consolidated Resources Action to this  
8 court. 28 U.S.C. § 1452. Consolidated Resources moved to remand the  
9 action to San Bernardino County, which this court denied.

10 Sallyport, Idemitsu and Happy Rock now move to dismiss with  
11 prejudice the now-removed Consolidated Resources Action under Rule  
12 12(b)(6), arguing that the action constitutes impermissible claim  
13 splitting. Consolidated Resources opposes the motion, arguing (1)  
14 that Sallyport, Idemitsu and Happy Rock “conflate the claim splitting  
15 doctrine with the doctrine of res judicata”; (2) the Consolidated  
16 Resources Action is not impermissible claim splitting; and (3) in the  
17 alternative that the court should consolidate the Kodiak Mining Action  
18 and now-removed Consolidated Resources Action. Consolidated Resources  
19 Opposition at pp. 7-12, *Consolidated Resources, Inc.*, No. 19-1137, ECF  
20 No. 75.

### 21 **III. JURISDICTION**

22 This court has jurisdiction. 28 U.S.C. § 1334(a),(b); see also  
23 General Order No. 182 of the Eastern District of California. This is  
24 a non-core proceeding. 28 U.S.C. § 157(c)(1); see also, Civil  
25 Minutes, pp. 6-9, *Kodiak Mining & Minerals II, LLC v. Don Rose Oil*  
26 *Co., Inc.*, No. 17-0186 (Bankr. E.D. Cal. 2017), ECF No. 102.

### 27 **IV. LAW**

28 Under Federal Rule of Civil Procedure 12(b)(6), a party may move

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

8 The Supreme Court has established the minimum requirements for  
9 pleading sufficient facts. "To survive a motion to dismiss, a  
10 complaint must contain sufficient factual matter, accepted as true, to  
11 'state a claim to relief that is plausible on its face.'" *Ashcroft v.*  
12 *Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*,  
13 550 U.S. 544, 556, 570 (2007)). "A claim has facial plausibility when  
14 the plaintiff pleads factual content that allows the court to draw the  
15 reasonable inference that the defendant is liable for the misconduct  
16 alleged." *Id.* (citing *Twombly*, 550 U.S. at 556).

17 In ruling on a Rule 12(b)(6) motion to dismiss, the court accepts  
18 all factual allegations as true and construes them, along with all  
19 reasonable inferences drawn from them, in the light most favorable to  
20 the non-moving party. *Sprewell v. Golden State Warriors*, 266 F.3d  
21 979, 988 (9th Cir. 2001); *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d  
22 336, 337-38 (9th Cir. 1996). The court need not, however, accept  
23 legal conclusions as true. *Iqbal*, 556 U.S. at 678. "A pleading that  
24 offers 'labels and conclusions' or 'a formulaic recitation of the  
25 elements of a cause of action will not do.'" *Id.* (quoting *Twombly*,  
26 550 U.S. at 555).

27 In addition to looking at the facts alleged in the complaint, the  
28 court may also consider some limited materials without converting the

1 motion to dismiss into a motion for summary judgment under Rule 56.  
2 Such materials include (1) documents attached to the complaint as  
3 exhibits, (2) documents incorporated by reference in the complaint,  
4 and (3) matters properly subject to judicial notice. *United States v.*  
5 *Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003); accord *Swartz v. KPMG LLP*,  
6 476 F.3d 756, 763 (9th Cir. 2007) (per curium) (citing *Jacobson v.*  
7 *Schwarzenegger*, 357 F. Supp. 2d 1198, 1204 (C.D. Cal. 2004)). A  
8 document may be incorporated by reference, moreover, if the complaint  
9 makes extensive reference to the document or relies on the document as  
10 the basis of a claim. *Ritchie*, 342 F.3d at 908 (citation omitted).

11 In proper circumstances an aggrieved party may challenge an  
12 opponent's effort to split claims by Rule 12(b)(6) motion. *Unicolors,*  
13 *Inc. v. Macy's Inc.*, 2015 WL 1020101 \* 2 (C.D. Cal. March 6, 2015);  
14 *Single Chip Sys. Corp. v. Intermec IP Corp.*, 495 F.Supp.2d 1052, 1056-  
15 57 (S.D. Cal. 2007); *Murphy v. Wells Fargo Home Mortgage*, 2013 WL  
16 4482671 \* 3 (N.D. Cal. August 19, 2013).<sup>7</sup>

17 "The burden of establishing improper claim splitting is on the  
18 moving party." *Unicolors, Inc.*, 2015 WL at \* 2; see also, *Taylor v.*  
19 *Sturgell*, 553 U.S. 880, 907 (2008) (burden of proof for claim  
20 preclusion). Comparison of the pleadings in the Kodiak Mining Action  
21 and the Consolidated Resources Action provides a sufficient basis to  
22

---

23 <sup>7</sup> Ordinarily, prevailing on a Rule 12(b)(6) motion results in dismissal. Fed.  
24 R. Civ. P. 12(b)(6). But when ruling on a Rule 12(b)(6) motion addressing a  
25 claim splitting issue, courts have broad discretion with respect to the  
26 property remedy, including dismissal, staying the action, enjoining the  
27 parties from proceeding with the second action, or consolidation. *Restaurant*  
28 *Equipment Contracting, Inc. v. Makino*, 148 F.Supp.3d 1126, 1128 (D. Nevada  
2015). The court in *Single Chip Sys.*, 495 F.Supp.2d at 1056-57, correctly  
notes that the lesser remedies invoke the standards applicable to staying  
proceedings (the inherent powers of the court) and consolidation (Rule  
42(a)).

1 decide this motion.<sup>8</sup>

2 **V. DISCUSSION**

3 As a rule, plaintiffs have "no right to maintain two separate  
4 actions involving the same subject matter at the same time in the same  
5 court and against the same defendants." *Walton v. Eaton Corp.*, 563  
6 F.2d 66, 70 (3rd Cir. 1977); *Adams v. California Dept. of Health*  
7 *Services*, 487 F.3d 684, 688 (9th Cir. 2007) (overruled on other  
8 grounds by *Taylor v. Sturgell*, 553 U.S. 880, (2008).

9 Colloquially described as "claim splitting," the practice refers  
10 to the improper pursuit of more than one lawsuit against the same  
11 parties arising out of the same facts. "The theory of claim splitting  
12 bars a party from subsequent, duplicative litigation where the 'same  
13 controversy' exists'." *Fairway Restaurant Equipment Contracting, Inc.*  
14 *v. Makino*, 148 F.Supp.3d 1126, 1128 (D. Nevada 2015); see also *Single*  
15 *Chip Sys.*, 495 F.Supp.2d at 1057; *Nakash v. Superior Court*, 196  
16 Cal.App.3d 59 (1987). It has been applied to state court actions  
17 removed to federal court. *Vanover v. NCO Financial Services, Inc.*,  
18 857 F.3d 833 (11th Cir. 2017). It has also been applied to preclude  
19 plaintiffs that were denied leave to amend a complaint from filing a  
20 second complaint based on the same facts. *Adams*, 487 F.3d at 688; see  
21 also *Hartsel Springs Ranch of Colorado, Inc. v. Bluegreen Corp.*, 296  
22 F.3d 982, 989 (10th Cir. 2002).

23 Claim splitting is a species of claim preclusion. *In re*  
24 *Associated Vintage Group, Inc.*, 283 B.R. 549, 555 (9th Cir. 2002),  
25

---

26 <sup>8</sup> The court may properly take judicial notice, Fed. R. Evid. 201, of: (1)  
27 Second Amended Complaint, September 5, 2018, ECF No. 131; and (2) Verified  
28 Complaint for Quiet Title in *Consolidated Resources, Inc. v. DRO Barite LLC*,  
No. CIVDS 1931070 (San Bernardino County Superior Court October 16, 2019).

1 citing Restatement (Second) Judgments §§ 24-26 (1982).<sup>9</sup> But unlike  
2 most uses of claim preclusion, claim spitting “does not require a  
3 final judgment on the merits in the prior case.” *Fairway Restaurant*  
4 *Equipment Contracting*, 148 F.Supp.3d at 1128; *Hartsel Springs*  
5 *Ranch*, 296 F.3d at 987 n. 1 (“[I]n the claim-splitting context, the  
6 appropriate inquiry is whether, assuming that the first suit were  
7 already final, the second suit could be precluded pursuant to claim  
8 preclusion.”).

9 In determining whether the actions violate the claim splitting  
10 rules, the court should consider whether the causes of action are  
11 identical and whether the parties are identical or at least in  
12 privity. *Id.* at 689.

13  
14  
15 <sup>9</sup> Section 25 provides the bar.

16 The rule of § 24 applies to extinguish a claim by the plaintiff  
17 against the defendant even though the plaintiff is prepared in  
18 the second action (1) To present evidence or grounds or theories  
of the case not presented in the first action, or (2) To seek  
remedies or forms of relief not demanded in the first action.

19 Restatement (Second) § 25.

20 Section 24 defines the scope of the claim.

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

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

28 Restatement (Second) § 24.

1           **A.     Claim Splitting**

2                   **1.     Causes of Action**

3           "The test for whether a subsequent action is barred is whether it  
4 arises from the same "transaction, or series of transactions" as the  
5 original action. Restatement (Second) § 24(1) (cited with approval in  
6 *Nevada [v. United States]*, 463 U.S. 110, 130-31 n. 12, 103 (1983)).

7 Whether two events are part of the same transaction or series depends  
8 on whether they are related to the same set of facts and whether they  
9 could conveniently be tried together. Restatement (Second) § 24(2)."

10 *Western Sys., Inc. v. Ulloa*, 958 F.2d 864, 871 (9th Cir.1992). In  
11 deciding this issue, the court should consider:

12           (1) whether rights or interests established in the prior  
13 judgment would be destroyed or impaired by prosecution  
14 of the second action; (2) whether substantially the same  
15 evidence is presented in the two actions; (3) whether the  
16 two suits involve infringement of the same right; and (4)  
17 whether the two suits arise out of the same transactional  
18 nucleus of facts.

19 *Adams*, 487 F.3d at 689, quoting from *Costantini v. Trans World*  
20 *Airlines*, 681 F.2d 1199, 1201-02 (9th Cir. 1982). "The last of these  
21 criteria ["the same transactional nucleus of facts"] is the most  
22 important." *Costantini*, 681 F.2d at 1202.

23           First, the rights and interests of the parties in the Kodiak  
24 Mining Action and in the Consolidated Resources Action are in active  
25 competition. As the pleadings now stand in the Kodiak Mining Action,  
26 Hellenic Petroleum and Sallyport seek declaratory relief as the to  
27 Settlement Agreement, which defined the rights of Hellenic Petroleum,  
28 Consolidated Resources and Don Rose Oil. In contrast, trustee Randell  
Parker attacks both the Settlement Agreement, 11 U.S.C. §§ 548, 548,  
and the underlying transaction, i.e., the \$7 million secured loan from  
Don Rose Oil and the deed in lieu of foreclosure resulting from that



1 loan. Juxtaposed is the Consolidated Resources Action that seeks to  
2 quiet title in favor of Consolidated Resources against DRO Barite,  
3 Sallyport, Idemitsu, Happy Rock and "All Persons Unknown Claiming Any  
4 Legal or Equitable Right or Title." Strangely, or perhaps tellingly,  
5 Trustee Parker has not been named as a defendant in the Consolidated  
6 Resources Action and the Settlement Agreement is omitted from those  
7 pleadings. The rights of the parties to these minerals will be defined  
8 by the Settlement Agreement, if not avoided by the trustee, or by the  
9 underlying common law theories, e.g. ultra vires and fraud. Any  
10 effort to quiet title based on the same underlying theories and  
11 without consideration of the Settlement Agreement (which would work an  
12 accord and satisfaction) would impair any judgment in the Kodiak  
13 Mining Action.

14 Second, as to the underlying state law rights, e.g., failure of  
15 consideration, fraud in the inducement and/or ultra vires acts by a  
16 corporate officer, the theories and evidence will be the same.

17 Third, there is sufficient identity of rights. The Kodiak Mining  
18 Action, particularly as asserted by trustee Parker (which addresses  
19 both the state law issues and avoidance actions), and the Consolidated  
20 Resources Action assert the same rights based on the same facts: (1)  
21 Don Rose's authority to bind Consolidated Resources and the effect of  
22 the lack of authority to encumber and/or transfer the barite to Don  
23 Rose Oil on persons who hold derivative rights; and (2) whether some,  
24 or all, of the transfer from Consolidated Resources, to Don Rose Oil  
25 may be avoided for lack of consideration or fraud in the inducement  
26 and the effect of such avoidance. That the trustee has asserted  
27 additional substantive rights, e.g., 11 U.S.C. §§ 547, 548, 544, 303,  
28 does not defeat identity of rights.

1 Fourth, and most importantly, the Kodiak Mining Action and the  
2 Consolidated Resources Action "arise out of the same transactional  
3 nucleus of facts." As to the state law issues, there is a common  
4 nucleus of facts, arising from Don Rose's authority to transact  
5 business for Consolidated Resources and, even if he had such  
6 authority, whether those transactions are tainted by failure of  
7 consideration or fraud in the inducement.

8 For these reasons, this court finds identity of causes of action  
9 between the two actions.

## 10 2. Parties

11 The second element of claim splitting is the identity of parties.

12 The second determination in assessing whether a second  
13 action is impermissibly duplicative is **whether the parties  
14 or privies to the action are the same.** "A person who was  
15 not a party to a suit generally has not had a "full and  
16 fair opportunity to litigate" the claims and issues settled  
17 in that suit." Taylor v. Sturgell, 553 U.S. 880, 892, 128  
18 S.Ct. 2161, 2171, 171 L.Ed.2d 155 (2008).

19 *Fairway Rest. Equip. Contracting, Inc.*, 148 F.Supp.3d at 1131  
20 (emphasis added).

21 Parties common to both actions are Consolidated Resources, DRO  
22 Barite, Sallyport, Indemitsu, and Happy Rock.<sup>10</sup> Because all parties to  
23 the Consolidated Resources Action are, or were, also parties to the  
24 Kodiak Mining Action, Consolidated Resources has had "full and fair

---

25 <sup>10</sup> The Consolidated Resources Action also names "All Persons Unknown, Claiming  
26 Any Legal or Equitable Right, Title, Estate, Lien, or Interest in the Barite  
27 Mineral Rights." Complaint ¶ 6, *Consolidated Resources, Inc. v. DRO Barite,  
28 LLC*, No. 19-1137 (Bankr. E.D. Cal. 2019), ECF No. 1. Naming such individuals  
is customary and is authorized by statute. Cal. Code of Civ. Proc. §  
762.060. Moreover, the court has authority to require the plaintiff to  
procure a title report to ensure all parties claiming an interest have been  
joined. *Id.* at § 762.040. Here, Consolidated Resources, discloses no such  
additional parties, save and except the Chapter 7 trustee, Randell Parker.

Indemitsu and Happy Rock were named in the original and Second Amended  
Complaint but have since been dismissed.

1 opportunity to litigate," *Taylor v. Sturgell*, 553 U.S. 880, 892  
2 (2008), against these parties and this court finds identity of  
3 parties.

4 Finding the Consolidated Resources Action falls within the reach  
5 of *Adams*, 487 F.3d at 688, and of *Hartsel Springs Ranch of Colorado,*  
6 *Inc.*, 296 F.3d at 989, this court finds that Consolidated Resources  
7 has engaged in claim splitting. Restatement (Second) §§ 24-26.

#### 8 **B. Remedy**

9 Unlike most Rule 12(b)(6) motions (which result in dismissal of  
10 the action), the appropriate remedy for claim splitting lies with the  
11 discretion of the trial court and should be made "[a]fter weighing the  
12 equities of the case." *Fairway Rest. Equip. Contracting, Inc.*, 148  
13 F.Supp.3d at 1128-29. Indeed, application of the claim splitting rule  
14 has always required a measure of discretion.

15 This court's decision is guided by two principles. First, a  
16 plaintiff may not "use the incorrect procedure of filing duplicative  
17 complaints for the purpose of circumventing the rules pertaining to  
18 the amendment of complaints." *Walton v. Easton Corp.*, 563 F.2d 66, 71  
19 (3d Cir. 1977); *Hartsel Springs Ranch of Colorado, Inc.*, 296 F.3d at  
20 989.<sup>11</sup>

---

21  
22 <sup>11</sup> Any argument that Consolidated Resources, was not required to file a Third  
23 Amended Complaint to preserve its rights with respect to the underlying state  
24 law claims, e.g., failure of consideration, fraud in the inducement, ultra  
25 vires acts by Don Rose, under the authority of *Hartsel Springs Ranch of*  
26 *Colorado, Inc. v. Bluegreen Corp.*, 296 F.3d 982, 990 (10th Cir. 2002), is  
27 resolved by the compulsory nature of its claims. Fed. R. Civ. P. 13(a),  
28 *incorporated by* Fed. R. Bankr. P. 7013. A compulsory counterclaim is one that  
"arises out of the transaction or occurrence that is the subject matter of  
the opposing party's claim" and "does not require adding another party over  
whom the court cannot acquire jurisdiction." *In re Marshall*, 600 F.3d 1037,  
1057 (9th Cir. 2010), *aff'd sub nom. Stern v. Marshall*, 564 U.S. 462, 131 S.  
Ct. 2594, 180 L. Ed. 2d 475 (2011). Here, the trustee has already pled fraud  
in the inducement of the \$7 million dollar loan from Don Rose Oil to  
Consolidated Resources and declaratory relief as to the Settlement Agreement.  
First Amended Counterclaim at pp. 30-32, *Kodiak Mining & Minerals II, LLC v.*

1 Here, this court has given Consolidated Resources two  
2 opportunities to file an amended complaint in the Kodiak Mining  
3 Action. When the court granted Sallyport's Rule 12(b)(6) motion it  
4 gave Consolidated Resources 21 days' leave to file its Third Amended  
5 Complaint. Order, *Kodiak Mining & Minerals II, LLC*, No. 17-1086, ECF  
6 No. 189.

7 Moreover, when Sallyport and Idemistu sought to make the  
8 dismissal of the Second Amended Complaint "with prejudice," the court  
9 specifically reserved to Consolidated Resources the right to seek  
10 leave of court to file a Third Amended Complaint. Civil minutes at 5,  
11 *Kodiak Mining & Minerals II, LLC*, No. 17-1086, ECF No. 251 ("In other  
12 words, *Lacey* does not preclude, for example, a challenge to the  
13 dismissal order under Rule 60(b) or a request for further leave to  
14 amend under Rule 15(a)(2)"). Nearly one year after the court granted  
15 Sallyport's motion to dismiss the Second Amended Complaint,  
16 Consolidated Resources filed its state court action. This is an  
17 improper attempt to circumvent this court's previous orders pertaining  
18 to amending the complaint and that is a proper basis to dismiss a  
19 second complaint attempting to split claims. *Serlin v. Arthur*  
20 *Anderson & Co.*, 3 F.3d 221, 223 (7th Cir. 1993). As a result, the  
21 Consolidated Resources Action will be dismissed.

22 Second, when considering the appropriate remedy for claim  
23 splitting, the court should neither expand, *Walton v. Easton Corp.*,  
24 563 F.2d at 71, nor contract the procedural rights that the plaintiff  
25 would have otherwise enjoyed. Indeed, the Restatement (Second) of  
26 Judgments § 26, cited with approval in *V.V.V. & Sons Edible Oils*

27 \_\_\_\_\_  
28 *Don Rose Oil Co., Inc.*, No. 17-1086 (Bankr. E.D. Cal. 2017), ECF No. 228.  
This court would have jurisdiction over that claim. 28 U.S.C. § 1367.

1 *Limited v. Meenakshi Overseas, LLC*, 946 F.3d 542, 545 (9th Cir. 2019),  
2 specifically provides that claim splitting should not work to  
3 "extinguish the claim" where "the court in the first action has  
4 expressly reserved the plaintiff's right to maintain the second  
5 action." Restatement (Second) § 26(b)(1). The comments to  
6 Restatement (Second) make this clearer still:

7       It may appear in the course of an action that the plaintiff  
8 is splitting a claim, but that there are special reasons  
9 that justify his doing so, and accordingly that the  
10 judgment in the action ought not to have the usual  
11 consequences of extinguishing the entire claim; rather the  
12 plaintiff should be left with an opportunity to litigate in  
13 a second action that part of the claim which he justifiably  
14 omitted from the first action. **A determination by the  
15 court that its judgment is "without prejudice (or words to  
16 that effect) to a second action on the omitted part of the  
17 claim, expressed in the judgment itself, or in the findings  
18 of fact, conclusions of law, or similar record, unless  
19 reversed or set aside, should ordinarily be given effect in  
20 the second action.**

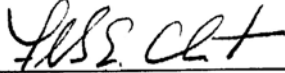
21 *Id.* at cmt. b (emphasis added).

22       Here, the court contemplated that Consolidated Resources might  
23 well seek leave of court to amend its pleadings. Hence, though  
24 dismissal is the proper remedy, dismissal with prejudice is too  
25 severe.

## 26 VI. CONCLUSION

27       For each of these reasons, the motion to dismiss will be granted  
28 with prejudice, except as to Consolidated Resources' right to seek  
leave to amend its complaint in *Kodiak Mining & Minerals II, LLC v.*  
*Don Rose Oil Co., Inc.*, No. 17-1086 (Bankr. E.D. Cal. 2017). The  
court will issue an order from chambers.

Dated: Apr 13, 2020

  
\_\_\_\_\_  
Fredrick E. Clement  
United States Bankruptcy Judge

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

# Instructions to Clerk of Court

## Service List - Not Part of Order/Judgment

**The Clerk of Court is instructed to** send the Order/Judgment or other court generated document transmitted herewith *to the parties below*. The Clerk of Court will send the document via the BNC or, if checked \_\_\_\_\_, via the U.S. mail.

<b>All Attorneys for the Plaintiff (s)</b>	<b>All Attorneys for the Defendant(s) (if any)</b>
<b>Bankruptcy Trustee</b> (if appointed in the case)	Office of the U.S. Trustee 2500 Tulare St, Ste 1401 Fresno, CA 93721