

38

<b>FILED</b>
JAN 18 2018
UNITED STATES BANKRUPTCY COURT EASTERN DISTRICT OF CALIFORNIA

Handwritten initials

FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF CALIFORNIA

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

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.

1           The judicial mediation following this court's initial  
2 negative reaction has led to a consensual solution that  
3 accommodates the interests of the parties and of the public. The  
4 adversary proceeding will not be dismissed. No opinion will be  
5 withdrawn. The damages judgment against Bank of America will be  
6 vacated. The adversary proceeding will be closed without formal  
7 resolution of the causes of action against Bank of America,  
8 thereby preventing finality for purposes of the claim and issue  
9 preclusion rules of res judicata. And, the court reserves  
10 jurisdiction to enforce the settlement agreement.

11           This fourth opinion in this case sets forth the court's  
12 reasoning for declining to grant the motion to dismiss as  
13 presented and for acquiescing in the mediated solution.<sup>1</sup>

14

15

#### Procedure

16           Three related motions are pending. Bank of America moves  
17 under Federal Rule of Civil Procedure 52, as incorporated by  
18 Federal Rule of Bankruptcy Procedure 7052, to strike the Renée  
19 Sundquist diary from evidence. The Sundquists move to reopen the  
20 evidence and prove more damages. Finally, they jointly move to  
21 vacate the judgment and opinion and to dismiss the adversary  
22 proceeding as demanded by Bank of America as a precondition to  
23 paying an undisclosed sum more than the \$6,074,581.50 judgment in  
24 their favor.

25

26

---

27           <sup>1</sup>The first three opinions were all styled Sundquist v. Bank  
28 of America (In re Sundquist), (Bankr. E.D. Cal. 2017), and are  
reported at: 566 B.R. 563 ("Sundquist I"); 570 B.R. 92 ("Sundquist  
II"); 576 B.R. 858 ("Sundquist III").

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 adversary proceeding with a Rule 54(b) determination that there  
 2 is no just reason for delay in entry of a final judgment as to  
 3 fewer than all the parties and fewer than all the claims. Fed.  
 4 R. Civ. P. 54(b), incorporated by Fed. R. Bankr. P. 7054(a). A  
 5 notice of appeal has been filed. That separate judgment prevents  
 6 dismissal of the adversary proceeding.

7 The § 329(b) appeal presents a significant question of  
 8 bankruptcy law as to which precedent is sparse. This tool for  
 9 courts grappling with the problem of counsel who poorly serve  
 10 their clients deserves explication in appellate precedent.

11  
12 2

13 As to punitive damages, the opinion and judgment give  
 14 context and content to the oft-stated public-interest aspect of  
 15 punitive damages. The law in this arena is evolving. By making  
 16 an award of statutory punitive damages that required that the  
 17 public interest component of the award be channeled to public  
 18 purposes, additional parties have been introduced into the  
 19 litigation, given standing to participate, and have intervened.

20 The judgment provides that the Intervenors are entitled to  
 21 receive the post-tax residue of \$40 million of punitive damages  
 22 with prospective remittitur to zero if Bank of America makes  
 23 certain voluntary contributions.

24 As a result, the Intervenors have standing because vacating  
 25 the judgment would injure them in a manner that could be  
 26 redressed by a favorable outcome on appeal. E.g., Diamond v.  
 27 Charles, 476 U.S. 54, 68-70 (1986); American Games, Inc. v. Trade  
 28 Prods., Inc., 142 F.3d 1164, 1167 (9th Cir. 1998).

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

3

III

4

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

7

4

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 The claim preclusion and issue preclusion rules of res  
2 judicata regarding federal judgments follow the Restatement  
3 (Second) of Judgments. E.g., B&B Hardware, Inc. v. Hargis  
4 Indus., Inc., 135 S.Ct. 1293, 1303 (2015) (The Court "regularly  
5 turns to the Restatement (Second) of Judgments for a statement of  
6 the ordinary elements of issue preclusion"); New Hampshire v.  
7 Maine, 532 U.S. 742, 748-49 (2001); Migra v. Warren City Sch.  
8 Dist. Bd. of Educ., 465 U.S. 75, 77 n.1 (1984).

9 In the context of this case, claim preclusion would tend to  
10 protect Bank of America from further claims by the Sundquists,  
11 while issue preclusion could threaten the bank in defending  
12 itself from claims by other persons.

13  
14 A

15 The sine qua non threshold requirement for applying rules of  
16 res judicata regarding merger and bar and claim and issue  
17 preclusion is that there be a final judgment or, for purposes of  
18 issue preclusion only, a determination "sufficiently firm to be  
19 accorded conclusive effect." RESTATEMENT (SECOND) OF JUDGMENTS § 13.<sup>2</sup>  
20

21 B

22 Claim preclusion, if the judgment were to remain in effect,  
23

---

24 <sup>2</sup>§ 13. Requirement of Finality.

25 The rules of res judicata are applicable only when a final  
26 judgment is rendered. However, for purposes of issue  
27 preclusion (as distinguished from merger and bar), "final  
28 judgment" includes any prior adjudication of an issue that  
is determined to be sufficiently firm to be accorded  
conclusive effect.

RESTATEMENT (SECOND) OF JUDGMENTS § 13.



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).<sup>3</sup>

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.<sup>4</sup>

19  
20 <sup>3</sup>§ 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.

<sup>4</sup>§ 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).<sup>5</sup>

---

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

17 RESTATEMENT (SECOND) OF JUDGMENTS § 19.

18 <sup>5</sup>§ 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.<sup>6</sup>

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).<sup>7</sup>

---

14  
 15           <sup>6</sup>§ 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           <sup>7</sup>§ 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

11

2

12

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.<sup>8</sup>

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.<sup>9</sup>

---

12  
13 <sup>8</sup>§ 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 <sup>9</sup>§ 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  
23 (1) The party against whom preclusion is sought could not,  
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  
determination is warranted in order to take account of an  
27 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.<sup>10</sup>  
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 <sup>10</sup>§ 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



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

2

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.<sup>11</sup>

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 <sup>11</sup>The 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 Intervenor 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 Intervenor, 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?

1

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.

13  
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.<sup>12</sup>

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 <sup>12</sup>See 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.

12

13

1

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           The final settlement agreement appears to be an arm's length  
2 document carefully drafted by competent counsel on each side. It  
3 contains conventional terms that the court views as benign.  
4 Potentially difficult questions are bridged by calculated  
5 ambiguity. There are the usual mutual releases and recitals to  
6 the effect that there is no admission of liability and that the  
7 compromise is of disputed claims and defenses, to avoid  
8 litigation, and to buy peace. Disclosure of the agreement is  
9 permitted, if required, to regulatory, taxing, and governmental  
10 authorities, and it is exposed to legal process (which may be  
11 resisted), preferably under seal.

12

13

2

14           A mutual promise not to make negative or disparaging remarks  
15 about each other in any form or media related to the factual  
16 allegations made in the litigation could be troublesome to the  
17 extent that it might muzzle talking about facts and evidence from  
18 the trial. If the parties genuinely choose not to talk, that is  
19 their privilege. But enforcing total silence about an entire  
20 litigation that went to judgment in public might go too far.

21           This court is satisfied, however, that the enforcement  
22 mechanism involving a court of competent jurisdiction prevents  
23 overreaching that might offend public policy. As jurisdiction is  
24 being reserved by this court over the settlement agreement, any  
25 dysfunction can be policed.

26

27

VII

28           Having reviewed the settlement agreement in camera and after

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.

14

15

#### Conclusion

16

17

18

19

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.

20

21

22

23

24

25

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.

26

27

28

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.

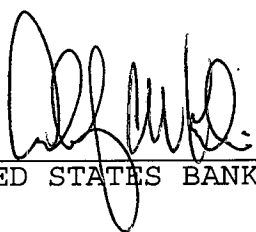
7 An appropriate order will issue.

8

9 Dated: January 18, 2018

10

11

  
UNITED STATES BANKRUPTCY JUDGE

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

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:

5 Dennise Henderson  
6 1903 21st Street  
7 Sacramento, California 95811

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

11 Jonathan Doolittle  
12 Reed Smith LLP  
13 101 Second Street, Suite 1800  
14 San Francisco, California 94105

15 Jonathan D Hacker  
16 1625 Eye St, NW  
17 Washington DC 20006

18 James Stang and Kenneth Brown  
19 Pachulski Stang Ziehl & Jones LLP  
20 10100 Santa Monica Blvd, #1300  
21 Los Angeles, California 90067

22 Estela Pino  
23 Pino & Associates  
24 800 Howe Avenue, Suite 420  
25 Sacramento, California 95825

26 Roger N Heller  
27 275 Battery St 29th Fl  
28 San Francisco CA 94111

Rhonda S Goldstein  
1111 Franklin St 8th Fl  
Oakland CA 94607

Elise K Traynum  
Office of the General Counsel  
200 McAllister St  
San Francisco CA 94102

Sandor T Boxer  
1888 Century Park E #1150  
Los Angeles CA 90067

Mark E Ellis  
1425 River Park Drive, Suite 400  
Sacramento, CA 95815

1 Office of the U.S. Trustee  
2 Robert T Matsui United States Courthouse  
3 501 I Street, Room 7-500  
4 Sacramento, CA 95814

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