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APPENDIX A

United States Court of Appeals
for the Ninth Circuit

ERNEST BOCK, LLC,

Plaintiff-Appellant,

v.

PAUL STEELMAN, individually and as trustee of the Steelman Asset Protection Trust ("SAPT"), the Paul C. Steelman and Maryann T. Steelman Revocable Living Trust ("RLT"), and the Paul Steelman Gaming Asset Protection Trust; STEPHEN STEELMAN, SUZANNE STEELMAN-TAYLOR; MARYANN STEELMAN, individually and as trustee of the SAPT and RLT; COMPETITION INTERACTIVE, LLC; PAUL STEELMAN, LTD; STEELMAN PARTNERS, LLP; PAUL STEELMAN DESIGN GROUP, INC; SAPT HOLDINGS, LLC SERIESB; KEEPSAKE, INC.; SMMR, LLC; SMMR, LLC SERIES A-Z; SSSSS, LLC; SSSSS, LLC SERIES B; CHRISTIANIA, LLC; CHRISTIANIA, LLC SERIES A-Z; JIM MAIN, as trustee of the SAPT; AARON SQUIRES; MATTHEW MAHANEY,

Defendants-Appellees.

No. 22-15466
D.C. No. 2:19-cv-01065-JAD-EJY

Appeal from the United States District Court
for the District of Nevada
Jennifer A. Dorsey, District Judge, Presiding

Argued and Submitted March 6, 2023
Las Vegas, Nevada

Filed August 3, 2023

Before: Richard R. Clifton, Jay S. Bybee,
and Mark J. Bennett, Circuit Judges.
Opinion by Judge Bennett

OPINION

BENNETT, Circuit Judge:

Plaintiff-Appellant Ernest Bock, LLC ("Bock") initially obtained an $11.8 million judgment for breach of contract against Defendants Paul and Maryann Steelman ("the Steelmans") in New Jersey state court. Bock then filed this federal suit in the District of Nevada, alleging that the Steelmans, assisted by other named Defendants, engaged in an elaborate series of allegedly improper asset transfers to insulate those assets from the New Jersey judgment.[1] But while the

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[1] Under Nevada's version of the Uniform Fraudulent Transfer Act, a "transfer" is "every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset, and includes payment of money, release, lease and creation of a lien or other encumbrance." Nev. Rev. Stat. § 112.150(12).

federal suit was pending, a New Jersey appellate court vacated the underlying judgment and remanded for further proceedings, including discovery, to determine whether the Steelmans were liable to Bock.

The district court then stayed this case pursuant to *Colorado River Water Conservation District v. United States* (*Colorado River*), 424 U.S. 800 (1976).[2] The court first determined that both the state and federal lawsuits turn on the same question of New Jersey law —whether the Steelmans are liable for breach of contract. The court then stayed the federal case, in part because it would be inefficient for both suits to proceed simultaneously.

We must decide whether a *Colorado River* stay was proper. "Generally . . . the rule is that 'the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction.'" *Id*. at 817 (quoting *McClellan v. Carland*, 217 U.S. 268, 282 (1910)). The Supreme Court has made clear that a *Colorado River* stay is proper only in "exceptional circumstances." *Id*. at 813. Absent such circumstances, federal courts have a "virtually unflagging obligation . . . to exercise the jurisdiction

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As relevant to Bock's claims, that Act prohibits a debtor from making a transfer "[w]ith actual intent to hinder, delay or defraud any creditor of the debtor." *Id*. § 112.180(1)(a). One of the factors used to determine "actual intent" is whether "[b]efore the transfer was made . . . the debtor had been sued or threatened with suit." *Id*. § 112.180(2)(d).

[2] This type of stay is often referred to as Colorado River abstention. *See infra* Section IV.A.

given them." *Id*. at 817. "Thus, the decision to invoke Colorado River necessarily contemplates that the federal court will have *nothing further to do* in resolving any substantive part of the case." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp*. (*Moses Cone*), 460 U.S. 1, 28 (1983) (emphasis added).

First, we conclude that Bock has standing to bring its federal court claims because it raised a question of fact as to whether it is injured by the Steelmans' asset transfers. Next, we hold that a *Colorado River* stay cannot issue when, as here, federal litigation will be fully resolved only if parallel state court proceedings end in one of several possible outcomes, though we acknowledge conflicting authority on the question. Finally, we reject Defendants' alternative argument that the district court's inherent docket management powers can justify a stay. Accordingly, we reverse the district court's order and remand for further proceedings.

I. Background

In 2011, members of the Catanoso family[3] approached Bock, a Philadelphia-based construction company, seeking a loan to finance the purchase and renovation of an amusement pier in Atlantic City. Bock was initially skeptical about the Catanosos' liquidity and ability to post collateral. To resolve those concerns, the Catanosos engaged Paul Steelman, an acclaimed architect based in Las Vegas, to join the project. Collectively, they formed Steel Pier Associates, LLC

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[3] The Catanosos are not parties in this case.

("SPA").[4] Bock agreed to make two loans to SPA in the form of commercial mortgage notes, each secured by a personal guarantee from Paul and his wife Maryann.[5]

It is undisputed that SPA was in default on both loans at least by March 2014. In October 2015, Bock filed suit against the Steelmans in New Jersey Superior Court, seeking to enforce their guarantee of SPA's liability under the commercial mortgage notes. Bock alleged that the Steelmans breached their contract by failing to honor the terms of the guaranty agreements and committed fraud by misrepresenting the net worth of their assets. The Steelmans countered that Bock breached an implied covenant of good faith and fair dealing inherent in every contract subject to New

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[4] It appears that Paul and the Catanosos also formed Cape Entertainment Associates, LLC ("CEA"). Bock's operative federal complaint alleges that CEA and SPA were both named borrowers on the second loan, which the Steelmans personally guaranteed in its entirety. For simplicity, we refer only to SPA as the parties do in their briefing.

[5] The notes provided that Bock could sue to enforce SPA's repayment obligations in the event of default. The notes defined default in part as: (1) SPA's "nonpayment when due of any amount payable under this Note"; (2) failure "to observe or perform any other existing or future agreement" between the parties; (3) insolvency, corporate mergers, or dissolutions; and (4) attempts to disclaim indebtedness.

The Steelmans' guarantees, in turn, constituted "guarantees as unconditional surety the prompt payment and performance of all loans, advances, debts, liabilities, obligations, covenants and duties owing by [SPA] to [Bock]." The guarantees purport to be "absolute and unconditional irrespective of: (1) any lack of validity or enforceability of any of the Loan Documents."

Jersey law, by encouraging SPA to take on risky financial obligations that made repayment of the original loans by SPA impossible.[6] *See Ernest Bock, LLC v. Steelman* (*Ernest Bock*), No. A-0469-19, 2021 WL 4771306, at *6–7 (N.J. Super. Ct. App. Div. Oct. 13, 2021). The Superior Court sided with Bock, entering summary judgment against the Steelmans for more than $11 million. The Steelmans appealed.

Bock alleges that the Steelmans then began dispersing their assets through a complicated web of trusts and corporate entities intending to shield their wealth from the New Jersey judgment while also retaining ultimate control over their assets. Accordingly, Bock filed this lawsuit in the District of Nevada against the Steelmans, the trusts and entities in question, and several individuals who allegedly helped facilitate the contested transfers (collectively, "Defendants"). The lawsuit alleges that Defendants violated Nevada and federal laws by: (1) creating trusts with the intent to defraud creditors; (2) transferring property, assets, and interests with the intent to defraud creditors; (3) impermissibly using corporate alter egos to shield personal liability; and (4) violating and conspiring to violate the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 et seq.

But while the federal suit was pending, the Appellate Division of the New Jersey Superior Court vacated the

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[6] The Steelmans also alleged that this behavior constituted "Tortious Interference with Prospective Financial Gain," and as a result, Bock's loans should be "recharacterized" as a purchase of an equity stake in SPA.

underlying judgment. *Ernest Bock*, 2021 WL 4771306, at *1. The court found that "summary judgment was prematurely granted before . . . discovery [was] completed," id., because "if defendants prove that Bock . . . improperly impeded the ability of [SPA] to pay the loan debt, that improper conduct might excuse or justify defendants' non- payment of the guaranties," *id*. at *5. For this reason, the court "vacate[d] the trial court's grant of summary judgment and remand[ed] the matter for continued discovery under the trial court's supervision." *Id*. at *9. The New Jersey Supreme Court declined to review the Appellate Division's determination. *Ernest Bock, LLC v. Steelman*, 270 A.3d 1084 (N.J. 2022).

As there was no longer a judgment, Bock was no longer a judgment creditor of the Steelmans. Accordingly, both the New Jersey litigation and the federal suit were set to proceed in parallel. And both cases turn on the same threshold question of New Jersey state law: whether the Steelmans' guarantees are enforceable.[7] For this reason, the Steelmans sought to stay federal proceedings pending resolution of the New Jersey litigation, arguing that allowing the suits to proceed simultaneously would waste judicial resources

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[7] In the New Jersey action, the Steelmans cannot have actionably breached the guarantees if the guarantees are unenforceable. And in the federal action, the Steelmans' asset transfers can only be a fraudulent attempt to evade "creditor" Bock, if the guarantees are enforceable by Bock (because if not, Bock could not obtain a monetary judgment and become a judgment creditor).

and risk inconsistent judgments.[8] Bock opposed the stay, arguing that: (1) a stay could not be justified by either the court's docket management powers or the *Colorado River* doctrine; and (2) pausing the federal litigation would afford the Steelmans additional time to hide assets and thus shield them from Bock. In the alternative, Bock asked that if the district court were to issue a stay, it should also require Defendants, as a condition, to post $35.5 million bond. The district court issued a stay under *Colorado River* and declined to require a bond.

Bock timely appealed, arguing that this case does not present the "exceptional circumstances" required for a *Colorado River* stay. Defendants contend that: (1) a *Colorado River* stay was proper; (2) even if not, the district court had the inherent docket management authority to issue a stay; and (3) without a valid New Jersey judgment, Bock lacks standing to bring its federal claims because it has not suffered an injury in fact.

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[8] Initially, the Steelmans requested a stay pursuant to the district court's inherent docket management powers. The district court found that *Colorado River* authorized the stay. As discussed below, we find that neither supports a stay here.

II. Jurisdiction & Standards of Review

We have jurisdiction under 28 U.S.C. § 1291.[9] Although the district court did not make an Article III standing determination, standing is a threshold jurisdictional requirement and "may be raised at any time during the proceedings, including on appeal." *Wash. Env't Council v. Bellon*, 732 F.3d 1131, 1139 (9th Cir. 2013) (citation omitted). Thus, we determine de novo whether Bock has standing.

Our *Colorado River* analysis proceeds in two steps. First, "[w]hether the facts of a particular case conform to the requirements for a *Colorado River* stay . . . is a question of law which we review de novo." *Smith v. Cent. Ariz. Water Conservation District*, 418 F.3d 1028, 1032 (9th Cir. 2005). Second, "[i]f we conclude that the *Colorado River* requirements have been met, we then review for abuse of discretion the district court's decision to stay . . . the action." *Seneca Ins. Co. v. Strange Land, Inc*. (*Seneca*), 862 F.3d 835, 840 (9th Cir. 2017) .. "[H]owever, this standard is stricter 'than the flexible abuse of discretion standard used in other areas of law' because 'discretion must be exercised within the narrow and specific limits prescribed by the *Colorado River* doctrine.'" *R.R. Street & Co. Inc. v. Transp. Ins. Co*. (*R.R. Street*), 656 F.3d 966, 973 (9th Cir. 2011) (cleaned up) (quoting *Holder v. Holder*, 305 F.3d 854, 863 (9th Cir. 2002)).

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[9] Although a stay is generally not a final appealable order, a stay issued under *Colorado River* is immediately appealable. *United States v. State Water Res. Control Bd*., 988 F.3d 1194, 1201–02 (9th Cir. 2021).

Finally, we review for abuse of discretion whether a district court properly stayed an action pursuant to its inherent docket management powers, "but this standard is 'somewhat less deferential' than the abuse of discretion standard used in other contexts." *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1105 (9th Cir. 2005) (quoting *Yong v. INS*, 208 F.3d 1116, 1119 (9th Cir. 2000)).

III. Standing

To establish standing, "a plaintiff must satisfy three 'irreducible constitutional minimum' requirements: (1) he or she suffered an injury in fact that is concrete, particularized, and actual or imminent; (2) the injury is fairly traceable to the challenged conduct; and (3) the injury is likely to be redressed by a favorable court decision." *Bellon*, 732 F.3d at 1139–40 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992)).

Defendants claim that without a New Jersey judgment, Bock cannot establish an injury in fact because the Steelmans are not legally obligated to pay the guarantees. But plaintiffs need only establish each element of standing "with the manner and degree of evidence required at the successive stages of the litigation." *Lujan*, 504 U.S. at 561. "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice." *Id.*[10] Here,

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[10] "In response to a summary judgment motion, however, the plaintiff can no longer rest on such 'mere allegations,' but must 'set forth' by affidavit or other evidence 'specific facts,' which for purposes of the summary judgment motion will be taken to be

Bock has at least raised a question of fact as to the enforceability of the guarantees. *See Ernest Bock*, 2021 WL 4771306, at *8 (recognizing "material factual disputes" as to enforceability). If the guarantees are enforceable, Bock would be injured by any fraudulent efforts to shield the Steelmans' assets from Bock, which would again become a judgment creditor. Thus, Bock has sufficiently alleged an injury in fact at this stage of the litigation.

IV. *Colorado River*

A. Standard

"Generally, as between state and federal courts, the rule is that 'the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction.'" *Colorado River*, 424 U.S. at 817 (quoting *McLellan*, 217 U.S. at 282). However, the Supreme Court has identified several instances in which it is appropriate for a federal court to abstain from exercising its jurisdiction. *See, e.g., id.* at 813–17 (discussing traditional abstention doctrines). As relevant here, in *Colorado River*, the Supreme Court recognized that in "exceptional circumstances," *id.* at 813, "considerations of '[w]ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation'" can support a stay of federal litigation in favor of parallel state proceedings, *id.* at 817 (alteration in original) (quoting

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true." *Lujan*, 504 U.S. at 561 (citation omitted) (quoting Fed. R. Civ. P. 56(e)).

Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co., 342 U.S. 180, 183 (1952)).

The Court was careful to distinguish *Colorado River* stays from traditional abstention doctrines. While traditional forms of abstention rest on "considerations of proper constitutional adjudication and regard for federal-state relations," *Colorado River* stays are based on administrative concerns and prioritize efficient "disposition of litigation" through the wise deployment of "judicial resources," *id*. (quoting *Kerotest Mfg.*, 342 U.S. at 183).[11] Following this distinction, we have recognized that "*Colorado River* is not an abstention doctrine, though it shares the qualities of one." *United States v. State Water Res. Control Bd.,* 988 F.3d 1194, 1202 (9th Cir. 2021); *see also Nakash v. Marciano*, 882 F.2d 1411, 1415 & n.5 (9th Cir. 1989) (citation omitted)

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[11] *See also Moses Cone*, 460 U.S. at 14–15 (distinguishing *Colorado River* from traditional abstention doctrines, which rest on "considerations of state-federal comity or on avoidance of constitutional decisions"). We note that scholars are divided as to whether a distinction between federalism and administration is a sensible basis for delineating forms of federal abstention. *Compare* James C. Rehnquist, *Taking Comity Seriously: How to Neutralize the Abstention Doctrine*, 46 Stan. L. Rev. 1049, 1094 (1994) (the "dichotomy between administration and federalism wholly overlooks the friction that inheres in duplication [of state and federal proceedings] itself"), *with* Martin H. Redish, *Intersystemic Redundancy and Federal Court Power: Proposing a Zero Tolerance Solution to the Duplicative Litigation Problem*, 75 Notre Dame L. Rev. 1347, 1374 (2000) ("[D]uplicative litigation is wasteful, burdensome, inefficient, and often harassing . . . . No consideration of litigant choice or judicial federalism should be allowed to outweigh this overriding interest.").

("Although [*Colorado River* is] commonly referred to as an abstention doctrine, the Supreme Court has flatly rejected this categorization.").

No matter how the *Colorado River* doctrine is formally characterized, however, one principle is clear: a stay of federal litigation in favor of state court proceedings "is the exception, not the rule." *Colorado River*, 424 U.S. at 813. "Only the clearest of justifications will warrant" a stay, *id*. at 819, and the circumstances justifying a stay are "exceedingly rare," *Smith*, 418 F.3d at 1033.

This court weighs eight factors to determine whether a *Colorado River* stay is justified:

> (1) which court first assumed jurisdiction over any property at stake; (2) the inconvenience of the federal forum; (3) the desire to avoid piecemeal litigation; (4) the order in which the forums obtained jurisdiction; (5) whether federal law or state law provides the rule of decision on the merits; (6) whether the state court proceedings can adequately protect the rights of the federal litigants; (7) the desire to avoid forum shopping; and (8) whether the state court proceedings will resolve all issues before the federal court.

R.R. Street, 656 F.3d at 978–79 (citing *Holder*, 305 F.3d at 870). "The factors are not a 'mechanical checklist.' We apply the factors 'in a pragmatic, flexible manner with a view to the realities of the case at hand. The weight to be given to any one factor may vary greatly from case to case.'" *State Water Res. Control Bd.*, 988 F.3d at 1203 (citations omitted) (quoting *Moses Cone*,

460 U.S. at 16, 21). "Some factors may not apply in some cases," but in other cases, "a single factor may decide whether a stay is permissible." *Id*. (cleaned up). "The underlying principle guiding this review is a strong presumption *against* federal abstention." *Seneca*, 862 F.3d at 842 (emphasis added). "Any doubt as to whether a factor exists should be resolved against a stay, not in favor of one." *Travelers Indem. Co. v. Madonna*, 914 F.2d 1364, 1369 (9th Cir. 1990).

Our first task is to review de novo whether, in light of the eight factors enumerated above, the facts here "conform to the requirements for a *Colorado River* stay." *Seneca*, 862 F.3d. at 840 (quoting *Smith*, 418 F.3d at 1032). Here, the district court concluded that factors three (piecemeal litigation), four (order of obtaining jurisdiction), and eight (parallelism) "militate decisively in favor of abstention." The court weighed factor seven (forum-shopping) "slightly in favor of retaining federal jurisdiction," and concluded that all other factors were "neutral."

B. Piecemeal Litigation & Order of Obtaining Jurisdiction

We agree that the piecemeal litigation and order of jurisdiction factors support a stay.[12] Allowing both the

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[12] We also agree that factors one, two, five, six, and seven are neutral or inconsequential. Neither the federal nor the state court has exercised jurisdiction over property, and there is no obvious forum shopping or reason to suspect that either court is incapable of fairly adjudicating the issues before it. There is also no indication that the federal forum is inconvenient. And while "[t]he presence of federal-law issues must always be a major

New Jersey state action and Nevada federal suit to proceed simultaneously will duplicate judicial efforts to resolve the common question of whether the Steelmans' personal guarantees are enforceable. And there is a risk that the courts will reach different results.[13] Accordingly, parallel proceedings could waste judicial resources and cause confusion in the continuing disputes between the parties. *See R.R. Street*, 656 F.3d at 979–80 (identifying duplication of efforts and possibility of differing results as the primary concerns of the piecemeal litigation factor).[14]

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consideration weighing *against* surrender'" of federal jurisdiction, *Moses Cone*, 460 U.S. at 26 (emphasis added), the existence of a common threshold issue of New Jersey state law in both the state and federal proceedings renders factor five largely irrelevant.

[13] We acknowledge that the decision of the New Jersey court could have preclusive effect in federal court. But if the New Jersey courts ultimately determine that the Steelmans' guarantees are enforceable, additional federal litigation will be required to determine liability for fraudulent transfer whether or not the state court's decision is preclusive. *See Intel Corp. v. Advanced Micro Devices, Inc.*, 12 F.3d 908, 913 & n.5 (9th Cir. 1993). Accordingly, preclusion doctrines do not eliminate the risk of continued litigation in federal court.

[14] Some of our cases have noted that the mere existence of piecemeal litigation is not sufficient on its own to warrant a stay. *See, e.g., Seneca*, 862 F.3d at 842–43 ("A general preference for avoiding piecemeal litigation is insufficient to warrant abstention . . . . Instead, there must be exceptional circumstances present that demonstrate that piecemeal litigation would be particularly problematic.").

Factor four requires us to consider "the order in which the [state and federal] forums obtained jurisdiction." *Id*. at 978. But under this factor, "courts are instructed not simply to compare filing dates, but to analyze the progress made in each case." *Seneca*, 862 F.3d at 843. Here, New Jersey courts have issued not one, but two (differing) reasoned opinions on the common issue of the enforceability of the Steelmans' guarantees. *See Ernest Bock*, 2021 WL 4771306, at *2. Most recently, the Appellate Division held that material factual disputes precluded summary judgment for Bock, at least without further discovery. *Id*. at *5–9. By contrast, the federal district court has not yet even entertained a summary judgment motion on the issue. Thus, the New Jersey courts have made more progress on resolving the common legal issue in this case.

C. Parallelism

We do not agree with the district court that the parallelism factor supports a stay. To the contrary, we find that because the federal and state proceedings are not sufficiently parallel, a *Colorado River* stay may not issue.

Parallelism is a threshold requirement for a *Colorado River* stay:

> When a district court decides to dismiss or stay under *Colorado River*, it presumably concludes that the parallel state-court litigation will be an adequate vehicle for the complete and prompt resolution of the issues between the parties. If there is any substantial doubt as to this, it would be a serious abuse of discretion to grant the stay

> or dismissal at all. Thus, the decision to invoke *Colorado River* necessarily contemplates that the federal court will have nothing further to do in resolving any substantive part of the case, whether it stays or dismisses.

Moses Cone, 460 U.S. at 28 (citations omitted). The Court reiterated that "a district court normally would expect the order granting the [*Colorado River*] stay to settle the matter for all time." *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 277 (1988). "[T]he granting of a *Colorado River* [stay] necessarily implies an expectation that the state court will resolve the dispute." *Id*. at 278. Applying these principles, we have recognized that "[p]arallelism is necessary but not sufficient to counsel in favor of abstention." *Seneca*, 862 F.3d at 845. But "exact parallelism . . . is not required. It is enough if the two proceedings are 'substantially similar.'" *Nakash*, 882 F.2d at 1416 (citations omitted).

Here, the question we face is whether state and federal proceedings are sufficiently parallel when the state court proceedings will fully resolve the federal case *only if* the state court rules in one of two ways. As discussed above, if the Steelmans' guarantees are *not* enforceable, then the federal claims are completely barred, as there would be no New Jersey judgment for Bock, and thus no fraudulent transfer of assets to avoid that non-existent judgment.[15] But if the guarantees *are*

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[15] We recognize that the district court may have authority to grant injunctive or other relief to prevent the fraudulent transfer of assets in anticipation of a *potential* judgment. But if either the district court or New Jersey courts determine that the

enforceable, the federal court must proceed to determine whether Defendants fraudulently transferred assets to avoid paying Bock on the valid guarantees.

We recognize that there is some tension in our decisions under such circumstances. In *Nakash*, we affirmed a *Colorado River* stay in a dispute between two competing business families, the Nakashes and the Marcianos. 882 F.2d at 1412–13. The Marcianos sued the Nakashes in California state court, bringing a litany of claims. Although the Nakashes filed a cross-complaint in state court, they ultimately dismissed it and brought an action in federal court instead, seeking to enjoin further state proceedings. *Id*.[16] We affirmed a *Colorado River* stay of the federal case, even after acknowledging that "[t]he state action focuses on the Nakash[es'] wrongdoing while their [federal] complaint alleges wrongdoing by the Marcianos." *Id*. at 1416; *see also Montanore Mins. Corp. v. Bakie*, 867 F.3d 1160, 1170 (9th Cir. 2017) (citations omitted) ("In *Nakash* . . . the suits were sufficiently parallel because they concerned the same relevant conduct and named the same pertinent parties. The parallelism requirement was met even though additional parties were named in the state suit, the federal suit included additional claims, and the suits arguably focused on different aspects of the dispute.").

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guarantees are unenforceable, then Bock's federal court claims necessarily fail.

[16] The Nakashes withdrew their cross-complaint in state court on the same day they filed their federal complaint. *Nakash*, 882 F.2d at 1413.

Thus, we affirmed a *Colorado River* stay even after implicitly recognizing that the state court proceedings might not fully resolve the federal case.

Moreover, in *Bakie*, we reversed the district court's denial of a *Colorado River* stay when the parties contested the validity of mining claims owned by the defendant. 867 F.3d at 1163. In a Montana state court lawsuit, a mining company sought a declaratory judgment that the defendant's claims were invalid, which would have cleared the way for the company to mine the land. *Id*. But after the state court upheld the validity of the claims in a non-final interlocutory order, *id*. at 1164, the company sued in federal court, "seeking to condemn [the land] for public use easements and rights of way," allowing it to mine the land notwithstanding defendant's valid claims, *id*. at 1163. The district court denied defendants' motion to stay the action pending final resolution of the Montana state court proceedings, finding "that the state court proceedings were not sufficiently parallel to the federal" condemnation action. *Id*. at 1165. Instead, the district court condemned the land and awarded the company a public easement. *Id*.

We reversed, holding that the district court abused its discretion by denying a *Colorado River* stay. *Id*. at 1163. When addressing the parallelism requirement, we relied heavily on *Nakash*'s instruction that "exact parallelism" is not required. *Id*. at 1170 (quoting *Nakash*, 882 F.2d at 1416). We explained that the federal condemnation and state validity proceedings were sufficiently parallel "because they both concern rights to the [same land], name the same pertinent

parties, and attempt to accomplish the same goal (namely extinguishing the Defendants' rights to the [land])." *Id*. Although we did not explicitly make this determination in *Bakie*, it appears at least possible that if the Montana court entered a final order affirming the validity of defendant's claim, the district court would still have had to make its condemnation determination. Thus it is possible that, as here, the state court case would have fully resolved the federal litigation only if the state court reached one of two possible outcomes. Both *Nakash* and *Bakie* then, could be read as suggesting that a *Colorado River* stay may issue even if parallel state proceedings may not fully resolve a federal case.

However, in another line of cases, we have expressly held that a "substantial doubt" about whether continued federal litigation would be necessary after resolution of state proceedings *precludes* a stay. *See Intel Corp. v. Advanced Micro Devices, Inc.,* 12 F.3d 908, 912–13 (9th Cir. 1993). In *Intel*, the parties were engaged in a copyright infringement dispute over intellectual property. *Id*. at 910–12. The district court stayed federal proceedings under *Colorado River* pending resolution of a state court action reviewing the propriety of an arbitrator's award of a license to use the disputed intellectual property. *Id*. We reversed, explaining that the "concurrent state court proceedings w[ould] resolve all the issues in [the federal case] *only* if the arbitration award [was] confirmed." *Id*. at 913 & n.5. "In contrast, if the state court overturn[ed] the arbitration award, then the case w[ould] return to federal court for the adjudication of the underlying

copyright claims." *Id*. at 913 & n.6. Applying *Moses Cone*, we found a "substantial doubt as to whether the state proceedings w[ould] resolve the federal action." *Id*. We found such a "substantial doubt" to be "dispositive," concluding that it was "sufficient to preclude a *Colorado River* stay." *Id*. Thus, we found that where one of two possible state court rulings would necessitate additional litigation in a parallel federal case, a *Colorado River* stay could not issue.

Although few of our subsequent cases appear to confront these exact factual circumstances, we have repeatedly affirmed *Intel*'s logic. *See, e.g., State Water Res. Control Bd.*, 988 F.3d at 1204 ("We have repeatedly emphasized that a *Colorado River* stay is inappropriate when the state court proceedings will not resolve the entire case before the federal court."); *Holder*, 305 F.3d at 859 ("In this Circuit, the narrow *Colorado River* doctrine requires that the pending state court proceeding resolve all issues in the federal suit."); *Smith*, 418 F.3d at 1033 (same); *cf. R.R. Street*, 656 F.3d at 982 (affirming *Colorado River* stay when all parties agreed that a state case would "resolve all issues raised in the Federal Action").[17]

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[17] We acknowledge that when a case is "controlled by contradictory precedents . . . the appropriate mechanism for resolving an irreconcilable conflict is . . . [a] call for en banc review." *Atonio v. Wards Cove Packing Co., Inc.*, 810 F.2d 1477, 1478–79 (9th Cir. 1987) (en banc). But "[i]t is our obligation, nonetheless, to reconcile [conflicting precedents], if possible, so as to avoid an intracircuit conflict necessitating en banc consideration." *Edwards v. Marin Park, Inc.*, 356 F.3d 1058, 1065 (9th Cir. 2004) (citation omitted).

Other circuits have also adopted disparate approaches. For example, the Third Circuit has explained that:

> As the Supreme Court pointed out in *Moses H. Cone*, the *Colorado River* doctrine applies only if there is parallel state court litigation involving the same parties and issues that will completely and finally resolve the issues between the parties . . . . In other words, because of the requirement of a parallel state court proceeding, stays entered under the authority of *Colorado River* will normally have the effect of putting the plaintiff 'effectively out of federal court' and surrendering jurisdiction to the state tribunal.

Marcus v. Abington, 38 F.3d 1367, 1371–72 (3d Cir. 1994) (citations omitted).[18] In another case, a

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We cannot say that the tension between *Intel*, *Nakash*, *Bakie*, and their progeny is irreconcilable as applied here. First, unlike this case, it is not clear that the state court proceedings in *Bakie* and *Nakash* could result only in binary outcomes, one of which would require federal litigation. Second, the panels in *Nakash* and *Bakie* did not find a "substantial doubt" that state proceedings would fail to resolve all federal issues. Because we find such a "substantial doubt" in this case, *Moses Cone* precludes a stay. *See Intel*, 12 F.3d at 912–13. Finally, because *Colorado River* requires balancing several non-exclusive factors, *Nakash* and *Bak*ie would not control the outcome of this case even if we found that the parallelism factor did not preclude a stay. Thus, any tension between our precedents does not definitively control the outcome of this case.

[18] In *Marcus*, the Third Circuit ultimately dismissed the appeal for lack of jurisdiction after concluding that the district

Colorado River dismissal was improper when a party "may at some point still be entitled to a federal forum for its diversity action" if the state court ruled in a certain way. *Ingersoll-Rand Fin. Corp. v. Callison*, 844 F.2d 133, 134 (3d Cir. 1988).[19]

But the Seventh Circuit is more permissive. In one recent case, that court summarized two prior decisions in which a "plaintiff in concurrent state and federal actions raised claims in the federal court that would have been fully resolved if the state court ruled one way, but only partially addressed if the state court ruled in the other direction. Nevertheless, [the Seventh Circuit] held that the state and federal actions were parallel" such that a *Colorado River* stay could issue. *Loughran v. Wells Fargo Bank, N.A.*, 2 F.4th 640, 649 (7th Cir. 2021) (discussing *Freed v. JP Morgan Chase Bank, N.A.*, 756 F.3d 1013 (7th Cir. 2014) and *Lumen Constr., Inc. v. Brant Constr., Co.*, 780 F.2d 691 (7th

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court's stay merely "delay[ed] the federal adjudication" rather than "deprived the federal plaintiff of a federal adjudication to which he or she may be entitled." 38 F.3d at 1372. But that case is procedurally distinct from this one because the court previously explained that federal litigation would remain *no matter* how the state court ruled. *See id.* at 1370–71 ("Once the stay is lifted, the state court's disposition of the criminal proceeding will have a negligible impact on the subsequent federal adjudication . . . . [N]either side will be foreclosed by collateral estoppel with respect to the federal issues.").

[19] The *Callison* court ultimately agreed that a *Colorado River* stay, rather than dismissal, was proper, but only because Congress evinced a clear policy preference to litigate certain parallel securities law issues in state court. 844 F.2d at 136–37.

Cir. 1985)). The court declined to "read *Moses Cone* as establishing rigid criteria for stay orders." *Id*. at 646.

In the context of this case, we conclude that the *Intel* and the Third Circuit approach is most consistent with the Supreme Court's instruction in *Moses Cone* that "it would be a serious abuse of discretion to grant [a *Colorado River*] stay" if there is "any substantial doubt" as to whether "parallel state-court litigation will be an adequate vehicle for the *complete* and prompt resolution of the issues between the parties." 460 U.S. at 28 (emphasis added). Indeed, the Court explained that a *Colorado River* stay "necessarily contemplates that the federal court will have *nothing further to do* in resolving any substantive part of the case." *Id*.; *see also Gulfstream Aerospace Corp.*, 485 U.S. at 278 ("[T]he granting of a *Colorado River* [stay] necessarily implies an expectation that the state court will resolve the dispute. . . ."). When one possible outcome of parallel state court proceedings is continued federal litigation, we find a "substantial doubt" that the state court action will provide a "complete and prompt resolution of the issues," because the federal court may well have something "further to do." *Moses Cone*, 460 U.S. at 28.

Here, because additional federal litigation would be necessary if the New Jersey courts enforce the Steelmans' guarantees, we have a "substantial doubt as to whether the state proceedings will resolve the federal action." *Intel*, 12 F.3d at 913 (relying on *Moses Cone*, 460 U.S. at 28). As both the Supreme Court and our

court have held, such a doubt "precludes the granting of a stay" under *Colorado River*. *Id*.[20]

Although we are sympathetic to the prudential concerns that the district court weighed in favor of a stay,[21] we conclude that the federal and state

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[20] We note that our holding is consistent with the general rule that "exact parallelism . . . is not required." *See Nakash*, 882 F.2d at 1416. The issues and parties in parallel state proceedings need not be identical so long as they are "substantially similar." *Id*. For example, a *Colorado River* stay could still be warranted if parallel state proceedings involve additional parties or claims, as long as the state court will necessarily resolve all issues between parties in the federal action. *See R.R. Street*, 656 F.3d at 982–83 (finding sufficient parallelism even where parallel cases did not involve identical parties because the parties in the federal suit agreed that the state action would "resolve all issues raised in the Federal Action"). We simply find a substantial doubt in this case that New Jersey state proceedings will completely resolve the federal action.

[21] At oral argument, counsel discussed alternatives to a stay that might resolve some of these concerns. *See* Oral Arg. at 8:20–9:05, 21:50– 26:30. For example: (1) Defendants could post a bond to ameliorate concerns about asset transfers; (2) the district court might have authority to enjoin future asset transfers; or (3) the parties could stipulate to jurisdiction and venue over the federal claims in New Jersey state court, ensuring resolution of all disputes in one court. On remand, we encourage the parties and the district court to explore these and other alternatives that could resolve or ameliorate the administrative concerns identified by the district court. However, we find that these concerns are not sufficient to set aside the district court's "virtually unflagging obligation" to exercise jurisdiction. *Colorado River*, 424 U.S. at 817.

proceedings are not sufficiently parallel to justify abdication of federal jurisdiction.[22]

V. Docket Management Stay

Finally, Defendants argue that even if the *Colorado River* stay was improper, the district court had the inherent authority to stay federal proceedings pursuant to its docket management powers. The Supreme Court first recognized this authority in *Landis v. North American Co.*, 299 U.S. 248 (1936), explaining that "the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Id*. at 254. We have since identified three non-exclusive factors courts must weigh when deciding whether to issue a docket management stay: (1) "the possible damage which may result from the granting of a stay"; (2) "the hardship or inequity which a party may suffer in being required to go forward"; and (3) "the orderly course of justice measured in terms of the simplifying or complicating of issues, proof, and questions of law." *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1110 (9th Cir. 2005) (quoting *CMAX, Inc. v. Hall*, 300 F.2d 265, 268 (9th Cir. 1962)).

Here, the parties contest whether these factors support a stay. But as the district court recognized, "because this case involves simultaneous and related federal and state actions, the proper analysis is under

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[22] Because we conclude that the district court's error in applying the *Colorado River* factors is dispositive, we need not proceed to abuse of discretion review. *See Seneca*, 862 F.3d at 840.

Colorado River, not *Landis*." We have held that "[a] district court may, in its discretion, stay or dismiss a federal case in favor of related state proceedings" in only two circumstances: "(1) when an action seeks only declaratory relief, or (2) when exceptional circumstances exist [under *Colorado River*]." *Scotts Co. LLC v. Seeds, Inc.*, 688 F.3d 1154, 1158 (9th Cir. 2012) (internal citations omitted). We suggested that to expand the scope of permissible stays beyond these contexts would "undermin[e] the *Colorado River* doctrine." *Id*.

Following this principle, we join other circuits to expressly hold that the *Colorado River* factors control whether a stay can issue in favor of parallel state proceedings. *See, e.g., Cottrell v. Duke*, 737 F.3d 1238, 1249 (8th Cir. 2013) ("To permit a district court to rely solely on its inherent power to control its docket, when the effect of the district court's order is to accomplish the same result contemplated by *Colorado River*, would allow a court to bypass the rigorous test set out by the Supreme Court."); *Evans Transp. Co. v. Scullin Steel Co.*, 693 F.2d 715, 717 (7th Cir. 1982) ("[I]t is not enough, to justify abstention, that a failure to stay the federal suit may result in judicial diseconomy—in having two active lawsuits instead of one.").[23] A docket management stay may not issue in favor of parallel state proceedings if the *Colorado River* factors do not

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[23] *See also AIIRAM LLC v. KB Home*, No. 19-CV-00269-LHK, 2019 WL 3779185, at *6 (N.D. Cal. Aug. 12, 2019) (reaching the same result but noting that "the Ninth Circuit has not spoken to th[is] precise question").

support a stay. *See Scotts Co. LLC*, 688 F.3d at 1158. Because *Colorado River* does not support a stay, neither can the district court's docket management authority.

VI. Conclusion

Following the Supreme Court's instruction in *Moses Cone*, we cannot uphold a stay as the New Jersey proceeding may not fully resolve the issues pending before the district court.

REVERSED and **REMANDED**.[24]

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[24] The parties shall bear their own costs on appeal.

APPENDIX B

United States District Court
District of Nevada

Ernest Bock, LLC

Plaintiff,

v.

Paul Steelman, et al.

Defendants.

Case No.: 2:19-cv-01065-JAD-EJY

Order Staying Proceedings under *Colorado River* and Denying without Prejudice Motions to Dismiss

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[ECF Nos. 171, 201, 202, 210, 211, 214, 225]

Ernest Bock, LLC sues the Steelman family, as individuals and trustees, for fraudulently transferring assets into various trusts in an effort to prevent Bock from recovering on an $11 million New Jersey state-court judgment it obtained against them. Last year, I granted Bock leave to file a fourth-amended complaint to add new defendants and new claims, including violations of the federal Racketeer Influenced and Corrupt Organizations (RICO) Act. A few months ago, a New Jersey appellate court vacated the judgment and damage award that undergird all of Bock's claims in this action, and the parties have begun to relitigate

that issue there. Numerous defendants now move to dismiss the complaint, and still others move to stay this case pending the final outcome of those New Jersey proceedings. Bock countermoves to condition any stay on the posting of a bond three times the value of the now-vacated state-court judgment. Because I find that exceptional circumstances warrant a stay of this action under the abstention doctrine articulated by the Supreme Court in *Colorado River Water Conservation District v. United States*,[1] I stay this case, deny the countermotion, and deny without prejudice all pending motions to dismiss.

Discussion[2]

"In exceptional circumstances, a federal court may decline to exercise its 'virtually unflagging obligation' to exercise federal jurisdiction, in deference to pending,

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[1] *Colorado River Water Conservation Dist. v. United States,* 424 U.S. 800 (1976).

[2] Defendants' requests for a stay are premised on a parallel doctrine the Supreme Court recognized in *Landis v. North American Company*, which provides that district courts have the inherent power to stay cases to control their dockets and promote the efficient use of judicial resources. *See* ECF No. 201; ECF No. 210; *Landis v. N. Am. Co.*, 299 U.S. 248, 254–55 (1936). But because this case involves simultaneous and related federal and state actions, the proper analysis is under *Colorado River*, not *Landis*. *See Nakash v. Marciano*, 882 F.2d 1411, 1416–17 (9th Cir. 1989) (citations omitted). Because Bock raised *Colorado River* in its response brief to the stay motions and defendants replied to its arguments, I find that the issue has been sufficiently briefed.

parallel state proceedings."[3] Such a decision "rest[s] on considerations of wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation."[4] The Ninth Circuit directs courts to consider eight factors when deciding whether to stay or dismiss under *Colorado River*:

> (1) which court first assumed jurisdiction over any property at stake; (2) the inconvenience of the federal forum; (3) the desire to avoid piecemeal litigation; (4) the order in which the forums obtained jurisdiction; (5) whether federal law or state law provides the rule of decision on the merits; (6) whether the state court proceedings can adequately protect the rights of the federal litigants; (7) the desire to avoid forum shopping; and (8) whether state court proceedings will resolve all issues before the federal court.[5]

The decision to abstain under *Colorado River* "does not rest on a mechanical checklist"; it instead requires "a careful balancing of the important factors as they apply in a given case, with the balance heavily weighted in

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[3] *Montanore Mins. Corp. v. Bakie*, 867 F.3d 1160, 1165 (9th Cir. 2017) (quoting *Colorado River*, 424 U.S. at 817).

[4] *Colorado River*, 424 U.S. at 817 (cleaned up).

[5] *R.R. Street & Co. Inc. v. Transp. Ins. Co.*, 656 F.3d 966, 978–79 (9th Cir. 2011).

favor of the exercise of jurisdiction."[6] On balance, these factors weigh in favor of staying, though not dismissing, Bock's federal suit during the pendency of its state suit.

Factor one is generally "dispositive" and focuses on whether the state or federal court has custody over any property at issue.[7] In this case, this factor is neutral. Especially absent the reinstatement of the now-vacated state-court damages award, neither this court nor the New Jersey state court has assumed jurisdiction over specific property. Bock is correct that its fraudulent-transfer claims in this action involve property,[8] but that is not enough to give this court custody over the property in dispute here. Rather, for it to be so, the claim must be brought under the court's *in rem* jurisdiction.[9] And although fraudulent transfer may implicate a property's ownership, it is an *in personam* claim against the alleged fraudster.[10]

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[6] *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 560 U.S. 1, 16 (1983).

[7] *40235 Wash. Street Corp. v. Lusardi*, 976 F.2d 587, 588 (9th Cir. 1992).

[8] ECF No. 225 at 12.

[9] *Colorado River*, 424 U.S. at 818 (citing *Donovan v. City of Dallas*, 377 U.S. 408, 412 (1964)).

[10] *See SuVicMon Dev., Inc. v. Morrison*, 991 F.3d 1213, 1222 (11th Cir. 2021) (a "fraudulent transfer action is not an execution proceeding" and "does not necessarily confer a property interest on the creditor; rather, any *in rem* effect of the action is a matter of" post-judgment remedies).

Factors two, five, and six are also neutral. The parties have been litigating the claims in the federal and state actions in both New Jersey and Nevada for years.[11] While Bock's federal claims entirely depend on the resolution of the state claims, the claims in each case are largely distinct from one another, and the relevant witnesses and evidence for each are present in the respective state. Federal and Nevada law provide the rules of decision for Bock's claims in this case,[12] but those considerations are irrelevant without the state court's damage award, which is premised on New Jersey law.[13] And the state-court proceedings needn't fully protect Bock's rights to federal relief, because the claims aren't identical; and if the New Jersey action goes Bock's way, this court will reassume jurisdiction and resolve its remaining claims.

While factor seven weighs slightly in favor of retaining federal jurisdiction, factors three, four, and eight militate decisively in favor of abstention. The New Jersey case was instituted first[14]—indeed, without it, this case could not exist. And the threat of piecemeal litigation looms large over such a complicated case. Piecemeal litigation "occurs when different tribunals

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[11] The state-court case was filed in October 2015 and the federal-court case was filed in June 2019. *See* ECF No. 1; ECF No. 133 at ¶ 54.

[12] *See generally* ECF No. 133 at ¶¶ 93–783.

[13] *Id*. at ¶ 54.

[14] *See supra* note 11.

consider the same issue, thereby duplicating efforts and possibly reaching different results."[15] Bock's "state case has progressed far beyond [its federal] case"[16] and involves similar issues and claims. Should the New Jersey action result in the solidification of the status quo, with Bock lacking a state-court judgment upon which to base its federal claims, any progress made in this litigation in the interim will have been for naught. Given that possibility, the state-court proceedings could completely moot this case. Thus, "it would be highly inefficient to allow the federal litigation to proceed."[17]

In *Nakash v. Marciano*, the Ninth Circuit held that "exact parallelism" between the state and federal actions "is not required" to warrant abstention; "it is enough if the two proceedings are substantially similar."[18] When the "federal action is but a spin-off of more comprehensive state litigation," courts should be "particularly reluctant to find that the actions are not parallel."[19] Bock accurately points out that its federal

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[15] *Travelers Indem. Co. v. Madonna*, 914 F.2d 1364, 1369 (9th Cir. 1990) (cleaned up).

[16] *Nakash*, 882 F.2d at 1415; *see also Madonna*, 914 F.2d at 1369 (reasoning that a *Colorado River* stay may be appropriate where there is a "'vastly more comprehensive' state action that 23 can adjudicate the rights of many parties or the disposition of much property").

[17] *Nakash*, 882 F.2d at 1415.

[18] *Id*. at 1416 (cleaned up).

[19] *Id*. at 1417 (cleaned up).

claims in this court are distinct from those in the state court action,[20] but its federal claims arise from and turn entirely on whether the defendants owe it breach-of-contract damages. That issue is currently before the New Jersey Supreme Court in the form of a petition for certification,[21] and if that results in a denial or an eventual affirmance of the appellate court's vacatur, it may head to trial in state court. If it instead results in reversal, or that trial ends with a similar damage award, this court will have jurisdiction to decide the remaining disputes. Thus, holding these claims in abeyance pending state-court adjudication serves efficient and just judicial administration. So this case is stayed.

Bock requests that, if I grant a stay, I condition it on the Steelmans posting a $35 million bond with the court. Beyond "alleviat[ing] some" of the general insecurity Bock has about defendants' ability to pay the original New Jersey judgment and any judgment in its favor in this case,[22] such a bond would not serve a legitimate purpose, especially when the state-court judgment stands vacated. So Bock's countermotion is denied and no condition is imposed upon the stay.

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[20] ECF No. 225 at 14–15.

[21] ECF No. 201-3; ECF No. 222-3.

[22] ECF No. 225 at 24–25.

Conclusion

IT IS THEREFORE ORDERED that the defendants' motions to stay **[ECF Nos. 201, 210] are GRANTED** and **this case is STAYED**. Once the New Jersey state-court proceedings have concluded, any party may move to lift this stay. Ernest Bock, LLC's countermotion for a condition on the stay **[ECF No. 225] is DENIED**.

IT IS FURTHER ORDERED that the pending motions to dismiss **[ECF Nos. 171, 202, 211, 214] are DENIED without prejudice** to their refiling within 20 days of the order lifting the stay. **The Clerk of the Court is directed to ADMINISTRATIVELY CLOSE this case**.

/s/ Jennifer A. Dorsey
U.S. District Judge Jennifer A. Dorsey
March 2, 2022

APPENDIX C

SUPERIOR COURT OF
NEW JERSEY APPELLATE DIVISION

DOCKET NO. A-0469-19

ERNEST BOCK, LLC,

Plaintiff-Respondent,

v.

PAUL STEELMAN and MARYANN STEELMAN,

Defendants-Appellants/Third-Party Plaintiffs,

v.

ANTHONY J. CATANOSO, CHRISTINE CATANOSO, CHARLES T. CATANOSO, JR., NINA CATANOSO, WILLIAM G. CATANOSO, TINA CATANOSO, EDWARD J. OLWELL, ROBERTA NEVIN, CAPE ENTERTAINMENT ASSOCIATES, LLC, THE ROCKET, LLC, HI TECH THRILLS, LLC, ATLANTIC PIER AMUSEMENTS, INC., and STEEL PIER ASSOCIATES, LLC,

Third-Party Defendants-Respondents.

Argued September 20, 2021
Decided October 13, 2021

Before Judges Sabatino, Mayer, and Natali.

On appeal from the Superior Court of New Jersey, Law Division, Atlantic County, Docket No. L-2294-15.

PER CURIAM

This appeal stems from an order granting summary judgment to a lender on commercial loan guaranties of approximately $12 million, and various other associated rulings of the trial court.

For the reasons that follow, we conclude summary judgment was prematurely granted before depositions of key witnesses and other pertinent discovery were completed. In addition, the trial court did not afford defendants a fair opportunity to litigate their contentions that the plaintiff lender breached the implied covenant of good faith and fair dealing. Specifically, defendants allege that the plaintiff lender engaged in transactions for its own benefit, which impeded the flow of revenues that might otherwise have been used to pay down the loan balances. Consistent with case law, including *National Westminster Bank N.J. v. Lomker*, we conclude the parties' guaranty agreements "do not expressly waive the defenses of bad faith . . . [.]" 277 N.J. Super. 491, 499 (App. Div. 1994). We likewise revive defendants' claims that the lender tortiously interfered with their reasonable expectations of economic advantage.

We consequently vacate the entry of summary judgment and remand for the completion of discovery, without prejudice to further substantive motion practice being pursued thereafter.

I.

The parties are surely familiar with the complicated factual and procedural background of this case, and

there is no need for this opinion to discuss those details comprehensively. In addition, we are mindful that discovery is ongoing and that additional or competing facts may emerge. We therefore precede our analysis with the following abbreviated synopsis.

Defendant Paul Steelman, a developer from Las Vegas, was a member of Steel Pier Associates, LLC ("SPA"), an entity that owned real estate known as the Steel Pier ("the Pier") on the Atlantic City boardwalk.

Steelman and his wife Maryann (the "Steelmans") guaranteed two loans on behalf of SPA. The loans were extended to SPA and a related entity, Cape Entertainment Associates, LLC ("Cape"), by plaintiff Ernest Bock, LLC ("Bock"), a company which did construction work on the Pier.[1] The Steelmans had non-controlling ownership interests in both SPA and Cape.

SPA defaulted on the loans. Bock did not pursue foreclosure on the property or sue SPA. Instead, Bock sought payment from the Steelmans as guarantors on the loans. After the Steelmans declined to pay the amounts due, Bock filed a complaint against them in October 2015 for breach of the guaranty agreements.

In May 2016, the Steelmans filed an amended answer and affirmative defenses to Bock's complaint. In that same pleading, the Steelmans asserted a counterclaim against Bock, contending Bock breached the implied

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[1] We shall refer to the LLC as "Bock", unless we specify that we are referring to Thomas Bock, the President of the LLC.

covenant of good faith and fair dealing and also tortiously interfered with their prospective economic advantage. The Steelmans simultaneously filed a third-party complaint against Anthony T. Catanoso, the managing principal of SPA, and other parties,[2] making parallel allegations of engaging in improper conduct with Bock. Anthony Catanoso, a number of his relatives (collectively "the Catanosos"), and several other third-party defendants are also co-guarantors of the loans.

The May 2016 version of the counterclaim and third-party complaint focused upon an amusement ride on the boardwalk known as the Wheel. Defendants charged that "[t]he Catanosos have denied Steelman the opportunity to share in the financial upside projected to be derived from the Wheel, opting instead to take the business opportunity from the Primary Owners of [the] Pier and enter into a secret agreement with Bock for development of the Wheel on adjacent land . . . [.]" That conduct, defendants alleged, "depriv[ed] the Primary Owners and Steelman the opportunity to gain from the potential financial upside projected to be realized from the Wheel."

Over a year later, in August 2017, Bock moved for summary judgment against defendants, seeking a final judgment on the outstanding loans they had

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[2] The other third-party defendants are Christine Catanoso, Charles T. Catanoso, Jr., Nina Catanoso, William G. Catanoso, Tina Catanoso, Edward J. Olwell, Roberta Nevin, Cape, The Rocket, L.L.C., High Tech Thrills, L.L.C., Atlantic Pier Amusements, Inc., and SPA. None of them are participating in this appeal.

co-guaranteed. Defendants opposed the motion and also cross-moved for various forms of relief. In particular, defendants moved for leave to amend their counterclaim and third-party complaint by amplifying their allegations of bad faith, unfair dealing, and tortious interference. Those amplified allegations specified improper conduct in connection with: project funding in August 2011 and September 2011; loans from the Casino Redevelopment Authority ("CRDA") in 2012 and 2014; the Wheel; and alleged mismanagement of SPA that caused it to become undercapitalized. Again, defendants asserted that Bock, aided by the third-party defendants, breached the covenant of good faith and fair dealing. These allegations continued a theme already previewed in defendants' counterclaim over a year earlier, and surely were no surprise to Bock.

Defendants further alleged in their proposed amended pleading that Bock induced or conspired with the Catanosos "to enter into an undisclosed agreement regarding the purchase and/or development of the Wheel[,] [and] induc[ed] SPA to make loans in the amount of $3.2 million" to Domeinac, LLC, an entity controlled by Anthony Catanoso, "when those funds could have and should have been used to satisfy the Bock Funding" to SPA.

In addition, defendants alleged Bock directed other transactions that were "designed to impair the Companies' ability to borrow without Tom Bock's consent and/or involvement[.]" They alleged Bock diverted revenues that could have been used to repay the SPA loans, and instead were used to fund other ventures of his or entities under his control "for the

benefit of DOMEINAC's development of the Wheel." According to defendants, these transactions and activities tortiously interfered with their prospective economic advantage.

In the third count of the proposed amended counterclaim, defendants requested that the court "equitably recharacterize" the SPA loans as a capital contribution to the enterprise. Defendants also sought leave to plead claims (1) for indemnification and contribution, and (2) alleging the fraudulent transfer of funds. Defendants further sought the appointment of a receiver or a statutory custodian for SPA and Cape.

In opposing summary judgment on the guaranties, defendants expressly argued under *Rule* 4:46 that such final relief in Bock's favor was inappropriate because discovery was incomplete. Defendants maintained in this regard that Bock had not turned over certain relevant financial records that could aid them in opposing summary judgment. They further urged they needed the depositions of Thomas Bock and the Catanosos before the summary judgment motion could be fairly adjudicated.

After hearing oral argument, the trial court rejected defendants' arguments and granted summary judgment in favor of Bock on the unpaid notes. The court issued two companion written opinions conveying its reasons on September 17, 2018.

The trial court was unpersuaded that the loans should be recharacterized as capital contributions. Although not explicitly saying so in its written opinions, the court appeared to adopt Bock's position that the

terms of the guaranty agreements permitted Bock to pursue defendants as guarantors of the loans without first seeking payment from the borrowers or the other co- guarantors. The court also seemingly agreed with Bock that, under the language of the guaranties, defendants waived the right to object to the lender foregoing or impairing the collateral on the notes.

The court did not allow defendants leave to amend their counterclaims. In this regard, the court stated Bock "has sufficiently established that there is no genuine issue of material fact for the above stated reasons in [Bock's] Reply[.]" As the court wrote, the counterclaims for breach of the implied covenant of good faith and fair dealing and tortious interference must be dismissed "because the [c]ourt finds that the money was a loan rather than equitable funding." The court added that the breach of implied covenant claims were not tenable because the loan notes were from SPA and Cape to Bock, and consequently "there are no legal obligations between the individual members of the two entities to each other individually."

Pursuant to *Rule* 4:42-2 and *Rule* 4:59, the court certified its summary judgment order as final for purposes of appeal, even though other issues in the case (such as the third-party complaint) had yet to be adjudicated. The amount of the final judgment, inclusive of interest as of the date of its entry, was $11,831,365.32.[3]

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[3] We presume post-judgment interest since that time has substantially increased the present amount due.

Defendants moved for reconsideration, which the court denied in another set of written opinions on March 19, 2019. The court found it had already sufficiently addressed and dispensed with defendants' arguments, and there were no grounds for revisiting or altering its decisions.

Defendants now appeal. A central aspect of their arguments is that the trial court prematurely granted summary judgment before discovery was completed. In addition, they argue the trial court's reasoning was flawed, particularly with respect to the dismissal of their claims of breach of the implied covenant and tortious interference.

Bock, meanwhile, first argues at length in its brief that defendants' appeal is procedurally defective for a number of reasons. As to the merits, Bock maintains there are ample grounds to uphold the entry of summary judgment against defendants as co-guarantors of the loans.

Among other things, Bock alleges defendants waived through the guaranty agreements any right to complain that Bock elected not to sue the primary obligors and pursue relief from them instead. Bock emphasizes that the guaranty documents contain a waiver of the right to assert impairment of the collateral for the loan, i.e., the Pier. Moreover, Bock contends that since SPA received the promised benefits of the loan agreements in the form of the borrowed funds, there is no basis for relief under alternative theories of lender liability.

II.

Before we delve into the substance of the issues, we briefly address Bock's procedural arguments, none of which are persuasive.

In particular, Bock argues defendants' appeal was filed too late and should be dismissed as untimely. Alternatively, Bock asserts that defendants have improperly challenged interlocutory orders that were not sufficiently identified in their Notice of Appeal and appellate Case Information Statement ("CIS").[4] We reject those contentions.

As we noted earlier, the trial court certified the summary judgment order on the loans as final under the special jurisdictional provision in *Rule* 4:42-2.

That Rule provides:

> If an order would be subject to process to enforce a judgment pursuant to *R*. 4:59 if it were final and if the trial court certifies that there is no just reason for delay of such enforcement, the trial court may direct the entry of final judgment upon fewer than all the claims as to all parties, but only in the following circumstances: (1) upon a complete adjudication of a separate claim; or (2) upon complete adjudication of all the rights and

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[4] Bock did not file a cross-appeal, but reiterates arguments made in its January 2020 motion to dismiss the appeal and strike the amended CIS. We denied that motion, and continue to maintain that disposition here.

> liabilities asserted in the litigation as to any party; or (3) where a partial summary judgment or other order for payment of part of a claim is awarded.
>
> [*R*. 4:42-2.]

To be certified as final under *Rule* 4:42-2, an order must fall within one of the Rule's sub-parts and must also be subject to process to enforce a judgment pursuant to *Rule* 4:59. *Janicky v. Point Bay Fuel, Inc.*, 396 N.J. Super. 545, 550 (App. Div. 2007) (citations omitted). *Rule* 4:59, in turn, requires a money judgment that is enforceable through ordinary collection procedures. *See Newstead Blrds., Inc. v. First Merch. Nat'l Bank*, 146 N.J. Super. 295, 296 (App. Div. 1977) (holding that a judgment or order will not "constitute a lien or be otherwise susceptible to execution unless *final and for a sum certain*[]") (emphasis added).

Here, the court certified as final its grant of summary judgment on the unpaid loans. That ruling constituted the adjudication of a separate claim pursuant to *Rule* 4:42-2, i.e., defendants' breach of the guaranty agreements. In addition, the money judgment—for a sum of nearly $12 million—was subject to enforcement pursuant to *Rule* 4:59. This is true even though defendants filed a third-party complaint against their co-guarantors, because according to the guaranty agreements, each signatory was jointly and severally liable. Thus, any determination the court eventually makes regarding the third-party complaint would presumably not affect defendants' own liability pursuant to the guaranty agreements.

We are satisfied the court's grant of summary judgment was properly certified as final and was appealable pursuant to *Rule* 4:42-2. The orders on appeal include the court's grant of summary judgment, the determination making that order final, and the denial of the motions for reconsideration of those orders.

Bock argues defendants are improperly going beyond that and appealing interlocutory orders, including: (1) the September 17, 2018 order granting summary judgment; (2) the September 17, 2018 order permitting Bock to amend its pleading to add a count for fraud, and denying defendants' request to amend their third-party complaint; (3) the March 19, 2019 order denying reconsideration of the grant of summary judgment and granting Bock's motion to enter final judgment; and (4) the March 19, 2019 order denying reconsideration of the court's denial of defendants' motion to amend their third- party complaint.

As we have already noted, the September 2018 order granting summary judgment and the March 2019 order denying reconsideration of the grant of summary judgment, making it final, are properly before us on appeal in compliance with *Rule* 4:42-2.

The trial court's decisions dismissing the counterclaim[5] and denying defendants' requests to

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[5] Part of the confusion here results from the fact that the same order that denied defendants' request to amend their third-party complaint does not mention the counterclaim. There is no written order that explicitly dismisses the counterclaim or

amend it, as well as its denial of leave to amend the third-party complaint are enmeshed with its decision to grant Bock summary judgment on the loan guaranties. As we will discuss, infra, if defendants prove that Bock or the third-party defendants improperly impeded the ability of the borrowers to pay the loan debt, that improper conduct might excuse or justify defendants' non-payment of the guaranties. The issues are so closely connected that the present appeal fairly and logically should encompass the rulings about the counterclaim and third-party complaint. And, as we noted above, we decline to rescind our previous order denying Bock's motion to strike appellants' amendment of the CIS form. Indeed, the original CIS form expressly mentions the counterclaim.

Bock further argues that defendants' appeal was untimely because it should have been filed within forty-five days after the entry of the court's final order of judgment on March 19, 2019. *See R*. 2:4-1(a). This timing argument has no merit. Defendants timely filed their motion for reconsideration on April 8, 2019, nineteen days after the entry of the March 19 order. That action began to toll the period for filing the appeal. *See R*. 2:4-3(b). The court denied reconsideration on September 10, 2019, and defendants filed their appeal twenty days later on October 1, 2019.

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denies defendants' request to amend it. However, those rulings as to the counterclaim are expressly stated in the court's September 17, 2018 written opinion, granting Bock's motion for summary judgment.

When the grounds for a motion judge's ruling on summary judgment and reconsideration are essentially the same, an appeal solely from the denial of reconsideration may be sufficient for appellate review of the merits of the case. *Fusco v. Bd. of Educ. of City of Newark*, 349 N.J. Super. 455, 461 (App. Div. 2002). This is especially true when the CIS makes clear that the court's order on reconsideration implicates the substantive issues in the underlying ruling. *Ibid.*; *accord Tara Enters., Inc. v. Daribar Mgmt. Corp.*, 369 N.J. Super. 45, 60 (App. Div. 2004). Also, "in the interests of justice," an order not specifically listed on the CIS may be considered on appeal. *Innes v. Marzano-Lesnevich*, 435 N.J. Super. 198, 211 n.6 (App. Div. 2014), *aff'd as modified*, 224 N.J. 584 (2016).

Taking into account the tolling period, defendants' filing of their appeal on October 1, 2019 occurred a total of thirty-nine "countable" days after the initial March 19 orders, and thus within the forty-five-day time frame required by the Rules. They later amended their CIS to clarify exactly which of the orders of March 19, 2019 were on appeal. It was clear from the original notice of appeal and CIS that defendants were appealing the rulings underlying the court's March 19, 2019 denial of reconsideration of the grant of summary judgment and the entry of final judgment. No manifest prejudice resulted to Bock from defendants' amending their CIS, because their notice of appeal was timely and stated

that the March 2019 order denying reconsideration and entering final judgment was on appeal.[6]

In sum, we reject Bock's procedural arguments and therefore proceed to the merits of the issues.

III.

The main issue before us is whether the trial court improvidently granted summary judgment to Bock and enforced defendants' guaranties, without first allowing defendants to complete depositions and other discovery. Part and parcel of that determination is whether defendants' non-payment of the guaranties could be justified as a matter of law because of alleged wrongful conduct by Bock or the third-party defendants that impeded the ability of the primary borrowers to pay the loan amounts.

Bock relies heavily on the fact that the guaranty agreements contain language granting it full discretion on whether to foreclose on the collateral, which the guarantors waived any right to oppose. In this regard, the guaranty agreements stated, in pertinent part, as follows:

> *Guaranty Absolute and Unconditional*. The liability of the Guarantor under this Guaranty is absolute and unconditional irrespective of:

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[6] Foreshadowing a main argument in their appellate briefs, defendants' notice of appeal expressly stated that the court's September 2018 grant of summary judgment was premature because discovery was not completed.

> 1. any lack of validity or enforceability of any of the Loan Documents;
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> 2. any change in the time, manner, place or amount of payment or in any other term of all or any of the Indebtedness, or any other amendment or waiver of or any consent to departure from any of the terms of the Indebtedness;
>
> 3. any exchange, release or non-perfection of any collateral or lien securing all or any part of the Indebtedness, which exchange, release or non-perfection the Guarantor expressly agrees will not be deemed an unjustifiable impairment of the collateral;
>
> 4. any release or amendment or waiver of or consent to departure from any other guaranty, for all or any part of the Indebtedness;
>
> 5. any settlement or compromise with any Borrower or any other person relating to the Indebtedness; or
>
> 6. any other circumstances which might otherwise constitute a defense available to, or a discharge of, any Borrower, any guarantor or other obligor in respect of the Indebtedness or the Guarantor in respect of this Guaranty.

In addition, the guaranty agreements included language that waived the guarantors' defense of impairment of collateral. The agreements further authorized Bock to release its interest in the collateral:

> *Waiver. . . . . This Guaranty will not be affected by any surrender, exchange, acceptance, compromise or release by the Lender of any other party, or any other guaranty or any security held by it for any of the Obligations, by any failure of the Lender to take any steps to perfect or maintain its lien or security interest in or to preserve its rights to any security or other collateral for any of the Obligations or any guaranty*, or by any irregularity, unenforceability or invalidity of any of the Obligations or any part thereof or any security or other guaranty thereof. The Guarantor's obligations hereunder shall not be affected, modified or impaired by any counterclaim, set-off, deduction or defense based upon any claim the Guarantor may have against the Borrower or the Lender, except payment or performance of the Obligations.

The agreement continued:

> The Guarantor hereby *waives* . . . . (f) *any requirement that the Lender protect, secure, perfect or insure any security interest or lien or any property subject thereto or exhaust any right or take any action against the Borrower, the Guarantor, any other person or any collateral*; . . .
>
> (emphasis added).

Finally, the guaranty agreements included an indemnity clause, whereby the guarantors agreed to indemnify the lender (Bock) from any claims and damages asserted against the lender, so long as those

claims were not "solely attributable" to the lender's "gross negligence or willful misconduct."

Nevertheless, the guaranty agreements contained no express language waiving the guarantors' ability to argue that their payment obligations are excused or diminished by proof of a breach of the implied covenant of good faith and fair dealing. This is a critically important omission.

As this court held in *Lomker*, 277 N.J. at 496–97:

> *Every contract contains an implied covenant of good faith and fair dealing*. *Onderdonk v. Presbyterian Homes of N.J.*, 85 N.J. 171, 182 (1981); *Palisades Properties Inc. v. Brunetti*, 44 N.J. 117, 130 (1965); N.J.S.A. 12A:1–203. Good faith is defined by the Uniform Commercial Code as "honesty in fact in the conduct or transaction concerned." *N.J.S.A.* 12A:1–201(19). In the context of commercial loans, we have recently recognized that this good faith requirement does not impose upon a lender obligations that alter the terms of its deal or preclude it from exercising its bargained-for rights. *Glenfed Financial Corp., etc. v. Penick Corp., et al.*, 276 N.J. Super. 163, 175 (App. Div. 1994) (lender's bad faith or lack of "honesty in fact" which would constitute a viable debtor's defense does not arise from lender's refusal to exercise greater forbearance). *But a debtor may defend against enforcement of lender's rights where the lender has engaged in bad faith, misconduct or the like*. *See Ramapo Bank v. Bechtel*, 224 N.J. Super. 191, 198 (App.Div.1988)

> (possibility of a concealed pre-transaction agreement not to pursue a co-guarantor in the event of default sufficient to overcome lender's motion for summary judgment).
>
> . . . .
>
> Related to this obligation is the requirement that a lender not "unjustifiably impair" any collateral. N.J.S.A. 12A:3–606. *See Langeveld v. L.R.Z.H. Corporation*, 74 N.J. 45, 50 (1977); *Lenape State Bank v. Winslow Corp.*, [216 N.J. Super. 115, 124–25 (App. Div. 1987)]. Equitable in nature and characterized as "probably the most important provision in the Code to the surety [or guarantor]," the defense of impairment of collateral is available to a guarantor just as much as to the debtor. *Langeveld*, [] 74 N.J. at 51-52. *No less can be said for the defenses of lender bad faith and misconduct*.
>
> [*Id*. at 496–97 (emphasis added).]

In *Lomker*, the lender sued the guarantor of a real estate loan because the debtor defaulted. 277 N.J. Super. at 493-95. The guarantor argued the lender engaged in bad faith with respect to the collateral. *Ibid*. The alleged bad faith consisted of the lender leaking information to a potential buyer that the bank would soon be foreclosing on the collateral property. *Ibid*. That leak resulted in the sale not going through, but the buyer ultimately purchased the collateral property from the lender for a price below market value. *Ibid*.

In *Lomker*, we reversed the trial court's grant of summary judgment on the guarantor's claim that the lender had violated the implied covenant of good faith and fair dealing. We found no waiver of that claim had occurred. We instructed there must be "unequivocal language" in the contract to effectuate a valid waiver of the defense of impairment of collateral, even when the language of the guaranties gave "virtually unlimited power to [the lender] to dispose of and deal with the collateral." *Id*. at 497-98. In this regard, we cited *Langeveld v. L.R.Z.H. Corp.*, 74 N.J. 45, 53-54 (1977), for the proposition that the "right [to the defense of impairment of collateral] does not originate in contract, and [] cannot lightly be destroyed by contract." *Id*. at 498.

Most importantly for purposes of the present case, we extended our holding in *Lomker* regarding the impairment-of-collateral defense to any defense of "bad faith and other misconduct," stating that "[i]n order to waive those lender liability defenses, *a guaranty must do so expressly*." *Ibid*. (emphasis added). We noted "this result logically flows from the maxim *strictissimi juris* (according to strict law) that applies to guaranties. *Max v. Schlenger*, 109 N.J.L. 298, 301 (E. & A. 1932)." We added that "a guarantor cannot be held liable beyond the strict terms of the guaranty." *Ibid*. (citations omitted).

Consistent with these principles, we held in *Lomker* that the "conspiring" conduct and "'inside' dealing" that culminated in the lender making "a better deal for the same property" amounted to "wrongful and

intentional conduct *not waived by the language* in the guaranties." *Id*. at 499. (emphasis added).

Hence, *Lomker* is clear precedent that, absent express language, a guarantor does not waive the implied covenant of good faith and fair dealing, even in a case where a contract otherwise gives the lender broad powers over the collateral. It also signifies the provision of a loan in and of itself does not insulate a lender from a claim of engaging in bad faith conduct during the loan repayment period.

Here, the guaranty agreements we have quoted above did grant Bock extensive power over the collateral, and also expressly waived the defense of impairment of collateral. Nevertheless, the agreements did *not* contain language that expressly waived the implied covenant of good faith and fair dealing. Also, the guaranty agreements were not enforceable to the extent the lender engaged in gross negligence or willful misconduct.

Because the guaranties do not contain an express waiver of the implied covenant, and because there are material factual disputes as to whether Bock violated the covenant, the trial court should not have granted summary judgment on the guaranties. Nor should the trial court have rejected, out of hand, defendants' associated counterclaims, and denied the motion to amplify them along with the related third-party complaint.[7]

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[7] In this regard, we also permit defendants to pursue their allied claims of tortious interference with prospective economic

Bock cites *Glenfed Financial Corp., Commercial Finance Division v. Penick Corp.* for the notion that a lender has not violated the implied covenant when it enforces its rights under a guaranty contract. 276 N.J. Super. 163, 178- 79 (App. Div. 1994). Bock's argument overreads *Glenfed*, and elides our later holding in *Lomker*.

In *Glenfed*, the defendant corporation experienced severe financial distress and attempted to raise funds, but the lender withheld its consent when asked to forego protections contained in the guaranty contract. *Id*. at 169-72. Ultimately, the corporation diverted funds it was supposed to be holding to repay the loan; the lender discovered this and accelerated the due date of the loan. *Ibid*.

We held in *Glenfed* that the implied covenant of good faith and fair dealing "may not be invoked by a commercial debtor to preclude a creditor from exercising its bargained-for rights under a loan agreement." *Id*. at 175. There is no breach of the covenant "when a party simply stands on its rights to require performance of a contract according to its terms." *Id*. at 176 (citations omitted).

However, *Glenfed* may be readily distinguished because we found no evidence in that case of the lender's bad faith, lack of honesty, or personal malice, "or that [the lender] was pursuing its own economic interests unrelated to obtaining the repayment of the

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advantage, which are based upon similar allegations of unfair dealing.

loan[.]" *Id*. at 178. But here, significantly, defendants have presented some evidence—which they anticipate developing through the completion of discovery—that Bock pursued its own selfish economic interests unrelated to repayment of the loan by acquiring the Wheel, releasing security interests in obtaining the collateral, and assuming obligations relating to significant funding from the CRDA for the benefit of Domeinac.

The record reflects, at least in its present incomplete state, material factual disputes regarding whether Bock violated the implied covenant. Viewing the present record, as we must, in a light most favorable to defendants, summary judgment should not have been granted. *Brill v. Guardian Life Ins. Co. of Am.*,142 N.J. 520, 523 (1995).

At the very least, defendants should have been afforded the opportunity to complete discovery that could shed light on these transactions and activities, including the depositions of Thomas Bock and other material witnesses. *R*. 4:46-5. We are acutely mindful that discovery has carried on for a long period of time. Even so, we discern no imperative to deprive the defense of the time to finish discovery that bears upon its asserted justifications for non-payment, particularly given the impact the COVID-19 pandemic has had on the civil trial calendar overall.

For these reasons we vacate the trial court's grant of summary judgment and remand the matter for continued discovery under the trial court's supervision. We also reverse the dismissal of defendants'

counterclaims and the denial of leave to amend those counterclaims and their third-party complaint. We do so without prejudice to Bock's ability to renew a motion for summary judgment after discovery is finally completed. Our restoration of the case should not be viewed as any advisory opinion on whether defendants' contentions will ultimately be substantiated.

All other arguments raised by the parties lack sufficient merit to warrant discussion in this opinion. *R*. 2:11-3(e)(1)(E).

Vacated and remanded.