

JUN 26 2018

NOT FOR PUBLICATION

SUSAN M. SPRUAL, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

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5 In re:) BAP No. CC-17-1277-KuLS
6 MURRAY ALTMAN,)
7 Debtor.) Bk. No. 6:16-BK-15248-MW
8)
9 YUN HEI SHIN,)
10 v.) Appellant,)
11 MURRAY ALTMAN,) MEMORANDUM*
12 Appellee.)
13)

14 Argued and Submitted on May 24, 2018 at
15 Pasadena, California

16 Filed - June 26, 2018

17 Appeal from the United States Bankruptcy Court
18 for the Central District of California

19 Honorable Mark S. Wallace, Bankruptcy Judge, Presiding

20 Appearances: Kathleen P. March of The Bankruptcy Law Firm,
21 P.C. argued for appellant Yun Hei Shin; Andrew S.
22 Bisom of Bisom Law Group argued for appellee
Murray Altman.

23 Before: KURTZ, LAFFERTY, and SPRAKER, Bankruptcy Judges.
24
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26 _____
27 * This disposition is not appropriate for publication.
28 Although it may be cited for whatever persuasive value it may
have (see Fed. R. App. P. 32.1), it has no precedential value.
See 9th Cir. BAP Rule 8013-1.

1 **I. INTRODUCTION**

2 Appellant-creditor, Yun Hei Shin aka Angie Shin (Ms. Shin),
3 held a 25% economic interest in Desert Springs Financial, LLC
4 (DSF), a California limited liability company. Appellee-debtor,
5 Murray Altman (Mr. Altman), held the remaining 75% economic
6 interest and had the sole right to manage DSF under its
7 operating agreement. Ms. Shin obtained a state court judgment
8 against Mr. Altman for breach of fiduciary duty related to his
9 mismanagement of DSF.

10 Mr. Altman later sought bankruptcy protection under
11 chapter 11.¹ Ms. Shin filed a motion seeking a determination
12 that the automatic stay did not apply to her proposed state
13 court action for the appointment of a receiver to take control
14 of DSF, or in the alternative, Ms. Shin requested relief from
15 the automatic stay for cause to proceed with the action under
16 § 362(d)(1) due to Mr. Altman's alleged mismanagement of DSF.

17 The bankruptcy court found that Mr. Altman's sole right to
18 manage DSF was property of his bankruptcy estate protected by
19 the automatic stay. The court denied Ms. Shin's request for
20 relief from the automatic stay to proceed with the state court
21 action with prejudice, deciding that the appointment of a
22 receiver would interfere with the administration of Mr. Altman's
23 estate and his efforts to reorganize. This appeal followed.
24 For the reasons explained below, we AFFIRM.

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26 _____
27 ¹ Unless otherwise indicated, all chapter and section
28 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
Rule references are to the Federal Rules of Bankruptcy Procedure.

1 **II. FACTS**

2 **A. Desert Springs Financial, LLC**

3 DSF is a limited liability company formed under California
4 law in January 1999, and is in the business of owning and
5 operating real estate. Former members of DSF transferred their
6 interests to Ms. Shin in July 2009 whereby she acquired a 25%
7 economic interest in DSF but no voting or other rights of any
8 kind. Mr. Altman holds the remaining 75% economic interest in
9 DSF and a 100% membership interest.

10 The Amended and Restated Operating Agreement for DSF dated
11 October 1, 2009 (Operating Agreement) defines an "Economic
12 Interest" as:

13 [A] Member's or Economic Interest Owner's share of one
14 or more of the Company's Net Profits, Net Losses, and
15 Distributions of the Company's assets. . . , but shall
16 not include any other rights, preferences or
privileges of a Member . . . including, without
limitation, the right to vote or participate in the
management of the Company. . . .

17 "Membership Interest" is defined as:

18 [A] Member's entire interest in the Company including
19 the Member's Economic Interest, the right to vote or
20 participate in the management, and the right to
receive information concerning the business and
affairs, of the Company.

21 The Operating Agreement shows that Mr. Altman had complete and
22 exclusive authority to manage and control DSF's business,
23 property and affairs.

24 Mr. Altman and Ms. Shin have been embroiled in a number of
25 disputes concerning DSF's business affairs. In July 2013,
26 Ms. Shin sued Mr. Altman in the California Superior Court for,
27 among other things, breach of fiduciary duty in connection with
28 his management of DSF. In December 2015, after a multi-phase

1 trial, the California Superior Court entered judgment in favor
2 of Ms. Shin and against Mr. Altman on her breach of fiduciary
3 duty cause of action. The state court ordered Mr. Altman to pay
4 Ms. Shin damages and attorneys' fees in the amount of
5 \$542,118.00 and was also required to repay DSF approximately
6 \$1.44 million.

7 DSF filed a voluntary chapter 11 petition on May 30, 2016.
8 Less than a year later, the case was dismissed.

9 **B. Bankruptcy Events**

10 Mr. Altman filed a voluntary chapter 11 petition on June
11 12, 2016. In his schedules, Mr. Altman listed his 75% ownership
12 interest in DSF with a value of \$2,895,000 and showed his
13 occupation as manager of DSF. He listed Ms. Shin as a judgment
14 creditor owed \$542,118.00. Mr. Altman also listed Ramon Palm
15 Lane, Inc., a company owned by Ms. Shin, as a judgment creditor
16 owed \$280,824.00.

17 In June 2017, Ms. Shin filed a motion seeking an order that
18 the automatic stay did not apply to her proposed state court
19 action for the appointment of a receiver to run DSF, or in the
20 alternative, requesting relief from the automatic stay for cause
21 under § 362(d)(1) due to Mr. Altman's alleged mismanagement of
22 DSF (Motion). Ms. Shin alleged that DSF held at least \$788,000
23 in cash generated from the sale of real property. Ms. Shin
24 wanted a receiver appointed to take control of the cash and
25 prevent Mr. Altman from misapplying the funds. Or, if the cash
26 had been misapplied, the receiver could seek to get it back for
27 DSF.

28 The Motion was scheduled for a hearing on July 25, 2017.

1 At the hearing, the bankruptcy court continued the matter to
2 September 12, 2017, so that Ms. Shin could serve the Motion on
3 the twenty largest unsecured creditors and provide the court
4 with a copy of her proposed motion for appointment of the
5 receiver. The order continuing the matter stated that "The
6 automatic stay remains in full force and effect pending the
7 continued hearing on September 12, 2017."

8 At the September 12, 2017 hearing, the bankruptcy court
9 stated that it was principally concerned that if a receiver were
10 appointed in the DSF case that receiver would displace
11 Mr. Altman as the manager. The court noted that the managerial
12 rights were held by his estate and the appointment of receiver
13 would destroy those rights. The bankruptcy court concluded that
14 the appointment of a receiver would be a clear exercise of
15 control and interference with property of the estate. For these
16 reasons, the court denied Ms. Shin's request for relief from the
17 automatic stay with prejudice. At the end of the hearing, the
18 bankruptcy court stated that its ruling was a final ruling and
19 requested Mr. Altman's counsel to lodge an order.

20 The bankruptcy court also made a docket entry that denied
21 Ms. Shin's Motion with prejudice. However, the entry was not a
22 dispositive order; it did not state that it was an order, was
23 not mailed to counsel, or signed by the clerk who prepared it.
24 Mullin v. Hamlin (In re Hamlin), 465 B.R. 863, 868 (9th Cir. BAP
25 2012). Ms. Shin filed a notice of appeal to this Panel prior to
26 the entry of a written order denying her Motion.

27 Later, when reviewing the matter, the bankruptcy court
28 decided that it needed a more comprehensive discussion regarding

1 its reasons for denying Ms. Shin's Motion and started drafting a
2 Memorandum Decision and Order. While doing so, the bankruptcy
3 court observed that neither party had briefed the factors for
4 deciding whether to lift the automatic stay for cause under
5 Kronemyer v. Am. Contractors Indem. Co. (In re Kronemeyer),
6 405 B.R. 915, 921 (9th Cir. BAP 2009) and In re Curtis, 40 B.R.
7 795, 799-801 (Bankr. D. Utah 1984). The court decided that it
8 needed briefing on those factors.

9 Since Ms. Shin had filed a notice of appeal, the bankruptcy
10 court sent out a statement requesting comments from the parties
11 regarding its jurisdiction to vacate its prior ruling and
12 established a briefing schedule.

13 Subsequently, although finding that the bankruptcy court
14 had jurisdiction to enter a final written ruling on the matter
15 despite Ms. Shin's appeal, the Panel remanded the matter to the
16 bankruptcy court and suspended briefing until further notice.

17 On October 13, 2017, the bankruptcy court vacated its oral
18 ruling, issued a briefing schedule, and set a hearing for
19 further argument on Ms. Shin's request for relief from stay on
20 November 28, 2017.

21 After receiving further briefing from the parties and
22 conducting two additional hearings, the bankruptcy court issued
23 its final Memorandum Decision and Order on December 19, 2017.
24 The court found that Mr. Altman's managerial rights under the
25 Operating Agreement were prepetition contract rights that were
26 included in his bankruptcy estate. The court further found
27 these rights along with Mr. Altman's Economic Interest in DSF
28

1 constituted the estate's most valuable and important assets.²
2 The bankruptcy court concluded that the appointment of a
3 receiver to manage DSF's business would affect and concern
4 property of Mr. Altman's estate. Therefore, the automatic stay
5 prevented Ms. Shin from proceeding in state court for the
6 appointment of a receiver unless the bankruptcy court granted
7 relief from stay for this purpose.

8 Next, the bankruptcy court considered the factors set forth
9 in Kronemyer and Christensen v. Tucson Estate, Inc. (In re
10 Tucson Estates, Inc.), 912 F.23d 1162, 1167 (9th Cir. 1990), in
11 determining whether there was "cause" to grant relief from the
12 automatic stay to Ms. Shin under § 362(d)(1). In the end, the
13 court found that a majority of the relevant factors favored
14 denying Ms. Shin's motion for relief from stay. Accordingly,
15 the court denied Ms. Shin's request to lift the stay with
16 prejudice.

17 Finally, the court considered Ms. Shin's argument that the
18 automatic stay terminated under § 362(e) which was raised by
19 Ms. Shin in her supplemental brief along with her analysis of
20 the Kronemyer factors. The bankruptcy court determined that
21 Ms. Shin's argument under § 362(e) was waived or should
22 otherwise be decided against her for numerous reasons,
23 including: (1) Ms. Shin had combined her request for relief
24 from stay with other relief thereby waiving the time deadline in
25 § 362(e)(2); (2) Ms. Shin waived her rights under § 362(e)(2)

27
28 ² Although the court found Mr. Altman's managerial rights
were valuable, it did not attach any number to that value.

1 because she made the argument too late and improperly included
2 it in her supplemental brief which was limited to briefing the
3 Kronemyer/Curtis factors; and (3) the bankruptcy court had made
4 findings on the record which justified extension of the time
5 deadline in § 362(e) (2) for good cause.

6 Having filed a premature notice of appeal from the
7 bankruptcy court's oral ruling on her Motion which was
8 subsequently vacated by the court, Ms. Shin filed a timely
9 amended notice of appeal from the court's December 19, 2017
10 Memorandum Decision and Order.

11 **III. JURISDICTION**

12 The bankruptcy court had jurisdiction under 28 U.S.C.
13 §§ 1334 and 157(b) (2) (G). We have jurisdiction under 28 U.S.C.
14 § 158.

15 **IV. ISSUES**

16 Did the bankruptcy court err in finding that Mr. Altman's
17 sole right to manage DSF as per the Operating Agreement was
18 property of his estate and protected by the automatic stay?

19 Did the bankruptcy court abuse its discretion by denying
20 Ms. Shin's request for relief from the automatic stay for
21 "cause" under § 362(d) (1)?

22 Did the bankruptcy court err in finding that the automatic
23 stay had not automatically terminated under § 362(e) (2)?

24 **V. STANDARDS OF REVIEW**

25 Whether an asset is estate property and whether the
26 automatic stay is applicable to a particular situation are
27 conclusions of law reviewed de novo. Cty. of Imperial
28 Treasurer-Tax Collector v. Stadtmueller (In re RW Meridian LLC),

1 564 B.R. 21, 27 (9th Cir. BAP 2017). We review the bankruptcy
2 court's interpretation of state law de novo. Id.

3 The interpretation of a federal statute is a question of
4 law also reviewed de novo. Quintana v. Comm'r of Internal
5 Revenue Serv. (In re Quintana), 915 F.2d 513, 515 (9th Cir.
6 1990).

7 We review an order denying relief from stay for abuse of
8 discretion. Veal v. Am. Home Mortg. Servicing, Inc. (In re
9 Veal), 450 B.R. 897, 914 (9th Cir. BAP 2011); In re Kronemyer,
10 405 B.R. at 919.

11 Whether Ms. Shin waived her argument under § 362(e)(2) for
12 automatic termination of the automatic stay is reviewed for an
13 abuse of discretion. See Novato Fire Prot. Dist. v. United
14 States, 181 F.3d 1135, 1141 (9th Cir. 1999) (reviewing waiver
15 for an abuse of discretion).

16 We review a bankruptcy court's refusal to consider an
17 untimely argument for abuse of discretion. Nw. Acceptance Corp.
18 v. Lynnwood Equip., Inc., 841 F.2d 918, 926 (9th Cir. 1988).

19 A bankruptcy court abuses its discretion if it applies an
20 incorrect legal standard or misapplies the correct legal
21 standard, or if its factual findings are illogical, implausible
22 or unsupported by evidence in the record. Trafficschool.com,
23 Inc. v. Edriver Inc., 653 F.3d 820, 832 (9th Cir. 2011).

24 VI. DISCUSSION

25 **A. The bankruptcy court did not err in finding that**
26 **Mr. Altman's sole right to manage DSF was property of his**
bankruptcy estate and protected by the automatic stay.

27 On appeal, Ms. Shin does not dispute that Mr. Altman's 75%
28 Economic Interest is property of his bankruptcy estate. Rather,

1 she contends that Mr. Altman's sole right to manage DSF is not
2 property of his estate because that right is terminable under
3 California law if it is found that he has mismanaged DSF and a
4 receiver should be appointed. She further argues that the
5 automatic stay does not apply to her proposed state court action
6 because a receiver would take control of DSF's assets, which are
7 not property of Mr. Altman's estate. Further, her action would
8 be against DSF, not Mr. Altman. Finally, she asserts that the
9 state court is the only court with jurisdiction to appoint a
10 receiver. We are not persuaded by any of these arguments.

11 When Mr. Altman filed his chapter 11 petition a bankruptcy
12 estate was created by operation of law. § 541(a). Property of
13 the estate includes "all legal or equitable interests of the
14 debtor in property as of the commencement of the case." Id.
15 The scope of § 541 is intended to be broad. United States v.
16 Whiting Pools, Inc., 462 U.S. 198, 205 (1983). "It includes
17 all kinds of property, including tangible or intangible
18 property. . . ." Computer Commc'ns, Inc. v. Codex Corp. (In re
19 Computer Commc'ns, Inc., 824 F.2d 725, 729 (9th Cir. 1987).

20 While § 541(a) provides whether an interest of the debtor
21 is property of the estate, a debtor's property rights are
22 defined by state law. Butner v. United States, 440 U.S. 48, 55
23 (1979); McCarthy, Johnson & Miller v. N. Bay Plumbing, Inc.
24 (In re Pettit), 217 F.3d 1072, 1078 (9th Cir. 2000). Therefore,
25 we look to California law to determine whether Mr. Altman has
26 any legal or equitable interest in the sole right to manage DSF
27 granted to him under the Operating Agreement.

28 In California, operating agreements are enforceable

1 contracts. See Commercial Ventures, Inc. v. Scottsdale Ins.
2 Co., CV15-08359, 2017 WL 1196462, at *6-7 (C.D. Cal. Mar. 22,
3 2017); Dunbar v. Willis, No. D054146, 2010 WL 336406, at *5
4 (Cal. Ct. App. Mar.1, 2010) (operating agreement is the
5 "contract among LLC members that govern[s] the members' rights
6 and obligations."); Ratliff v. Cochise Agric. Properties, LLC
7 (In re Ratliff), BAP No. AZ-10-1011, 2010 WL 6259955, at *7 (9th
8 Cir. BAP Oct. 13, 2010), aff'd in part, rev'd in part and
9 remanded, 490 F. App'x 896 (9th Cir. 2012) ("[o]perating
10 agreements are construed according to the general principles of
11 contract law."); see also Cal. Civ. Code § 1549 ("A contract is
12 an agreement to do or not to do a certain thing").

13 A contract right is "property" under California law. Cal.
14 Civ. Code § 654 provides:

15 The ownership of a thing is the right of one or more
16 persons to possess and use it to the exclusion of
17 others. In this Code, the thing of which there may be
ownership is called property.

18 Accordingly, Mr. Altman's sole right to manage DSF is a contract
19 right under the Operating Agreement and thus is the "property"
20 under California law.

21 It is well settled that prepetition contract rights are
22 included within the Bankruptcy Code's definition of bankruptcy
23 estate property. Rau v. Ryerson (In re Ryerson), 739 F.2d 1423,
24 1425 (9th Cir.1984); see also Sliney v. Battley (In re Schmitz),
25 270 F.3d 1254, 1258 (9th Cir. 2001) (listing additional Ninth
26 Circuit cases); Johnson v. Taxel (In re Johnson), 178 B.R. 216,
27 218-19 (9th Cir. BAP 1995) (holding that proceeds of contracts
28 rights arising from prepetition sales contract were estate

1 property).

2 Furthermore, although Mr. Altman's sole right to manage DSF
3 is a non-economic right, numerous cases recognize that
4 membership in a limited liability company may confer both
5 economic and non-economic rights and that both fall within the
6 § 541(a)'s definition of estate property. See Fursman v. Ulrich
7 (In re First Protection, Inc.), 440 B.R. 821, 830 (9th Cir. BAP
8 2010) ("We conclude that all of the Debtor's [members]
9 contractual rights and interest in Redux [LLC] became property
10 of the estate under § 541(a) by operation of law when they filed
11 their petition."); In re Tarkanian, 562 B.R. 424, 455 (Bankr.
12 D. Nev. 2014) ("If the member files a chapter 7 petition, both
13 the member's economic and non-economic interests become property
14 of the bankruptcy estate and the bankruptcy trustee may exercise
15 the management rights, if any, that the debtor has in the
16 limited liability company."); Caymus Ventures, LLC v. Jundanian
17 (In re Jundanian), Adv. No. 11-00185, 2012 WL 1098544, at *5-6
18 (Bankr. D. Md. Mar. 30, 2012) (concluding that the member's
19 voting and management rights become property of the estate upon
20 the filing of his bankruptcy petition); Sheehan v. Warner (In re
21 Warner), 480 B.R. 641, 653 (Bankr. W. Va. 2012) (the debtor's
22 economic and non-economic rights in a limited liability company
23 became property of the estate upon the filing of a bankruptcy
24 petition); Klingerman v. ExecuCorp LLC (In re Klingerman),
25 388 B.R. 677, 679 (Bankr. E.D.N.C. 2008) (holding that debtor's
26 interest in an LLC—including both economic and non-economic
27 rights—are property of the estate); see also Gould v. Antonelli
28 (In re Antonelli), 4 F.3d 984 (4th Cir. 1993) ("When bankruptcy

1 proceedings commenced, Antonelli's general partnership interests
2 became the property of the Debtor's bankruptcy estate. Both the
3 economic interest in the partnerships and the right to
4 participation in the management of the partnerships' affairs
5 vested in the estate.").

6 The case of Colonial Realty Co. v. River Bank Am. (In re
7 Colonial Realty Co., 122 B.R. 1 (Bankr. D. Conn. 1990),
8 illustrates the enforcement of the automatic stay under
9 circumstances similar to those here. In Colonial Realty, the
10 debtor had an agreement with the owner of real property in
11 California to manage that property. The owner defaulted on its
12 loan for the purchase of the property, and the secured lender
13 (and the defendant in the Colonial Realty case) subsequently
14 obtained a court-appointed receiver in the context of a
15 California foreclosure action. The bankruptcy court held that
16 the defendant lender's acts "in removing the debtor from such
17 management control were direct acts to obtain possession of
18 property of and from the estate." Id. at 4; see also Edisto
19 Resources Corp. v. McConkey (In re Edisto Resources Corp.),
20 158 B.R. 954, 957 (Bankr. D. Del. 1993) (automatic stay was
21 violated by minority shareholders' state court action requesting
22 appointment of receiver for corporation in which Chapter 11
23 debtors were majority shareholders; appointment of receiver
24 would control debtors' joint interest in management of
25 corporation) (citing Colonial Realty). Similarly, as the
26 bankruptcy court here found, appointment of a receiver would
27 remove Mr. Altman from his management role in DSF. Therefore,
28 it would result in a violation of the automatic stay.

1 It is unnecessary to delve any deeper into the case law
2 cited by Ms. Shin regarding the applicability of the automatic
3 stay to non-debtor third parties because the bankruptcy court's
4 Memorandum Decision correctly found the holdings in Chugach
5 Timber Corp. V. N. Stevedoring & Handling Corp. (In re Chugach
6 Forest Prods.), 23 F.3d 241 (9th Cir. 1994), Pintlar Corp. v.
7 Fid. & Cas. Co. (In re Pintlar Corp.), 124 F.3d 1310 (9th Cir.
8 1997); and United States v. Dos Cabeza Corp., 995 F.2d 1486,
9 1491 (9th Cir. 1993) did not apply under these circumstances.
10 While it is well-settled that property owned by a non-debtor
11 third party generally lies outside the scope of property of the
12 estate and is not protected by the automatic stay, DSF's assets
13 are not at issue in this case. Rather, it is Mr. Altman's sole
14 right to manage DSF that is property of his estate.

15 In sum, under the Operating Agreement, Mr. Altman had the
16 prepetition contractual right to manage DSF. The bankruptcy
17 court correctly found that this non-economic contractual right
18 to manage DSF was property of Mr. Altman's estate under
19 § 541(a)(1) and therefore protected by the automatic stay.

20 **B. The bankruptcy court did not abuse its discretion in**
21 **denying Ms. Shin's motion for relief from stay for "cause."**

22 As alternative relief in her Motion, Ms. Shin asked the
23 bankruptcy court to lift the automatic stay for "cause" under
24 § 362(d)(1). Section § 362(d)(1) provides:

25 On request of a party in interest and after notice and
26 a hearing, the court shall grant relief from the stay
27 provided under subsection (a) of this section, such as
28 by terminating, annulling, modifying, or conditioning
such stay-(1) for cause, including the lack of
adequate protection of an interest in property of such
party in interest[.]

1 What constitutes "cause" for granting relief from the automatic
2 stay is decided on a case-by-case basis. In re Kronemyer,
3 405 B.R. at 921.

4 Among factors which the bankruptcy court may consider when
5 deciding whether to lift the stay to permit litigation in
6 another forum are considerations of judicial economy, the
7 expertise of the state court, prejudice to the parties and
8 whether exclusive bankruptcy issues are involved. In re
9 Kronemyer, 405 B.R. at 921. In Kronemyer, the Panel agreed that
10 the so-called Curtis factors articulated in In re Curtis,
11 40 B.R. at 799-800 are appropriate, nonexclusive, factors to
12 consider in deciding whether to grant relief from the automatic
13 stay to allow litigation to continue in another forum. Id. The
14 Curtis factors include:

- 15 (1) Whether the relief will result in a partial or
- 16 complete resolution of the issues; (2) The lack of any
- 17 connection with or interference with the bankruptcy
- 18 case; (3) Whether the foreign proceeding involves the
- 19 debtor as a fiduciary; (4) Whether a specialized
- 20 tribunal has been established to hear the particular
- 21 cause of action and whether that tribunal has the
- 22 expertise to hear such cases; (5) Whether the debtor's
- 23 insurance carrier has assumed full financial
- 24 responsibility for defending the litigation; (6)
- 25 Whether the action essentially involves third parties,
- 26 and the debtor functions only as a bailee or conduit
- 27 for the goods or proceeds in question; (7) Whether the
- 28 litigation in another forum would prejudice the
- interests of other creditors, the creditors' committee
- and other interested parties; (8) Whether the judgment
- claim arising from the foreign action is subject to
- equitable subordination under Section 510(c); (9)
- Whether movant's success in the foreign proceeding
- would result in a judicial lien avoidable by the
- debtor under Section 522(f); (10) The interests of
- judicial economy and the expeditious and economical
- determination of litigation for the parties; (11)
- Whether the foreign proceedings have progressed to the
- point where the parties are prepared for trial, and
- (12) The impact of the stay on the parties and the
- 'balance of hurt.'

1 Also relevant is a non-exclusive list of factors identified
2 in Tucson Estates, 912 F.23d at 1167, that suggest cause for
3 permissive abstention and, consequently, for relief from stay.

4 Those factors include:

- 5 (1) the effect or lack thereof on the efficient
6 administration of the estate if a Court recommends
7 abstention, (2) the extent to which state law issues
8 predominate over bankruptcy issues, (3) the difficulty
9 or unsettled nature of the applicable law, (4) the
10 presence of a related proceeding commenced in state
11 court or other nonbankruptcy court, (5) the
12 jurisdictional basis, if any, other than 28 U.S.C.
13 § 1334, (6) the degree of relatedness or remoteness of
14 the proceeding to the main bankruptcy case, (7) the
15 substance rather than form of an asserted "core"
16 proceeding, (8) the feasibility of severing state law
17 claims from core bankruptcy matters to allow judgments
18 to be entered in state court with enforcement left to
19 the bankruptcy court, (9) the burden of [the
20 bankruptcy court's] docket, (10) the likelihood that
21 the commencement of the proceeding in bankruptcy court
22 involves forum shopping by one of the parties, (11)
23 the existence of a right to a jury trial, and (12) the
24 presence in the proceeding of nondebtor parties.

25 Although the above referenced factors may be considered by
26 the bankruptcy court, "cause" is a generic concept without a
27 specific definition that is committed to the sound discretion of
28 the bankruptcy court on a case-by-case basis. Benedor Corp. v.
Conejo Enters., Inc. (In re Conejo Enters., Inc.), 96 F.3d 346,
351-52 (9th Cir. 1996).

29 The bankruptcy court conducted its analysis mostly under
30 the Kronemyer and Tucson Estate factors and found that a clear
31 majority of the factors favored denying Ms. Shin's motion for
32 relief from stay with prejudice. Among other things, the
33 bankruptcy court found:

- 34 • The process and appointment of a receiver would
35 jeopardize the bankruptcy court's efficient administration of

1 the estate because a receiver would become the manager of DSF.

2 • Bankruptcy issues predominated with the issues raised
3 by Ms. Shin because the ultimate disposition of the bankruptcy
4 estate's exclusive managerial rights with respect to DSF
5 involved and implicated a host of bankruptcy issues.

6 • The receivership action was connected to Mr. Altman's
7 case because if a receiver was appointed, the court's authority
8 over the management of the estate's principal asset could become
9 limited or in jeopardy.

10 • Because the matter involved a motion for relief from
11 stay and the appointment of a receiver, the matter involved the
12 bankruptcy court's core jurisdiction and would impact the
13 administration of the estate.

14 • There would be potential prejudice to creditors of
15 Mr. Altman's estate because a receiver would have no fiduciary
16 duties to those creditors.

17 According to the court, these factors favored denying
18 relief from the automatic stay.

19 The bankruptcy court properly applied the factors for
20 determining "cause" set forth in Kronemyer, Tucson Estates, and
21 Curtis, weighing the relevant factors and concluding that the
22 appointment of a receiver would adversely impact Mr. Altman's
23 ability to reorganize and affect the administration of his
24 estate. Accordingly, the bankruptcy court did not abuse its
25 discretion by denying Ms. Shin's motion for relief from the

1 automatic stay for "cause" under § 362(d)(1).³

2 **C. The bankruptcy court did not err by finding that Ms. Shin**
3 **waived the operation of § 362(e).**

4 Section 362(e)(2) provides for the termination of the
5 automatic stay in chapter 11 cases in which the debtor is an
6 individual 60 days after a request for relief from stay is made
7 by a party in interest unless

8 (A) a final decision is rendered beginning on the date
9 of the request; or (B) such 60-day period is extended
10 -- (i) by agreement of all parties in interest; or
11 (ii) by the court for such specific period of time as
12 the court finds is required for good cause, as
13 described in findings made by the court.

14 Ms. Shin argues that the automatic stay imposed against
15 Mr. Altman's managerial rights terminated by operation of law
16 once the bankruptcy court vacated its oral decision by order on
17 October 13, 2017, and continued the matter to November 28, 2017,
18 and then again to December 7, 2017. Ms. Shin concedes her
19 counsel agreed to the initial continuance of her Motion from
20 July 25th to September 12, 2017, but contends she did not agree

21 ³ Although many provocative questions were asked by the
22 Panel during oral argument regarding potential conflicts that
23 could arise for a receiver appointed in DSF's estate, or for a
24 trustee appointed in Mr. Altman's case, these issues were not
25 raised or considered by the bankruptcy court. We thus do not
26 consider them for the first time on appeal. Cold Mountain v.
27 Garber, 375 F.3d 884, 891 (9th Cir. 2004). Moreover, we are
28 unable to discern why the bankruptcy court denied Ms. Shin's
motion for relief from stay "with prejudice" under these
circumstances. However, we cannot consider any claims that were
not specifically and distinctly argued in a party's opening
brief. Indep. Towers of Wash. v. Washington, 350 F.3d 925, 929
(9th Cir. 2003) (quoting Greenwood v. Fed. Aviation Admin.,
28 F.3d 971, 977 (9th Cir. 1994)).

1 to any further continuances. Therefore, the condition under
2 § 362(e)(2)(B)(i) for extending the 60-day deadline was not met.

3 Although Ms. Shin did not agree to any further continuances
4 of her Motion beyond September 12, 2017, the automatic stay can
5 also be extended beyond the 60-day period under
6 § 362(e)(2)(B)(ii) "by the court for such specific period of
7 time as the court finds is required for good cause, as described
8 in findings made by the court." Ms. Shin ignores this
9 provision. Furthermore, the Central District of California's
10 Local Bankruptcy Rule (LBR) 4001-1(c)(3) provides in relevant
11 part:

12 Unless otherwise ordered, an order by the court to
13 continue a hearing under 11 U.S.C. § 362 to a later
14 date is deemed to include an order continuing the stay
in effect until the conclusion of the hearing on such
later date.

15 Here, Ms. Shin concedes that the automatic stay had not
16 terminated by operation of law under § 362(e)(2) any earlier
17 than the bankruptcy court's October 13, 2017 Order Vacating Oral
18 Ruling And Setting Briefing and Hearing Schedule. In that
19 order, the bankruptcy court clearly continued the hearing on
20 Ms. Shin's motion for relief from stay in order to give the
21 parties an opportunity to brief the Kronemyer/Curtis factors
22 because they had not previously done so. Further, the factors
23 were relevant to the court's decision whether to grant
24 Ms. Shin's request for relief from stay. Accordingly, the order
25 shows that the hearing on Ms. Shin's motion for relief from stay
26 was continued for a specific period of time (until November 28,
27 2017) as the court found was required for "good cause" described
28 in its findings (briefing needed from both parties on the

1 Kronemyer/Curtis factors). Furthermore, under LBR 4001-1(c)(3),
2 the bankruptcy court's order continuing the matter to a later
3 date "is deemed to include an order continuing the stay in
4 effect until the conclusion of the hearing on such later date."
5 Therefore, the automatic stay did not terminate by operation of
6 law as Ms. Shin contends. This same analysis applies to the
7 continuance of Ms. Shin's Motion from November 28, 2017, to
8 December 7, 2017.

9 While courts have found that a party may implicitly waive
10 any right it had to assert automatic termination of the
11 automatic stay under § 362(e), we cannot find an implicit waiver
12 here. An implicit waiver is generally found when the creditor
13 takes some action which is inherently inconsistent with
14 adherence to the time constraints of § 362(e). Wedgewood Inv.
15 Fund, Ltd. v. Wedgewood Realty Grp., Ltd. (In re Wedgewood
16 Realty Grp., Ltd.), 878 F.2d 693 (3rd Cir.1989) (recognizing
17 implicit waiver when creditor takes some action which is
18 inherently inconsistent with adherence to the time constraints
19 of section 362(e); J.H. Streiker & Co., Inc. v. SeSide Co., Ltd.
20 (In re SeSide Co., Ltd), 155 B.R. 112, 116 (E.D. Pa. 1993)
21 (Implied waiver may be found where a creditor's actions are
22 clearly inconsistent with an intention to insist on its
23 rights.).

24 Ms. Shin did not object to the continuance of her request
25 for relief from stay at the time or shortly after the bankruptcy
26 court issued its October 13, 2017 order. Instead, she waited
27 until she filed her brief on the Kronemyer/Curtis factors on
28 October 27, 2017. Nonetheless, we cannot conclude that

1 Ms. Shin's delay in raising her argument or combining it with
2 her briefing of the Kronemyer/Curtis factors involved an
3 implicit waiver. It was the bankruptcy court's actions that
4 required the extension of the automatic stay under § 362(e)(2).
5 To the extent the bankruptcy court determined waiver occurred,
6 it was harmless error because we can affirm on any ground
7 supported by the record, even if it differs from the bankruptcy
8 court's stated rationale. Pollard v. White, 119 F.3d 1430, 1433
9 (9th Cir. 1997).

10 In sum, we conclude that there was no automatic termination
11 of the stay because the condition in § 362(e)(2)(B)(ii) was met;
12 i.e., the bankruptcy court extended the stay for a specific
13 period of time for good cause.

14 **VII. CONCLUSION**

15 For the reasons stated, we AFFIRM.

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