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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

ORDERED PUBLISHED

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

6	In re:)	BAP No.	CC-06-1137-BPaMa
)		
7	MICHAEL HANSEN and KIMBERLY)	Bk. No.	SA 03-19212 ES
	A. HANSEN,)		
8	Debtors.)	Adv. Nos.	SA 04-01336 ES
)		SA 04-01337 ES
9)		
10	KIMBERLY A. HANSEN; MICHAEL)		
	HANSEN,)		
11	Appellants,)		
)		
12	v.)	O P I N I O N	
)		
13	SCOTT MOORE; INSCO INSURANCE)		
	SERVICES, INC.)		
14)		
15	Appellees.)		

Argued and Submitted on February 22, 2007
at Pasadena, California

Filed - April 23, 2007

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

Honorable Erithe A. Smith, Bankruptcy Judge, Presiding

Before: BRANDT, PAPPAS and MARLAR,¹ Bankruptcy Judges.

¹ Hon. James M. Marlar, Bankruptcy Judge for the District of
Arizona, sitting by designation.

1 BRANDT, Bankruptcy Judge:

2
3 After trial, the bankruptcy court entered judgment denying debtor
4 Kimberly Hansen's discharge under § 727(a)². She timely moved for
5 reconsideration, which the bankruptcy court denied. Thereafter, the
6 bankruptcy court awarded the adversary plaintiffs \$97,678.72 in
7 attorneys' fees as a sanction under FRCP 37, applicable via Rule 7037.
8 Debtor timely appealed all three orders.

9 We conclude that,

- 10 ● To the extent she preserved her objections, debtor has not
11 shown the bankruptcy court considered inadmissible evidence,
12 or that its findings of fact are clearly erroneous;
- 13 ● Debtor waived her affirmative defense that settlement of the
14 trustee's separate denial of discharge action precluded these
15 actions, and that, in any event, there is no preclusion; and
16 ● Debtor waived any issue regarding the sanction award.

17 Accordingly, we AFFIRM the judgment and the two orders.

18
19 **I. FACTS**

20 Kimberly Hansen ("Hansen"), an attorney, and Michael Hansen, a real
21 estate broker, filed for chapter 7 relief on 22 December 2003. Although
22 Mr. Hansen is named as an appellant, he was not a party to the adversary

23
24 ² Absent contrary indication, all "Code," chapter and section
25 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330 prior to
26 its amendment by the Bankruptcy Abuse Prevention and Consumer
Protection Act of 2005, Pub. L. 109-8, 119 Stat. 23, as the case from
which this appeal arises was filed before its effective date
(generally 17 October 2005).

27 All "Rule" references are to the Federal Rules of Bankruptcy
28 Procedure, and all "FRCP" references are to the Federal Rules of Civil
Procedure.

1 proceeding, nor was he named in the judgment on appeal.

2 Debtors hired counsel to assist them with the preparation and
3 filing of their bankruptcy. Hansen reviewed and revised at least two
4 versions of the chapter 7 forms, after which counsel transmitted revised
5 forms to her. She signed her petition, schedules, and statements
6 approximately two months before they were filed.

7 Debtors scheduled a residence in Orange County, California, with a
8 value of \$500,000, encumbered by a first deed of trust securing
9 \$356,718.92, and a second deed of trust in favor of "IAT Group" for
10 \$115,000. Testimony at trial established that as of the petition date
11 there was no encumbrance of record in favor of IAT Group, nor was there
12 any such entity. Rather, "IAT Group" referred to Hansen's mother, Irene
13 A. Tennant.

14 The schedules and statements contained a number of other
15 inaccuracies: omitted assets, understated income, undisclosed prior
16 related bankruptcy cases, and undisclosed potentially preferential
17 transfers. On the same day as their continued § 341 meeting, debtors
18 filed amended schedules of income and expenses and an amended statement
19 of financial affairs. They amended their schedules again after Rule
20 2004 examinations. Their amended schedule of secured claims still
21 included the deed of trust to IAT Group, but the claim amount was
22 reduced to \$0.

23 In the meantime, on 9 February 2004, Hansen recorded a deed of
24 trust in favor of her mother, which purportedly secured a \$115,000 loan
25 Ms. Tennant made to the Hansens in 1994 to help purchase the residence.
26 The evidence at trial was that the total amount loaned had been \$50,000,
27 and that the \$115,000 reflected the amount due as of the petition date.

28 Appellees INSCO Insurance Services, Inc., and Scott Moore are

1 creditors by virtue of attorney's fees awarded to them in Hansen's
2 unsuccessful pre-petition employment discrimination lawsuit against
3 INSCO and Moore, a former employee of INSCO who was named as a co-
4 defendant. On 26 May 2004 INSCO and Moore initiated separate adversary
5 proceedings against Hansen, seeking to deny her discharge under § 727.

6 The chapter 7 trustee also initiated a § 727 action against
7 debtors, which they settled by paying \$217,500 to the estate. The
8 bankruptcy court approved the settlement by order entered 19 January
9 2005, and thereafter dismissed the trustee's adversary proceeding with
10 prejudice.

11 The INSCO and Moore adversary proceedings were consolidated for
12 trial. After trial, the bankruptcy court concluded that debtor's
13 discharge should be denied pursuant to §§ 727(a)(2)(A) (transfer of
14 property with intent to hinder, delay, or defraud), and (a)(4)(A) and
15 (B) (false oath and false claim). Transcript, 24 January 2006, pages 2-
16 5. The court entered findings and conclusions and a separate judgment
17 on 16 February 2006.

18 After the bankruptcy court ruled but before judgment was entered
19 Hansen moved for reconsideration, arguing for the first time that the
20 settlement of the trustee's § 727 action barred the separate
21 nondischargeability actions of INSCO and Moore. The trial judge having
22 retired, the action was reassigned to another judge, who heard the
23 motion and denied it.

24 INSCO and Moore moved for an award of attorneys' fees under FRCP
25 37, applicable via Rule 7037, as a sanction for debtors' refusal to
26 admit during discovery factual matters that were later proven at trial.
27 The bankruptcy court awarded \$97,678.72.

28 Hansen appealed the judgment, the denial of reconsideration, and

1 the sanction.³

2
3 **II. JURISDICTION**

4 The bankruptcy court had jurisdiction via 28 U.S.C. § 1334 and
5 § 157(b)(1) and (b)(2)(J), and we do under 28 U.S.C. § 158(c).

6
7 **III. ISSUES⁴**

8 A. Whether the bankruptcy court abused its discretion in
9 admitting excerpts of deposition testimony of non-party witnesses,
10 excerpts of § 341 meeting testimony, and excerpts of Rule 2004
11 examinations of both party and non-party witnesses;

12 B. Whether the bankruptcy court erred in entering judgment
13 denying Hansen's discharge;

14 C. Whether the bankruptcy court abused its discretion in denying
15 Hansen's motion for reconsideration;

16 D. Whether INSCO and Moore are estopped by their failure to
17 object to the settlement;

18 E. Whether the nondischargeability actions of INSCO and Moore are
19 barred by their election of other remedies; and

20 F. Whether the bankruptcy court abused its discretion in
21

22 ³ Debtor's notice of appeal also lists a fourth order which
23 denied her homestead exemption. This order was entered in the main
24 case on 16 February 2006; the notice of appeal was not timely as to
that order. Rule 8002. Accordingly, this appeal is limited to the
three orders timely appealed.

25 ⁴ In her opening brief, appellant requests that we order the
26 bankruptcy court to issue a discharge to Michael Hansen. Although it
is not evident from the record provided us why his discharge has not
27 been issued, this question was not addressed in the orders on appeal.
Accordingly, we have no jurisdiction to grant the relief requested.
28 See 28 U.S.C. § 158(a) (appellate court has jurisdiction over final
judgments, orders, and decrees, and interlocutory orders under some
circumstances). Resolution of Michael Hansen's discharge status lies
with the bankruptcy court.

1 sanctioning Hansen under FRCP 37.

2
3 **IV. STANDARDS OF REVIEW**

4 We review the bankruptcy court's findings of fact for clear error
5 and its conclusions of law de novo. In re Lawson, 122 F.3d 1237, 1240
6 (9th Cir. 1997). In an action for denial of discharge, a finding that
7 debtor acted with intent to hinder, delay, or defraud creditors is
8 reviewed for clear error. Id.

9 "A finding is 'clearly erroneous' when although there is evidence
10 to support it, the reviewing court on the entire evidence is left with
11 the definite and firm conviction that a mistake has been committed."
12 United States v. U.S. Gypsum Co., 333 U.S. 364, 395 (1948). If two
13 views of the evidence are possible, the trial judge's choice between
14 them cannot be clearly erroneous. Anderson v. Bessemer City, 470 U.S.
15 564, 573-575 (1985). We give findings of fact based on credibility
16 particular deference. Id. See also Rule 8013 (on appeal, "due regard
17 shall be given to the opportunity of the bankruptcy court to judge the
18 credibility of the witnesses.")

19 We review the denial of a motion for reconsideration for abuse of
20 discretion, In re Weiner, 161 F.3d 1216, 1217 (9th Cir. 1998); likewise
21 the imposition of discovery sanctions under FRCP 37. In re Rothery, 200
22 B.R. 644, 649 (9th Cir. BAP 1996). A bankruptcy court necessarily
23 abuses its discretion if it bases its decision on an erroneous view of
24 the law or clearly erroneous factual findings. Cooter & Gell v.
25 Hartmarx Corp., 496 U.S. 384, 405 (1990). To reverse for abuse of
26 discretion we must have a definite and firm conviction that the
27 bankruptcy court committed a clear error of judgment in the conclusion
28 it reached. S.E.C. v. Coldicutt, 258 F.3d 939, 941 (9th Cir. 2001); In

1 re Black, 222 B.R. 896, 899 (9th Cir. BAP 1998).

2 We also review a bankruptcy court's evidentiary rulings for abuse
3 of discretion. Latman v. Burdette, 366 F.3d 774, 786 (9th Cir. 2004).
4 To reverse an evidentiary ruling, we must conclude that the error was
5 prejudicial. Id.

6 7 V. DISCUSSION

8 A. Evidentiary Rulings

9 Hansen argues that the bankruptcy court erred in admitting
10 (allowing to be read into the record) excerpts of deposition testimony
11 of non-party witnesses, § 341 first meeting of creditors testimony, and
12 Rule 2004 examination testimony of both party and non-party witnesses.
13 She argues that § 341 testimony and Rule 2004 examination testimony are
14 not "depositions" admissible under FRCP 32, applicable via Rule 7032,
15 and that plaintiffs should have elicited live testimony from Kimberly
16 Hansen and the other witnesses.

17 A party who fails to object to evidence at trial waives the right
18 to raise admissibility issues on appeal. Price v. Kramer, 200 F.3d
19 1237, 1251-52 (9th Cir. 2000). The record reflects that objections to
20 evidence were not consistently raised at trial, and that some were
21 raised but were not pursued. For example, Hansen's counsel objected to
22 admission of excerpts of § 341 meeting testimony on the basis that the
23 transcript had not been authenticated. The court conditionally admitted
24 the excerpts without prejudice to a motion to strike as to authenticity.
25 Transcript, 2 December 2005, page 41. Nothing in the record indicates
26 that Hansen ever so moved.

27 More importantly, appellant has not articulated how she was
28 prejudiced by admission of the evidence at issue. Each witness whose

1 testimony was read into the record was present at the trial, gave live
2 testimony, and could have been cross-examined on their previous
3 testimony. And it is apparent that the bankruptcy court's ruling was
4 based on live testimony. "In nonjury trials, it is assumed that in
5 reaching a decision the trial judge disregarded evidence admitted
6 improperly over objection if the record contains sufficient competent
7 evidence to sustain the result." Hon. Barry Russell, Bankruptcy
8 Evidence Manual, § 103.6 (2007 ed.) (citing Plummer v. Western Int'l
9 Hotels Co., Inc., 656 F.2d 502, 505 (9th Cir. 1981)).

10 If evidence was improperly admitted, appellant points to nothing to
11 rebut the presumption that the court did not rely on it. She has shown
12 no error.

14 **B. Denial of Discharge**

15 The bankruptcy court denied Hansen's discharge under §§ 727(a)(2),
16 (a)(4)(A), and (a)(4)(B). Her primary argument is that the evidence did
17 not support the bankruptcy court's findings on intent.

19 **1. Section 727(a)(2)**

20 Under this subsection, a debtor's discharge shall be denied if she,
21 with intent to hinder, delay, or defraud a creditor or an
22 officer of the estate charged with custody of property under
23 this title, has transferred, removed, destroyed, mutilated, or
concealed, or has permitted to be transferred, removed,
destroyed, mutilated, or concealed--

24 (A) property of the debtor, within one year before the
25 date of the filing of the petition; or

26 (B) property of the estate, after the date of the filing
of the petition[.]

27 § 727(a)(2). The party seeking denial of discharge under this
28 subsection must prove, by a preponderance of the evidence, "1) a

1 disposition of property, such as transfer or concealment, and 2) a
2 subjective intent on the debtor's part to hinder, delay or defraud a
3 creditor through the act of disposing of the property." In re
4 Beauchamp, 236 B.R. 727, 732 (9th Cir. BAP 1999), aff'd, 5 Fed. Appx.
5 743 (9th Cir. 2001) (quoting Lawson, 122 F.3d at 1240). The granting of
6 a security interest is a transfer of property under the Code. Lawson,
7 122 F.3d at 1240; § 101(54).

8 It is undisputed that debtor transferred an interest in estate
9 property post-petition, by recording the deed of trust in favor of her
10 mother, leaving only intent at issue. She argues that this element was
11 not proven.

12 Intent to hinder, delay, or defraud may be inferred from
13 circumstantial evidence. In re Woodfield, 978 F.2d 516, 518 (9th Cir.
14 1992); In re Devers, 759 F.2d 751, 753-54 (9th Cir. 1985). At trial,
15 Hansen testified that she and her husband had executed a deed of trust
16 in 1994 when her mother made them a loan and believed it had been
17 recorded. When Hansen later discovered it had not, she allegedly
18 altered the original to change the amount from \$50,000 to \$115,000, and
19 recorded it on the advice of counsel. Irene Tennant testified that she
20 had no recollection of the deed of trust, and a forensic document
21 examiner testified that the document Hansen recorded was an altered
22 version of a reconveyed deed of trust in favor of the parties from whom
23 the Hansens had purchased the property (the Robinsons).

24 The bankruptcy court found Hansen's explanations surrounding the
25 recording not credible:

26 She would have this Court believe that the post petition
27 recordation was based on the advice or instruction of her
28 attorney of record in this bankruptcy. This Court agrees with
Plaintiffs, however, that even if one believes an attorney
would give and gave Defendant such advice, it is not
reasonable for someone with her background, education and

1 qualifications to follow it . . . it is much more likely
2 than not that the trust deed . . . recorded was . . . an
3 altered version of the one they [debtors] executed in favor of
the people from whom they bought the home in 1994, the
Robinsons.

4 Transcript, 24 January 2006, pages 3-4.

5 "[I]t is axiomatic that the debtor cannot prevail if [s]he fails to
6 offer credible evidence after the creditor makes a prima facie case. A
7 debtor's failure to offer a satisfactory explanation when called on by
8 the court is a sufficient ground for denial of discharge"
9 Devers, 759 F.2d at 754 (citation omitted). That was the case here.

10 The bankruptcy court did not err in concluding that Hansen acted
11 with intent to hinder, delay or defraud.

12
13 **2. Sections 727(a)(4)(A) and (B)**

14 Denial of discharge is also warranted if it is shown that "the
15 debtor knowingly and fraudulently, in or in connection with the case--
16 (A) made a false oath or account; [or] (B) presented or used a false
17 claim[.]" § 727(a)(4). The purpose of this provision is to ensure that
18 a debtor provides reliable information so interested parties do not have
19 to "dig out [the] facts in examination or investigations[.]" In re
20 Aubrey, 111 B.R. 268, 274 (9th Cir. BAP 1990) (citation omitted). As
21 under § 727(a)(2), intent under § 727(a)(4) may be established by
22 circumstantial evidence, or by inferences drawn from a course of
23 conduct. In re Wills, 243 B.R. 58, 64 (9th Cir. BAP 1999).

24 That Hansens amended their bankruptcy schedules after inadequacies
25 were revealed at their § 341 meeting and Rule 2004 exams is immaterial
26 in these circumstances: foxhole conversions are not necessarily
27 convincing, and disclosures made after a debtor realizes exposure is
28 imminent do not absolve fraud. See Beauchamp, 236 B.R. at 734.

1 The bankruptcy court found that "Defendant and her husband
2 materially misrepresented the Debtors' financial affairs in the Initial
3 Schedules and the Initial Statement of Affairs. The Defendant and her
4 husband omitted income, assets, and liabilities, misrepresented their
5 monthly expenses, and misrepresented the amount and nature of a debt
6 allegedly owed to the Defendant's mother." Findings of Fact and
7 Conclusions of Law, page 3, ¶ 14.

8 Specifically, the bankruptcy court found that debtors:

- 9 1. Failed to list two related bankruptcy cases pending on or
10 within six years before the petition date (¶ 15);
- 11 2. Listed on Schedule B one bank account with a balance of
12 \$46.86, when debtors owned three bank accounts with a combined
13 balance of at least \$15,000 (¶ 16);
- 14 3. Listed on Schedule D a deed of trust encumbering debtors'
15 residence in favor of IAT Group for \$115,000, when there was
16 no such encumbrance on the petition date, and no entity called
17 IAT Group – rather, the name was used by the debtor to refer
18 to her mother, Irene A. Tennant (¶ 17);
- 19 4. Failed to list interests in life insurance policies (¶ 26);
- 20 5. Failed to list interests in partnerships and business entities
21 (¶ 27);
- 22 6. Failed to disclose a payment of \$8000 to the IRS within 90
23 days of the petition date (¶ 29);
- 24 7. Failed to disclose a payment of \$5711.33 to George Hansen,
25 Michael Hansen's father, within one year of the petition date
26 (¶ 30);
- 27 8. Understated their gross income for the twelve months preceding
28 the petition date (¶ 31); and

1 9. Amended their schedules only after they learned that their
2 inaccuracies had been discovered; moreover, some of the
3 amended schedules perpetuated the inaccuracies (§ 33).

4 Again, the bankruptcy court found Hansen's explanations not
5 credible:

6 She contends her attorney filed [the petition and
7 schedules] without authorization using forged signatures and
8 containing admittedly incorrect information, and professes to
9 have misunderstood a question in her bankruptcy papers which
10 she repeatedly answered incorrectly respecting the repayment
11 of a loan from her father-in-law during the year preceding the
12 filing of the bankruptcy petition, the majority of which was
13 apparently paid the month before the petition was filed.

14

15 Defendant's contentions that the inaccurate information
16 provided in the bankruptcy schedules regarding the Debtor's
17 income was inadvertent is also suspect. . . . [H]er allegedly
18 signing the incomplete bankruptcy papers a couple of months
19 before they were filed provides another unfortunate benchmark
20 of her willingness to disregard the requirements and
21 obligations of signing documents under oath. . . . [I]f the
22 Defendant was in fact surprised by the filing of her petition,
23 she had ample opportunity after receiving notice of her first
24 meeting of creditors to take steps to assure that the papers
25 were filed as she expected rather than waiting to the day of
26 the creditor's meeting to review them.

27 Transcript, 24 January 2006, pages 2, 4-5.

28 The bankruptcy court did not err in finding the requisite intent.
The sheer number of material inaccuracies contained in schedules that
debtor, an attorney, admittedly reviewed and revised twice suffices as
circumstantial evidence to support the finding that the "knowingly and
fraudulently" element of § 727(a)(4) was proven. See In re Searles, 317
B.R. 368, 378-79 (9th Cir. BAP 2004), aff'd, 2006 WL 3431844 (9th Cir.
2006) (discussing debtor's continuing duty to assure accuracy and
completeness of schedules). Here we also have the bankruptcy court's
unequivocal finding, to which we must defer, that Hansen's explanations
were not credible.

1 **C. Reconsideration**

2 Reconsideration under FRCP 59(e), applicable via Rule 9023, is
3 appropriate only if the moving party demonstrates (1) manifest error of
4 fact; (2) manifest error of law; or (3) newly discovered evidence.
5 In re Basham, 208 B.R. 926, 934 (9th Cir. BAP 1997), aff'd, 152 F.3d 924
6 (9th Cir. 1998) (table).

7 Hanson moved for reconsideration on the ground that INSCO and Moore
8 were barred, under principles of res judicata, from relitigating the
9 § 727 claims.

10 The res judicata doctrines regarding judgments of federal courts
11 are a matter of federal common law. The Supreme Court has applied the
12 Restatement (Second) of Judgments' substitution of the terms "claim
13 preclusion" and "issue preclusion" for "res judicata" and "collateral
14 estoppel." In re George, 318 B.R. 729, 733 (9th Cir. BAP 2004), aff'd,
15 144 Fed. Appx. 636 (9th Cir. 2005), cert. denied, ___U.S. ___, 126 S.
16 Ct. 1068 (2006) (citing New Hampshire v. Maine, 532 U.S. 742, 748
17 (2001); additional citations omitted). Both claim and issue preclusion
18 are waived if not pled as affirmative defenses. Id. at 736; FRCP 8(c).
19 Nothing in the record indicates debtor ever raised preclusion before she
20 moved for reconsideration. Accordingly, she has waived that affirmative
21 defense. FRCP 12(b), applicable via Rule 7012(b). Kontrick v. Ryan,
22 540 U.S. 443, 459 (2004).

23 Even had she not waived the defense, the bankruptcy court correctly
24 determined that claim preclusion did not apply. Claim preclusion can
25 operate to bar a legal theory that has never been, but could and should
26 have been, litigated by the parties in a prior proceeding:

27 Claim preclusion treats a judgment, once rendered, as the full
28 measure of relief to be accorded between the same parties on
the same claim or cause of action. Claim preclusion prevents
litigation of all grounds for, or defenses to, recovery that

1 were previously available to the parties, regardless of
2 whether they were asserted or determined in the prior
proceeding.

3 Robi v. Five Platters, Inc., 838 F.2d 318, 321-22 (9th Cir. 1988)
4 (quotations, citations, and footnote omitted).

5 For these purposes, a "claim" is a party's right to pursue remedies
6 "with respect to all or any part of the transaction, or series of
7 connected transactions, out of which the action arose." Restatement
8 (Second) of Judgments § 24(1) (1982). When there has been a final
9 judgment on a part of a "claim," the right to obtain remedies respecting
10 that claim is extinguished. George, 318 B.R. at 735-37; Christopher
11 Klein et al., Principles of Preclusion and Estoppel in Bankruptcy Cases,
12 79 Am. Bankr. L.J. 839, 852-58 (2005).

13 Under federal law, the doctrine of claim preclusion requires: (1)
14 the identity of claims, (2) a final judgment on the merits, and (3)
15 privity between the parties. Tahoe-Sierra Preservation Council, Inc. v.
16 Tahoe Regional Planning Agency, 322 F.3d 1064, 1077 (9th Cir. 2003). A
17 judicially approved settlement operates as a final judgment on the
18 merits for purposes of claim preclusion. Rein v. Providian Fin. Corp.,
19 270 F.3d 895, 902-03 (9th Cir. 2001).

20 It is undisputed that the claims are identical, although there are
21 some variations in the subsections of § 727 under which the parties
22 sought relief. For example, the trustee's complaint included a claim
23 under subsection (a) (7), while the INSCO/Moore complaints did not. But

24 [w]hat constitutes the same "claim" for purposes of claim
25 preclusion is determined under the so-called "transactional
26 test" This test focuses on the transactional nucleus
27 of operative facts and includes all rights to remedies with
respect to all or any part of the "transaction," determined
pragmatically, out of which the action arose, so long as they
could conveniently be tried together.

28 George, 318 B.R. at 735 (citations omitted). All the claims in the

1 § 727 actions arose out of the same basic facts.

2 Thus, the only element at issue is privity between trustee and
3 creditors.

4 A person is in privity when that person is "so identified in
5 interest with a party to former litigation that he represents precisely
6 the same right in respect to the subject matter involved." Headwaters
7 Inc. v. U.S. Forest Serv., 399 F.3d 1047, 1052-53 (9th Cir. 2005)
8 (citation omitted). The concept was traditionally limited to certain
9 "legal relationships in which two parties have identical or transferred
10 rights with respect to a particular legal interest," such as co-owners
11 of property, decedents and heirs, joint obligees, etc. Id. at 1053.
12 However, it now includes almost any relationship in which "there is
13 'substantial identity' between parties, that is, when there is
14 sufficient commonality of interest. . . . [P]rivity is a flexible
15 concept dependent on the particular relationship between the parties in
16 each individual set of cases[.]" Tahoe-Sierra, 322 F.3d at 1081-82
17 (citations and quotations omitted).

18 Still, parallel legal interests are not sufficient to establish
19 privity. It must be shown that the subsequent plaintiff's interests
20 were adequately represented by the plaintiff in the former litigation.
21 See Headwaters, 399 F.3d at 1054; Irwin v. Mascott, 370 F.3d 924, 930
22 (9th Cir. 2004).

23 Here the bankruptcy court correctly concluded that the trustee was
24 not in privity with appellees. First, § 727 grants the trustee and each
25 creditor an independent right to file an action to deny discharge.
26 Second, the interests of trustees and creditors, while similar, are not
27 identical. As pointed out by the bankruptcy court, the trustee may
28 settle a case with the idea of maximizing recovery for the estate, while

1 still leaving creditors with unpaid claims. Creditors who receive less
2 than a 100% distribution, on the other hand, want to be able to pursue
3 payment in full. Transcript, 16 March 2006 at 3-7.

4 Appellant argues that there is "substantial identity" of interests
5 between the trustee and creditors, but cites no case so holding in the
6 context of § 727 claims. She does cite Petitioning Creditors of Melon
7 Produce, Inc. v. Braunstein, 112 F.3d 1232, 1240 (1st Cir. 1997) wherein
8 the court held that unsecured creditors were barred, under claim
9 preclusion principles, from pursuing an equitable subordination claim.
10 There the unsecured creditors did not object to the trustee's settlement
11 of an adversary proceeding to avoid preferential and/or fraudulent
12 transfers, nor did they ask the trustee to pursue an equitable
13 subordination claim in that action. Accordingly, the court concluded
14 that "[b]ecause the Trustee was acting for the petitioning unsecured
15 creditors, they are bound by the Trustee's actions." Id. The court
16 reasoned that because the Code confers standing only on the trustee, on
17 behalf of creditors, to bring a claim for avoidance of preferential or
18 fraudulent transfers, the trustee would have been the appropriate party
19 to request equitable subordination of the resulting claim.

20 But this case involves a different statute with a different
21 purpose, and the Code implicitly acknowledges the potentially differing
22 interests of the trustee and individual creditors by conferring
23 independent standing upon each to seek denial of discharge.

24
25 **D. Estoppel?**

26 Hansen contends INSCO and Moore's failure to object to her
27 settlement with the trustee estops them from obtaining denial of
28 discharge judgments. In the bankruptcy court she did not explicitly

1 argue estoppel, although she did emphasize that INSCO and Moore had
2 notice of the settlement and failed to object. We do not ordinarily
3 consider arguments advanced for the first time on appeal. See Stewart
4 v. U.S. Bancorp, 297 F.3d 953, 957 n.1 (9th Cir. 2002).

5 Moreover, Hansen advances no analysis or argument in her brief
6 regarding estoppel, and has thus waived the issue. Laboa v. Calderon,
7 224 F.3d 972, 980-81 n.6 (9th Cir. 2000).

8 In any event, it is difficult to see why Hansen herself is not
9 estopped from asserting claim preclusion: nothing indicates she raised
10 the issue of the impact the settlement might have on the INSCO and Moore
11 actions when it was before the bankruptcy court for approval, while the
12 INSCO and Moore actions were pending. Hansen articulates no rationale
13 for reversing the normal burden that one who asserts preclusion must
14 establish it. By analogy, we see no reason why it was not her burden to
15 surface the issue, and put appellees on notice that their action might
16 be precluded, or assure that the trustee did.

17
18 **E. Election of Remedies?**

19 Hansen complains that appellees have received a distribution from
20 the estate funded by the settlement proceeds and therefore elected their
21 remedy and stand to obtain a double recovery if allowed to prevail. But
22 denial of her discharge will only entitle appellees to pursue collection
23 of the unpaid portions of their claims, while election of remedies:

24 prevents a party from obtaining double redress for a single
25 wrong. The doctrine "refers to situations where an individual
26 pursues remedies that are legally or factually inconsistent."
27 Alexander v. Gardner-Denver Co., 415 U.S. 36, 49, 94 S. Ct.
28 1011, 39 L. Ed. 2d 147 (1974). As a general rule, three
elements must be present for a party to be bound to an
election of remedies: (1) two or more remedies must have
existed at the time of the election, (2) these remedies must
be repugnant and inconsistent with each other, and (3) the
party to be bound must have affirmatively chosen, or elected,

1 between the available remedies.

2 Latman, 366 F.3d at 781-82 (9th Cir. 2004)

3 There is no prospect of a double recovery, and partial payment via
4 the trustee's settlement is neither factually nor legally inconsistent
5 with later collection of the balance of undischarged debt. There was no
6 election of remedies. In any event, Hansen did not make this argument
7 to the bankruptcy court, and thus waived it. Stewart, 297 F.3d at 957
8 n.1.

9 We conclude there is no privity, and settlement of the trustee's
10 action does not bar those of INSCO and Moore.

11
12 **F. FRCP 37 Sanctions**

13 The bankruptcy court sanctioned appellant \$97,678.72 under FRCP 37,
14 applicable via Rule 7037, for appellees' expenses, including attorneys'
15 fees, incurred "in proving the truth of matters denied by Defendant in
16 response to certain admissions requested by Plaintiffs under FRCP 36."
17 Order on Plaintiff's Motion for Attorneys' Fees, 21 March 2006.

18 The rule provides:

19 If a party fails to admit the genuineness of any document
20 or the truth of any matter as requested under Rule 36, and if
21 the party requesting the admissions thereafter proves the
22 genuineness of the document or the truth of the matter, the
23 requesting party may apply to the court for an order requiring
24 the other party to pay the reasonable expenses incurred in
25 making that proof, including reasonable attorney's fees. The
26 court shall make the order unless it finds that (A) the
27 request was held objectionable pursuant to Rule 36(a), or (B)
28 the admission sought was of no substantial importance, or (C)
the party failing to admit had reasonable ground to believe
that the party might prevail on the matter, or (D) there was
other good reason for the failure to admit.

FRCP 37(c) (2).

Hansen did not oppose appellees' motion in the bankruptcy court and
the bankruptcy court granted it. Transcript, 16 March 2006, page 9.

1 Although Hansen prays for the order to be reversed, she sets forth no
2 argument in her briefs. She has twice waived this issue. See Stewart,
3 297 F.3d at 957 n.1; Laboa, 224 F.3d at 980 n.6 (issues not specifically
4 and distinctly argued in the opening brief are deemed waived).

5 Accordingly, we will affirm the sanctions order.

6
7 **VI. CONCLUSION**

8 Hansen has waived any objection to the bankruptcy court's
9 evidentiary rulings. In any event, she has not shown either abuse of
10 discretion or prejudice suffered as a result of those rulings.

11 Contrary to Hansen's arguments, the bankruptcy court did not
12 clearly err in finding that appellant acted with the requisite intent to
13 justify denial of discharge under § 727(a)(2) and (a)(4). No other
14 element is in dispute.

15 Hansen waived the affirmative defense of claim preclusion. Even if
16 she had not, she has shown no abuse of discretion in the denial of her
17 motion for reconsideration on that ground. Nor are her estoppel and
18 election of remedies arguments well founded.

19 Finally, Hansen has set forth no basis for reversing the bankruptcy
20 court's order awarding discovery sanctions.

21 Accordingly, we AFFIRM.