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

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:	BAP No. CC-08-1103-PaHMo
EVERETT LOPEZ,	Bk. No. SV 04-15351-GM
Debtor.	Adv. No. SV 04-01464-KT
EVERETT LOPEZ, Appellant,	
v.	**M E M O R A N D U M**[1]
EMERGENCY SERVICE RESTORATION, INC., Appellee.	

Argued and submitted on November 21, 2008
at Los Angeles, California

Filed - December 31, 2008

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

Honorable Kathleen Thompson, Bankruptcy Judge, Presiding

Before: PAPPAS, HOLLOWELL and MONTALI, Bankruptcy Judges.

[1] This disposition is not appropriate for publication. 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.

After determining that application of issue preclusion was available, an earlier Panel remanded this adversary proceeding to the bankruptcy court to exercise its discretion whether to apply the doctrine to the findings of a state court that appellant Everett Lopez ("Lopez"), a chapter 7[2] debtor, committed a willful and malicious injury to the property of appellee Emergency Service Restoration, Inc. ("ESR") for purposes of § 523(a)(6). Perceiving no abuse of discretion in the bankruptcy court's decision on remand to apply issue preclusion, we AFFIRM.

FACTS[3]

Lopez and his former company, Fibertech, were competitors of ESR in the water damage and cleanup business. In August 2000, ESR sued Lopez in Los Angeles County Superior Court. Emergency Service Restoration, Inc. v. Lopez et al., Case No. PC-025958 (the "State Court Action"). Among other claims, ESR alleged that Lopez had misappropriated ESR's trade secrets, including customer lists and marketing materials, via a Fibertech employee, Luis Martinez, an independent contractor of ESR. Over Lopez' objection, the state court judge determined that the action should be tried

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[2] Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, as enacted and promulgated prior to the effective date (October 17, 2005) of the relevant provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109-8, April 20, 2005, 119 Stat. 23, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

[3] This recitation of facts from the filing of the State Court Action through the Panel's decision of the first appeal is based on the published opinion in the first appeal, Lopez v. Emergency Service Restoration, Inc. (In re Lopez), 367 B.R. 99 (9th Cir. BAP 2007) ("Lopez I").

without a jury. After a seven-day trial, on August 14, 2002, the state court awarded ESR damages of $800,000 against Lopez and Fibertech, jointly and severally, together with $386,367.53 in attorney's fees and costs, for misappropriating trade secrets. The state court judge's statement of decision recited that, "The Court further finds that Lopez/Fibertech's misappropriation of ESR's customer list trade secret was willful and malicious and that ESR is the prevailing party in this action. Therefore, ESR shall recover reasonable attorney's fees and costs incurred in this action." Lopez I, 367 B.R. at 99.

Lopez filed and then abandoned an appeal of the state court judgment. As a result, the state court judgment is final.

On August 10, 2004, Lopez filed a petition for relief under chapter 7 of the Bankruptcy Code.[4] ESR commenced an adversary proceeding against Lopez seeking to have the money judgment in the State Court Action declared non-dischargeable under § 523(a)(4) and (6).

ESR moved for summary judgment on April 1, 2005, arguing that the judgment against Lopez in the State Court Action was for willful and malicious misappropriation of its trade secrets and that issue preclusion should be applied to bar Lopez from relitigating whether ESR's judgment was for conduct that constitutes larceny and willful and malicious injury to ESR and its property. Therefore, ESR insisted, the bankruptcy court

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[4] Fibertech, acting through Lopez, had earlier filed for protection under chapter 11. ESR purchased the assets of Fibertech in a § 363(f) sale. The sale agreement relieved Fibertech of its liability for the ESR judgment, but did not relieve Lopez.

should order that ESR's claim against Lopez was excepted from discharge in his bankruptcy case under § 523(a)(4) and (6).

After hearing arguments from counsel on ESR's summary judgment motion on August 4, 2005, the bankruptcy court ruled that because the elements of larceny within the meaning of § 523(a)(4) had not been tried in the State Court Action, issue preclusion would not apply to that claim. Hr'g Tr. 29:13-19 (August 4, 2005). However, the bankruptcy court determined that the state court had made adequate findings that a willful and malicious injury within the meaning of § 523(a)(6) had occurred. Hr'g Tr. 29:20-23. The bankruptcy court rejected Lopez' argument that it had the discretion to disregard the state court judgment, stating, "I don't agree that I have the authority to ignore what the state court did[.]" Hr'g Tr. 30:5-6

The bankruptcy court memorialized its findings in its order, judgment, and separate findings of fact and conclusions of law ("FOF/COL"), all entered on December 16, 2005. The bankruptcy court ruled:

> The elements of a claim for relief for Larceny within the meaning of Bankruptcy Code section 523(a)(4) were not actually litigated and determined in the State Court Action. FOF/COL ¶ 12.
>
> The elements of a claim for relief for willful and malicious injury to property within the meaning of Bankruptcy Code section 523(a)(6) were actually litigated and determined in the State Court Action. FOF/COL ¶ 15.
>
> The Debtor may not collaterally attack the State Court Judgment under the Rooker-Feldman Doctrine. FOF/COL ¶ 17.
>
> ESR is entitled to summary judgment on its Second Claim for Relief for Willful and Malicious Injury to Property under Bankruptcy Code section 523(a)(6). FOF/COL ¶ 18.

Lopez appealed the bankruptcy court's partial summary judgment.[5] On March 27, 2007, the Panel issued a published Opinion, Lopez I. The Opinion primarily addressed three topics: application of the Rooker-Feldman Doctrine, issue preclusion, and the extent of the bankruptcy court's discretion.

The Panel first determined that the bankruptcy court had erroneously concluded that Rooker-Feldman required it to give the state court judgment preclusive effect in the dischargeability action. Id. at 104.

Next, the Panel discussed several aspects of the bankruptcy court's decision to apply issue preclusion. It affirmed the bankruptcy court's determination that the factual elements of a claim for relief for willful and malicious injury to ESR's property within the meaning of § 523(a)(6) had been litigated and decided in the State Court Action. In that regard, the Panel rejected Lopez' argument that the findings in the state court's statement of decision should not be given preclusive effect because those findings had been drafted by ESR's trial counsel. And the Panel affirmed the bankruptcy court's ruling that it could not disregard the state court judgment because Lopez felt that he had been improperly denied a jury trial. Id. at 104-06.

Finally, the Panel ruled that the bankruptcy court erred in holding that it lacked discretion to decline to apply issue preclusion. The Panel provided an extensive presentation of various exceptions to the application of issue preclusion, and

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[5] On May 2, 2006, the bankruptcy court certified the partial summary judgment as final under Rule 7054(a), which incorporates Fed. R. Civ. P. 54(b), as to the willful and malicious injury claim.

remanded the action to the bankruptcy court for a discretionary determination whether the factors suggested by Lopez, or other considerations of fairness, justified relitigation in the bankruptcy court of ESR's claim that Lopez committed a willful and malicious injury to ESR's property. Id. at 108.

On remand, after a status conference, the bankruptcy court invited the parties to file supplemental briefs. They did so. In his supplemental brief, Lopez raised sixteen new issues that the bankruptcy court should consider in exercising its discretion whether to apply issue preclusion that were not presented in the earlier BAP appeal. ESR filed a reply brief addressing the additional issues.

The bankruptcy court heard oral argument from the parties on February 29, 2008,[6] and issued a Memorandum detailing its decision on March 24, 2008 ("Memorandum on Remand"). In its decision, the bankruptcy court ratified its earlier conclusion that the requirements for issue preclusion were satisfied.

The Memorandum on Remand next discussed and rejected the arguments advanced by Lopez as to why the court should not apply issue preclusion under the circumstances, grouping them into six general categories: (1) lack of decorum in the state trial; (2) denial of a right to trial by jury; (3) findings were drafted by ESR's counsel; (4) incompetence of Lopez' attorneys; (5) incompetence of trial judge; (6) Lopez' depression and ESR's animosity. The bankruptcy court ultimately concluded:

> Unlike many disputes over issue preclusion, this case is not about whether the elements for application of the

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[6] A transcript of that hearing has not been included in the excerpts of record in this appeal.

> doctrine have been met. Here, the issue is whether, in light of that doctrine and the Full Faith and Credit Act, the court is convinced that application of that doctrine is fundamentally unfair to the Debtor under the circumstances of this case. While I have great sympathy for the Debtor and admiration for the devotion of his counsel, I cannot reach that conclusion.

Memorandum on Remand at 7.

The bankruptcy court issued its Order on Remand Denying Reconsideration of [Partial Summary] Judgment on March 25, 2008. Dkt. no. 79. Lopez filed this timely appeal on April 2, 2008.

JURISDICTION

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

ISSUE

Whether the bankruptcy court abused its discretion in applying issue preclusion to the state court judgment and thereby determining that Lopez committed a willful and malicious injury to the property of ESR for purposes of § 523(a)(6).

STANDARD OF REVIEW

The decision to apply issue preclusion is reviewed for abuse of discretion. Lopez I, 367 B.R. at 103; see also Dias v. Elique, 436 F.3d 1125, 1128 (9th Cir. 1997). We may not reverse the bankruptcy court unless we have a definite conviction that it committed a clear error of judgment, upon the weighing of relevant factors. Cashco Fin. Servs. v. McGee (In re McGee), 359 B.R. 764, 769 (9th Cir. BAP 2006).

DISCUSSION

I.

In his opening brief, Lopez asks us to revisit the Panel's conclusion in Lopez I that the elements for application of issue preclusion are satisfied in this action. We decline to reexamine our prior Panel's conclusion that issue preclusion is available.

The Panel's rulings in Lopez I were set forth in a published opinion, and it is the long-standing policy of the Panel that rulings in published opinions of a panel are binding on subsequent panels. Ball v. Payco-Gen. Am. Credits, Inc. (In re Ball), 185 B.R. 595, 597 (9th Cir. BAP 1995) (conforming BAP practices to principles of stare decisis followed by the court of appeals), citing, e.g., In re Visiness, 57 F.3d 775 (9th Cir. 1995) (holding that an appellate panel is bound by decisions of prior panels unless an en banc decision, Supreme Court decision, change in state precedent, or subsequent legislation undermines those decisions).

Moreover, even if the Panel's earlier decision had not been published, its rulings would nonetheless bind us in this context under "law of the case." Thomas v. Bible, 983 F.2d 152, 154 (9th Cir. 1993) ("Under 'law of the case' doctrine, one panel of an appellate court will not as a general rule reconsider questions which another panel has decided on a prior appeal in the same case."). Although the court's instruction is offered "as a general rule," our discretion to reconsider the prior Panel's decision here is limited: "A court may have discretion [under law of the case doctrine] only where (1) the first decision was clearly erroneous; (2) an intervening change in the law has

occurred; (3) the evidence on remand is substantially different; (4) other changed circumstances exist; or (5) a manifest injustice would otherwise result." Disimone v. Browner, 121 F.3d 1262, 1266 (9th Cir. 1997).

Although none of these conditions seemed to apply here, after briefing was completed in this appeal, the Ninth Circuit issued its opinion in Barboza v. New Form, Inc. (In re Barboza), 545 F.3d 702 (9th Cir. 2008), wherein the court examined the relationship between the "willful" and "malicious" prongs of the test for an exception to discharge under § 523(a)(6). To be prudent, the Panel, on its own motion, asked the parties to address the implications, if any, this new decision may have on the issues in this appeal at oral argument. They did so. But after reviewing Barboza, and considering the arguments of counsel, we conclude that this new decision did not significantly modify existing case law in this circuit.

As we read it, the thrust of Barboza is that, when faced with a request for an exception to discharge under § 523(a)(6) based upon the preclusive effect of a judgment entered by another court, a bankruptcy court must still make specific findings as to both the willful and malicious prongs of the statute: "Although there may be some overlap between the test for 'willfulness' and the test for 'malice' [citation omitted] the overlap does not mean that the bankruptcy court can ignore entirely the malice inquiry." Id. at 711. The court of appeals concluded that the bankruptcy court had erred because "[T]he bankruptcy court made no rulings as

to the malicious prong of § 523(a)(6)." Id.[7]

The analysis in Barboza is based upon its earlier decision in Carillo v. Su (In re Su), 290 F.3d 1140, 1146-47 (9th Cir. 2002) (holding that the malicious injury requirement is separate from the willful injury requirement, and that conflating the two requirements is grounds for reversal). Su, in turn, affirmed an earlier decision holding that the bankruptcy court must make findings as to both willfulness and malice. Petralia v. Jercich (In re Jercich), 238 F.3d 1202, 1209 (9th Cir. 2001). In other words, in our view, no novel legal trails were blazed in Barboza.

The Panel's opinion in Lopez I is consistent with the Ninth Circuit's § 523(a)(6)decisions. The Panel directly addressed whether Lopez' misappropriation of trade secrets, as determined by a state court judge, was a willful and malicious injury to ESR's property and nondischargeable under § 523(a)(6). In its opinion, the Panel examined two lines of cases. The majority line, as exemplified by Hobson Mould Works, Inc. v. Madsen (In re Madsen), 195 F.3d 988, 988-90 (8th Cir. 1999), held that a state court judgment for misappropriation of trade secrets met the requirements for willful and malicious injury to property and precluded relitigating the issues of willfulness and malice in an action under § 523(a)(6). See also Spring Works, Inc. v. Sarff (In re Sarff), 242 B.R. 620 (6th Cir. BAP 2000). Importantly, although not mentioned by the Panel in Lopez I, Madsen was a trade secret case arising under Iowa law, and Sarff involved a similar

[7] The court also held that the Panel erred in its review of the bankruptcy court's decision by ruling that, under the circumstances, malice could be implied from the debtor's willful acts. In re Barboza, 545 F.3d at 711-12.

claim under Ohio law. Both Iowa and Ohio, like California, have adopted the Uniform Trade Secrets Act, and their versions of that law, including the provisions regarding willful and malicious conduct in a trade secret case, are virtually identical. Compare, CAL. CIV. CODE § 3426; IOWA CODE § 550; OHIO REV. CODE § 1333.61.[8]

The Panel in Lopez I then contrasted the majority line with a minority group of cases, including Miller v. J.D. Abrams Inc. (In re Miller), 156 F.3d 598 (5th Cir. 1998). Miller reversed a bankruptcy court's summary judgment holding that a state court's judgment for misappropriation of trade secrets was nondischargeable under § 523(a)(6). The Fifth Circuit held that the state court judgment did not necessarily establish the willful and malicious prongs. The Panel correctly observed that, unlike Madsen, the state court in Miller had not made an explicit finding of willfulness and maliciousness, nor did it award punitive damages or attorney's fees. Miller was decided applying Texas law, a state that has not adopted the Uniform Trade Secrets Act.

The Panel found that, in this case, the state court made "both an express finding of willful and malicious conduct and an award of attorney's fees" pursuant to the California Uniform Trade Secrets Act. Its decision was thus consistent with the Madsen line of cases, which the Panel determined "accurately states the law[.]" Lopez I, 367 B.R. at 106-07.

The earlier Panel's decision affirming the bankruptcy court's ruling that the elements for application of issue preclusion were satisfied is consistent with the court of appeals' holding in

[8] All three statutory versions provide for an award of punitive damages and/or attorney's fees for willful and malicious misappropriation of trade secrets.

Barboza. The bankruptcy court, relying upon the findings by the state court judge, expressly found that the conduct resulting in ESR's damages was both willful and malicious. During the original hearing, the bankruptcy court noted:

> THE COURT: I do think that there are sufficient findings to find willful and malicious injury, and the intent, in the documents that were signed by this [the state court] judge and so I find for ESR on that ground.

Hr'g Tr. 29:20-23 (August 4, 2005).

> MR. DORCY [counsel for Lopez]: Is the court finding that the state court found intentional injury? Is that what it's finding?
>
> THE COURT: Yes.

Hr'g Tr. 31:4-6 (August 4, 2005).

In its Findings of Fact and Conclusions of Law, the bankruptcy court memorialized these oral findings:

> ¶ 15. The elements of a claim for relief for willful and malicious injury to property within the meaning of Bankruptcy Code section 523(a)(6) were actually litigated and determined in the State Court Action.

Findings of Fact and Conclusions of Law in Support of Order Granting in Part Motion of Plaintiff Emergency Service Restoration, Inc. For Summary Judgment, entered December 16, 2005.

Then, following remand, the bankruptcy court reaffirmed this finding:

> The judgment in the State Court Action is based on findings of willful and malicious conduct which findings are necessary to the State Court Judgment. Those findings meet the standard for nondischargeability under Section 523(a)(6).

Memorandum on Remand at 4.

In analyzing the state court's decision, the bankruptcy court had access to the transcript of the seven days of trial in the

State Court Action, the state court judge's Tentative Decision announced on the record on the last day of trial of June 19, 2002, the state court's Statement of Decision of August 14, 2002, and the State Court Judgment. We also have that complete record before us in this appeal and find that the record from the State Court Action adequately supports the bankruptcy court's findings of willful and malicious conduct.

For example, in the state court's Statement of Decision, the court in three locations finds that Lopez committed a "willful and malicious" misappropriation of trade secrets:

> The court, after hearing and considering the evidence, evaluating the credibility and demeanor of witnesses, considering plaintiff's motion for directed verdict, and hearing arguments of counsel, issued a tentative decision on June 19, 2002, in favor of plaintiff and against all defendants on plaintiff's cause of action for unfair competition based on the willful and malicious misappropriation of trade secrets by defendants.

Statement of Decision at IA.

> The Court further finds that Lopez/FiberTech's misappropriation of ESR's customer list trade secret was willful and malicious and that ESR is the prevailing party in this action.

Statement of Decision at IC.

> Requested Issue No. 8: Whether or not attorney's fees and costs can be awarded in this matter under California Civil Code Section 3426.4 and if so the basis of such an award?
>
> Decision on Issue No. 8: As the basis for finding that Lopez/FiberTech engaged in unlawful business practices in violation of the [Unfair Competition Act], the Court finds that Lopez/FiberTech misappropriated ESR's customer list trade secret in violation of Civil Code § 3426.1 of the [Uniform Trade Secrets Act]. The Court further finds that Lopez/FiberTech's misappropriation was willful and malicious. Therefore, ESR is entitled to reasonable attorney's fees pursuant to Civil Code § 3426.4 of the UTSA.

Statement of Decision at II.

This last-quoted finding by the state court, awarding attorney's fees to ESR, is particularly significant because the award is made pursuant to Cal. Civ. Code § 3426.4: "If . . . willful and malicious misappropriation exists, the court may award reasonable attorney's fees and costs to the prevailing party. . . ." See Vacco Indus. Inc. v. Van den Berg, 5 Cal. App.4th 34, 54 (Cal. Ct. App. 1992) ("In order to justify [attorney's] fees under Civil Code 3426.4, the court must find a 'willful and malicious misappropriation' occurred."); see also Roton Barrier, Inc. v. Stanley Works, 79 F.3d 1112, 1120 (Fed. Cir. 1996) (reversing an award of attorney's fees in a trade secrets case because the appeals court also overturned the finding of willful and malicious misappropriation).[9]

In summary, we conclude that Barboza did not represent an intervening change in the case law, and that under the law of the case, we are bound by the decisions on issues made by the earlier Panel in Lopez I. We therefore decline Lopez' request that we review whether the elements for application of issue preclusion are satisfied in this case.

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[9] In his "Request for Statement of Decision," Lopez provided a list of fifteen issues to the state judge to be addressed in his decision. Statement of Decision at II. Requested Issue number 8 asks the state court to decide "whether or not attorney's fees can be awarded in this matter under California Civil Code Section 3426.4 and the basis for such an award." In other words, not only did Lopez request that the court specifically address the nature of his actions, but he cited to the precise statute that allows an award of attorney's fees only if his actions were "willful and malicious misappropriation." That Lopez specifically directed the state court's attention to the willful and malicious misappropriation section of the statute undermines his argument in this appeal that ESR inserted the willful and malicious terms in the Statement of Decision without the court's authorization.

The Panel in Lopez I made other rulings that also are binding on us under law of the case. In particular, the Panel decided that, even if the state court had erroneously denied Lopez' right to a jury trial, it would not affect the obligation of a federal court to give full faith and credit to a final California judgment. Lopez I, 367 B.R. at 106. While Lopez asks that we do, the Panel may not revisit this issue in this appeal.

Nor will we entertain Lopez' repeated challenges to the validity of the Statement of Decision based upon his view that the decision was drafted by ESR. The Lopez I Panel ruled that, since California courts allow this practice, full faith and credit requires us to accept the findings in the Statement of Decision as eligible for issue preclusion purposes. Id. at 105.

II.

In Lopez I, the Panel remanded to the bankruptcy court with instructions:

> Lopez urged the bankruptcy court to consider several factors which he claimed militate against precluding him from contesting that this conduct was willful and malicious. These included alleged lack of decorum in the state court trial, alleged denial of a right to a jury, and the fact that the findings in the state court's written statement of decision drafted by ESR's counsel go beyond those made by the court orally. We are not in a position to be able to make the discretionary determination whether any of these factors, taken in context, justify allowing the nature of Lopez's conduct to be relitigated in bankruptcy court and we accordingly express no opinion on this issue. These are factors for the bankruptcy court to weigh in the exercise of sound discretion.

Lopez I, 367 B.R. at 108. These instructions are consistent with the Supreme Court's pronouncement that trial courts have "broad discretion" in determining when issue preclusion is to be applied.

Parklane Hosiery Co. v. Shore, 439 U.S. 322, 331 (1979).

The Restatement provides guidance to courts concerning the factors that may militate against application of issue preclusion. They include "change in applicable legal context; avoiding inequitable administration of laws; differences in quality or extensiveness of procedures; and lack of adequate opportunity or incentive to obtain a full and fair adjudication in the initial action. RESTATEMENT (SECOND) OF JUDGMENTS, § 28 (2), (3) and (5); accord Parklane Hosiery, 439 U.S. at 331.[10]

In applying issue preclusion in a federal court to a state court judgment, the court should take into consideration the issue preclusion law of that state. Diamond v. Kolcum (In re Diamond), 285 F.3d 822, 826 (9th Cir. 2002). California law is consistent with the federal law discussed above concerning the discretionary application of issue preclusion, but California additionally requires a court to take into consideration any public policy implications before applying issue preclusion. Lucido v. Super. Ct., 795 P.2d 1223, 1226 (Cal. 1990).

In this action, the bankruptcy court properly considered these guidelines in its review of the factors Lopez urged militated against application of issue preclusion. In its Memorandum on Remand, the court exercised its "broad discretion," viewing each of the categories of objections raised by Lopez to the application of issue preclusion, both standalone and in context. It supported its conclusions with citations to authority

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[10] In Parklane Hosiery, the Supreme Court provided guidelines to courts in applying issue preclusion. Those guidelines are either consistent with the Restatement, or only applicable to nonmutual offensive issue preclusion (i.e., where issue preclusion may affect the rights of third parties).

and with reasoned analysis. Lopez' concerns about the state court proceedings were addressed by the bankruptcy court, and are examined here, in turn.

(1) "Lack of Decorum and Judicial Bias." This group of issues was raised by Lopez after remand. The bankruptcy court reviewed the complete transcript of the state court trial, but could not substantiate Lopez' allegations that "screaming matches" had occurred between his counsel and the state court judge, nor that the judge treated his counsel significantly different from counsel for ESR. The court's Memorandum on Remand recites that "Lopez has not shown that the trial judge's rulings were a result of prejudice against Lopez or that his lack of patience and judicial demeanor lead to an unfair trial." Memorandum on Remand at 5. This finding addresses the California requirement of public policy review before applying issue preclusion. Lucido, 795 P.2d at 1226 (public policy review includes consideration of the integrity of the judicial process).

Additionally, the bankruptcy court's determination that the state court record does not establish that the judge was biased is consistent with both California and federal court standards, which require a showing of personal interest, extrajudicial source, or deep-seated favoritism or antagonism that would make fair judgment impossible. Liteky v. United States, 510 U.S. 540 (1994); Roitz v. Coldwell Banker Residential Brokerage Co., 62 Cal. App.4th 716, 724 (Cal. Ct. App. 1998) ("Neither strained relations between a judge and an attorney for a party nor 'expressions of opinion uttered by a judge, in what he conceived to be a discharge of his official duties, are . . . evidence of bias or prejudice.

[Citation omitted.]'").

(2) "Denial of a Right to a Jury." As discussed above, Lopez I determined that this concern would not bar application of issue preclusion. In its Memorandum on Remand, the bankruptcy court repeated its finding that the state court's decision to bifurcate the State Court Action trial and consider the equitable claims first, without a jury, and that the equitable relief granted disposed of the legal claims, was consistent with California law. Raedeke v. Gibraltar Sav. & Loan Ass'n, 10 Cal.3d 665, 671 (1974). Lopez' belief that he would have achieved a different result in the state court if the legal claims had been tried first before a jury does not, by itself, render the resulting proceeding conducted by the state court judge unfair.

(3) "Findings Drafted by ESR's Counsel." As discussed above, the earlier Panel concluded that this feature of the state court's statement of decision would not constitute a bar to application of issue preclusion. As to the fairness of the proposed findings prepared by ESR's counsel, the bankruptcy court carefully considered Lopez' arguments and concluded that there was no evidence in the record that the state court did not read the proposed findings before it signed them, or that it failed to consider the import of the words, or that in adopting them, the findings did not accurately reflect the state court judge's "deliberations based on the evidence and the law." Memorandum on Remand at 6.

(4) "Incompetence of Counsel." The bankruptcy court acknowledged that the Restatement identified the lack of adequate opportunity to obtain a full and fair adjudication in the initial

action as grounds for not applying issue preclusion. However, the bankruptcy court determined that the "fair opportunity" exception requires "a compelling showing of unfairness." Memorandum on Remand at 7, citing RESTATEMENT (SECOND) OF JUDGMENTS § 28 cmt. 5(c) (emphasis added). Although the bankruptcy court acknowledged the possibility that better counsel may have obtained a more favorable outcome for Lopez, it nevertheless found that there were no extraordinary circumstances, and that Lopez had a fair opportunity to litigate the issues in state court.

(5) "State Court Judge's Competence." Lopez argued that the fact that the state judge later took his own life raised questions as to his competence at trial. The bankruptcy court correctly dismissed this argument, noting that the judge's death occurred years after the trial in the State Court Action, and the record showed no evidence that the state court judge "was incompetent to understand the facts and law or to engage in the deliberative process and articulate the basis for his rulings." Memorandum on Remand at 7.

(6) "The Debtor's Depression and ESR's Animosity." In this regard, the bankruptcy court's decision exhibited compassion for Lopez' plight. Memorandum on Remand at 9 ("I have great sympathy for the Debtor and admiration for the devotion of his counsel[.]". However, the bankruptcy court correctly observed that the exercise of its discretion regarding whether to apply issue preclusion as to the state court's judgment should not be influenced by these irrelevant factors that occurred after the State Court Action.

Before concluding its Memorandum on Remand, the bankruptcy court explicitly addressed the exceptions to issue preclusion

catalogued in the Restatement, deciding that they were inapplicable in this instance. The bankruptcy court correctly concluded that there were no changes in applicable law between the time of the State Court Action and the adversary proceeding; that there was no significant difference in the quality or extensiveness of procedures afforded Lopez in state court, because the California Rules of Civil Procedure provide context and protections comparable to the Federal Rules of Civil and Bankruptcy Procedure; and that there was no difference in the incentive to litigate between the State Court Action and the adversary proceeding because the financial stakes in both cases were the same.

The bankruptcy court observed repeatedly throughout the Memorandum on Remand that Lopez had a full and fair opportunity to litigate about the nature of his challenged conduct, and that the state court found it to be willful and malicious as to the property of ESR.

Without regard to whether the members of this Panel would agree with each of the findings made by the bankruptcy court, we conclude, given its careful consideration of the arguments raised by Lopez, and its observations or reasoning, that the bankruptcy court did not abuse its discretion in rejecting the factors raised by Lopez in opposition to the application of issue preclusion.

III.

Lopez repeats two complaints about the bankruptcy court’s analysis throughout his appellate brief: that the bankruptcy court improperly shifted the burden of persuasion regarding the

application of issue preclusion from ESR to him; and that each of the factors Lopez identified raised "reasonable doubt" sufficient not to apply preclusion. These concepts were discussed in Lopez I, but Lopez misapplies them in this appeal.

In its Opinion, the earlier Panel stated that "preclusion is an affirmative matter as to which the proponent of preclusion has the burden of persuasion and bears the correlative risk of nonpersuasion." Lopez I, 367 B.R. at 108; see also Exxon-Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280, 293 (2005). ESR, as the proponent of preclusion, has always borne the ultimate burden of persuasion.

However, that burden is a shifting one. ESR, as proponent of issue preclusion, filed its supplementary brief first, addressing the factors militating against the application of issue preclusion originally raised by Lopez in the first appeal. Lopez then filed a responsive brief, raising sixteen new factors. At that point, the bankruptcy court could expect that Lopez identify the facts to "prove up" these new factors. ESR then filed its sur-reply, addressing the new factors. In our view, there was never a change in the ultimate burden of persuasion, but instead, there was a temporary shift of that burden when Lopez raised new issues and ESR answered. The bankruptcy court did not transfer the ultimate burden of persuasion to Lopez.

Lopez also misperceives the Panel's reference to "reasonable doubt" in its Opinion. In particular, Lopez I states that "reasonable doubts about what was decided in a prior judgment are resolved against applying issue preclusion." Lopez I, 367 B.R. at 108. As authority for this statement, the Panel cited Frankfort

Digital Servs. v. Kistler (In re Reynoso), 477 F.3d 1117, 1123 (9th Cir. 2007). An examination of that case shows that the Panel could never have intended "reasonable doubt" to have the expansive meaning Lopez suggests.

In Reynoso, a bankruptcy trustee sued Frankfort Digital Services, a seller of web-based software that prepared bankruptcy petitions and schedules, alleging that it had violated § 110 and 18 U.S.C. § 156 governing bankruptcy petition preparers ("BPP"). The debtor, Reynoso, had used Frankfort's software in preparing his chapter 7 petition and schedules. The trustee argued that Frankfort was a BPP as that term is understood in § 110. In an earlier case, In re Pillot, 286 B.R. 157, 162 (Bankr. C.D. Cal. 2002), a bankruptcy court had held that Frankfort, with its software, was a BPP. The trustee in Reynoso therefore argued that issue preclusion barred Frankfort from relitigating whether it was a BPP. Frankfort opposed issue preclusion, arguing that a fact relied on by the Pillot court, the website and software, was not the same website and software as that used by Reynoso. The Reynoso court held that, under these circumstances, it could not apply issue preclusion:

> Although there is substantial support for a finding of issue preclusion, we note that the record does not include a complete print-out of the website as accessed by Pillot that can be compared with the website as accessed by Reynoso. Because there remains some possibility that, as Frankfort contends, the website changed significantly after Pillot accessed it, we decline to hold that issue preclusion applies and instead affirm the bankruptcy court's and BAP's decisions on the grounds discussed infra. Cf. Berr v. FDIC (In re] Berr, 172 B.R. 299, 306 (9th Cir. BAP 1994)] (noting that "(a)ny reasonable doubt as to what was decided by a prior judgment should be resolved against giving it collateral estoppel effect.").

In re Reynoso, 477 F.3d at 1123.

An examination of the Panel's Berr case, cited by the Reynoso court as the source of the quotation at issue here, is also revealing as to what the Panel in Lopez I meant by "reasonable doubt." The full quotation is as follows:

> The party seeking to assert collateral estoppel has the burden of proving all the requisites for its application. [Citations omitted.] To sustain this burden, a party must introduce a record sufficient to reveal the controlling facts and pinpoint the exact issues litigat[ed] in the prior action. Any reasonable doubt as to what was decided by a prior judgment should be resolved against giving it collateral estoppel effect.

In re Berr, 172 B.R. at 306.

Based upon this review of the underlying authorities, when the Panel in Lopez I observed that issue preclusion should not apply when there was reasonable doubt from the record whether a controlling fact or precise issue had been litigated in the earlier action, the Panel was referring to reasonable doubt as to a fact, and not to reasonable doubt as to the bankruptcy court's reasoning or conclusions in applying issue preclusion.

Lopez construes the Panel's statement about reasonable doubt as a license to question the bankruptcy court's reasoning and conclusions: "Rather than looking at all the facts as a whole to see if 'in context' 'reasonable doubt' existed not to apply preclusion, the Bankruptcy Court insulated each fact[.]" Lopez Br. at 17. Lopez presented a list of alleged facts and suggested that, when those facts were considered together, there was reasonable doubt about whether issue preclusion should be applied. However, the bankruptcy court adequately addressed each of these facts in its Memorandum on Remand.

For example, in his discussion of judicial bias, Lopez cites the various alleged improprieties committed by the state court judge: "Upon looking at just these facts, it is clear that Appellant did not get a full and fair opportunity to adjudicate his claims in the initial action. But the Bankruptcy Court did not have to go that far, it only needed to find that there was 'reasonable doubt.'" Lopez Br. at 19. The bankruptcy court examined each of the alleged improprieties in its Memorandum on Remand and explained its reasons why they did not prevent it from applying issue preclusion.

In another portion of his brief, Lopez' counsel observes "Certainly, reasonable doubt exists as to whether intent to 'act' and 'injure' would have been found if Appellant had been granted his right to a jury trial on the damage claim." Lopez Br. at 22. While both the bankruptcy court and the Panel in Lopez I acknowledged that it was possible that there would have been a different outcome if there had been a jury trial, whether there should have been a jury trial was irrelevant as to the application of issue preclusion on a final state court judgment entitled to full faith and credit by a federal court.

Regarding the state court judge's competence, Lopez argues: "We may not know for certain what made the state court judge 'impatient,' 'irascible,' and 'unpleasant' and of 'imperious demeanor'. . . . But . . . Appellant would suggest that it adds one more building block for the case that reasonable doubt exists as to whether Appellant had a full and fair opportunity to adjudicate his rights in the state court." Lopez Br. at 29. Here, Lopez clearly attempts to apply the reasonable doubt

standard to a pattern and conclusion, not to whether a particular fact was litigated and decided by the state court.

Regarding incompetence of counsel: "It is hard to read the Lopez decision and not see that these facts, in the 'context' of this case, may unmask reasonable doubt as to whether Appellant had adequate opportunity and incentive to obtain a full and fair adjudication in the initial action." Lopez Br. at 27. Again, Lopez attempts to apply a reasonable doubt standard to the conclusion of the bankruptcy court. The court explicitly addressed whether Lopez had an adequate opportunity to present his case in the state court several times in its Memorandum on Remand and, as noted above, we find no abuse of discretion in its conclusion that he did.

In the one location where Lopez may have correctly applied the reasonable doubt standard referred to in Lopez I, he questions whether the willful and malicious issue was litigated in the state court:

> At the very least, the state court's own contradictory statements from the bench regarding its reasoning for awarding attorney's fees should raise some reasonable doubt as to what was decided. At the very least, the fact that Appellee who never once during the trial or in any pleading prior to the written decision mentioned the term "willful and malicious" should raise some reasonable doubt as to whether Appellant ever had an opportunity to adjudicate the issue in the state court.

Lopez Br. at 25. Although Lopez can suggest that reasonable doubt exists about whether the willful and malicious nature of his acts was litigated in state court, that contention was rejected by the bankruptcy court, and its conclusion affirmed on appeal in Lopez I. As discussed above, that it was litigated is law of the case and may not be reargued in this appeal.

CONCLUSION

For all these reasons, we conclude that the bankruptcy court did not abuse its broad discretion in giving issue preclusive effect to the state court's judgment that Lopez had willfully and maliciously injured ESR. The bankruptcy court's order on remand is AFFIRMED.