NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP No. AZ-07-1189-PaMkKu
MLC I, INC. and SUPERWASH[1] CORP.,	Bk. Nos. 05-00059 05-00061
Debtors.	(jointly administered)
MICHAEL CUTTER; JAVIER HERNANDEZ,	Adv. No. 06-00839
Appellants,	
v.	**M E M O R A N D U M[2]**
SUPERWASH NEVADA, INC.; PAUL CUTTER and TERRI CUTTER; MARK CUTTER and DEBRA CUTTER; THE CUTTER FAMILY TRUST(1999 Restatement), PAUL BARRY CUTTER and THERESA ANN CUTTER, Trustees,	
Appellees.	

Argued by Video Conference and Submitted
on November 29, 2007

Filed - January 8, 2008

Appeal from the United States Bankruptcy Court
for the District of Arizona

Honorable George B. Nielsen, Jr., Bankruptcy Judge, Presiding

---

[1] There is inconsistency in the record concerning the name of these corporations. In the notice of appeal and some captioned pleadings, "Superwash" is one word (Superwash). In other captions, it is two words (Super Wash). We will use the names "Superwash" for the Arizona corporation and "Superwash Nevada" for the Nevada corporation.

[2] 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.

Before: PAPPAS, MARKELL and KURTZ,[3] Bankruptcy Judges.

The bankruptcy court granted a motion to dismiss an adversary proceeding that had been removed from state court. This appeal followed. We AFFIRM.

FACTS

The Separation Agreement

The parties jointly operated several laundromats in Arizona and Nevada in a family-owned business known as Superwash Corp. ("Superwash"). The shareholders of Superwash were Mark J. Cutter ("Mark") (30 percent), Paul B. ("Paul") and Theresa ("Theresa") Cutter as Trustees of the Cutter Family Trust ("Trust") (30 percent), Michael L. Cutter ("Michael") (30 percent), and Javier Hernandez ("Javier") (10 percent).[4] All the shareholders guaranteed equipment loans made to Superwash by Viking Financial, LLC ("Viking")[5], and operating and real estate loans made by Zions First National Bank ("Zions").

On August 10, 2004, as the result of "significant acrimony and managerial conflict" among the shareholders, they executed an Agreement and Plan of Corporate Separation (the "Separation Agreement"). The Separation Agreement provided for a division of

---

[3] Hon. Frank Kurtz, Chief Bankruptcy Judge for the Eastern District of Washington, sitting by designation.

[4] Michael and Javier are sometimes referred to hereafter, collectively, as Appellants, and Mark, Paul and Trust, collectively, as Appellees. Their spouses and Trust have not appeared in this appeal.

[5] Viking is the financial arm of Wascomat Equipment Manufacturing Company, the manufacturer of the equipment used by Superwash and later by Superwash Nevada.

the family businesses. Superwash, to be wholly owned by Michael and Javier, would operate the businesses in Arizona. A new entity, Superwash Nevada, Inc. ("Nevada"), to be wholly owned by Mark and Trust, would operate the businesses in Nevada.

The Separation Agreement included non-compete covenants. Superwash, Michael, and Javier agreed not to compete for three years within 50 miles of Las Vegas, Nevada. And in ¶ 9 of the Separation Agreement, a provision at issue in this appeal, Nevada, Mark and Trust agreed that:

> **Non-Competition of Subsidiary, Mark J. Cutter and Paul Barry Cutter and Theresa Ann Cutter as Trustees of the Cutter Family Trust (1999 Restatement)**. Subsidiary, Mark J. Cutter and Paul Barry Cutter and Theresa Ann Cutter as Trustees of the Cutter Family Trust (1999 Restatement) agree that for a period of three (3) years after August 10, 2004, they will not engage in, or have any direct or indirect ownership interests in, or have any relationship which is the same as or similar to that of an owner, shareholder, employee, officer, director, agent or consultant with, or loan any money to, any firm, corporation or business which engages in the coin-operated laundry business or any activity which is the same as or similar to a coin-operated laundry business within a fifty (50) mile radius of any of the stores in the Phoenix, Arizona area being retained by [Superwash] pursuant to this Agreement, unless Parent, Michael L. Cutter and Javier Hernandez no longer conduct a coin operated laundry business in the same area.

The Chapter 11 Case

Michael and Javier allege that Viking refused to acknowledge the parties' division of their business interests in the Separation Agreement, and threatened to foreclose on the equipment if Paul and Mark did not pressure Michael and Javier to speed up loan payments. Allegedly in response, on January 3, 2005,

Superwash filed for chapter 11[6] relief. Then, on June 10, 2005, Superwash filed a state court action against Viking asserting claims for, among other theories, lender liability, breach of fiduciary duty, and bad faith (the "Viking Suit").

Superwash filed its First Amended Plan of Reorganization on January 26, 2006. Zions (Class 2), Alliance Laundry Systems (class 3), Viking (class 4), and Paul (91 percent of dollar amount of unsecured claims, Class 9) voted against the plan.

Michael and Javier allege that, "in or around February of 2006, without notice, consent or knowledge of the Appellants, Appellees Mark Cutter and Paul Cutter then began covertly dealing with Zions Bank concerning the Zions loan and the guarantee." Appellants' Opening Br. at 5 ¶ 9.[7]

On March 26, 2006, Superwash defaulted under a cash collateral order previously entered by the bankruptcy court by failing to make a payment due on Zions' secured claim. The last day to cure the default under the cash collateral order was April 20, 2006.

---

[6] 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.

[7] This allegation is not completely consistent with one by Michael and Javier in their First Complaint (discussed below) that, "On February 16, 2006, Defendant Paul wrote [Michael and Javier] to notice them that Zions Bank had threatened to foreclose on the Zions loan and pursue the guarantors, including defendants Paul and Mark." This letter does not appear in the excerpts of record or the bankruptcy court docket. However, the bankruptcy court noted it at the hearing on December 6, 2006. Tr. Hr'g 46:22-25.

On March 28, 2006, Appellees purchased the Zions loan. Zions' claim was transferred to Nevada on April 6, 2006, and notice of the transfer was served by mail on Superwash the same day. No objection was filed to this transfer.

On April 20, Superwash presented a check to attorneys for Nevada in the amount of $4,550 curing the default on the Zions loan. However, when Paul attempted to cash the check, it was dishonored for insufficient funds.

On April 25, 2006, the Debtor companies and Appellees, acting through their attorneys, entered into an agreement (the "Letter Agreement") settling the principal issues in the bankruptcy case. In it, Appellees agreed to change their votes rejecting the Superwash plan (including the Zions ballot) to accept the plan, to settle a pending motion for relief from stay filed by Zions (which had also been assigned to Nevada), and to withdraw all plan objections. The Debtor companies agreed to modify their plan treatment of Zions' claim, to dismiss the Viking Suit, and to make monthly payments on the Zions loan claim and semi-annual payments on Appellees' individual creditor claims.

The parties informed the bankruptcy court of the Letter Agreement at a hearing on April 26, 2006. Counsel for Superwash advised the court that, pursuant to the Letter Agreement, four of five impaired classes now voted to accept the plan. The bankruptcy court decided it would confirm the plan, as modified, and directed that a stipulated order of confirmation be submitted. The court directed that the Letter Agreement be attached to the court's minute order.

Consistent with the Letter Agreement, by order dated April

27, 2006, the bankruptcy court modified the stay to allow Nevada to enforce the terms of the Zions loan. The court's order, however, prevented Nevada from foreclosing on the real estate securing the loan provided Superwash cured the loan arrearages and continued to make regularly monthly payments.

Based on the Letter Agreement, Nevada and Paul withdrew their objections to plan confirmation on May 11, 2006. In addition, secured creditor Alliance Laundry Systems changed its vote to one accepting the plan on May 30, 2006. Consequently, all classes voting had now cast ballots in favor of plan confirmation.[8] The bankruptcy court entered its order confirming the plan on June 5, 2006, incorporating the Letter Agreement in its order. A Final Decree closing the bankruptcy case was entered on December 27, 2006.

The Adversary Proceeding

Although the Superwash plan had been confirmed, Michael and Javier, as individuals, filed an action in Maricopa County Superior Court on August 22, 2006, against Superwash Nevada, Paul and Theresa Cutter, Mark and Debra Cutter, and Paul and Theresa as trustees of the Trust (the "First Complaint"). Cutter v. Super Wash Nevada, Inc., case no. CV2006-052303 (Superior Court, County of Maricopa, August 22, 2006). The First Complaint asserted causes of action for breach of contract, interference with legal proceedings, lender liability, breach of fiduciary duty, breach of

[8] There is no indication in the bankruptcy docket that Viking formally rescinded its earlier negative ballot. However, the amended ballot report submitted by Debtors listed all Viking claims in favor of confirmation.

covenant of good faith and fair dealing, interference with prospective business advantage, and intentional infliction of emotional distress. For the most part, Michael and Javier cited the defendants' tactics and conduct in connection with the Superwash chapter 11 case, and in particular, their acquisition of the Zions' loans, as a basis for the claims against them. The First Complaint sought an award of compensatory and punitive damages, attorneys fees and costs.

The defendants in this state court action removed it to the bankruptcy court on September 18, 2006. Then, on September 28, 2006, they filed a motion to dismiss the complaint.

The bankruptcy court conducted a hearing on the motion to dismiss on December 5, 2006. The bankruptcy court ruled that Michael and Javier lacked standing to pursue several of the claims in the complaint (counts 2, 3, and 4), because those claims, if viable, belonged to the corporate debtor. Tr. Hr'g 38:10-15 (December 5, 2006). The court further held that counts 2, 3, 4, and 6 "could have been advanced by debtors [i.e., Superwash] to obtain confirmation of their plan over defendants' objections. Because the claims could have been raised in the confirmation process, they are now barred by entry of the confirmation order." Tr. Hr'g 42:16-21. The bankruptcy court also dismissed count 7 because "the alleged conduct is simply not sufficiently extreme or outrageous to state a claim for relief." Tr. Hr'g 47:16-18. The court, however, requested supplemental briefing on the issue of whether Michael and Javier were precluded from pursuing individual actions based upon the defendants' conduct, and whether the

bankruptcy court had post-confirmation jurisdiction to resolve such claims. Tr. Hr'g 44:19-25.

Michael and Javier responded to the court's order for supplemental briefing by submitting an Amended Complaint on February 9, 2007, attached to their brief. The Amended Complaint replaced the seven counts of the First Complaint with two counts stating individual claims against the defendants for breach of contract (i.e., the Separation Agreement), and for breach of the implied covenant of good faith and fair dealing arising out of the parties' contract. Based on the Amended Complaint, Michael and Javier requested that the bankruptcy court deny the defendants' motion to dismiss as moot (because the Amended Complaint was filed as a matter of right under Fed. R. Civ. P. 15); that the bankruptcy court rule that it lacked jurisdiction over these individual claims; and that it remand the action to the state court.

On March 1, 2007, the bankruptcy court held another hearing on the motion to dismiss. After hearing from the parties, the court first ruled that, because it had jurisdiction over the claims in the First Complaint, it had supplemental jurisdiction over the individual claims stated in the Amended Complaint because "they involve a common nucleus of operative facts and would ordinarily be expected to be resolved in one judicial proceeding[.]" Tr. Hr'g 14:13-15 (March 1, 2007). Second, the court determined that the confirmation order precluded assertion of the individual claims. Tr. Hr'g 20:18-19 (March 1, 2007). As a result, the court granted the motion to dismiss in an order entered on March 21, 2007.

Michael and Javier moved for a new trial on March 30, 2007, principally arguing that the bankruptcy court's reliance on In re Pegasus Gold Corp., 394 F.3d 1189 (9th Cir. 2005) had been erroneous. The court held another hearing on May 8, 2007, at which it reaffirmed its decision to dismiss and denied the motion for a new trial by order dated May 11, 2007.

Michael and Javier filed a timely appeal of the order dismissing the adversary proceeding on May 15, 2007.

JURISDICTION

Whether the bankruptcy court had jurisdiction is an issue in this appeal, and is discussed below. We have jurisdiction over the appeal of the order dismissing the adversary proceeding pursuant to 28 U.S.C. § 158.

ISSUES

1. Whether the bankruptcy court had subject matter jurisdiction over Appellants' individual claims against Appellees in the adversary proceeding.
2. Whether the bankruptcy court erred in dismissing those claims because they were precluded by confirmation of Debtors' chapter 11 plan.

STANDARDS OF REVIEW

We review the bankruptcy court's assertion of subject matter jurisdiction de novo. In re McGhan, 288 F.3d 1172, 1178 (9th Cir. 2002). The preclusive effect of plan confirmation also is

reviewed de novo. In re Assoc. Vintage Group, Inc., 283 B.R. 549, 555 (9th Cir. BAP 2002).

DISCUSSION

I.

The bankruptcy court had subject matter jurisdiction over the claims asserted by appellants.

The bankruptcy court's jurisdiction over adversary proceedings is governed by 28 U.S.C.§ 1334(b), which provides:

> Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts [and by reference pursuant to 28 U.S.C. § 157, the bankruptcy courts] shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

Some aspects of bankruptcy court jurisdiction are quite narrow in focus. For example, only when a cause of action is created by title 11, such as an action by a trustee employing the statutory avoiding powers, does it "arise under title 11." H.R. Rep. No. 595, 95th Cong., 1st Sess. 445 (1977). Similarly, proceedings "arising in" bankruptcy cases are also usually easy to recognize as those that, although not based on any right granted in title 11, would not exist outside bankruptcy, such as matters related to the administration of the estate. In re Harris Pine Mills, 44 F.3d 1431, 1435-37 (9th Cir. 1995).

By contrast, "related to" jurisdiction covers a much broader set of disputes, actions and issues, and includes almost every matter or action that directly or indirectly relates to a bankruptcy case. Celotex Corp. v. Edwards, 514 U.S. 300 (1995);

In re Sasson, 424 F.3d 864, 868-69 (9th Cir. 2005). The Ninth Circuit has concluded that, because "related to" jurisdiction is, potentially, all-encompassing, clear tests are needed for determining its proper scope under the statute. The test it adopted was developed by the Third Circuit in its decision in Pacor, Inc. v. Higgins, 743 F.2d 984 (3d Cir. 1984). That standard measures whether

> the outcome of the proceeding could conceivably have any effect on the estate being administered in bankruptcy. Thus, the proceeding need not necessarily be against the debtor or against the debtor's property. An action is related to bankruptcy if the outcome could alter the debtor's rights, liabilities, options, or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankruptcy case."

Pacor, 743 F.2d at 994 (quoted in In re Fietz, 852 F.2d 455, 457 (9th Cir. 1988)).

In recent years, however, various courts of appeal have moved to modify or limit bankruptcy court jurisdiction over matters arising after confirmation of a reorganization plan. See, e.g., Bank of La. v. Craigs Stores of Tex., Inc., 266 F.3d 388, 390-91 (5th Cir. 2001) (post-confirmation bankruptcy jurisdiction limited to matters pertaining to implementation or execution of the plan); In re Resorts Int'l, Inc., 372 F.3d 154, 166-67 (3d Cir. 2004) ("the essential inquiry appears to be whether there is a close nexus to the bankruptcy plan or proceeding sufficient to uphold bankruptcy court jurisdiction over the matter"). The Ninth Circuit recently adopted the "close nexus" test of Resorts for measuring post-confirmation "related to" bankruptcy court jurisdiction. In re Pegasus Gold Corp., 394 F.3d 1189, 1194 (9th

Cir. 2005) (reasoning that while this test "recognizes the limited nature of post-confirmation jurisdiction, [it] retains a certain flexibility . . . .").

In Pegasus, the court of appeals determined that a bankruptcy court properly exercised jurisdiction where resolution of several counts in a complaint that belonged to the reorganized debtor would require interpretation of a confirmed plan of reorganization, and could affect implementation and execution of the plan itself. In addition, in Pegasus, relying upon 28 U.S.C. § 1367, the court determined that, in the post-confirmation setting, a bankruptcy court, when faced with claims over which it had "related to" jurisdiction, could also exercise supplemental jurisdiction over other tangential claims that "involve a 'common nucleus of operative facts' and would be expected to be resolved in one judicial proceeding . . . ." 394 F.3d at 1195 (citation omitted). In a footnote, the Pegasus court noted that a bankruptcy court's supplemental jurisdiction could even extend to claims involving parties who were "'not subject to the federal claims primarily at issue.'" 394 F.3d at 1195 n.2 (citing Davis v. Courington, 177 B.R. 907, 912 (9th Cir. BAP 1995).

In the instant appeal, the bankruptcy court properly applied the lessons of Pegasus/Resorts Int'l in measuring its jurisdiction. The bankruptcy court correctly decided that it clearly had jurisdiction over the four claims it determined belonged to the debtor companies in the First Complaint. It noted that "[t]he court was required to determine if the debtor held claims barred because of the confirmed plan, and as such, the court was required to interpret the parties' settlement related to

the Plan objection as well as the Plan and confirmation order." Tr. Hr'g 13:23 – 14:2 (March 1, 2007). We agree with this analysis, and Appellants have not challenged the bankruptcy court's assertion of jurisdiction over, and subsequent dismissal of, those claims in this appeal.

In deciding whether there was jurisdiction over the claims in the Amended Complaint, like the bankruptcy court, we are guided by the analysis in Pegasus. Applying the same test, we conclude the bankruptcy court correctly assumed supplemental jurisdiction over Michael and Javier's individual claims against Appellees (including the two restated claims in the Amended Complaint) because they were "part and parcel of a common nucleus of operative facts surrounding the transfer of the Zions First National Bank Claim to Superwash Nevada, Incorporated, which forms the basis for the original seven count complaint." Tr. Hr'g 14:22 – 15:1 (March 1, 2007). The individual claims assert that Appellees breached the Separation Agreement, entitling Appellants to money damages, based upon Appellees' actions and conduct during the chapter 11 case. Under these circumstances, it could be expected that the debtor companies' claims against Appellees would be resolved in the same judicial proceeding as Michael and Javier's individual claims, and the bankruptcy court had supplemental jurisdiction over the individual claims.

In their Reply Brief, Appellants challenge the bankruptcy court's linkage of the original seven-count complaint and the claims asserted in the two counts of the Amended Complaint. They rely on an older version of Moore's Federal Practice for the proposition that their Amended Complaint superseded the claims

stated in the First Complaint that it purported to replace. However, Appellants provide no case law for this proposition.

To the contrary, Appellants' argument ignores clear precedent in our circuit that subject matter jurisdiction is determined at the time of removal, and thus, in this instance, would be based upon the claims stated in the First Complaint. Sparta Surgical Corp. v. Nat'l Assn. Of Sec. Dealers, Inc., 159 F.3d 1209, 1213 (9th Cir. 1998) ("[J]urisdiction must be analyzed on the basis of the pleadings filed at the time of removal without reference to subsequent amendments.") Sparta is, in turn, grounded in earlier rulings that discourage a plaintiff from amending a complaint to destroy federal jurisdiction over the complaint. Pullman Co. v. Jenkins, 305 U.S. 534, 537 (1939) (right to remove is determined according to plaintiff's pleadings at the time of the petition for removal); St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 294 (1938) (barring amendment to lower amount in controversy below federal court's jurisdictional limit).

We think the bankruptcy court correctly applied the Pegasus standard for determining jurisdiction over post-confirmation proceedings, and concur with the bankruptcy court that it had subject matter jurisdiction over the individual claims stated in the Amended Complaint.

II.

The bankruptcy court did not err in dismissing the individual claims based upon claim preclusion.

Both Appellants and Appellees incorrectly suggest that the bankruptcy court decided that Appellants' individual state law

claims were barred by issue preclusion. Issue preclusion bars relitigation of an issue of fact or law that: (1) was actually decided by a court in an earlier action, (2) in which the issue was necessary to the judgment in such action, and (3) there was a valid and final judgment.[9] Instead, the question in this appeal is whether the bankruptcy court correctly decided that the confirmation order precluded Appellants from litigating issues concerning Appellees' preconfirmation purchase of the Zions claim and their subsequent alleged threats of foreclosure to obtain ownership of Appellants' business and real estate in Arizona. As the bankruptcy court properly noted, this question was not actually decided in an earlier action. Rather, since Appellees invoke the confirmation order to bar litigation of issues that could have been decided in the earlier proceeding, but were not, they seek to invoke the doctrine of claim preclusion.

In all three hearings held by the bankruptcy court on Appellee's motion to dismiss, the court carefully examined and explained how claim preclusion operated to bar consideration of Appellants' claims:

> The instant case involves claim preclusion. The question is whether debtor's confirmation order precludes the debtor from litigating issues concerning the defendant's preconfirmation purchase of the Zions claim, objection to the plan, and successful efforts to allegedly coerce the debtor in dismissing the Viking litigation.

Tr. Hr'g 40:1-7 (December 5, 2006).

---

[9] For an excellent scholarly discussion, see Christopher Klein, Lawrence Ponoroff & Sarah Borrey, Principles of Preclusion and Estoppel in Bankruptcy Cases,79 AM. BANKR.L.J. 839, 844 (2002) (hereinafter, Principles of Preclusion).

> Here, in the case before me, it seems that the individual claims also arise from the same transaction, the same agreement, as the debtor's claims for claim preclusion purposes. These claims arise out of the alleged breach of the separation agreement and the purchase of the Zions note at a substantial discount without the consent of presumably plaintiff [Michael] Cutter and form the basis of the debtor's claims against the defendants. Any alleged breach of the separation agreement involving the corporate divorce of the two entities was known to the plaintiffs prior to the confirmation hearing. Any agreement was reached as to the Zions National Bank claim that was assigned to defendant, Superwash Nevada. . . . This agreement was incorporated into the confirmation order. This agreement provided for allowance of the unsecured claims of defendants, Paul and Mark Cutter. . . . Here, as in Heritage Hotel I, the action complained of in the amended complaint occurred prior to the confirmation and derived from the same nucleus of operative facts. The individual plaintiffs as principals of the debtor were part of the negotiation process. . . . As noted by the defendants, the individual plaintiffs had an opportunity prior to confirmation to litigate these same issues by way of an action to subrogate[10] the claim that the defendants acquired. That was not done. . . . In sum, I think these plaintiffs should be bound by the preclusive effects of the confirmation order.

Tr. Hr'g 19:13 – 20:19 (March 1, 2007).

> Movants [Appellants] also assert that the defendant's motion to dismiss was based on the merits of the actual claims, not any legal doctrine of res judicata or claim preclusion. As a result, it argued that this Court did not have the benefit of an adversarial briefing on claim preclusion. The defendants bore the burden on this defense and yet submitted nothing. . . . As the defendants noted in their response, the issue was brief[ed]. The movants have done little to advance the argument that their claims were not precluded under Ninth Circuit law.

---

[10] Given the context, rather than subrogation, we assume the bankruptcy court intended to refer to an action to subordinate this claim under § 510(c). Any error in this regard is harmless.

Tr. Hr'g 21:5-10 (May 8, 2007).

A plan confirmation order has preclusive effect. It is a binding, final order. Stoll v. Gottlieb, 305 U.S. 165 (1938). It precludes the litigation of issues that could or should have been raised during the pendency of the bankruptcy case. In re Kelley, 199 B.R. 698, 703 (9th Cir. BAP 1996); In re Heritage Hotel P'ship I, 160 B.R. 374, 381 (9th Cir. BAP 1993). This Panel has previously published an extensive commentary on the preclusive effect of confirmation orders in bankruptcy cases. Alary Corp. v. Sims (In re Assoc. Vintage Group, Inc.), 283 B.R. 549 (9th Cir. BAP 2002). The bankruptcy court carefully tracked Assoc. Vintage in its analysis in this case.

It is well established that the preclusive effect of a plan confirmation order bars non-debtor plaintiffs, creditors, equity holders, principals of the debtor and parties in privity with the debtor or any of their successors in interest from relitigating issues that could or should have been raised before confirmation. Heritage Hotel, 160 B.R. at 377; Eubanks v. F.D.I.C., 977 F.2d 166, 170 (5th Cir. 1992); Sure-Snap Corp. v. State St. Bank & Trust Co., 948 F.2d 869, 877 (2nd Cir. 1991); Sanders Confectionery Prod. Inc. v. Heller Fin., Inc., 973 F.2d 474, 480-81 (6th Cir. 1992). As the bankruptcy court noted, Michael and Javier are the sole officers and directors, and together own 100 percent of the shares, of the chapter 11 debtor, Superwash. They are therefore bound by the confirmation order as non-debtor plaintiffs and principals of the debtor. Indeed, they are the only principals of the debtor, and as such, designed and proposed the plan of reorganization, and authorized Superwash to enter into

the Letter Agreement with Appellees. Under these facts, it would indeed be difficult to distinguish their personal interests from the corporate interests of the debtor corporation.

Assoc. Vintage provides the test for determining the scope of claims precluded by the confirmation order:

> (1) whether rights or interests established in the [confirmation order] could be destroyed or impaired by the prosecution of the second action, (2) whether substantially the same evidence is presented in the two actions, (3) whether the two suits involve infringement of the same rights, and (4) whether the two suits arise out of the same transactional nucleus.

283 B.R. at 558 (citing Harris v. Jacobs, 621 F.2d 341, 343 (9th Cir. 1980)). Those elements are satisfied in this case with regard to Michael and Javier's individual claims against Appellees.

If Appellants' claims are sustained, and Michael and Javier were to recover substantial money damages from Appellees, we believe Appellees' rights as the successor to the Zions loan claim, as treated in the confirmed plan, would be jeopardized. Indeed, we suspect the true purpose of Appellants' claims against Appellees was to discourage them from enforcing Zions' claim and taking any action to obtain the Arizona operation and assets.

The second and third criteria also bring Appellants' claims within the zone of claim preclusion. As the bankruptcy court noted, these criteria refer to the "convenient trial unit" of Restatement (Second) § 24: "What factual grouping constitutes a transaction . . . [is] to be determined pragmatically, giving weight to such considerations as . . . whether they form a convenient trial unit and whether their treatment as a unit

conforms to the parties' expectations or business understanding or usage." The official comment to Restatement (Second) of Judgments § 24 notes that,

> the relevance of trial convenience makes it appropriate to ask how far the witnesses or proofs in the second action would tend to overlap the witnesses or proofs relevant to the first. If there is a substantial overlap, the second action should ordinarily be held precluded. But the opposite does not hold true; even when there is not a substantial overlap, the second action may be precluded if it stems from the same transaction or series.

Id. at cmt. b (emphasis added).

Appellants, acting through chapter 11 debtor Superwash, could have challenged Appellees' conduct and right to assert Zions' claim in the bankruptcy case. They could have objected to allowance of their claims, sought to equitably subordinate the Zions' claim for treatment under the chapter 11 plan under § 510(c), or attempted to confirm the plan over Appellees' objections. Had they done so, the evidence and proof necessary to obtain such relief would have been identical to that required to establish any individual claims for money damages. Clearly, had these various claims been litigated, Michael and Javier could have expected they would be tried together. However, Appellants elected not to contest Appellants' claims, and instead, elected to compromise the debtor companies' rights in favor of a consensual plan. But even so, the second and third requirements for claim preclusion are satisfied here.

Of the criteria, the most important is the fourth, that the two actions arise out of the same transactional nucleus. Assoc. Vintage, 283 B.R. at 548. According to the bankruptcy court,

there can be little doubt that Appellants' allegations in the individual claims focus upon the same transactional nucleus of facts that the bankruptcy court had already considered in connection with the proceedings leading to the confirmed plan. Tr. Hr'g 24:24-25 (May 8, 2007). The individual claims arose out of an alleged breach of the Separation Agreement, and the purchase by Appellees of the Zions loan without consent of the Plaintiffs. Any alleged breach of the Separation Agreement was known to Appellants long before the confirmation hearing. Nevertheless, acting through Michael and Javier, an agreement was reached between Appellants and Appellees, including the terms of treatment of the Zions loan that had been assigned to Appellees, to settle the objections and obtain confirmation of a plan. The Zions loan treatment was incorporated into the confirmation order.

The bankruptcy court's conclusion that Appellants are barred by the confirmation order from asserting the individual claims against Appellees conforms to requirements of the case law of this circuit. The bankruptcy court did not err in deciding that Appellants' individual claims are precluded by the confirmation order.[11]

---

[11] In the conclusion of their Opening Brief, Appellants call upon the equitable powers of this Panel: "The equities of this controversy clearly support the reinstatement of Appellants' claims against Appellees." As discussed above, we affirm the decision of the bankruptcy court on the basis of claim preclusion, a legal rather than equitable ground. See Principles of Preclusion at 839. However, were we to accept Appellants' invitation to apply equitable principles to our analysis, we could find Appellants' own conduct in this case to have been inequitable. After failure in the confirmation balloting and their default under the cash collateral order, Appellants induced the bankruptcy court to proceed with plan confirmation on the basis of the Letter Agreement with Appellees, which included Appellees' promise to

(continued...)

CONCLUSION

We AFFIRM the bankruptcy court's order.

---

[11](...continued)
vote its claims and that of Zions in favor of confirmation. Terms of the Letter Agreement were ordered incorporated in the plan of reorganization by the court. Two months after confirmation, Appellants filed this adversary proceeding, which in essence seeks to keep the benefits they and their wholly owned company received in the plan confirmation while challenging and undermining the benefits granted to Appellees. In pursuing this course, Appellants have, at least arguably, taken a position contrary to the one they presented to the bankruptcy court in the Letter Agreement and plan confirmation hearings, which earlier position both induced the court to proceed with plan confirmation and to direct that its terms be incorporated in the plan. Seen in this way, there may be merit to Appellees' earlier contention before the bankruptcy court that Appellants should be judicially estopped from asserting their individual claims against Appellees. Judicial estoppel is a flexible, equitable doctrine under which a litigant, who has obtained an advantage by taking a particular position, is estopped by the court from thereafter taking a different and inconsistent position. In re JZ LLC, 371 B.R. 412, 420 (9th Cir. BAP 2007) (citing New Hampshire v. Maine, 532 U.S. 742, 749-51 (2001); Rissetto v. Plumbers & Steamfitters Local 343, 94 F.3d 597, 600-01(9th Cir. 1996)).

However, Appellees did not raise their judicial estoppel argument in this appeal, and based upon our disposition of the issues above, we need not consider the issue sua sponte.