

NOT FOR PUBLICATION

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

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

In re: ) BAP No. AZ-07-1189-PaMkKu  
 )  
 MLC I, INC. and SUPERWASH<sup>1</sup> CORP., ) Bk. Nos. 05-00059  
 ) 05-00061  
 Debtors. ) (jointly administered)  
 )  
 Adv. No. 06-00839  
 MICHAEL CUTTER; JAVIER HERNANDEZ, )  
 )  
 Appellants, )  
 )  
 v. ) **M E M O R A N D U M**<sup>2</sup>  
 )  
 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

<sup>1</sup> 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.

<sup>2</sup> 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.

1 Before: PAPPAS, MARKELL and KURTZ,<sup>3</sup> Bankruptcy Judges.

2

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

6

7

### FACTS

8

#### The Separation Agreement

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

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

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24 <sup>3</sup> Hon. Frank Kurtz, Chief Bankruptcy Judge for the Eastern  
District of Washington, sitting by designation.

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26 <sup>4</sup> 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  
27 appeared in this appeal.

28

<sup>5</sup> Viking is the financial arm of Wascomat Equipment  
Manufacturing Company, the manufacturer of the equipment used by  
Superwash and later by Superwash Nevada.

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

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

10 **Non-Competition of Subsidiary, Mark J. Cutter**  
11 **and Paul Barry Cutter and Theresa Ann Cutter**  
12 **as Trustees of the Cutter Family Trust (1999**  
13 **Restatement)**. Subsidiary, Mark J. Cutter and  
14 Paul Barry Cutter and Theresa Ann Cutter as  
15 Trustees of the Cutter Family Trust (1999  
16 Restatement) agree that for a period of three  
17 (3) years after August 10, 2004, they will not  
18 engage in, or have any direct or indirect  
19 ownership interests in, or have any  
20 relationship which is the same as or similar  
21 to that of an owner, shareholder, employee,  
22 officer, director, agent or consultant with,  
23 or loan any money to, any firm, corporation or  
24 business which engages in the coin-operated  
25 laundry business or any activity which is the  
26 same as or similar to a coin-operated laundry  
27 business within a fifty (50) mile radius of  
28 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.

23 The Chapter 11 Case

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

1 Superwash filed for chapter 11<sup>6</sup> relief. Then, on June 10, 2005,  
2 Superwash filed a state court action against Viking asserting  
3 claims for, among other theories, lender liability, breach of  
4 fiduciary duty, and bad faith (the "Viking Suit").

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

9 Michael and Javier allege that, "in or around February of  
10 2006, without notice, consent or knowledge of the Appellants,  
11 Appellees Mark Cutter and Paul Cutter then began covertly dealing  
12 with Zions Bank concerning the Zions loan and the guarantee."  
13 Appellants' Opening Br. at 5 ¶ 9.<sup>7</sup>

14 On March 26, 2006, Superwash defaulted under a cash  
15 collateral order previously entered by the bankruptcy court by  
16 failing to make a payment due on Zions' secured claim. The last  
17 day to cure the default under the cash collateral order was April  
18 20, 2006.

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21 <sup>6</sup> Unless otherwise indicated, all chapter, section and rule  
22 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, as  
23 enacted and promulgated prior to the effective date (October 17,  
24 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.

25 <sup>7</sup> This allegation is not completely consistent with one by  
26 Michael and Javier in their First Complaint (discussed below)  
27 that, "On February 16, 2006, Defendant Paul wrote [Michael and  
28 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.

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

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

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

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

28           Consistent with the Letter Agreement, by order dated April

1 27, 2006, the bankruptcy court modified the stay to allow Nevada  
2 to enforce the terms of the Zions loan. The court's order,  
3 however, prevented Nevada from foreclosing on the real estate  
4 securing the loan provided Superwash cured the loan arrearages and  
5 continued to make regularly monthly payments.

6 Based on the Letter Agreement, Nevada and Paul withdrew their  
7 objections to plan confirmation on May 11, 2006. In addition,  
8 secured creditor Alliance Laundry Systems changed its vote to one  
9 accepting the plan on May 30, 2006. Consequently, all classes  
10 voting had now cast ballots in favor of plan confirmation.<sup>8</sup> The  
11 bankruptcy court entered its order confirming the plan on June 5,  
12 2006, incorporating the Letter Agreement in its order. A Final  
13 Decree closing the bankruptcy case was entered on December 27,  
14 2006.

#### 15 16 The Adversary Proceeding

17 Although the Superwash plan had been confirmed, Michael and  
18 Javier, as individuals, filed an action in Maricopa County  
19 Superior Court on August 22, 2006, against Superwash Nevada, Paul  
20 and Theresa Cutter, Mark and Debra Cutter, and Paul and Theresa as  
21 trustees of the Trust (the "First Complaint"). Cutter v. Super  
22 Wash Nevada, Inc., case no. CV2006-052303 (Superior Court, County  
23 of Maricopa, August 22, 2006). The First Complaint asserted  
24 causes of action for breach of contract, interference with legal  
25 proceedings, lender liability, breach of fiduciary duty, breach of  
26

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27 <sup>8</sup> There is no indication in the bankruptcy docket that  
28 Viking formally rescinded its earlier negative ballot. However,  
the amended ballot report submitted by Debtors listed all Viking  
claims in favor of confirmation.

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

9 The defendants in this state court action removed it to the  
10 bankruptcy court on September 18, 2006. Then, on September 28,  
11 2006, they filed a motion to dismiss the complaint.

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

28

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

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

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



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

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

9  
10 **JURISDICTION**

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

15  
16 **ISSUES**

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

23  
24 **STANDARDS OF REVIEW**

25 We review the bankruptcy court's assertion of subject matter  
26 jurisdiction de novo. In re McGhan, 288 F.3d 1172, 1178 (9th Cir.  
27 2002). The preclusive effect of plan confirmation also is  
28

1 reviewed de novo. In re Assoc. Vintage Group, Inc., 283 B.R. 549,  
2 555 (9th Cir. BAP 2002).

3  
4 **DISCUSSION**

5 I.

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

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

10 Notwithstanding any Act of Congress that  
11 confers exclusive jurisdiction on a court or  
12 courts other than the district courts, the  
13 district courts [and by reference pursuant to  
14 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.

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

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

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

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

14 Pacor, 743 F.2d at 994 (quoted in In re Fietz, 852 F.2d 455, 457  
15 (9th Cir. 1988)).

16           In recent years, however, various courts of appeal have moved  
17 to modify or limit bankruptcy court jurisdiction over matters  
18 arising after confirmation of a reorganization plan. See, e.g.,  
19 Bank of La. v. Craigs Stores of Tex., Inc., 266 F.3d 388, 390-91  
20 (5th Cir. 2001) (post-confirmation bankruptcy jurisdiction limited  
21 to matters pertaining to implementation or execution of the plan);  
22 In re Resorts Int'l, Inc., 372 F.3d 154, 166-67 (3d Cir. 2004)  
23 ("the essential inquiry appears to be whether there is a close  
24 nexus to the bankruptcy plan or proceeding sufficient to uphold  
25 bankruptcy court jurisdiction over the matter"). The Ninth  
26 Circuit recently adopted the "close nexus" test of Resorts for  
27 measuring post-confirmation "related to" bankruptcy court  
28 jurisdiction. In re Pegasus Gold Corp., 394 F.3d 1189, 1194 (9th

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

4 In Pegasus, the court of appeals determined that a bankruptcy  
5 court properly exercised jurisdiction where resolution of several  
6 counts in a complaint that belonged to the reorganized debtor  
7 would require interpretation of a confirmed plan of  
8 reorganization, and could affect implementation and execution of  
9 the plan itself. In addition, in Pegasus, relying upon 28 U.S.C.  
10 § 1367, the court determined that, in the post-confirmation  
11 setting, a bankruptcy court, when faced with claims over which it  
12 had “related to” jurisdiction, could also exercise supplemental  
13 jurisdiction over other tangential claims that “involve a ‘common  
14 nucleus of operative facts’ and would be expected to be resolved  
15 in one judicial proceeding . . . .” 394 F.3d at 1195 (citation  
16 omitted). In a footnote, the Pegasus court noted that a  
17 bankruptcy court’s supplemental jurisdiction could even extend to  
18 claims involving parties who were “‘not subject to the federal  
19 claims primarily at issue.’” 394 F.3d at 1195 n.2 (citing Davis v.  
20 Courington, 177 B.R. 907, 912 (9th Cir. BAP 1995).

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

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

6 In deciding whether there was jurisdiction over the claims in  
7 the Amended Complaint, like the bankruptcy court, we are guided by  
8 the analysis in Pegasus. Applying the same test, we conclude the  
9 bankruptcy court correctly assumed supplemental jurisdiction over  
10 Michael and Javier’s individual claims against Appellees  
11 (including the two restated claims in the Amended Complaint)  
12 because they were “part and parcel of a common nucleus of  
13 operative facts surrounding the transfer of the Zions First  
14 National Bank Claim to Superwash Nevada, Incorporated, which forms  
15 the basis for the original seven count complaint.” Tr. Hr’g 14:22  
16 - 15:1 (March 1, 2007). The individual claims assert that  
17 Appellees breached the Separation Agreement, entitling Appellants  
18 to money damages, based upon Appellees’ actions and conduct during  
19 the chapter 11 case. Under these circumstances, it could be  
20 expected that the debtor companies’ claims against Appellees would  
21 be resolved in the same judicial proceeding as Michael and  
22 Javier’s individual claims, and the bankruptcy court had  
23 supplemental jurisdiction over the individual claims.

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

1 stated in the First Complaint that it purported to replace.

2 However, Appellants provide no case law for this proposition.

3 To the contrary, Appellants' argument ignores clear precedent  
4 in our circuit that subject matter jurisdiction is determined at  
5 the time of removal, and thus, in this instance, would be based  
6 upon the claims stated in the First Complaint. Sparta Surgical  
7 Corp. v. Nat'l Assn. Of Sec. Dealers, Inc., 159 F.3d 1209, 1213  
8 (9th Cir. 1998) ("[J]urisdiction must be analyzed on the basis of  
9 the pleadings filed at the time of removal without reference to  
10 subsequent amendments.") Sparta is, in turn, grounded in earlier  
11 rulings that discourage a plaintiff from amending a complaint to  
12 destroy federal jurisdiction over the complaint. Pullman Co. v.  
13 Jenkins, 305 U.S. 534, 537 (1939) (right to remove is determined  
14 according to plaintiff's pleadings at the time of the petition for  
15 removal); St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S.  
16 283, 294 (1938) (barring amendment to lower amount in controversy  
17 below federal court's jurisdictional limit).

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

23

24 II.

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

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

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

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

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

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

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27 <sup>9</sup> For an excellent scholarly discussion, see Christopher  
28 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).

1 Here, in the case before me, it seems that the  
2 individual claims also arise from the same  
3 transaction, the same agreement, as the  
4 debtor's claims for claim preclusion purposes.  
5 These claims arise out of the alleged breach  
6 of the separation agreement and the purchase  
7 of the Zions note at a substantial discount  
8 without the consent of presumably plaintiff  
9 [Michael] Cutter and form the basis of the  
10 debtor's claims against the defendants. Any  
11 alleged breach of the separation agreement  
12 involving the corporate divorce of the two  
13 entities was known to the plaintiffs prior to  
14 the confirmation hearing. Any agreement was  
15 reached as to the Zions National Bank claim  
16 that was assigned to defendant, Superwash  
17 Nevada. . . . This agreement was incorporated  
18 into the confirmation order. This agreement  
19 provided for allowance of the unsecured claims  
20 of defendants, Paul and Mark Cutter. . . .  
21 Here, as in Heritage Hotel I, the action  
22 complained of in the amended complaint  
23 occurred prior to the confirmation and derived  
24 from the same nucleus of operative facts. The  
25 individual plaintiffs as principals of the  
26 debtor were part of the negotiation  
27 process. . . . As noted by the defendants,  
28 the individual plaintiffs had an opportunity  
prior to confirmation to litigate these same  
issues by way of an action to subrogate<sup>[10]</sup> 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.

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

20 Movants [Appellants] also assert that the  
21 defendant's motion to dismiss was based on the  
22 merits of the actual claims, not any legal  
23 doctrine of res judicata or claim preclusion.  
24 As a result, it argued that this Court did not  
25 have the benefit of an adversarial briefing on  
26 claim preclusion. The defendants bore the  
27 burden on this defense and yet submitted  
28 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.

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<sup>10</sup> 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.



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

2 A plan confirmation order has preclusive effect. It is a  
3 binding, final order. Stoll v. Gottlieb, 305 U.S. 165 (1938). It  
4 precludes the litigation of issues that could or should have been  
5 raised during the pendency of the bankruptcy case. In re Kelley,  
6 199 B.R. 698, 703 (9th Cir. BAP 1996); In re Heritage Hotel P'ship  
7 I, 160 B.R. 374, 381 (9th Cir. BAP 1993). This Panel has  
8 previously published an extensive commentary on the preclusive  
9 effect of confirmation orders in bankruptcy cases. Alary Corp. v.  
10 Sims (In re Assoc. Vintage Group, Inc.), 283 B.R. 549 (9th Cir.  
11 BAP 2002). The bankruptcy court carefully tracked Assoc. Vintage  
12 in its analysis in this case.

13 It is well established that the preclusive effect of a plan  
14 confirmation order bars non-debtor plaintiffs, creditors, equity  
15 holders, principals of the debtor and parties in privity with the  
16 debtor or any of their successors in interest from relitigating  
17 issues that could or should have been raised before confirmation.  
18 Heritage Hotel, 160 B.R. at 377; Eubanks v. F.D.I.C., 977 F.2d  
19 166, 170 (5th Cir. 1992); Sure-Snap Corp. v. State St. Bank &  
20 Trust Co., 948 F.2d 869, 877 (2nd Cir. 1991); Sanders  
21 Confectionery Prod. Inc. v. Heller Fin., Inc., 973 F.2d 474, 480-  
22 81 (6th Cir. 1992). As the bankruptcy court noted, Michael and  
23 Javier are the sole officers and directors, and together own 100  
24 percent of the shares, of the chapter 11 debtor, Superwash. They  
25 are therefore bound by the confirmation order as non-debtor  
26 plaintiffs and principals of the debtor. Indeed, they are the  
27 only principals of the debtor, and as such, designed and proposed  
28 the plan of reorganization, and authorized Superwash to enter into

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

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

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

14 283 B.R. at 558 (citing Harris v. Jacobs, 621 F.2d 341, 343 (9th  
15 Cir. 1980)). Those elements are satisfied in this case with  
16 regard to Michael and Javier's individual claims against  
17 Appellees.

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

25 The second and third criteria also bring Appellants' claims  
26 within the zone of claim preclusion. As the bankruptcy court  
27 noted, these criteria refer to the "convenient trial unit" of  
28 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

1 conforms to the parties' expectations or business understanding or  
2 usage." The official comment to Restatement (Second) of Judgments  
3 § 24 notes that,

4 the relevance of trial convenience makes it  
5 appropriate to ask how far the witnesses or  
6 proofs in the second action would tend to  
7 overlap the witnesses or proofs relevant to  
8 the first. If there is a substantial overlap,  
9 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.

10 Id. at cmt. b (emphasis added).

11 Appellants, acting through chapter 11 debtor Superwash, could  
12 have challenged Appellees' conduct and right to assert Zions'  
13 claim in the bankruptcy case. They could have objected to  
14 allowance of their claims, sought to equitably subordinate the  
15 Zions' claim for treatment under the chapter 11 plan under  
16 § 510(c), or attempted to confirm the plan over Appellees'  
17 objections. Had they done so, the evidence and proof necessary to  
18 obtain such relief would have been identical to that required to  
19 establish any individual claims for money damages. Clearly, had  
20 these various claims been litigated, Michael and Javier could have  
21 expected they would be tried together. However, Appellants  
22 elected not to contest Appellants' claims, and instead, elected to  
23 compromise the debtor companies' rights in favor of a consensual  
24 plan. But even so, the second and third requirements for claim  
25 preclusion are satisfied here.

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

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

15 The bankruptcy court's conclusion that Appellants are barred  
16 by the confirmation order from asserting the individual claims  
17 against Appellees conforms to requirements of the case law of this  
18 circuit. The bankruptcy court did not err in deciding that  
19 Appellants' individual claims are precluded by the confirmation  
20 order.<sup>11</sup>

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21  
22 <sup>11</sup> In the conclusion of their Opening Brief, Appellants call  
23 upon the equitable powers of this Panel: "The equities of this  
24 controversy clearly support the reinstatement of Appellants'  
25 claims against Appellees." As discussed above, we affirm the  
26 decision of the bankruptcy court on the basis of claim preclusion,  
27 a legal rather than equitable ground. See Principles of Preclusion  
28 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...)

1 **CONCLUSION**

2 We AFFIRM the bankruptcy court's order.  
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16 <sup>11</sup>(...continued)

17 vote its claims and that of Zions in favor of confirmation. Terms  
18 of the Letter Agreement were ordered incorporated in the plan of  
19 reorganization by the court. Two months after confirmation,  
20 Appellants filed this adversary proceeding, which in essence  
21 seeks to keep the benefits they and their wholly owned company  
22 received in the plan confirmation while challenging and  
23 undermining the benefits granted to Appellees. In pursuing this  
24 course, Appellants have, at least arguably, taken a position  
25 contrary to the one they presented to the bankruptcy court in the  
26 Letter Agreement and plan confirmation hearings, which earlier  
27 position both induced the court to proceed with plan confirmation  
28 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.