

**AUG 24 2005**

**HAROLD S. MARENUS, CLERK  
U.S. BKCY. APP. PANEL  
OF THE NINTH CIRCUIT**

**NOT FOR PUBLICATION**

**UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT**

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|----------------------------------|---|-------------------------------|-------------------|
| In re:                           | ) | BAP Nos. <sup>1</sup>         | EC-04-1263-SPMa   |
|                                  | ) |                               | EC-04-1264-SPMa   |
| AARON D. LOOS and ALICE M. LOOS, | ) |                               | (Related Appeals) |
|                                  | ) |                               |                   |
| Debtors.                         | ) | Bk. No.                       | 03-24832-C-7      |
|                                  | ) |                               |                   |
|                                  | ) | Adv. Nos.                     | 03-02402          |
| AARON D. LOOS; ALICE M. LOOS,    | ) |                               | 03-02403          |
|                                  | ) |                               |                   |
| Appellants,                      | ) |                               |                   |
|                                  | ) |                               |                   |
| v.                               | ) | <b>MEMORANDUM<sup>2</sup></b> |                   |
|                                  | ) |                               |                   |
| STANLEY AYERS; BRIAN BANIQUED,   | ) |                               |                   |
|                                  | ) |                               |                   |
| Appellees.                       | ) |                               |                   |
|                                  | ) |                               |                   |

Argued and Submitted on  
May 20, 2005 at Sacramento, California

Filed - August 24, 2005

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

Honorable David E. Russell, Bankruptcy Judge, Presiding

Before: SMITH, PERRIS and MARLAR, Bankruptcy Judges.

<sup>1</sup> Two independently filed adversary proceedings were joined for the purposes of trial and are the subject of this appeal. This memorandum addresses both appeals.

<sup>2</sup> This disposition is not appropriate for publication and may not be cited except when relevant under the doctrines of law of the case, res judicata, or collateral estoppel. See 9th Cir. BAP Rule 8013-1.

1 The debtors, Aaron D. Loos ("Loos" or "Debtor") and Alice M.  
2 Loos ("Mrs. Loos") (collectively, "Debtors"), appeal final  
3 judgments of the bankruptcy court, entered on May 5, 2004, which  
4 rendered the debts owed to Stanley Ayers ("Ayers") and Brian  
5 Baniqued ("Baniqued") (collectively "Plaintiffs") non-  
6 dischargeable.<sup>3</sup> We VACATE and REMAND.

7  
8 **FACTS**

9 Debtors filed a voluntary chapter 7<sup>4</sup> petition on April 29,  
10 2003. On July 25, 2003, Ayers and Baniqued initiated separate  
11 adversary proceedings against Debtors objecting to discharge under  
12 §§ 727(a) (3) and (a) (5).<sup>5</sup> The complaints each alleged that Loos  
13 was hired to manage Plaintiffs' respective apartment buildings and  
14 that under the terms of the management agreements, Loos was to  
15 "advertise and lease units, collect rents, pay bills  
16 for services and supplies, and perform necessary repairs."  
17 According to Plaintiffs, Loos failed to perform the duties as

18  
19 \_\_\_\_\_  
20 <sup>3</sup> The bankruptcy court made a finding as to Loos and not Mrs. Loos and held that Plaintiffs "take nothing against" Mrs. Loos. Nevertheless, both Debtors appealed.

21 <sup>4</sup> Unless otherwise indicated, all chapter, section and rule  
22 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and  
to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036.

23 <sup>5</sup> Prior to the bankruptcy filing, both Ayers and Baniqued had  
24 commenced litigation against Loos. Ayers had filed a complaint in  
25 state court for breach of contract, breach of implied covenant of  
26 good faith and fair dealing, conversion, and breach of fiduciary  
27 duty. However, the bankruptcy case was filed before the complaint  
28 could be served. Baniqued had commenced an arbitration proceeding  
asserting the same claims, as well as intentional  
misrepresentation and fraud, and obtained an arbitration award in  
the amount of \$20,530.32 prior to the bankruptcy. The arbitration  
award, however, makes no findings regarding any of the specific  
charges.

1 required. Specifically, Loos failed to "provide [Plaintiffs] with  
2 invoices and other documentation sufficient to justify the amounts  
3 of rent retained."

4 The trial in both adversary proceedings was set for February  
5 5, 2004.<sup>6</sup> On January 30, 2004, just six days prior to the trial  
6 and without leave of the court, Plaintiffs filed a pleading which  
7 apparently sought to amend the complaint to add exceptions to  
8 discharge under § 523.<sup>7</sup> At trial, Plaintiffs' attorneys orally  
9 moved to amend the complaint and explained the basis for the  
10 proposed amendment:

11 Bildhauer<sup>8</sup>: [Plaintiffs] had spoken with the  
12 clerk who suggested that we file 523 to give -  
13 anyway, we wanted to give you another option  
14 in the event that you felt specific exception  
15 was equitable, as to oppose - as opposed to a  
16 total conclusion of discharge.

17 Transcript of Proceedings, February 5, 2004, p. 11.

18 Debtors opposed the motion for leave on the ground that they  
19 did not receive adequate notice pursuant to Fed. R. Civ. P. 15 (as  
20 incorporated by Fed. R. Bankr. P. 7015):

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21 <sup>6</sup> The adversaries were consolidated for purposes of trial.  
22 Though Debtor has raised an objection to the "conjoining" of the  
23 proceedings on appeal, no objection was made prior to or during  
24 the trial. In any event, the consolidation of the two actions  
25 seeking the denial of discharge under identical subsections of  
26 § 727 is not clearly erroneous.

27 <sup>7</sup> The docket reflects the filing of a document entitled  
28 "Supplemental Filing/Support By Plaintiff Brian Baniqued To . . .  
Complaint 727 Objection" on January 30, 2004. At trial,  
Plaintiffs' counsel identified the supplemental pleading as one  
purporting to add § 523 exceptions. However, as the document was  
not submitted as part of the record on appeal, its content is  
unknown.

<sup>8</sup> Mathias Bildhauer ("Bildhauer") appeared at trial on behalf  
of the Plaintiffs and Eric Farber ("Farber") served as co-counsel.  
Transcript of Proceedings, February 5, 2004, p. 4.

1           Loos<sup>9</sup>: Under Rule 7015 it is okay to convert  
2           it from a 727 to a 523, but thirty days needs  
3           to be given advance notice, a motion needs to  
4           be filed, summons to the court, an order needs  
5           to be signed, and that was never accomplished.  
6           The [P]laintiffs' attorney has said that he  
7           filed [the amended complaint] two or three  
8           weeks ago, but, again, the facts in the docket  
9           show that it was filed on the mere eve of  
10          trial attempting to convert it from everyone  
11          being discharged on the 727 to only their  
12          clients being discharged on the 727, so I  
13          object to the conversion.

14          Id. at p. 10.

15          The court agreed with Loos and denied the oral motion for  
16          leave to amend, as well as the admission of all evidence in  
17          support of the § 523 claims:

18                The Court: Well, I'm definitely very troubled  
19                by [the amended complaint]. I have not had  
20                such a situation occur before. I am aware  
21                that there is provision about changing or  
22                amending a pleading, which would be the  
23                complaint, I suppose, at the end of the trial  
24                if the evidence that comes in is admitted and  
25                the evidence shows that another cause of  
26                action or another approach could be satisfied  
27                by the evidence that was permitted. Here,  
28                however, we have someone who is objecting from  
29                the beginning of the proceeding about the  
30                change in the complaint. Again, without  
31                having - had this matter come before  
32                previously, I still think I have to make a  
33                decision on this morning in regard to it [sic]  
34                because the matter has been set for trial, we  
35                have proceeded this far to get to trial. And  
36                I must - I think I agree with the debtor, I'm  
37                going to deny the amendment of the complaint.

38          Id. at p. 17 (emphasis added).

39                The Court: . . . I have omitted or not taken  
40                in or not permitted Plaintiff Baniqued's  
41                objection to discharge supplemental filing  
42                because that does refer almost entirely to  
43                523, and I don't think it's applicable to 727,  
44                that is going to be excluded . . . .

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45                <sup>9</sup> Loos represented himself pro se at trial.

1 Id. at 20.

2       Thereupon, the trial proceeded as scheduled. The court heard  
3 testimony and reviewed evidence in support of the objection to  
4 discharge under § 727. At various points in the proceeding, Loos  
5 objected to evidence directed to § 523 allegations and the court  
6 seemed to take great pains to limit the evidence admitted to that  
7 which supported denial of discharge under § 727.

8       At the close of trial, and after both parties had rested,  
9 Plaintiffs once again moved to amend the complaint to assert  
10 exceptions to discharge under § 523. At this point, the court and  
11 Plaintiffs engaged in a curious round of negotiation:

12             Farber: At this time I would like to make a  
13 motion to amend the pleadings to amend the  
14 complaint to add 523. I believe that the  
evidence has clearly shown in this that 523 is  
applicable code and complaint to be added.

15             The Court: Are you going to waive the denial  
16 of discharge?

17             Farber: Are you going to allow me to amend  
18 523?

19             The Court: I may very well allow you to amend  
20 your pleadings to show 523 if you will remove  
21 your request for denial of discharge.

22             Farber: I do so.

23             The Court: All right. Very well. We will  
24 remove the - your request is granted.

25 Id. at 175-176.

26       The bankruptcy court explained its rationale for reversing  
27 its earlier decision:

28             The Court: . . . And I have a very specific  
reason why I permitted the change at the last  
minute, when previously I had ruled that it  
would not be permitted, that is because I  
think you were going to lose the other one,

1 and that is far more devastating to you than  
2 523(a)(2), which I think has been proven here.

3 We know that - it's weird the way the facts  
4 came into this case, I guess, because we  
5 initially had started with a 727, there was a  
6 request to change it to a 523, which I denied,  
7 and then we moved in the evidence under 523 -  
8 I mean, under 727(a)(3) and (5). What I think  
9 the evidence clearly shows is that there was  
10 an effort by you, Loos, to deceive these  
11 parties. I think that the financial  
12 statements that you gave them were wrong. I  
13 think that you made up those statements  
14 deliberately for the purpose of taking their  
15 money and not giving them an honest accounting  
16 of what happened to the money. I have no  
17 doubt that you spent some monies on repairs, I  
18 have no doubt that you did a lot of the repair  
19 work yourself, but you had a duty to your  
20 clients to present them with or provide to  
21 them an appropriate accounting, which you  
22 didn't do. And from that I can only conclude  
23 that you had taken money that didn't belong to  
24 you under this management - under these  
25 management agreements.

26 I think that was - that you had the intent at  
27 the time you took the money to misrepresent  
28 what you were doing to Dr. Ayers and Baniqued  
- pardon me, Baniqued. That because you had  
the intent to take the money, that you made  
material misrepresentations to them about what  
happened during the time that you were  
operating the management agreements with them.

19 Id. at 176-77.

20 The court thereafter ruled in favor of Plaintiffs pursuant to  
21 §§ 523(a)(2)(A) and (a)(4) as follows:

22 1. Debtor Aaron Loos, in his dealings with  
23 [Plaintiffs], through false accountings, false  
24 representations and actual fraud, violated 11  
U.S.C. Section 523(a)(2)(A).

25 2. Debtor Aaron Loos, as [Plaintiffs' Real  
26 Property Manager], engaged in fraud, or  
27 defalcation while acting in a fiduciary  
28 capacity and embezzled rents and other funds  
and therefore violated 11 U.S.C. Section  
523(a)(4).

1 Debtors appeal.<sup>10</sup>

2  
3 **ISSUE**

4 Whether bankruptcy court abused its discretion in granting  
5 the motion for leave to amend the § 727 complaint to add § 523  
6 exceptions to discharge at the conclusion of trial.<sup>11</sup>

7  
8 **JURISDICTION**

9 The bankruptcy court had jurisdiction under 28 U.S.C. § 1334  
10 and § 157(b) (1) ( and (b) (2). This Panel has jurisdiction under 28  
11 U.S.C. § 158(b) (1).

12  
13 **STANDARD OF REVIEW**

14 Leave to amend a complaint is generally within the discretion  
15 of the bankruptcy court and is reviewed under the abuse of

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<sup>10</sup> The bankruptcy court awarded Baniqued \$20,530.32, which was  
18 the amount of the arbitration award, as being excepted from  
19 discharge. As to Ayers, the proceeding was continued to February  
20 8, 2005 for further findings on damages. On that date, the  
bankruptcy court awarded a judgment in the amount of \$22,494.51.  
Transcript of Proceedings, February 8, 2005, p. 41.

21 <sup>11</sup> Debtors also assert on appeal: (1) the bankruptcy court  
22 failed to hold the Plaintiffs responsible for late filings,  
including the amended complaint, which handicapped their defense;  
23 (2) impartiality and clarity were impaired by the consolidation of  
the two adversary proceedings; (3) "[Baniqued] in his capacity as  
24 an agent in contract with the plaintiff was authorized to do  
repairs without holding a contractor's license;" and (4) the  
25 "absence of testimony, expert witness, etc. to expound a perfect  
affirmative defense gave sure and right precedent to the bench to  
26 generally and specifically award a carte blanc [sic] judgment to  
plaintiff."

27 The Panel does not address these issues primarily because, in  
28 our view, the dispositive issue on appeal is whether the court  
abused its discretion when it granted the motion for leave to  
amend the complaint at the conclusion of the trial.

1 discretion standard. Mende v. Dun & Bradstreet, Inc., 670 F.2d  
2 129 (9th Cir. 1982); Waters v. Weyerhaeuser Mortg. Co., 582 F.2d  
3 503, 507 (9th Cir. 1978); Komie v. Buehler Corp., 449 F.2d 644,  
4 648 (9th Cir. 1971). Even under the abuse of discretion standard,  
5 the bankruptcy court's decision is reversible if it is based upon  
6 an incorrect legal conclusion. In re Dominguez, 51 F.3d 1502,  
7 1508 n.5 (9th Cir. 1995); Magno v. Rigsby (In re Magno), 216 B.R.  
8 34, 38 (9th Cir. BAP 1997) (citation omitted). Whether an  
9 amendment relates back to the date of the original pleading under  
10 Fed. R. Civ. P. 15(c)(2) is a legal question which we review de  
11 novo. Id.; Martell v. Trilogy, Ltd., 872 F.2d 322, 325 (9th Cir.  
12 1989).

#### 14 DISCUSSION

15 Leave to amend pleadings "shall be freely given when justice  
16 so requires." Fed. R. Civ. P. 15.<sup>12</sup> The Ninth Circuit applies  
17 this rule with "extreme liberality." Forsyth v. Humana, Inc., 114  
18 F.3d 1467, 1482 (9th Cir. 1997) (citing Morongo Band of Mission

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20 <sup>12</sup> Fed. R. Civ. P. 15, made applicable in an adversary  
21 proceedings by Rule 7015, provides in part:

22 (a) A party may amend the party's pleading once as a  
23 matter of course at any time before a responsive  
24 pleading is served or, if the pleading is one to which  
25 no responsive pleading is permitted and the action has  
26 not been placed upon the trial calendar, the party may  
27 so amend it at any time within 20 days after it is  
28 served. Otherwise a party may amend the party's  
pleading only by leave of court or by written consent of  
the adverse party; and leave shall be freely given when  
justice so requires. A party shall plead in response to  
an amended pleading within the time remaining for  
response to the original pleading or within 10 days  
after service of the amended pleading, whichever period  
may be the longer, unless the court otherwise orders.



1 Indians v. Rose, 893 F.2d 1074, 1079 (9th Cir. 1990)).

2 In exercising its discretion, a bankruptcy court "must be  
3 guided by the underlying purpose of Rule 15 to facilitate decision  
4 on the merits, rather than on the pleadings or technicalities."  
5 In re Magno, 216 B.R. at 38; United States v. Webb, 655 F.2d 977,  
6 979 (9th Cir. 1981). A bankruptcy court considers the following  
7 factors in determining whether a motion to amend should be  
8 granted: "(1) undue delay; (2) bad faith; (3) futility of  
9 amendment; and (4) prejudice to the opposing party." Hurn v. Ret.  
10 Fund Trust of the Plumbing, Heating & Piping Indus., 648 F.2d  
11 1252, 1254 (9th Cir. 1981); In re Magno, 216 B.R. at 38.

12 Here, the prejudice to Debtor is so overwhelming that it  
13 alone is enough to prompt remand. However, for completeness, the  
14 Panel will consider all four factors.

15 **1. Undue Delay**

16 Plaintiffs initiated this adversary proceeding on July 25,  
17 2003. The request to amend the complaint was filed seven months  
18 after the commencement of the adversary proceeding and just six  
19 days before trial; the oral motions for leave were made at trial.  
20 No explanation for the extraordinary delay in seeking the  
21 amendment has ever been offered by Plaintiffs.

22 **2. Bad Faith**

23 Nothing in the record suggests that Plaintiffs acted in bad  
24 faith.

25 **3. Futility of Amendment**

26 There is no question that the amendment to the complaint was  
27 allowed after the June 10, 2003 deadline for the filing of a  
28

1 complaint under § 523.<sup>13</sup> Therefore, if the amendment did not  
2 relate back to the original complaint it would have been a "futile  
3 gesture for the bankruptcy court to grant leave to amend." In re  
4 Magno, 216 B.R. at 38.

5 Under the Fed. R. Civ. P. 15(c)(2):

6 An amendment of a pleading relates back to the  
7 date of the original pleading when the claim  
8 or defense asserted in the amended pleading  
9 arose out of the conduct, transaction, or  
10 occurrence set forth or attempted to be set  
11 forth in the original pleading.

12 Thus, the new claim should be capable of being proven by the  
13 "same kind of evidence offered in support of the original  
14 pleading." 216 B.R. at 39 (citation omitted). Indeed, the "focus  
15 of the inquiry is on the factual allegations made in the two  
16 complaints so as to give the opposing party fair notice of the  
17 claims against him." Id. (citing In re Dean, 11 B.R. 542 (9th Cir.  
18 BAP 1981), aff'd, 687 F.2d 307 (9th Cir. 1982)). In Dean, we  
19 observed:

20 The basic test is whether the evidence with  
21 respect to the second set of allegations could  
22 have been introduced under the original

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23 <sup>13</sup> Rule 4007(c) provides:

24 A complaint to determine the dischargeability of a debt  
25 under § 523(c) shall be filed no later than 60 days  
26 after the first date set for the meeting of creditors  
27 under § 341(a). The court shall give all creditors no  
28 less than 30 days' notice of the time so fixed in the  
manner provided in Rule 2002. On motion of a party in  
interest, after hearing on notice, the court may for  
cause extend the time fixed under this subdivision. The  
motion shall be filed before the time has expired.

29 Pursuant to the court's Notice of Filing Report of No  
Distribution Combined with Order Fixing Deadline to Object  
Thereeto, the deadline for filing a nondischargeability complaint  
was June 10, 2003.

1 complaint, liberally construed; or, as a  
2 corollary, that in terms of notice, one may  
3 fairly perceive some identification or  
relationship between what was pleaded in the  
original and amended complaints.

4 11 B.R. at 545.

5 Though it is not clear from the record which specific  
6 subsections of § 523 Plaintiffs sought to add to the complaint, it  
7 is abundantly clear that the evidence required to support denial  
8 of discharge under § 727(a)(3) and (a)(5)<sup>14</sup> was not factually  
9 similar to the bankruptcy court's ultimate findings under  
10 §§ 523(a)(2)(A) and (a)(4)<sup>15</sup>.

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11  
12 <sup>14</sup> Section 727 provides, in relevant part:

13 (a) The court shall grant the debtor a discharge,  
unless --

14 . . . .

15 (3) the debtor has concealed, destroyed, mutilated,  
16 falsified, or failed to keep or preserve any recorded  
information, including books, documents, records, and  
17 papers, from which the debtor's financial condition or  
business transactions might be ascertained, unless such  
18 act or failure to act was justified under all of the  
circumstances of the case; [or]

19 . . . .

20 (5) the debtor has failed to explain satisfactorily,  
21 before determination of denial of discharge under this  
paragraph, any loss of assets or deficiency of assets to  
meet the debtor's liabilities[.]

22 <sup>15</sup> Sections 523(a)(2)(A) and (a)(4) provide:

23 (a) A discharge under section 727, 1141, 1228(a),  
24 1228(b), or 1328(b) of this title does not discharge an  
individual debtor from any debt -

25 (2)(A) for money, property, services, or an extension,  
renewal or refinancing of credit, to the extent obtained  
26 by false pretenses, or actual fraud, other than a  
statement respecting the debtor's or an insider's  
27 financial condition; [or]

28 (4) for fraud or defalcation while acting in a fiduciary  
(continued...)

1 For example, the bankruptcy court found that Loos violated  
2 § 523(a)(2)(A) in his dealings with Ayers through false  
3 accountings, false representations, and actual fraud.  
4 Significantly, the bankruptcy court made a finding of fraud where  
5 no requirement of fraud exists under either § 727(a)(3) or  
6 § 727(a)(5). Additionally, the bankruptcy court also found the  
7 existence of a "fiduciary relationship" under § 523(a)(4) though  
8 no such requirement exists under §§ 727(a)(3) or (a)(5). The  
9 elements required to prove discharge exceptions under  
10 §§ 523(a)(2)(A) and (a)(4) simply do not fit into the requirements  
11 for establishing denial of discharge under §§ 727(a)(3) and  
12 (a)(5). In Magno, we declined to affirm a court's decision to  
13 allow an amended pleading which added a new claim under § 523 to a  
14 § 727 complaint, reasoning that:

15 To prove a § 523(a)(6) claim, [plaintiff] must  
16 show that there was an intentional act by  
17 debtor which caused injury to [plaintiff] or  
18 their property. On the other hand, under  
19 § 727(a)(2)(A), there must be findings that  
20 debtor concealed his property with the intent  
21 to hinder, delay, or defraud a creditor.  
22 Section 727(a)(4)(A) requires a finding that  
23 Debtor knowingly and fraudulently made a false  
24 oath or account in, or in connection with, the  
25 case. ¶ The elements under § 523(a)(6) are  
26 not included in those required for § 727 and  
27 are clearly distinct from them. Even under a  
28 liberal definition of lesser-included claim,  
the 523(a)(6) claim does not fit the  
definition.

24 In re Magno, 216 B.R. at 42 (citations omitted).

25 Here, it is clear that the evidence required to establish the  
26 § 727 claims on the one hand, and the § 523 claims on the other,  
27

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28 <sup>15</sup>(...continued)  
capacity, embezzlement, or larceny[.]

1 are not identical, or even related.

2 **4. Prejudice to Debtor**

3 Notwithstanding the court's unequivocal denial of the motions  
4 to add the discharge exceptions under § 523 at the outset of trial  
5 and its limitation of the evidence to the § 727 allegations during  
6 trial, the court nevertheless allowed the amendments at the close  
7 of the trial.<sup>16</sup>

8 The bankruptcy court abused its discretion by allowing the  
9 post-trial amendments. The prejudice to Debtors, who proceeded  
10 throughout trial under the belief that the allegations and  
11 evidence against them were solely rooted in § 727, was  
12 substantial. Simply put, the bankruptcy court effectively  
13 deprived Debtors of a defense. As the Fehrle court so eloquently  
14 articulated:

15 The recitation of a specific cause of action,  
16 and the selection of a particularized section  
17 of the Bankruptcy Code under which to proceed,  
18 both profoundly affect the nature of the  
19 resulting defense. To construct a complaint  
20 invoking a general denial of discharge  
21 inspires an altogether different form of  
22 defense from that which would be forthcoming  
23 in the case of a complaint seeking to have a  
24 particular debt excepted from discharge. The  
25 whole theory of the defense and the elements  
26 of its rebuttal proof are radically  
27 distinguishable in the two types of cases.

22 In re Fehrle, 34 B.R. 974, 975 (Bankr. W.D. Ky. 1983).

23 As stated above, and as implicitly recognized by the court  
24 itself, the proof requirements under §§ 727(a)(3) and (a)(5) do  
25 not include fraud or the existence of a fiduciary relationship.  
26 Thus, Debtors defended the § 727 claims without regard for, among

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27  
28 <sup>16</sup> At oral argument, Plaintiffs' counsel conceded that the  
fraud evidence was introduced on rebuttal.

1 other things, presenting evidence relating to Loos' intent (or  
2 lack thereof) to deceive Plaintiffs, Plaintiffs' reliance on  
3 alleged misrepresentations, or the existence (or lack thereof) of  
4 a fiduciary relationship between Loos and Plaintiffs. Allowing  
5 Plaintiffs to completely abandon the original focus of the  
6 complaint at the end of the trial, after the bankruptcy court  
7 clearly denied the amendment at the outset, substantially  
8 prejudiced Debtor.

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**CONCLUSION**

We VACATE and REMAND to the bankruptcy court with instructions to: (1) set aside the withdrawal of the § 727 complaints; and (2) enter findings and judgment as appropriate under §§ 727 (a) (3) and (a) (5).