

JUN 09 2015

NOT FOR PUBLICATION

SUSAN M. SPRAUL, CLERK  
U.S. BKCY. APP. PANEL  
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

In re: ) BAP No. EC-14-1382-JuKuPa  
 )  
 6 BUN AUYEUNG and SOO HAN TSE, ) Bk. No. 13-30919  
 )  
 7 Debtors. )  
 )  
 8 \_\_\_\_\_ )  
 )  
 9 BUN AUYEUNG; SOO HAN TSE, )  
 )  
 10 Appellants, )  
 )  
 11 v. ) M E M O R A N D U M \*  
 )  
 12 PAULA CHRISTENSEN; BARTON )  
 13 CHRISTENSEN; DAVID CUSICK, )  
 Chapter 13 Trustee, )  
 )  
 14 Appellees. )  
 \_\_\_\_\_ )

Argued and Submitted on May 14, 2015  
at Sacramento, California

Filed - June 9, 2015

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

Honorable Ronald H. Sargis, Bankruptcy Judge, Presiding

Appearances: Peter G. Macaluso argued for appellants Bun  
Auyeung and Soo Han Tse; John D. Maxey of  
Dudugjian & Maxey argued for appellees Barton and  
Paula Christensen.\*\*

\* 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 8024-1.

\*\* Appellee David Cusick was the chapter 13 trustee in  
Debtors' first chapter 13 bankruptcy case and was appointed the  
(continued...)

1 Before: JURY, KURTZ, and PAPPAS, Bankruptcy Judges.

2 Memorandum by Judge Jury

3 Dissent by Judge Kurtz

4

5 Chapter 13<sup>1</sup> debtors, Bun Auyeung and Soo Han Tse (Debtors),  
6 moved under § 522(f)(1)(A) to avoid the judicial lien held by  
7 Barton and Paula Christensen (Creditors) against Debtors'  
8 homestead property. The bankruptcy court avoided the lien in  
9 part. Thereafter, the court confirmed Debtors' fourth amended  
10 chapter 13 plan which required Debtors to sell the property  
11 encumbered by Creditors' lien and use a portion of the proceeds  
12 to satisfy the remaining lien. Debtors never took any steps to  
13 sell the property and defaulted under the terms of the plan.

14 The bankruptcy court subsequently denied Debtors' motion to  
15 voluntarily dismiss their case and converted it to chapter 7.  
16 After Debtors received their § 727 discharge, they moved to  
17 avoid Creditors' judicial lien in its entirety, arguing that the  
18 value of the property encumbered by the lien had decreased and  
19 that the amount of their homestead exemption had increased. The  
20 bankruptcy court denied their motion on the grounds that Debtors  
21 were barred from relitigating the value of the property by the

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\*\* (...continued)

24 successor trustee in Debtors' second chapter 13 bankruptcy case.  
25 He has not participated in this appeal.

26 <sup>1</sup> Unless otherwise indicated, all chapter and section  
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532.  
28 "Rule" references are to the Federal Rules of Bankruptcy  
Procedure and "Civil Rule" references are to the Federal Rules of  
Civil Procedure.

1 doctrines of claim preclusion and merger and bar, and that their  
2 exemption was determined as of the petition date and not the  
3 date of conversion. A final decree was entered and Debtors'  
4 chapter 7 bankruptcy case was closed.

5 Debtors then filed this chapter 13 case and again moved to  
6 avoid Creditors' judicial lien on the same grounds asserted in  
7 their chapter 7 case. The bankruptcy court summarily denied  
8 their motion, finding that Debtors were ineligible for a  
9 discharge. Debtors moved for reconsideration, which the  
10 bankruptcy court granted in part by finding that the denial of  
11 the motion should have been without prejudice since Debtors were  
12 eligible for a discharge. Debtors filed another motion to avoid  
13 Creditors' judicial lien, which the bankruptcy court denied on  
14 the basis of judicial estoppel. Debtors appeal from that ruling  
15 and order. We AFFIRM.

16 **I. FACTS<sup>2</sup>**

17 In September 2008, the California state court entered a  
18 judgment in the amount of \$300,000 against Debtors and in favor  
19 of Creditors and other parties not before us in this appeal.  
20 The judgment allocated \$144,000 of the \$300,000 to Creditors.  
21 Creditors recorded an abstract of judgment in the Sacramento  
22 County Recorder's Office which perfected their lien against  
23 Debtors' homestead property located in Elk Grove, California

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24  
25 <sup>2</sup> The following facts have been taken from the record of  
26 this chapter 13 case and Debtors' first bankruptcy case (Bankr.  
27 Case. No. 09-35065). To the extent needed, we take judicial  
28 notice of various pleadings which were docketed and imaged by the  
bankruptcy court in the underlying bankruptcy cases. Atwood v.  
Chase Manhattan Mortg. Co. (In re Atwood), 293 B.R. 227, 233 n.9  
(9th Cir. BAP 2003).

1 (Property).

2 **A. Debtors' First Bankruptcy Case: Bankr. Case No. 09-35065**

3 Debtors filed a chapter 13 petition on July 21, 2009.<sup>3</sup> In  
4 Schedule A, Debtors listed the fair market value (FMV) of the  
5 Property as \$130,000.<sup>4</sup> In Schedule D, Debtors listed the  
6 \$300,000 judgment lien as the only lien against the Property.  
7 In December 2009, Debtors filed an amended Schedule C to claim a  
8 homestead exemption in the Property under Cal. Code Civ. Proc.  
9 (CCP) § 704.730(a)(3) for \$150,000.

10 On November 25, 2009, Creditors filed a proof of claim  
11 (POC) asserting a secured claim for \$158,854.60 based on their  
12 state court judgment and accrued interest as of the petition  
13 date.

14 On December 15, 2009, Debtors filed a motion to avoid  
15 Creditors' judgment lien under § 522(f)(1)(A) (First Lien  
16 Avoidance Motion). Consistent with their Schedules, Debtors  
17 claimed a \$150,000 homestead exemption and asserted that the FMV  
18 of the Property was \$130,000.

19 Creditors opposed, contending that the FMV of the Property  
20 was \$420,000 based on a January 2009 appraisal. Creditors noted  
21 that the difference between the appraised value (\$420,000) and  
22 the value assigned by Debtors as of the petition date (\$130,000)  
23 was \$290,000.

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24  
25 <sup>3</sup> The case was reassigned to the Honorable Roger H. Sargis  
and transferred to the Sacramento Division on January 15, 2010.

26  
27 <sup>4</sup> Evidently, Debtors asserted that the Property was  
28 uninhabitable and they adjusted the initial FMV of \$200,000  
downward due to \$50,000 in demolition costs and \$20,000 for costs  
of sale.

1 On August 30, 2010, the bankruptcy court conducted an  
2 evidentiary hearing on valuation and found that the FMV of the  
3 Property was \$290,000. Subtracting Debtors' \$150,000 homestead  
4 exemption from that amount, the court concluded that Creditors'  
5 lien was avoided as to all amounts over \$140,000. The  
6 bankruptcy court entered an order consistent with its ruling on  
7 the same day and that order became final (August 30, 2010  
8 Order).

9 On November 14, 2011, the bankruptcy court confirmed  
10 Debtors' fourth amended chapter 13 plan. The plan provided that  
11 proceeds from the sale of the Property would be used to pay all  
12 Class 2 claimants and lien holders in full, which included  
13 Creditors. The order confirming the plan states that "pursuant  
14 to . . . § 1323, the plan is amended as follows: the real  
15 property shall be listed immediately at \$290,000 and sell by  
16 September 2012."

17 In December 2012, the chapter 13 trustee, David Cusick,  
18 moved to dismiss the case on the grounds that Debtors were not  
19 current in their payments and had failed to sell the Property by  
20 September 2012 as required by the confirmed plan. Debtors  
21 opposed and filed a motion for voluntary dismissal.<sup>5</sup>

22 On February 25, 2013, the bankruptcy court converted  
23

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24 <sup>5</sup> In its July 22, 2014 findings of fact and conclusions of  
25 law denying Debtors' fourth lien avoidance motion which is the  
26 subject of this appeal, the bankruptcy court states that "Debtors  
27 pleaded with the court to allow them to dismiss the case so they  
28 could (after having improperly delayed and make [sic] affirmative  
misrepresentations to the court) file a new case and manufacture  
a larger exemption apparently not satisfied with the substantial  
California homestead exemption already afforded them."

1 Debtors' case to chapter 7. In deciding to convert the case,  
2 the court found that Debtors actively misrepresented that they  
3 would liquidate the Property, but never intended to do so,  
4 instead hoping it would appreciate in value. The bankruptcy  
5 court further found that Debtors had continued in possession of  
6 the Property without making regular monthly payments to  
7 Creditors who had a lien on the Property. Under these  
8 circumstances, the court decided that only an independent  
9 fiduciary could consider whether the estate was properly managed  
10 and what assets remained for distribution to creditors. The  
11 bankruptcy court denied Debtors' request for a voluntary  
12 dismissal.

13 After their case was converted, Debtors amended Schedule A,  
14 stating that the FMV of the Property was \$185,000. Debtors also  
15 amended their Schedule C, listing an exemption in the Property  
16 in the amount of \$175,000.<sup>6</sup>

17 In May 2013, the chapter 7 trustee filed a report of no  
18 distribution.

19 On June 4, 2013, Debtors received their chapter 7  
20 discharge.

21 On June 5, 2013, Debtors filed a second motion to avoid  
22 Creditors' lien under § 522(f)(1)(A) (Second Lien Avoidance  
23 Motion). Debtors again asserted that the FMV of the Property  
24 was \$185,000 based on an appraisal performed by David LaBella on  
25 March 14, 2013, and claimed a homestead exemption in the amount

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26  
27 <sup>6</sup> CCP § 704.730(a)(3) was amended in 2009 to increase the  
28 exemption from \$150,000 to \$175,000 for persons over the age of  
65.

1 of \$175,000.

2 Creditors opposed, arguing that the FMV of the Property was  
3 previously determined to be \$290,000 at the August 30, 2010  
4 evidentiary hearing, and thus Debtors were barred from  
5 relitigating the value of the Property.

6 In reply, Debtors argued, without citation to any  
7 authority, that the date of valuation for the Property in the  
8 converted chapter 7 case was the date of conversion,  
9 February 25, 2013. Accordingly, Debtors asserted that they were  
10 not bound by the previous valuation.

11 On July 11, 2013, the bankruptcy court issued its findings  
12 of fact and conclusions of law (July 11, 2013 FFCL). The court  
13 found that exemption values are determined as of the petition  
14 date which does not change after a case is converted. The  
15 bankruptcy court further found that the August 30, 2010 Order  
16 granting Debtors' First Lien Avoidance Motion was a final order  
17 and thus Debtors were barred from relitigating the FMV of the  
18 Property by the doctrines of claim preclusion and merger and  
19 bar:<sup>7</sup>

20 A judgment, when rendered on the merits, constitutes  
21 an absolute bar to a subsequent attempting [sic] to  
22 re-litigate the matters determined by the judgment.  
Cromwell v. County of Sacramento, 94 U.S. 351 (1876).

23 Central to this claims preclusion doctrine or [sic]  
24 the concepts of merger and bar. The concept of merger  
25 holds that when a plaintiff succeeds in litigation and  
26 recovers a valid and final personal judgment, the  
27 plaintiffs [sic] claim is merged into the judgment,  
28 and the original claim and all defenses to it, whether

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27 <sup>7</sup> Claim preclusion includes doctrines of merger and bar.  
28 See Paine v. Griffin (In re Paine), 283 B.R. 33, 38 (9th Cir. BAP  
2002).

1 asserted or not, are extinguished. The plaintiffs  
2 [sic] rights and the defendants [sic] liabilities are  
3 thereafter determined by the judgment. If the  
4 plaintiff loses the litigation, the resultant judgment  
5 acts as a bar to any further actions by the plaintiff  
6 on the same claim, with certain limited exceptions.  
7 By definition, merger and bar prohibit claim-  
8 splitting. All facts, allegations, and legal theories  
9 which support a particular claim, as well as all  
10 possible remedies and defenses, must be presented in  
11 one action or are lost (see §§ 131.20-131.24). Moores  
12 Federal Practice, Third Edition, § 131.01. The Ninth  
13 Circuit Court of Appeals addressed the application of  
14 this principal [sic] to orders in bankruptcy court (an  
15 order approving the sale of property) in Robertson v.  
16 Isomedix, Inc. (In re International Nutronics),  
17 28 F.3d 965 (9th Cir. 1993), cert. denied 513 U.S.  
18 2016 (1994).

19 The court having entered a final order avoiding  
20 Creditors [sic] judgment lien, it cannot now be  
21 relitigated by Debtors. There remains no case or  
22 controversy for this court to exercise federal court  
23 jurisdiction, all such claims having been merged into  
24 the prior final order.

25 In the same ruling, Judge Sargis again commented on Debtors'  
26 conduct throughout the case. On July 15, 2013, the bankruptcy  
27 court entered a Civil Minute Order denying Debtors' Second Lien  
28 Avoidance Motion.

On August 19, 2013, the bankruptcy case was closed and a  
final decree was entered.

**B. Debtors' Second Bankruptcy Case: Bankr. Case No. 13-30919**

On August 19, 2013, Debtors filed a second chapter 13  
petition.<sup>8</sup> In Schedule A, Debtors valued the Property at  
\$185,000. In Schedule C, they claimed a homestead exemption in  
the Property under CCP § 704.730(a)(3) for \$142,220.<sup>9</sup>

On October 1, 2013, Creditors filed a POC asserting a

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<sup>8</sup> The case was assigned to the Honorable Michael S. McManus.

<sup>9</sup> It is unclear where this amount came from.



1 secured claim in the amount of \$140,000.

2         Meanwhile, Debtors attempted to have their chapter 13 plan  
3 confirmed. Debtors proposed to fund the plan by paying \$100 per  
4 month from future earnings and by obtaining a one-time gift of  
5 \$13,000 from one of their children on or before November 25,  
6 2013. Debtors reduced Creditors' claim from \$158,854.60 to  
7 \$7,000 and proposed to pay them \$40 per month. The plan further  
8 provided that when Debtors successfully avoided Creditors' lien  
9 in their yet to be filed motion, they would pay Creditors in  
10 full by a lump sum distribution on or before December 2013.

11         The appointed chapter 13 trustee, Jan P. Johnson, objected  
12 to confirmation of the plan on the grounds that Debtors had  
13 failed to provide a copy of their federal tax returns for the  
14 tax year ending before the filing of the petition and the plan  
15 failed to specify a monthly payment for administrative expenses.  
16 The trustee also maintained that the feasibility of the plan  
17 depended on the granting of Debtors' motion to avoid Creditors'  
18 lien and they had not yet filed such a motion. According to the  
19 trustee, if their motion was unsuccessful, the court could deny  
20 confirmation.

21         Creditors also objected to Debtors' plan, contending that  
22 the plan was not proposed in good faith and did not provide for  
23 their secured claim. Creditors further argued that Debtors had  
24 not filed their petition in good faith.

25         On October 14, 2013, Debtors filed their third motion to  
26 avoid Creditors' lien (Third Lien Avoidance Motion). This  
27 motion was virtually identical to the prior motion filed in  
28 their chapter 7 case. Debtors again valued the Property at

1 \$185,000 and claimed a \$175,000 homestead exemption. Creditors  
2 opposed, contending that Debtors' Third Lien Avoidance Motion  
3 was barred by the doctrines of claim and issue preclusion and  
4 that Debtors had filed their petition in bad faith.

5 On November 12, 2013, Judge McManus held a hearing on the  
6 chapter 13 trustee's objections to confirmation of Debtors'  
7 plan.<sup>10</sup> The court sustained the chapter 13 trustee's objections  
8 and denied confirmation. The bankruptcy court also denied  
9 Debtors' Third Lien Avoidance Motion finding:

10 Because the debtor has received a chapter 7 discharge  
11 within 4 years of this case, they will not receive a  
12 discharge of any debts in this case. See 11 U.S.C.  
13 § 1328(f)(1). Therefore, absent payment in full of a  
14 claim, it will survive the completion of the plan.  
15 The same will be true of any lien securing a claim.  
16 While it might be temporarily stripped off its  
17 collateral, in whole or in part, during the pendency  
18 of this chapter 13 case, because the court will not be  
19 entering a discharge order to conclude the case, the  
20 lien will be revived after completion of the plan  
21 payments. Accord In re Victorio 454 B.R. 759 (Bankr.  
22 S.D. Cal. 2011), affirmed 470 B.R. 545 (S.D. Cal.  
23 2012). This is because, when a chapter 13 case  
24 does not end in a discharge, the only alternative is  
25 dismissal or conversion to another chapter. In this  
26 case, conversion is not an option given the prior  
27 discharge. Dismissal is the only other alternative  
28 method of ending the case. Id. and see 11 U.S.C.  
§ 1307(c), 1328. Upon dismissal, any lien avoided  
pursuant to section 522(f) will be reinstated. See  
11 U.S.C. § 349(b)(1)(B).

Because it is certain that the debtor will not receive  
a discharge, that the case will be dismissed when all  
payments are completed, that the judicial lien will be  
revived upon dismissal, and that the plan does not  
provide for payment in full of the Christiensen's  
[sic] lien, there is no point in avoiding the lien or  
confirming this plan.

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<sup>10</sup> The next day, Debtors' bankruptcy case was transferred to  
Judge Sargis, the appointed chapter 13 trustee resigned, and  
David Cusick was appointed the successor trustee.

1 On November 15, 2013, the bankruptcy court entered a Civil  
2 Minute Order denying Debtors' Third Lien Avoidance Motion.

3 On November 22, 2013, Debtors filed a motion for  
4 reconsideration of the order sustaining the chapter 13 trustee's  
5 objection to their plan, the order denying their Third Lien  
6 Avoidance Motion, and the order on objection to confirmation by  
7 Creditors.<sup>11</sup> Debtors maintained that they provided their most  
8 recent tax returns to the chapter 13 trustee and that the plan  
9 provided for payment of their attorney not to exceed \$5,000.  
10 Debtors also argued that the time period between their first  
11 chapter 13 case filed on July 21, 2009, and this case filed on  
12 August 19, 2013, was more than four years. Thus, Debtors  
13 maintained that they were entitled to a discharge.

14 David Cusick, the successor chapter 13 trustee, opposed,  
15 contending, among other things, that Debtors had defaulted under  
16 the proposed plan.

17 On December 10, 2013, the Honorable Christopher M. Klein  
18 heard Debtors' motion for reconsideration. Judge Klein noted  
19 the history in the case and ruled that there were no grounds to  
20 vacate the prior orders under Civil Rule 60(b). However, the  
21 court opined that it appeared the motions should have been  
22 denied without prejudice:

23 The grounds for denying the motions appears to have  
24 been based substantially on the findings of this court  
concerning the conduct of the Debtors in the prior

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25  
26 <sup>11</sup> The order sustaining Creditors' objection to confirmation  
27 of the plan was not entered until November 27, 2013. The  
28 appointed chapter 13 trustee, Jan P. Johnson, resigned prior to  
submitting an order. Therefore, Debtors' motion for  
reconsideration of the various orders was premature.

1 case. The prior judge in this case correctly  
2 understood those rulings. However, it appears that  
3 the denials [sic] were summarily denied and may be  
4 based on a less than complete record presented by the  
Debtors. The court concludes that if this judge had  
been ruling on the substance of the motions, the  
denials would have been without prejudice.

5 In a footnote, Judge Klein further observed:

6 It also appears that the rationale for the prior  
7 rulings was based on that judges [sic] conclusions  
8 that there can be no Chapter 20 bankruptcy cases  
9 (Chapter 7 followed by a Chapter 13, in which no  
10 discharge can be granted). First, this judge  
11 disagrees with that conclusion. See In re Frazier,  
12 448 B.R. 803 (Bankr. ED Cal. 2011), affd., 469 B.R.  
13 803 (ED Cal. 2012) (discussion of lien striping in  
14 Chapter 13 case), and Martin v. CitiFinancial  
Services, Inc. (In re Martin), Adv. No. 12-2596, 2013  
LEXIS 1622 (Bankr. E.D. CA 2013). Secondly, it  
appears that while the prior judge correctly  
understood the less than stellar conduct of the  
Debtors in the prior case, the computation of time  
between the first bankruptcy case being filed,  
July 21, 2009 and the filing of the current case,  
August 19, 2013, is more than four years.

15 The bankruptcy court stated that it would issue an amended order  
16 on the lien avoidance, correcting it to state that the denial of  
17 the motion was without prejudice. The court denied the balance  
18 of the motion and noted that if Debtors wanted to proceed with  
19 confirmation of their chapter 13 plan they could file an amended  
20 plan, motion to confirm, and supporting evidence. On  
21 December 13, 2013, the bankruptcy court entered a Civil Minute  
22 Order granting Debtors' motion for reconsideration in part.

23 Meanwhile, the chapter 13 trustee filed a motion to dismiss  
24 Debtors' case for failure to make plan payments. The bankruptcy  
25 court heard the motion on January 8, 2014, and denied it without  
26 prejudice because the trustee confirmed at the hearing that the  
27 \$13,000 lump-sum payment as required under the plan had been  
28 made.

1           Creditors also objected to Debtors' homestead exemption in  
2 the amount of \$175,000. On January 28, 2014, the bankruptcy  
3 court overruled the objection without prejudice on the grounds  
4 that neither issue nor claim preclusion barred Debtors from  
5 claiming the higher exemption amount since the amount of the  
6 exemption was not at issue in the First Lien Avoidance Motion or  
7 evidentiary hearing that resulted in the August 30, 2010 Order.  
8 The court noted, however, that other theories may exist as to  
9 why Debtors should not be asserting the higher exemption amount,  
10 but those theories were not before the court.

11           On January 29, 2014, Debtors filed a motion seeking  
12 confirmation of their plan and also filed their fourth motion to  
13 avoid Creditors' lien under § 522(f)(1)(A) (Fourth Lien  
14 Avoidance Motion). Thereafter, Debtors' Fourth Lien Avoidance  
15 Motion tracked with the confirmation process.

16           Debtors' Fourth Lien Avoidance Motion was virtually  
17 identical to their prior two motions. They again asserted the  
18 FMV of the Property was \$185,000, claimed a homestead exemption  
19 in the amount of \$175,000, and asserted that the equity in the  
20 Property was no more than \$7,000 for purposes of lien avoidance.

21           Creditors opposed, arguing that Debtors must be barred from  
22 obtaining any further avoidance of their lien because the claim  
23 had been merged into judgment and the doctrines of claim and  
24 issue preclusion, double recovery and judicial estoppel barred  
25 their request. On all these bases, Creditors maintained that  
26 Debtors' Fourth Lien Avoidance Motion should be denied in its  
27 entirety and with prejudice.

28           In reply, Debtors argued that claim preclusion did not

1 apply because the evidence presented was based on an entirely  
2 different target date, value date, exemption date, and type of  
3 discharge and, therefore, was not the same claim. Debtors  
4 further argued that Creditors' double recovery theory did not  
5 apply between a chapter 7 case and a chapter 13. Finally,  
6 Debtors asserted that equitable considerations were inapplicable  
7 to the formula under § 522(f). Debtors noted that they were  
8 eligible for a discharge and for the exemption claimed, and they  
9 provided evidence of the Property's value, which was undisputed.

10 Judge Sargis held an initial hearing on plan confirmation  
11 and Debtors' Fourth Lien Avoidance Motion on March 4, 2014. The  
12 matters were continued several times to allow time for  
13 discovery, if any, related to plan confirmation, and to allow  
14 the parties to brief the issue whether judicial estoppel applied  
15 to Debtors' Fourth Lien Avoidance Motion.

16 On July 22, 2014, Judge Sargis issued Civil Minutes denying  
17 confirmation of Debtors' plan. On the same day, the court  
18 issued Civil Minutes denying Debtors' Fourth Lien Avoidance  
19 Motion. There, the bankruptcy court stated:

20 The court has denied the Debtors' motion to confirm a  
21 plan in this case, determining that (1) the Debtors do  
22 not qualify as Chapter 13 Debtors, (2) the bankruptcy  
23 case has not been filed in good faith, (3) the  
24 bankruptcy plan has not been proposed in good faith,  
25 and (4) the Debtors have not prosecuted the  
26 bankruptcy case in good faith. Therefore, there is no  
27 reason for the court to proceed with causing the  
28 Creditor, Debtors, and the court to conduct further  
hearings on this Motion, as there appears to be no  
legal reason for doing so.

While these findings related to Debtors' motion for confirmation  
of their plan, at another point, the court said:

The Debtors are attempting to pick the best from all

1 worlds. They get their prior Chapter 13 case  
2 converted to Chapter 7 due to their misconduct. They  
3 file a new Chapter 13 case, providing a di minimis  
4 [sic] payment, premised on having obtained a discharge  
5 in the prior case. Then they seek to take away the  
6 lien of Christensen, paying them nothing as an  
7 unsecured claim. The Debtors [sic] failure of good  
8 faith has continued to the present case.

9 The court also referred to its July 11, 2013 FFCL issued in  
10 Debtors' prior case and then discussed application of judicial  
11 estoppel:

12 The court finds that the equitable doctrine of  
13 judicial estoppel encompasses this very situation.  
14 The court must preserve the integrity of the judicial  
15 process, and Debtors clearly are attempting to abuse  
16 the process by filing a sham Chapter 13 plan and  
17 avoiding the lien of the Christensen [sic]. Debtors  
18 filed this bankruptcy after the dismissal<sup>12</sup> of the  
19 prior bankruptcy, admitting that they would be able to  
20 reap the benefit of a higher homestead exemption if  
21 they were to refile. Bankr. E.D. No. 09-35065, Civil  
22 Minutes, Dkt. 214. The Debtors are not entitled to  
23 reap the benefits of an increased exemption and  
24 therefore avoiding more of the Creditors['] lien based  
25 on their prior bad faith.

26 While the Debtor [sic] attempt to disengage the  
27 current bankruptcy filing from their prior case, and  
28 their conduct in that case, the federal courts are not  
so nearsighted. The Debtors intentionally and  
willfully misrepresented to this court the terms of  
their Chapter 13 Plan. The court relied on their  
statements under penalty of perjury in confirming the  
Chapter 13 Plan in the prior case. Through their  
misrepresentations, the Debtors managed to confirm a  
plan and exhaust four years of judicial time and  
resources. This Chapter 13 case is one more step by  
the Debtors in their plan to delay, abuse (both the  
Creditors and the court), avoid performing, not  
following through with the obligations of a Chapter 13  
debtor, and taking what they want, when they want it.

These Debtors willfully and intentionally abused the  
Bankruptcy Code in the prior case, breached the order  
confirming the Chapter 13 Plan and failed to comply

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<sup>12</sup> The chapter 13 case was converted, not dismissed, and  
Debtors received their chapter 7 discharge.

1 with the Chapter 13 Plan for the marketing and sale of  
2 the property which secures the Christensen claim.  
3 Through misrepresentation and intentional delay, while  
4 having committed to pay Christensen several years ago,  
5 the Debtors have hung on to the property gambling on a  
6 rising real estate market. It further appears, and  
7 the court so concludes, that the Debtors intentionally  
8 misrepresented the plan in the prior case,  
9 misrepresented that they would prosecute the plan to  
10 sell this Property that secures the Christensen claim,  
11 and then sought to dismiss the prior case as part of  
12 of a strategy to not only gamble on the real estate  
13 market, but obtain a higher exemption due to the  
14 passage of time.

15 The Debtors['] strategy was to not perform the  
16 Chapter 13 Plan in the prior case, going as far (or  
17 doing so little) as not engaging an active real estate  
18 broker to market and sell the property necessary to  
19 fund their Chapter 13 Plan. When caught in their  
20 deception, the Debtor[s] and their counsel feigned  
21 ignorance that they were required to hire a broker and  
22 sell the property notwithstanding the express term  
23 stated in the order confirming the Plan which was  
24 prepared by Debtors' counsel.

25 The Debtors, now are not satisfied with the arguments  
26 they made, the positions they took, the rulings made  
27 by the court after an evidentiary hearing, and the  
28 relief they obtained in the prior evidentiary hearing  
and bankruptcy case. They want to relitigate the  
issues, putting the court and Creditor to more cost  
and expense. Quite likely, if they do not like the  
result from a new evidentiary hearing, the Debtors  
will just file another case and re-relitigate the  
matter.

19 It is proper for the court to apply judicial estoppel  
20 to the Debtors in their repeated quest to abuse the  
21 Bankruptcy Code and federal judicial process. The  
22 Debtors['] strategy of repeatedly litigating the issue  
23 in a series of bankruptcy cases, changing what they  
24 want puts the Debtors at an unfair advantage to the  
25 Christensen [sic].

26 The bankruptcy court entered a Civil Minute Order denying  
27 Debtors' Fourth Lien Avoidance Motion without prejudice on  
28 July 28, 2014. Debtors filed a timely notice of appeal.

On December 22, 2014, the Panel issued an Order Re:  
Finality since the bankruptcy court had entered the order



1 appealed from without prejudice. Debtors responded by filing a  
2 motion for leave to appeal, which the Panel granted to the  
3 extent it was necessary.

## 4 **II. JURISDICTION**

5 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.  
6 §§ 1334 and 157(b) (2) (K). We have jurisdiction under 28 U.S.C.  
7 § 158.

## 8 **III. ISSUE**

9 Whether the bankruptcy court erred by denying Debtors'  
10 Fourth Lien Avoidance Motion.

## 11 **IV. STANDARD OF REVIEW**

12 We review the bankruptcy court's application of the  
13 doctrine of judicial estoppel to the facts of this case for an  
14 abuse of discretion. Hamilton v. State Farm Fire & Cas. Ins.  
15 Co., 270 F.3d 778, 782 (9th Cir. 2001). The bankruptcy court  
16 abuses its discretion when it fails to identify and apply "the  
17 correct legal rule to the relief requested," United States v.  
18 Hinkson, 585 F.3d 1247, 1263 (9th Cir.2009) (en banc), or if its  
19 application of the correct legal standard was "(1) 'illogical,'  
20 (2) 'implausible,' or (3) without 'support in inferences that  
21 may be drawn from the facts in the record.'" Id. at 1262.

22 We may affirm on any ground supported in the record.  
23 ASARCO, LLC v. Union Pac. R. Co., 765 F.3d 999, 1004 (9th Cir.  
24 2014).

## 25 **V. DISCUSSION**

### 26 **A. Scope of the Appeal**

27 Debtors argue in their opening brief that the equitable  
28 remedy of judicial estoppel is not applicable and that they are

1 entitled to their fresh start in this new, independent  
2 chapter 13 case. Creditors expand the issues on appeal,  
3 asserting that the doctrine of claim preclusion also bars  
4 Debtors' Fourth Lien Avoidance Motion and that the bankruptcy  
5 court properly denied Debtors' motion due to their bad faith.  
6 Debtors responded to the arguments raised by Creditors in their  
7 reply brief. To the extent Debtors might consider themselves to  
8 be making additional arguments by responding to Creditors'  
9 arguments in their reply brief, they are mistaken. Such  
10 arguments are waived. See Arpin v. Santa Clara Valley Transp.  
11 Agency, 261 F.3d 912, 919 (9th Cir. 2001) ("[I]ssues which are  
12 not specifically and distinctly argued and raised in a party's  
13 opening brief are waived."); See Entm't Research Grp., Inc. v.  
14 Genesis Creative Grp., Inc., 122 F.3d 1211, 1217 (9th Cir. 1997)  
15 (we limit our review to issues argued in a party's opening  
16 brief). Because the only issue raised by Debtors in their  
17 opening brief concerns the application of judicial estoppel, and  
18 we affirm on this basis, we need not address Creditors'  
19 arguments on claim preclusion.

20 **B. Judicial Estoppel: Legal Standards**

21 "Judicial estoppel is a flexible equitable doctrine that  
22 encompasses a variety of abuses, one form of which is preclusion  
23 of inconsistent positions that estops a party from gaining an  
24 advantage by taking one position and then seeking another  
25 advantage from an inconsistent position." Cheng v. K & S  
26 Diversified Invs., Inc. (In re Cheng), 308 B.R. 448, 455 (9th  
27 Cir. BAP 2004), aff'd, 160 Fed.Appx. 644 (9th Cir. 2005). "A  
28 court invokes judicial estoppel not only to prevent a party from

1 gaining an advantage by taking inconsistent positions, but also  
2 because of 'general consideration[s] of the orderly  
3 administration of justice and regard for the dignity of judicial  
4 proceedings,' and to 'protect against a litigant playing fast  
5 and loose with the courts.'" Hamilton, 270 F.3d at 782. To  
6 that end, the Ninth Circuit has routinely inquired into the  
7 intent of the party asserting an inconsistent position in cases  
8 outside of the bankruptcy context. "Judicial estoppel applies  
9 when a party's position is 'tantamount to a knowing  
10 misrepresentation to or even fraud on the court.'" Johnson v.  
11 State of Or., 141 F.3d 1361, 1369 (9th Cir. 1998).

12 "[A] party puts the integrity of the judicial process at  
13 risk not only when it knowingly lies but when it takes a  
14 position in the short term knowing that it may be on the verge  
15 of taking an inconsistent future action." Adelphia Recovery  
16 Trust v. HSBC Bank USA (In re Adelphia Recovery Trust), 634 F.3d  
17 678, 696 (2d Cir. 2011). "[T]he proper focus is on the  
18 objective conduct of a party or its counsel." Id. "[I]n  
19 considering whether to apply judicial estoppel a court must  
20 focus on the conduct of the party to be estopped, not the party  
21 seeking estoppel." Id. at 698. "[A]lthough a court is unlikely  
22 to be asked to apply judicial estoppel when no party has been  
23 prejudiced, it is unfair **advantage** to the potentially prejudiced  
24 party's adversary that is the touchstone of the doctrine." Id.  
25 at 698-99 (emphasis in original).

26 As an equitable doctrine, judicial estoppel is not easily  
27 defined. However, three factors are relevant to its  
28 application. Hamilton, 270 F.3d at 782-83 (citing N.H. v.

1 Maine, 532 U.S. 742, 750 (2001)). First, a party's position in  
2 the second matter must be "clearly inconsistent" with its  
3 position in the first matter. Id. at 782. Second, a court must  
4 have accepted the party's earlier position. Id. at 782-83. The  
5 third consideration is whether the party asserting an  
6 inconsistent position "would derive an unfair advantage or  
7 impose an unfair detriment on the opposing party if not  
8 estopped. Id. at 783.

9 **C. Analysis**

10 Debtors assign error to the bankruptcy court's decision to  
11 apply the doctrine based on Debtors' bad faith in their prior  
12 bankruptcy case. According to Debtors, their bad faith had  
13 already been redressed by the bankruptcy court's denial of their  
14 request for a voluntary dismissal, conversion of their case to  
15 chapter 7, and denial of their Second Lien Avoidance Motion in  
16 the converted chapter 7. Apparently, in Debtors' view, they  
17 already paid the price for their alleged bad faith. Therefore,  
18 Debtors maintain that they are entitled to seek the avoidance of  
19 Creditors' lien in this case as authorized by the plain language  
20 of the Bankruptcy Code and obtain their fresh start. Debtors  
21 conclude that the remedy of judicial estoppel is not applicable  
22 under these circumstances and especially when the bankruptcy  
23 court brought up the theory sua sponte.

24 We are not persuaded. First, judicial estoppel not only  
25 bars inconsistent positions taken in the same litigation, but  
26 "bar[s] litigants from making incompatible statements in two  
27 different cases." Hamilton, 270 F.3d at 783 (9th Cir. 2001).  
28 Second, the record supports the conclusion that the bankruptcy

1 court did not abuse its discretion in applying the doctrine of  
2 judicial estoppel as discussed below.

3       Turning back to the three factors that guide application of  
4 judicial estoppel, we conclude that they are all met. As to the  
5 first factor - inconsistent positions - Debtors' position in  
6 their Fourth Lien Avoidance Motion was inconsistent with their  
7 earlier position that they would sell the Property to pay off  
8 the remaining balance on Creditors' lien. By representing that  
9 they would sell the Property, Debtors left the bankruptcy court  
10 and Creditors with the distinct, and false, belief that Debtors  
11 would follow through with the sale.<sup>13</sup> Further, it was this  
12 representation that led to confirmation of Debtors' fourth  
13 amended chapter 13 plan. Yet, the record shows that after  
14 confirmation of their plan, Debtors never took any steps to  
15 market or sell the Property. Debtors' conduct was thus  
16 inconsistent with their representations to the bankruptcy court  
17 that they would sell the Property by a certain date.

18       Debtors engaged in a course of conduct inconsistent with  
19 their representation ever since. They defaulted on their  
20 confirmed chapter 13 plan and then sought the voluntary  
21 dismissal of their case. After the bankruptcy court denied  
22 dismissal and converted the case, Debtors received their  
23 discharge and filed another motion to avoid Creditors' lien

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25       <sup>13</sup> At oral argument, Debtors' counsel explained that Debtors  
26 allegedly "got mad" at Creditors because Creditors had told them  
27 they did not have any personal property of Debtors. But then,  
28 when Debtors threatened Creditors with sanctions for violating  
the automatic stay, Creditors returned personal property to  
Debtors. However, the reason Debtors intentionally defaulted  
under their confirmed plan is not relevant.

1 based on a higher exemption and decreased property value, which  
2 the bankruptcy court denied. On the same day they received  
3 their discharge, Debtors initiated this chapter 13 case and  
4 again sought to avoid Creditors' judicial lien on the same  
5 grounds asserted in their chapter 7. At the same time, Debtors  
6 proposed a chapter 13 plan which would be largely funded by a  
7 gift from one of their children and which did not provide for  
8 Creditors' unsecured claim.

9 Viewed objectively, Debtors' conduct and position in their  
10 Fourth Lien Avoidance Motion and proposed chapter 13 plan in  
11 this case is clearly inconsistent and cannot be reconciled with  
12 Debtors' earlier representation that they would sell the  
13 Property by a certain date and pay Creditors \$140,000.  
14 Undoubtedly, both the bankruptcy court and Creditors would have  
15 approached the confirmation process differently in the prior  
16 case had they known Debtors had no intention of listing the  
17 Property for sale or paying Creditors the balance on their lien.

18 The second criterion for judicial estoppel – that the  
19 earlier position have been adopted in some manner by the court –  
20 is easily satisfied here, as Debtors' representation that they  
21 would sell the Property and pay off Creditors' lien was critical  
22 to the bankruptcy court's willingness to confirm Debtors' fourth  
23 amended plan. The bankruptcy court adopted Debtors' former  
24 position and accepted the accuracy of their representation that  
25 they would sell the Property.

26 The third requirement that is said to be the touchstone of  
27 the judicial estoppel doctrine – the unfair advantage to the  
28 potentially prejudiced party's adversary – is also met. The

1 record shows that Debtors would gain a significant unfair  
2 advantage if allowed to further litigate the lien avoidance  
3 issue in this case after obtaining confirmation of their prior  
4 chapter 13 plan by misrepresenting that they would sell the  
5 Property by a certain date and pay off Creditors' lien. Debtors  
6 deceived the bankruptcy judge who relied on their  
7 misrepresentation in deciding to confirm a plan which they never  
8 intended to honor.

9 Judicial estoppel is concerned with the ability of the  
10 courts to render their decisions based on faithful  
11 representations. Allowing Debtors to proceed with the Fourth  
12 Lien Avoidance Motion in this case would clearly undermine the  
13 integrity of the judicial process, especially when the  
14 bankruptcy court explicitly found that it was misled by Debtors'  
15 misrepresentations in the prior case.

16 Finally, Debtors complain that the bankruptcy court raised  
17 the theory of judicial estoppel sua sponte. However, it was  
18 Creditors who raised the issue in opposition to Debtors' Fourth  
19 Lien Avoidance Motion. Even so, "judicial estoppel . . . can be  
20 raised by courts sua sponte, because judicial estoppel concerns  
21 the integrity of the judicial system independent of the interest  
22 of the parties." See Fed. Commc'ns Comm'n v. Airadigm Commc'ns,  
23 Inc. (In re Airadigm Commc'ns, Inc., 616 F.3d 642, 661 n.14 (7th  
24 Cir. 2010); Kaiser v. Bowlen, 455 F.3d 1197, 1205 (10th Cir.  
25 2006); Grigson v. Creative Artists Agency LLC, 210 F.3d 524, 530  
26 (5th Cir. 2000). The bankruptcy court here gave the parties the  
27 opportunity to brief the issue and the opportunity for oral  
28 argument. Therefore, Debtors had a fair opportunity to argue

1 that the doctrine did not apply. Under these circumstances,  
2 even if the bankruptcy court had raised the issue sua sponte,  
3 that would not change the outcome of this case.

4 **D. The holding in Law v. Siegel does not apply.**

5 While no party had briefed the issue, at the hearing on  
6 this matter we raised the applicability of Law v. Siegel, ---  
7 U.S. ----, 134 S.Ct. 1188 (2014) to this situation as possibly  
8 deciding the issue in Debtors' favor as a matter of law. In  
9 Siegel, the validity of the debtor's claim of exemption was not  
10 directly contested or challenged; rather, the issue was whether  
11 the bankruptcy court had authority under § 105 to "surcharge" an  
12 already allowed exemption because of the debtor's bad acts. Id.  
13 at 1196. In the end, the Supreme Court held that the general  
14 equitable powers of § 105(a) did not provide authority for  
15 judge-made exceptions to explicit mandates of the Bankruptcy  
16 Code. There, since § 522(k) explicitly prohibited the use of  
17 exempt property to satisfy administrative expenses such as  
18 attorney fees, the bankruptcy court was not authorized under  
19 § 105(a) to order otherwise.

20 Notwithstanding Siegel, we conclude there is a material and  
21 decisive difference between the bankruptcy court not having the  
22 authority under § 105(a) to surcharge a previously allowed and  
23 unobjected-to exemption, and not having the authority to deny  
24 Debtors another bite at the apple in avoiding Creditors'  
25 judicial lien based on the equitable doctrine of judicial  
26 estoppel. As noted, Debtors intentionally defaulted under their  
27 confirmed plan by not taking any steps to sell the Property,  
28 followed by further attempts to virtually eliminate the



1 remainder of Creditors' judicial lien, while at the same time  
2 foregoing any payments to Creditors. Applying Siegel in this  
3 situation would undermine the very basic need of the bankruptcy  
4 court to maintain and enforce the integrity of the bankruptcy  
5 system by protecting against litigants who play fast and loose  
6 with the courts under circumstances such as this. To apply  
7 Siegel to this situation would render the bankruptcy court  
8 virtually powerless to deny any motion tangentially related to a  
9 debtor's exemption. Accordingly, the reach of the holding in  
10 Siegel cannot be construed to be that broad.

11 **VI. CONCLUSION**

12 For the reasons stated above, we AFFIRM.

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19 DISSENT BEGINS ON NEXT PAGE  
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1 KURTZ, Bankruptcy Judge, Dissenting:  
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3 In upholding the bankruptcy court's judicial estoppel  
4 ruling, the majority unnecessarily ventures into the perilous  
5 world of bankruptcy court equitable powers. In Law v. Siegel,  
6 134 S. Ct. 1188, 1194-95 (2014), the United States Supreme Court  
7 held that the bankruptcy court exceeded the limits of its  
8 statutory and inherent authority when it surcharged the debtor's  
9 allowed homestead exemption to pay for attorney fees incurred by  
10 the estate as a result of the debtor's dishonesty. Here, the  
11 bankruptcy court employed the equitable doctrine of judicial  
12 estoppel to deny the debtors' statutory entitlement to avoid  
13 liens that impaired their exemption rights. The majority  
14 decision deftly limits the scope of Siegel by identifying it as  
15 a case dealing solely with the bankruptcy court's equitable  
16 powers under § 105, as opposed to the case at bar, which deals  
17 with a specific equitable doctrine presumably available to all  
18 courts in the interest of protecting the integrity of the  
19 judicial process. While I understand my colleagues desire to  
20 limit Siegel, I do not believe the appropriate case for that  
21 decision is before us.

22 In the debtors' first chapter 13 case, the bankruptcy court  
23 confirmed a chapter 13 plan that provided for the sale of the  
24 debtors' residence, after partially granting the debtors' motion  
25 to avoid the creditors' judgment lien. Based upon the value of  
26 the debtors' residence, the court ruled that the lien only  
27 partially impaired their homestead exemption. After some time,  
28 the chapter 13 trustee moved to dismiss or convert the case

1 because the debtors had defaulted on the plan by missing  
2 payments and failing to list their residence for sale. The  
3 bankruptcy court converted the case, emphasizing the debtors'  
4 failure to list the residence and questioning whether the  
5 debtors ever intended to comply with their plan. In the chapter  
6 7 case, the debtors renewed their motion to avoid the creditors'  
7 lien but the court denied the motion. The debtors received a  
8 chapter 7 discharge.

9       Shortly thereafter, the debtors filed a second chapter 13  
10 case, which included a plan providing for the retention of their  
11 residence. See, e.g., In re Frazier, 448 B.R. 803, 808-10  
12 (Bankr. E.D. Cal. 2011), aff'd, 469 B.R. 889 (E.D. Cal. 2012);  
13 In re Okosisi, 451 B.R. 90, 97-100 (Bankr. D. Nevada 2011).  
14 They again moved to avoid the creditors' judgment lien, arguing  
15 that based upon current values and an increased homestead  
16 exemption, the lien impaired their homestead exemption. This  
17 second chapter 13 case raised an issue of bad faith -  
18 specifically, whether it was filed for a legitimate bankruptcy  
19 purpose or merely to avoid the creditors' judgment lien. See  
20 Leavitt v. Soto (In re Leavitt), 171 F.3d 1219, 1225 (9th Cir.  
21 1999); In re Tran, 431 B.R. 230, 237-38 (Bankr. N.D. Cal. 2010),  
22 aff'd, 814 F.Supp.2d 946 (N.D. Cal. 2011). When the case came  
23 on for confirmation, the bankruptcy court considered the motion  
24 to confirm the chapter 13 plan and the motion to avoid the  
25 judgment lien at the same time. Denying the motion to confirm,  
26 the court ruled that the case had not been filed in good faith,  
27 the plan had not been proposed in good faith, and the debtors  
28 had not prosecuted the case in good faith. Denying the motion

1 to avoid the lien without prejudice, the court ruled that  
2 judicial estoppel barred the motion - which was premised on  
3 their retention rather than their sale of the residence. The  
4 debtors appealed the order denying the motion to avoid lien,  
5 which required an order from this court granting leave to  
6 appeal.

7 A bankruptcy court's finding that a case has been filed for  
8 an improper purpose inexorably leads to dismissal or conversion.  
9 Marsch v. Marsch (In re Marsch), 36 F.3d 825, 829 (9th Cir.  
10 1994). In Marsch, the bankruptcy court found that the debtor's  
11 chapter 11 case had been filed in bad faith and ordered that it  
12 be dismissed, but delayed the effective date of the order for  
13 sixty days so that the debtor could liquidate assets to pay  
14 creditors. Id. at 827. On appeal, the Ninth Circuit  
15 characterized the order allowing the case to continue for sixty  
16 days as error, stating that "immediate dismissal was the only  
17 appropriate course once the court found that the petition was  
18 filed without a legitimate purpose." Id. at 829. Likewise,  
19 once the bankruptcy court here decided that the debtors' second  
20 chapter 13 case had been filed in bad faith, the court was  
21 required to enter an order under § 1307(c) dismissing or  
22 converting the case. There was no reason or purpose for the  
23 court to decide whether the equitable doctrine of judicial  
24 estoppel barred debtors' motion to avoid the creditors' judgment  
25 lien.

26 I understand that the issue before us is not whether the  
27 bankruptcy court was required to grant relief under § 1307(c).  
28 Rather, the issue before us is judicial estoppel. But that is

1 an issue the bankruptcy court should not have reached and for  
2 which we should not have granted review. Accordingly, I  
3 respectfully dissent. I would vacate the order of this court  
4 granting review and dismiss this appeal.

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