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NOT FOR PUBLICATION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.	CC-17-1155-TaFS
	)		
CYNTHIA ANN McCLENNY,	)	Bk. No.	9:16-bk-10556
	)		
Debtor.	)		
_____	)		
CYNTHIA ANN McCLENNY,	)		
	)		
Appellant,	)		
	)		
v.	)	<b>MEMORANDUM*</b>	
	)		
STEPHEN McCLENNY;	)		
SANDRA McBETH, Trustee,	)		
	)		
Appellees.	)		
_____	)		

Argued and Submitted on February 22, 2018  
at Pasadena, California

Filed - March 6, 2018

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

Honorable Peter H. Carroll, Bankruptcy Judge, Presiding

Appearances: Susan A. Hemb of Hemb Law Group argued for  
appellant; William Charles Beall of Beall &  
Burkhardt argued for appellee Sandra McBeth,  
Trustee.

Before: TAYLOR, FARIS, and SPRAKER, Bankruptcy Judges.

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\* 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(c)(2).

1 **INTRODUCTION**

2 After two years of apparently acrimonious divorce  
3 proceedings, Cynthia Ann McClenny filed a bankruptcy petition.  
4 Her former husband, Stephan McClenny, resided in the marital  
5 home and ran a veterinary business from the property; but Debtor  
6 appropriately scheduled an interest in the marital homestead as  
7 an asset of her estate. Her chapter 7<sup>1</sup> trustee then sought to  
8 sell the estate's interest to Dr. McClenny; the trustee also  
9 wanted to settle all ownership disputes with him. The  
10 bankruptcy court granted the trustee's sale and compromise  
11 motion and found that Dr. McClenny was a § 363(m) good faith  
12 purchaser.

13 Although Debtor did not obtain a stay pending appeal, she  
14 challenges the bankruptcy court's § 363(m) finding and attacks  
15 the sale. She does not, however, show that the bankruptcy court  
16 clearly erred or abused its discretion.

17 Accordingly, we AFFIRM.

18 **FACTS**

19 In 2014, Debtor filed a petition for dissolution of her  
20 marriage with Dr. McClenny in the San Luis Obispo Superior  
21 Court; the superior court entered a judgment of dissolution in  
22 December of 2016.

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

1 Earlier in 2016, Debtor had filed a chapter 7 petition.<sup>2</sup>  
2 On her Schedule A/B, she listed a fee simple interest in real  
3 property in San Miguel, California (the "Property"), valued it  
4 at \$650,000, and characterized it as community property. She  
5 also identified Wells Fargo Home Mortgage as the holder of a  
6 \$400,000 secured claim against the Property.

7 Sandra McBeth was appointed as the chapter 7 trustee. She  
8 filed a notice designating the case as an asset case and  
9 established a claims bar date.

10 **The Trustee liquidates the Property.** The Trustee took a  
11 natural interest in the Property; it was the only scheduled  
12 asset with equity. She initially sought permission to sell the  
13 Property to Dr. McClenny for \$100,000. Debtor opposed, and the  
14 bankruptcy court denied the motion without prejudice.

15 The Trustee followed with a second motion. First, she  
16 sought to sell the estate's fractional interest in the Property  
17 to Dr. McClenny for \$130,000, subject to overbid. Dr. McClenny  
18 agreed to acquire title subject to existing liens; the Trustee  
19 estimated these at \$409,018. The motion also sought approval of  
20 a resolution of the disputes between Dr. McClenny and the estate  
21 regarding percentage ownership of the Property, as he asserted a  
22 separate property interest in it, contrary to Debtor's schedules  
23 and claims. The points and authorities supporting the motion  
24 reported that total claims filed against the estate totaled less  
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26 <sup>2</sup> We exercise our discretion to take judicial notice of  
27 documents electronically filed in the underlying bankruptcy  
28 case. See Atwood v. Chase Manhattan Mortg. Co. (In re Atwood),  
293 B.R. 227, 233 n.9 (9th Cir. BAP 2003).

1 than \$50,000 and that this sale would allow payment in full of  
2 all claims.

3 The Trustee's declaration provided evidence of her due  
4 diligence in connection with the sale and compromise. She did  
5 not employ a real estate professional to market the Property,  
6 but she had a broker evaluate the prospects for its sale. The  
7 broker opined that the Property could sell for about \$700,000,  
8 but only if it were vacant.

9 And, in the absence of a settlement, vacancy would  
10 necessarily require that the estate undertake the potentially  
11 complex and difficult process of involuntarily ousting  
12 Dr. McClenny from possession. Further, maximization of recovery  
13 absent a settlement might require victory in other potentially  
14 costly litigation. The Trustee also observed that Debtor filed  
15 numerous documents describing Dr. McClenny as violent and  
16 dangerous; she did not adopt these statements as true, but she  
17 accepted that there was potentially unusual risk in contesting  
18 the situation with Dr. McClenny. The record supports the  
19 Trustee's evaluation; Dr. McClenny had a significant ownership  
20 interest in the Property, it was both his home and his place of  
21 business, he was in sole possession as of the petition date, and  
22 he was reported to be difficult to deal with.

23 Debtor again opposed. Initially, she merely questioned the  
24 bankruptcy court's jurisdiction over the Property. Later, she  
25 filed supplemental opposition papers and raised a host of new  
26 arguments. And the day before the hearing, Debtor filed a  
27 request for judicial notice of one of our opinions, Brace v.  
28 Brace (In re Brace), 566 B.R. 13 (9th Cir. BAP 2017). The

1 Trustee responded with a motion to strike the supplemental  
2 papers.

3 At the hearing, the bankruptcy court recognized that the  
4 new motion contained additional information, that the Trustee  
5 had obtained an additional \$30,000 in value, and that the sale  
6 was subject to the first trust deed. It overruled Debtor's  
7 jurisdictional argument and explained correctly that, when a  
8 bankruptcy petition is filed after a dissolution petition but  
9 before the final disposition of the community property, both the  
10 community property and Debtor's separate property are within the  
11 bankruptcy court's jurisdiction. While it stated that this was  
12 the only basis for timely objection, there is nothing in the  
13 record evidencing that it granted the Trustee's motion to strike  
14 Debtor's other late-filed objections. Finally, it noted the  
15 absence of any dispute that the estate was receiving fair market  
16 value.

17 The bankruptcy court then approved the sale and compromise;  
18 it found that the estate was receiving fair value for its  
19 interest in the Property, that the sale was a proper exercise of  
20 the Trustee's business judgment, and that the compromise was  
21 fair and equitable and in the best interests of the estate. In  
22 addition, it found that Dr. McClenny was a \$ 363(m) good faith  
23 purchaser.

24 The bankruptcy court entered an order consistent with these  
25 conclusions (the "Order").<sup>3</sup>

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27 <sup>3</sup> The bankruptcy court also entered an amended order that  
28 included the legal description of the Property.

1 Debtor timely appealed.

2 **Post-appeal events.** Debtor did not seek a stay pending  
3 appeal from the bankruptcy court. Instead, in response to the  
4 Trustee's motion to dismiss the appeal as moot, Debtor sought a  
5 stay pending appeal from the BAP. The Panel denied the  
6 Trustee's motion to dismiss without prejudice and also denied  
7 Debtor's request for a stay pending appeal.

#### 8 **JURISDICTION**

9 The bankruptcy court had jurisdiction under 28 U.S.C.  
10 §§ 1334 and 157(b)(2)(N). We have jurisdiction under 28 U.S.C.  
11 § 158.

#### 12 **ISSUES**

13 Is the appeal statutorily moot under § 363(m)?

14 Did the bankruptcy court abuse its discretion in granting  
15 the motion to sell and approving the settlement?

#### 16 **STANDARDS OF REVIEW**

17 We review mootness de novo. *Wilson v. Lynch*, 835 F.3d  
18 1083, 1091 (9th Cir. 2016). But we review a § 363(m) "good  
19 faith" finding for clear error. *Thomas v. Namba (In re Thomas)*,  
20 287 B.R. 782, 785 (9th Cir. BAP 2002).

21 We review § 363 sale orders for an abuse of discretion.  
22 *Fitzgerald v. Ninn Worx Sr, Inc. (In re Fitzgerald)*, 428 B.R.  
23 872, 880 (9th Cir. BAP 2010). And we likewise review the  
24 bankruptcy court's approval of a settlement for an abuse of  
25 discretion. *Martin v. Kane (In re A & C Props.)*, 784 F.2d 1377,  
26 1380 (9th Cir. 1986).

27 A bankruptcy court abuses its discretion if it applies the  
28 wrong legal standard, misapplies the correct legal standard, or

1 makes factual findings that are illogical, implausible, or  
2 without support in inferences that may be drawn from the facts  
3 in the record. See TrafficSchool.com, Inc. v. Edriver Inc.,  
4 653 F.3d 820, 832 (9th Cir. 2011) (citing United States v.  
5 Hinkson, 585 F.3d 1247, 1262 (9th Cir. 2009) (en banc)).

#### 6 **DISCUSSION**

7 Debtor profoundly misunderstands what happened in the  
8 bankruptcy court. As a result, her arguments lack merit. In  
9 particular, and fatally, she fails to adequately challenge the  
10 bankruptcy court's finding that Dr. McClenny was a good faith  
11 purchaser under § 363(m). Affirmance is required.

#### 12 **A. Debtor waived her jurisdictional arguments on appeal.**

13 Before the bankruptcy court, Debtor's timely opposition was  
14 limited to an attack on the bankruptcy court's jurisdiction over  
15 the Property, its sale, and the compromise of the disputes with  
16 Dr. McClenny as to title. We agree with the bankruptcy court  
17 that the argument is meritless.<sup>4</sup> And, in any event, Debtor did  
18 not preserve this argument on appeal; we do not consider it  
19 further. See Padgett v. Wright, 587 F.3d 983, 986 n.2 (9th Cir.  
20 2009) (per curiam) (appellate courts "will not ordinarily  
21 consider matters on appeal that are not specifically and  
22 distinctly raised and argued in appellant's opening brief").

23 The Trustee argues that this is the only determination we  
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25 <sup>4</sup> For "purposes of § 541(a)(2), all community property not  
26 yet divided by a state court at the time of the bankruptcy  
27 filing is property of the bankruptcy estate." Dumas v. Mantle  
28 (In re Mantle), 153 F.3d 1082, 1085 (9th Cir. 1998). Cf. Keller  
v. Keller (In re Keller), 185 B.R. 796, 800-801 (9th Cir. BAP  
1995).

1 need to make on appeal. But, in oral argument, she acknowledged  
2 her position's vulnerabilities; Debtor raised a number of  
3 untimely arguments, the Trustee moved to strike them, but the  
4 bankruptcy court did not rule on this motion. In an abundance  
5 of caution, we address Debtor's additional arguments.

6 **B. Debtor waived objection to approval of the settlement**  
7 **on appeal.**

8 The bankruptcy court approved a joint sale of the Property  
9 and settlement of the percentage of ownership dispute between  
10 the estate and Dr. McClenny. This combination was proper. See  
11 Adeli v. Barclay (In re Berkeley Del. Court, LLC), 834 F.3d  
12 1036, 1040 (9th Cir. 2016).

13 Rule 9019 allows the bankruptcy court to approve a  
14 compromise or settlement, and it has great latitude in approving  
15 compromises; it may approve a compromise if it is fair and  
16 equitable. Fed. R. Bankr. P. 9019(a); Woodson v. Fireman's Fund  
17 Ins. Co. (In re Woodson), 839 F.2d 610, 620 (9th Cir. 1998)  
18 (citing In re A & C Props., 784 F.2d at 1381). The bankruptcy  
19 court considers four factors when determining whether a  
20 compromise is fair and equitable. In re A & C Props., 784 F.2d  
21 at 1381. Here, the bankruptcy court considered those four  
22 factors and found the compromise fair and equitable.

23 Debtor does not directly argue in her opening brief that  
24 the bankruptcy court abused its discretion in approving the  
25 settlement. She never discusses the A & C factors. She thus  
26 waived any dispute as to these matters. See Padgett, 587 F.3d  
27 at 986 n.2. And if she intends her arguments in connection with  
28 the sale to somehow relate to the settlement, they lack merit as

1 discussed below.

2 **C. The appeal is statutorily moot.**

3 The Trustee argues that the appeal is statutorily moot  
4 under § 363(m).

5 Section 363 authorizes a trustee to sell property of the  
6 estate. In § 363(b) sale motions, the bankruptcy court's  
7 obligation "is to assure that optimal value is realized by the  
8 estate under the circumstances." Simantob v. Claims Prosecutor,  
9 LLC (In re Lahijani), 325 B.R. 282, 288 (9th Cir. BAP 2005).  
10 Here, the bankruptcy court approved the sale under § 363(b) and  
11 found that the estate was receiving fair value for the estate's  
12 interest in the Property.

13 Under § 363(m), when a "sale of assets is made to a good  
14 faith purchaser, it may not be modified or set aside unless the  
15 sale was stayed pending appeal." Paulman v. Gateway Venture  
16 Partners III, LP (In re Filtercorp, Inc.), 163 F.3d 570, 576  
17 (9th Cir. 1998); 11 U.S.C. § 363(m).<sup>5</sup> An "[a]bsence of good  
18 faith is 'typically shown by fraud, collusion between the  
19 purchaser and other bidders or the trustee, or an attempt to  
20 take grossly unfair advantage of other bidders.'" In re Berkeley Del. Court, LLC, 834 F.3d at 1041 (quoting  
21 In re Filtercorp, Inc., 163 F.3d 570, 577 (9th Cir. 1998)). And  
22 the relevant focus of inquiry is good faith during the course of  
23 the sale proceedings. Cnty. Thrift & Loan v. Suchy  
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26 <sup>5</sup> Recent Ninth Circuit caselaw clarifies that § 363(m) may  
27 apply to both standard § 363 sales and to sales of claims under  
28 a Rule 9019 settlement. In re Berkeley Del. Court, LLC,  
834 F.3d at 1039-40.

1 (In re Suchy), 786 F.2d 900, 902 (9th Cir. 1985).

2 We start with the obvious. The bankruptcy court found that  
3 Dr. McClenny purchased the Property in good faith; the Order was  
4 not stayed. Statutory mootness facially exists on these facts.

5 But the statutory mootness argument has a potential  
6 vulnerability. Debtor attacks the good faith finding itself on  
7 appeal. If we reverse on this point, the examination of the  
8 sale itself could proceed. See Ferrari of N. Am., Inc. v. Sims  
9 (In re R.B.B., Inc.), 211 F.3d 475, 480 (9th Cir. 2000). Here,  
10 however, Debtor advances neither evidence nor argument that  
11 adequately challenges the § 363(m) good faith determination.

12 Debtor's arguments are difficult to follow – and in some  
13 cases an argument allegedly focused on good faith is more aptly  
14 cabined as a direct attack on the sale. As a result, we briefly  
15 address all arguments regarding the good faith finding and the  
16 sale without differentiating as to their focus. All lack merit.

17 ● Debtor confuses the standards required for good faith  
18 purchaser for value status under nonbankruptcy law with  
19 those required for a § 363(m) good faith finding. She is  
20 correct that to be a good faith purchaser for value, taking  
21 title free of liens and adverse claims to the property, one  
22 must both purchase in good faith and without knowledge of  
23 liens; but Dr. McClenny's obvious knowledge of the liens  
24 against the Property is irrelevant under § 363(m). He is  
25 not attempting to take title free of the liens – this sale  
26 is expressly subject to any and all existing liens whether  
27 he knows about them or not.

28 ● Alleged misdeeds during the dissolution process are not

1 relevant in the § 363(m) good faith context. Dr. McClenny  
2 can be a good faith buyer vis a vis the bankruptcy estate  
3 and the Trustee even if his relationship with Debtor is  
4 acrimonious; Debtor's remedy is to seek orders and liens  
5 from the family court as opposed to thwarting a sale that  
6 maximizes value for her estate.

7 ● The Trustee did not collude with Dr. McClenny and gift him  
8 "\$562,000 of estate funds by applying them to the  
9 satisfaction of the first position mortgage obligation  
10 . . . ." The Trustee sold the Property subject to the  
11 first trust deed. Dr. McClenny remains obligated on this  
12 debt; sales proceeds were not used to reduce this secured  
13 obligation.

14 ● The fact that the Trustee and Dr. McClenny signed the sale  
15 contract before bankruptcy court approval is of no moment.  
16 The agreement was "expressly subject to Bankruptcy Court  
17 approval in the Bankruptcy Proceeding." This is standard  
18 practice rather than cause for reversal; if an overbidder  
19 emerged, the agreement would have been without force or  
20 effect because the bankruptcy court would not have approved  
21 it.

22 ● Debtor's broad assertion that evidence existed to show the  
23 "Trustee's dereliction of her fiduciary duties owed to the  
24 estate and to the creditors" and sufficed as justification  
25 for appeal falls short. She questions the Trustee's  
26 decision to liquidate the Property and not any of Debtor's  
27 other assets. But this decision was entirely consistent  
28 with the Trustee's statutory obligation to liquidate the

1 estate expeditiously. 11 U.S.C. § 704(1). And embedded in  
2 this duty is the requirement to maximize the value of  
3 estate assets. See United States v. Sims (In re Feiler),  
4 218 F.3d 948, 952 (9th Cir. 2000). Here, the Trustee  
5 decided to promptly liquidate the Property that Debtor on  
6 appeal describes as "the last equity-holding asset." The  
7 Trustee reasonably anticipated that proceeds would be  
8 sufficient to pay all claims against the estate, and the  
9 sale and compromise avoided costs of litigation and sale.  
10 In doing so, the Trustee exercised her business judgment,  
11 and the bankruptcy court's approval of this decision was  
12 not erroneous.

13 ● Debtor erroneously asserts that In re Brace controls the  
14 decision here and required the bankruptcy court "to  
15 consider and apply California family law statutes and case  
16 law mandating the equal division of marital property and  
17 minimizing [Debtor]'s financial distress . . . ." So far  
18 as we can tell, her argument is a variation of her general  
19 complaint that the Trustee liquidated the estate's interest  
20 in the Property first; she asserts that the Trustee should  
21 have valued the entire community estate and resolved all  
22 community property equalization issues at a trial. We  
23 disagree. Debtor's misguided request that the bankruptcy  
24 court resolve the pending marital dissolution disputes is  
25 not appropriate. In re Brace applies in bankruptcy  
26 disputes involving the characterization of marital  
27 property. 566 B.R. at 19. So In re Brace would apply if  
28 the Trustee decided to litigate the appropriate

1 characterization of the Property. Here, the Trustee  
2 elected to settle any disputes about Dr. McClenny's  
3 separate property interest in the Property.

4 ● The sale will not impede Debtor's right to future liens  
5 from the family court; she failed to establish, or even  
6 argue, that she had an existing lien at the time of sale.  
7 But nothing in the bankruptcy court's decision bars her  
8 from family court relief.

9 ● Debtor wrongly argues that the sale price was too low based  
10 on a homestead exemption that the bankruptcy court found  
11 improper in a final and unappealed order. The homestead,  
12 however, even if capable of assertion, would never reduce  
13 the purchase price; it merely impacts distribution of  
14 proceeds. And, in attacking the sale price, she never  
15 addresses the fact that the sale was subject to overbid but  
16 no overbidders materialized. This argument is unavailing.<sup>6</sup>

17 ● The bankruptcy court did not commit "structural" error by  
18 granting "the sale order as between co-owners, without an  
19 adversary proceeding" as allegedly required by Rule

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21 <sup>6</sup> We also note that, as the bankruptcy court found, the  
22 estate received fair value. The estate received \$130,000. If  
23 the Trustee sold the Property to a third party for \$700,000, any  
24 recovery would be reduced by approximately \$409,018, the amount  
25 secured by the first trust deed. Further, the sale price would  
26 certainly be reduced by the other costs the Trustee avoided by  
27 selling directly to Dr. McClenny: sale costs (marketing,  
28 broker's fee, etc.); costs of litigation over the parties'  
ownership claims; and costs of litigation to evict Dr. McClenny  
and obtain possession. The estate claimed at most a 50%  
interest in the property. So instead of recovering less than  
\$128,000.00 (\$700,000.00 less \$409,000.00 less 5% costs of sale  
or \$35,000.00 divided by two), the Trustee recovered \$130,000.

1 7001(3). Debtor wrongly believes that this was a § 363(h)<sup>7</sup>  
2 sale of Dr. McClenny's interest in the Property. In fact,  
3 the Trustee sought to sell the estate's fractionalized  
4 interest in the Property to the co-owner, Dr. McClenny.  
5 Thus, neither § 363(h) nor Rule 7001(3) (which states that  
6 a § 363(h) sale requires an adversary proceeding) were  
7 implicated.

8 ● Debtor's claim that Dr. McClenny's debts to her are  
9 priority claims under §§ 504 and 721 and thus that  
10 creditors are not likely to be paid from the sale proceeds  
11 is nonsensical. Debts owed to Debtor are estate **assets**;  
12 the Trustee will not pay them. And Debtor does not have a  
13 right to a priority payment over her estate's creditors.

14 ● Debtor's expressed concern at oral argument that the Order  
15 will have preclusive effect in the dissolution proceedings  
16 is difficult to square with reality. The bankruptcy court  
17 necessarily decided that the sale was for reasonable value  
18 and that the compromise was fair and reasonable. The  
19 bankruptcy court did not have to decide what Debtor's and  
20 Dr. McClenny's relative property interests in the Property  
21 were.<sup>8</sup> Nor did the bankruptcy court have to decide if  
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23 <sup>7</sup> Section 363(h) allows the trustee to sell both the  
24 estate's interest and the interest of certain co-owners.

25 <sup>8</sup> In fact, that is one point of a Rule 9019 compromise  
26 motion: the "purpose of a compromise agreement is to allow the  
27 trustee and the creditors to avoid the expenses and burdens  
28 associated with litigating sharply contested and dubious  
claims." In re A & C Props., 784 F.2d at 1380-81. The law

(continued...)

1 Debtor had any liens arising out of family law court  
2 matters, much less if they attached or remain attached to  
3 the Property. And the bankruptcy court certainly did not  
4 decide any California law based marital dissolution issue.

5 • Debtor erroneously contends that the Trustee should have  
6 brought her motion under § 363(d), not § 363(b).

7 Section 363(d) applies when the **debtor in bankruptcy** is a  
8 type of trust. Here, Debtor is a person and it is  
9 irrelevant that a marital (family) trust holds title to the  
10 Property; Debtor's interest in this trust was an asset of  
11 the estate that the Trustee could sell.<sup>9</sup>

12 In sum, Debtor has not shown that the bankruptcy court  
13 clearly erred when it found that Dr. McClenny was a good faith  
14 purchaser under § 363(m).<sup>10</sup> Accordingly, we AFFIRM the  
15 bankruptcy court's § 363(m) finding and, as a result, "the sale  
16 may not be modified or set aside on appeal unless it was stayed  
17 pending appeal." In re Berkeley Del. Court, LLC, 834 F.3d at  
18 1041. It was not stayed. So what remains of the appeal is  
19 moot. Id.

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21 <sup>8</sup>(...continued)  
22 "favors compromise and not litigation for its own sake . . . ."  
23 Id. at 1381.

24 <sup>9</sup> In any event, she also failed to raise this argument  
25 before the bankruptcy court; she thus waived it on appeal.  
26 Samson v. W. Capital Partners, LLC (In re Blixseth), 684 F.3d  
27 865, 872 n.12 (9th Cir. 2012) (appellate court may decline to  
28 address argument not raised before bankruptcy court).

<sup>10</sup> Debtor also requests attorney's fees and costs on  
28 appeal. Given our affirmance, we deny this request.

**CONCLUSION**

Based on the foregoing, we AFFIRM.

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