

JUL 31 2009

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

ORDERED PUBLISHED

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

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In re:)	BAP No.	AZ-08-1281-PaDMo
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STEVEN MARC WEINBERG and)	Bk. No.	02-14058-RTB
DANA GRETTEY WEINBERG,)		
)	Adv. No.	02-01391-RTB
Debtors.)		
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RICHARD E. ONEY and)		
ERIN K. COX ONEY,)		
)		
Appellants,)		
)		
v.)		
)		
STEVEN MARC WEINBERG and)		
DANA GRETTEY WEINBERG,)		
)		
Appellees.)		
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O P I N I O N

Argued and Submitted on June 19, 2009
at Pasadena, California

Filed - July 31, 2009

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

Hon. Redfield T. Baum, Sr., Chief Bankruptcy Judge, Presiding.

Before: PAPPAS, DUNN and MONTALI, Bankruptcy Judges.

1 PAPPAS, Bankruptcy Judge:

2

3 Appellants Richard E. Oney ("Oney") and his spouse, Erin K.
4 Cox Oney, commenced an adversary proceeding against chapter 7¹
5 debtors Steven Marc Weinberg ("Weinberg")² and spouse Dana Gretty
6 Weinberg seeking a determination that their claim against Weinberg
7 was excepted from discharge under § 523(a)(2)(A), (4) and (6).
8 The bankruptcy court ruled in favor of Oney under § 523(a)(4) and
9 in favor of Weinberg under § 523(a)(2) and (6). Oney appealed,
10 challenging the amount the bankruptcy court determined was
11 nondischargeable under § 523(a)(4) and the bankruptcy court's
12 rejection of the § 523(a)(2)(A) and (6) claims. We AFFIRM.

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FACTS

15 Weinberg, an attorney, founded an intellectual property law
16 firm known as the Weinberg Law Group P.C. ("WLG") in early 1999.
17 Weinberg was the firm's president and a director from its
18 inception to its closure on December 17, 2001. He was also the
19 sole shareholder until late 2000 or early 2001 when John

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21

22 ¹ Unless otherwise indicated, all chapter, section and rule
23 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, as
24 enacted and promulgated prior to the effective date (October 17,
25 2005) of the relevant provisions of the Bankruptcy Abuse
Prevention and Consumer Protection Act of 2005, Pub. L. 109-8,
April 20, 2005, 119 Stat. 23, and to the Federal Rules of
Bankruptcy Procedure, Rules 1001-9037.

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² Although the spouses of Oney and Weinberg are parties to
the litigation and this appeal, they are not active participants,
nor, except as indicated below, were they involved in the events
giving rise to this contest. For convenience, we refer to the
parties, collectively, as Oney and Weinberg.

1 Cummerford ("Cummerford") joined the firm.³ At some point in
2 2001, Cummerford became the manager of the firm, although he
3 appears only to have held the corporate titles of vice president
4 and secretary.

5 Oney is also an attorney. He practiced intellectual property
6 and patent law for several years as a solo practitioner. He was
7 then employed by WLG from April 1, 1999, through August 31, 2000.
8 The terms of his employment were that he would receive a
9 percentage of WLG's collected receivables attributable to his
10 work, less a share of the expenses incurred by WLG. Oney was to
11 receive \$10,000 per month as a draw from WLG, with the difference
12 between his net collections and draws to be calculated quarterly.
13 If this difference favored Oney, he was to be paid that amount by
14 WLG. If the draws had overpaid Oney, he was to reimburse WLG for
15 the difference.

16 By August 2000, Oney alleges that he had not been paid the
17 amounts owed him by WLG for the previous two quarters. Following
18 discussions between Weinberg and Oney about this situation,
19 Weinberg terminated Oney's employment in an email sent to him on
20 September 11, 2000, retroactive to September 1, 2000. On
21 September 12, 2000, WLG paid Oney \$73,962.28, which it alleged
22 represented the amount of his actual undisputed unpaid wages.
23 However, in a letter to WLG dated September 13, 2000, Oney took
24 the position that WLG owed him \$378,624.44, which included treble
25 damages for unpaid wages pursuant to Ariz. Rev. Stat. ("A.R.S.")

27 ³ At that time, the firm name was changed to Weinberg
28 Cummerford Legal Group. Both the bankruptcy court and the parties
referred to the firm by its original name, and so do we.

1 § 23-355.

2 That same day, Oney filed a complaint in Superior Court,
3 Maricopa County, Oney v. Weinberg Legal Group, PC, no. CV2000-
4 016938 (the "State Court Action"). WLG was the only defendant
5 named in the complaint. Oney alleged that WLG had breached its
6 employment contract with him, and Oney sought treble damages,
7 interest, costs and fees. The complaint made no reference to any
8 tort claims. WLG answered on January 30, 2001, disputing the
9 amounts Oney alleged to be due, noting that it had paid Oney the
10 undisputed portion of his unpaid wages, and asserting twelve
11 affirmative defenses.

12 Between October 4, 2000, and August 27, 2001, WLG paid Oney
13 an additional \$69,695.22 in nine payments as accounts receivable
14 were collected by the firm.

15 In approximately November 2001, Weinberg and Cummerford
16 decided to close WLG; they joined another law firm as partners on
17 December 18, 2001. Weinberg continued after that date to wind up
18 the affairs of WLG. Mrs. Weinberg was paid a small salary for her
19 services in helping wind up the firm.

20 On May 15, 2002, Oney moved for summary judgment in the State
21 Court Action. After briefing and argument, the state court
22 granted Oney a partial summary judgment. It found that Oney was
23 an employee of WLG within the meaning of the Arizona Wage Act,
24 A.R.S. § 23-355.⁴ It further found that the money owed by WLG to

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26 ⁴ "Action by employee to recover wages; amount of recovery:
27 A. Except as provided in subsection B of this section [not
28 relevant here], if an employer, in violation of this chapter,
fails to pay wages due any employee, the employee may recover in a
civil action against an employer or former employer an amount that
(continued...)

1 Oney constituted wages as defined by the Arizona Wage Act, and
2 that the payment from WLG to Oney on September 12, 2000, of
3 \$73,962.13, was untimely. However, the state court determined
4 that questions concerning WLG's good faith, and Oney's claim for
5 treble damages, should be decided by a jury.

6 Weinberg and Cummerford acted as counsel to WLG in the State
7 Court Action. Oney moved to disqualify them as counsel because
8 they were to be trial witnesses. Oney's motion was unopposed, and
9 the state court disqualified Weinberg and Cummerford effective
10 July 17, 2002. Thereafter, WLG was not represented by counsel.

11 On August 9, 2002, Oney moved for reconsideration of the
12 state court's partial summary judgment ruling referring the
13 questions of good faith and treble damages to a jury. Since WLG
14 was no longer represented by counsel, the motion was unopposed,
15 and was granted by the state court on September 11, 2002. When
16 WLG was also unrepresented at a pretrial conference held on
17 September 23, 2002, the state court struck WLG's answer to the
18 complaint, vacated the jury trial order, and set a default hearing
19 for October 8, 2002. WLG did not appear at the default hearing.

20 On December 4, 2002, the state court entered a judgment
21 against WLG in favor of Oney. In addition to the earlier finding
22 in the partial summary judgment that WLG had violated the Arizona
23 Wage Act, the state court concluded that WLG did not have a good
24 faith defense to its failure to pay the wages and determined that
25 Oney was entitled to treble damages on the undisputed amount of
26 \$73,962.28 and the disputed amount of \$24,579.20, less a setoff

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28 ⁴(...continued)
is treble the amount of the unpaid wages." A.R.S. § 23-355(A).

1 for the paid \$73,962.28. Thus, the state court awarded Oney
2 \$221,662.00 plus interest at 10 percent from September 6, 2000.
3 The state court also awarded Oney \$64,682.50 in attorney's fees
4 and costs of \$252.00 plus interest at 10 percent.

5 The Weinbergs filed a petition under chapter 7 of the
6 Bankruptcy Code on September 4, 2002. On their Schedule F they
7 listed a contingent, unliquidated, disputed debt owed to Oney
8 valued at "\$0.00" for "potential claim pertaining to Weinberg
9 Cummerford."

10 Oney commenced an adversary proceeding against Weinberg on
11 December 17, 2002; he filed an amended complaint on August 29,
12 2003. Oney's amended complaint sought an order from the
13 bankruptcy court determining that he held a claim against Weinberg
14 that was excepted from discharge under § 523(a)(2)(A), (4) and (6),
15 and denying Weinberg's discharge pursuant to § 727(a)(2),
16 (a)(4)(A), and (a)(5). Weinberg answered the amended complaint on
17 September 30, 2003, generally denying the allegations in the
18 complaint.

19 On June 10, 2005, both parties moved for summary judgment.
20 Weinberg argued for dismissal of both the § 523 claims and the
21 § 727 claims. After a hearing on October 6, 2005, the bankruptcy
22 court dismissed the § 727 claims, concluding that there were no
23 issues of material fact and that Weinberg was entitled to judgment
24 as a matter of law. However, the bankruptcy court denied
25 Weinberg's motion to dismiss and Oney's motion for summary
26 judgment concerning the § 523 claims, and ordered that those
27 claims proceed to trial.

28 On December 12, 2005, Weinberg moved to bifurcate the trial,

1 requesting that the initial phase focus solely upon Oney's
2 allegations that, at critical times, WLG was insolvent. Over
3 Oney's limited objection, on January 4, 2006, the bankruptcy court
4 granted Weinberg's motion.

5 The first phase of the trial took place on February 22, 2006.
6 The bankruptcy court heard testimony from Weinberg and Susannah
7 Sabnekar ("Sabnekar"), an accountant appearing as an expert
8 witness for Oney. After receiving post-hearing briefs, and
9 hearing the parties' arguments on March 30, 2006, the bankruptcy
10 court issued its decision concerning WLG's insolvency. Based upon
11 its review of the evidence and testimony, the bankruptcy court
12 determined that WLG was insolvent under the so-called balance
13 sheet test as of November 1, 2001, and that it was never insolvent
14 under the cash flow analysis test. While Sabnekar had testified
15 that WLG was insolvent after September 6, 2000, under the balance
16 sheet test, the bankruptcy court declined to credit this opinion
17 for two reasons.

18 First, the bankruptcy court disagreed with Sabnekar's
19 analysis that WLG's assets should not include any value for either
20 WLG's work in progress ("WIP") or its accounts receivable ("AR").
21 The bankruptcy court reasoned that law firms generate income by
22 generating WIP, billing their clients for the WIP, and then
23 collecting the resulting AR. According to the bankruptcy court,
24 "it defies logic to conclude that here no WIP or AR existed."

25 The bankruptcy court also took exception to Sabnekar's
26 decision, in her insolvency analysis, to include a lease liability
27 of \$165,000 for WLG's office space without also accounting for an
28 equivalent asset, the lease, even though Sabnekar was aware that

1 the lease was paid and current through November 1, 2001.

2 The bankruptcy court remarked that, "because the opinions and
3 conclusions of Sabnekar were not credible, it was extremely
4 difficult and time consuming to sift through the evidence to
5 determine the financial status (solvency or insolvency) of WLG."
6 In performing its own insolvency analysis, the bankruptcy court
7 adjusted Sabnekar's accounting matrix by including assets for WIP
8 and AR, and by deleting the lease liability. Based on these
9 calculations, the court determined that WLG's liabilities exceeded
10 its assets by no later than December 2001, and that WLG became and
11 remained insolvent on a balance sheet basis from and after
12 November 1, 2001.

13 Under the cash flow or equitable insolvency test, the
14 bankruptcy court found no evidence that WLG was unable to pay its
15 debts as they became due, and thus it found that WLG was not
16 insolvent at any time under that test. Indeed, Weinberg had
17 testified that WLG's bills had always been paid when due in the
18 ordinary course of its business.

19 On April 24, 2006, Oney moved for reconsideration of the
20 bankruptcy court's ruling that WLG was insolvent from and after
21 November 1, 2001, arguing that the court had double-counted WIP
22 and AR, that certain additional liabilities should be added to the
23 insolvency analysis, and that the lease should be kept solely in
24 the liability column. After a hearing, the bankruptcy court
25 denied Oney's motion.

26 The second phase of the trial addressing Oney's discharge
27 exception claims under § 523(a)(2)(A), (4) and (6) was conducted on
28 May 31, June 7, and July 26, 2007. The bankruptcy court heard

1 testimony from Cummerford, Sabnekar, Weinberg, Mrs. Weinberg, and
2 Oney. After taking the issues under advisement, on July 26, 2007,
3 the bankruptcy court entered its decision wherein it concluded,
4 among other things that:

5 - After becoming insolvent on November 1, 2001, Weinberg
6 received cumulative transfers from WLG totaling \$43,484.98. In
7 the court's view, these transfers violated the Arizona Trust Fund
8 Doctrine because WLG paid the insider Weinberg in full, at a time
9 when WLG was insolvent, therefore preferring Weinberg over WLG's
10 other creditors, including Oney.

11 - At the time of the subject transfers, the total liabilities
12 of WLG were \$472,141.74. The debt owed to Oney was \$286,596.50,
13 or 60.7 percent of total liabilities. Therefore, the bankruptcy
14 court concluded, under the Trust Fund Doctrine, Oney should have
15 received \$26,395.38 of the \$43,484.98 transferred to Weinberg.
16 The court awarded Oney a nondischargeable claim against Weinberg
17 under § 523(a)(4) in that amount.

18 - The bankruptcy court rejected Oney's arguments that his
19 claim against Weinberg was excepted from discharge under
20 § 523(a)(2)(A). Oney contended that Weinberg defrauded him in
21 connection with events occurring in September 2000, because
22 Weinberg never intended to provide him with office space and
23 services after his termination. The bankruptcy court found that
24 there was no evidence of any intent to deceive or defraud, and
25 that Weinberg's behavior during that period was inconsistent with
26 intent to deceive or defraud. Second, Oney argued that the
27 payments from WLG to Weinberg were fraudulent transfers, and thus
28 excepted from discharge under § 523(a)(2)(A). However, the

1 bankruptcy court ruled that debts arising from transfers for less
2 than reasonable value are not encompassed within § 523(a)(2)(A)
3 because such transfers do not involve false pretenses, false
4 representations or actual fraud on the creditor.

5 - As to Oney's argument for nondischargeability under
6 § 523(a)(6), the bankruptcy court ruled that Oney's claim against
7 Weinberg was for breach of his employment contract, and that such
8 a claim was not the type of injury addressed in § 523(a)(6).

9 Based upon its various decisions, the bankruptcy court
10 entered a judgment on October 14, 2008, awarding Oney \$26,395.38,
11 plus prejudgment interest at the rate of 10 percent from the date
12 of its decision, August 28, 2007, to entry of judgment, and
13 taxable costs and postjudgment interest consistent with provisions
14 of 28 U.S.C. § 1961(a), and determining that these amounts were
15 excepted from discharge in Weinberg's bankruptcy pursuant to
16 § 523(a)(4). The bankruptcy court denied Oney's claims for
17 nondischargeability under § 523(a)(2)(A) and (6), and for denial
18 of discharge under § 727(a).

19 Oney timely appealed the bankruptcy court's judgment on
20 October 24, 2008.⁵

21 22 **JURISDICTION**

23 The bankruptcy court had jurisdiction under 28 U.S.C. §§ 1334
24 and 157(b)(2)(I). The Panel has jurisdiction under 28 U.S.C.
25 § 158.

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27 ⁵ Weinberg cross-appealed on October 30, 2008, but later
28 voluntarily dismissed the appeal. Oney does not challenge the
court's overruling of his objection to Weinberg's discharge.

1 was made. Hoopai v. Countrywide Home Loans, Inc. (In re Hoopai),
2 369 B.R. 506, 509 (9th Cir. BAP 2007).

3 The bankruptcy court's witness credibility findings are
4 entitled to special deference, and are also reviewed for clear
5 error. Rule 8013; Anderson v. City of Bessemer City, N.C., 470
6 U.S. 564, 573, 105 S. Ct. 1504, 85 L. Ed. 2d 518 (1985).

7 Awards of prejudgment interest are reviewed for abuse of
8 discretion. Champion Produce, Inc. v. Ruby Robinson Co., 342 F.3d
9 1016, 1020 (9th Cir. 2003).

10 11 **DISCUSSION**

12 I.

13 The bankruptcy court did not clearly err in determining that WLG
14 was insolvent on and after, but not before, November 1, 2001.

15 Section 523(a)(4) provides that "A discharge under section
16 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not
17 discharge an individual debtor from any debt - . . .(4) for fraud
18 or defalcation while acting in a fiduciary capacity, embezzlement,
19 or larceny."

20 "Defalcation" is defined as the "misappropriation of trust
21 funds or money held in any fiduciary capacity; the failure to
22 properly account for such funds." Lewis v. Scott (In re Lewis),
23 97 F.3d 1182, 1186 (9th Cir. 1996) (quoting BLACK'S LAW DICTIONARY 417
24 (6th ed. 1990)). A defalcation may include innocent, as well as
25 intentional or negligent, defaults in performing trust duties.
26 Woodworking Enters., Inc. v. Baird (In re Baird), 114 B.R. 198,
27 204 (9th Cir. BAP 1990) (cited with approval in In re Lewis, 97
28 F.3d at 1186).

1 Under Ninth Circuit precedent, whether a relationship is a
2 fiduciary one within the meaning of § 523(a)(4) is a question of
3 federal law. Ragsdale v. Haller, 780 F.2d 794, 795 (9th Cir.
4 1986). In the dischargeability context, the fiduciary
5 relationship must arise from an express or technical trust that
6 was imposed before and without reference to the wrongdoing that
7 caused the debt. Id. at 796. Whether a fiduciary is a trustee
8 chargeable under § 523(a)(4) is determined by reference to state
9 law. Id.

10 The Panel has held that the Trust Fund Doctrine implicates an
11 express trust sufficient for purposes of the application of
12 § 523(a)(4). Nahman v. Jacks (In re Jacks), 266 B.R. 728, 737
13 (9th Cir. BAP 2001); In re Kallmeyer, 242 B.R. at 495.

14 As a matter of disputed fact, the point in time at which WLG
15 became insolvent is a critical issue in this appeal. A
16 corporation's insolvency is a requisite for application of
17 Arizona's version of the Trust Fund Doctrine. In concluding that
18 Weinberg had committed a defalcation as a fiduciary, giving rise
19 to a nondischargeable claim under § 523(a)(4), the bankruptcy
20 court applied the Arizona Trust Fund Doctrine.

21 The Trust Fund Doctrine is a time-honored principle in our
22 legal system. It replaced the earlier common law rule that, upon
23 dissolution of a corporation, its real estate reverted to the
24 grantors and its personalty to the state. 19 AM. JUR. 2d
25 Corporations § 2419 (2008). The doctrine first appears in
26 American case law in the early Nineteenth Century. See Wood v.
27 Dummer, 30 F. Cas. 435, 437 (C.C.D. Me. 1824) (Story, Circ.
28 Justice) (holding that the law will follow funds into the hands of

1 any persons who are not innocent purchasers or have no equitable
2 right to the property); see also Decker v. Mitchell (In re JTS
3 Corp.), 305 B.R. 529, 535 (Bankr. N.D. Cal. 2003) (tracing the
4 history of the Trust Fund Doctrine to Justice Story's opinion in
5 Wood). The doctrine has been widely accepted and applied by state
6 courts.⁶

7 The Trust Fund Doctrine was adopted as the law of Arizona in
8 Valley Bank v. Malcolm, 23 Ariz. 395, 406, 204 P. 207, 211 (Ariz.
9 1922) ("The doctrine that the assets of a private corporation
10 constitute a trust fund for the benefit of its creditors, though
11 often criticized or sought to be limited, is too firmly
12 established by judicial decision to be longer questioned."). The
13 current manifestation of the Trust Fund Doctrine in Arizona case
14 law is found in A.R. Teeters & Assocs. v. Eastman Kodak Co., 172
15 Ariz. 324, 836 P.2d 1034 (Ariz. Ct. App. 1992), where the court
16 explained:

17 The theory of the trust fund doctrine is that all of the
18 assets of a corporation, immediately on its becoming
19 insolvent, exist for the benefit of all of its creditors
20 and that thereafter no liens nor rights can be created
21 either voluntarily or by operation of law whereby one
22 creditor is given an advantage over others.

22 ⁶ See, e.g., Theta Props. v. Ronci Realty Co., 814 A.2d 907,
23 917 (R.I. 2003); Jones v. Billings County School Dist. #1, 1997
24 N.D. 173, 176, 568 N.W.2d 477, 480 (N.D. 1997); In re Baldwin
25 Trading Corp., 8 N.Y.2d 144, 148, 168 N.E.2d 383, 384 (N.Y. 1960);
26 Franks v. Receiver of Booneville Banking Co., 202 Miss. 858, 867,
27 32 So.2d 859, 862 (Miss. 1947); Lind v. Johnson, 183 Minn. 239,
28 242, 236 N.W. 317, 318 (Minn. 1931); Wilson v. Lucas, 185 Ark.
183, 189, 47 S.W.2d 8, 10 (Ark. 1932); Nw. Roofers & Employers
Health & Sec. Trust Fund v. Bullis, 114 Idaho 56, 61, 753 P.2d
267, 272 (Idaho Ct. App. 1988); Blankenship v. Demmler Mfg. Co.,
89 Ill. App. 3d 569, 572, 411 N.E.2d 1153, 1155 (Ill. Ct. App.
1980); Saracco Tank & Welding Co. v. Platz, 65 Cal. App. 2d 306,
315, 150 P.2d 918, 923 (Cal. Ct. App. 1944).

1 Teeters, 836 P.2d at 1041 (citation omitted).⁷ According to
2 Teeters, a director or officer of a corporation breaches a
3 fiduciary duty owed to the company's creditors where:

4 corporate assets were transferred to [the officer], the
5 transfer of corporate assets occurred while the
6 corporation was insolvent, and the transfer preferred
7 [the officer] to the disadvantage of other creditors of
the same priority. Liability, if established, is
limited to the value of the assets received by the
director, officer, or stockholder.

8 Id. As can be seen, then, the liability of a corporate officer to
9 a creditor under the Arizona Trust Fund Doctrine arises when the
10 corporation transfers assets to the officer while the company is
11 insolvent.

12 The meaning of "insolvent" can vary. In this case, Oney and
13 Weinberg disagree whether Arizona Trust Fund Doctrine compels
14 application of the equitable insolvency cash flow standard, or the
15 balance sheet standard, for determining insolvency. In Teeters,
16 the Arizona court cited to A.R.S. § 10-002(12) (now § 10-140(29))
17 for the definition of insolvency: "inability of a corporation to
18 pay its debts as they become due in the usual course of its
19 business," i.e., the cash flow standard. However, in its
20 decision, the Teeters court also seemed to approve the trial
21 court's instruction given to the jury that a corporation is
22 insolvent when it either ceases to pay its debts in the ordinary
23 course of business, cannot pay its debts as they become due, or
24 its liabilities are greater than its assets. Teeters, 836 P.2d at
25 1041. This last standard for insolvency is referred to as the

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27 ⁷ The holdings in the Teeters case and the Arizona Trust
28 Fund Doctrine were recently reaffirmed in Dawson v. Withycombe,
216 Ariz. 84, 108, 163 P.3d 1034, 1058 (Ariz. Ct. App. 2007).

1 balance sheet test. Akers v. Koubourlis (In re Koubourlis), 869
2 F.2d 1319, 1321 (9th Cir. 1989) ("This definition of insolvency is
3 the traditional bankruptcy balance sheet test of insolvency:
4 whether debts are greater than assets, at a fair evaluation,
5 exclusive of exempted property.").⁸

6 In this appeal, Oney argues that Teeters allows use of the
7 balance sheet test for determining insolvency under Arizona law;
8 Weinberg contends that the statute is plain and that only the cash
9 flow standard applies to determine insolvency.⁹

10 The Panel concludes that the bankruptcy court did not err in
11 applying the balance sheet test for insolvency in this case.
12 While not as clear as it could be, we believe the Teeters court

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14 ⁸ This definition also appears in Arizona's Uniform
15 Fraudulent Transfer Act, A.R.S. § 44-1002(a) ("UFTA") ("A debtor
16 is insolvent if the sum of the debtor's debts is greater than all
17 of the debtor's assets at a fair valuation."). Arizona recognizes
18 a cause of action for breach of the Trust Fund Doctrine using the
19 definition of insolvency in A.R.S. § 10-140(29) and a separate
20 cause of action for breach of UFTA, using the definition in A.R.S.
21 § 44-1002(a). However, in addition to the Teeters court, at least
22 one other Arizona appeals court appears to have conflated the two
23 definitions. In Warne Investments, Ltd. v. Higgins, 219 Ariz.
24 186, 194, 195 P.3d 645, 654 (Ariz. Ct. App. 2008), rev. denied
25 2008 Ariz. LEXIS 192 (Ariz., Sept. 23, 2008), the appeal included
26 separate awards under both the UFTA and the Trust Fund Doctrine.
27 Even though the corporation was paying its bills as they became
28 due, the appeals court ruled that the jury could reasonably
conclude that the corporation was insolvent for purposes of the
Trust Fund Doctrine cause of action based on a balance sheet
analysis.

⁹ Because the bankruptcy court determined that, under the
cash flow standard, WLG was never insolvent, Weinberg argues that
the Arizona Trust Fund Doctrine does not apply to these facts,
that Weinberg violated no fiduciary duty owed to creditor Oney,
and thus, any transfers from WLG to Weinberg would not support an
exception to discharge under § 523(a)(4)'s "defalcation by a
fiduciary" provision. Of course, even if that were correct,
because Weinberg abandoned his cross-appeal of the bankruptcy
court's judgment, the best result Weinberg can achieve is
affirmance of that judgment.

1 embraced a flexible definition for insolvency in this context.
2 While the statute the state court cited to define insolvency in
3 that decision adopts a cash flow insolvency approach, the court
4 affirmed a verdict where the jury had been instructed by the trial
5 court that it could apply either the cash flow standard or the
6 balance sheet approach. In the absence of any more definite
7 statement by the Arizona courts, we decline to construe Teeters as
8 compelling application of one insolvency definition to the
9 exclusion of the other.

10 Moreover, although the Panel has not previously examined the
11 insolvency test under Arizona's Trust Fund Doctrine, it has
12 approved the use of the balance sheet test to determine insolvency
13 in connection with the application of the Trust Fund Doctrine in
14 two other states with statutes very similar to Arizona. See In re
15 Kallmeyer, 242 B.R. at 496 (applying Oregon law); In re Jacks, 266
16 B.R. at 736-37 (applying California law). We therefore do not
17 believe the bankruptcy court erred in applying the balance sheet
18 test to determine whether WLG was insolvent.

19 After settling on the balance sheet test for insolvency, the
20 bankruptcy court next was required to consider the evidence,
21 including the expert testimony and report, in valuing assets and
22 liabilities to determine the fact and date of WLG's insolvency.
23 Wolkowitz v. Am. Research Corp. (In re DAK Indus., Inc.), 170 F.3d
24 1197, 1199-1200 (9th Cir. 1999) (in a balance sheet insolvency
25 analysis, valuing assets and liabilities are questions of fact
26 reviewed for clear error); accord Transamerica Ins. Co. v. Trout,
27 145 Ariz. 355, 360, 701 P.2d 851, 856 (Ariz. Ct. App. 1985) ("A
28 finding of insolvency [under a balance sheet test] therefore

1 depends on an actual analysis of assets and liabilities – a ‘fact-
2 and-figure balancing[.]’”). Oney contends the bankruptcy court
3 clearly erred in selecting November 1, 2001, as the date of
4 insolvency.

5 The bankruptcy court considered Sabnekar’s expert report and
6 trial testimony opining that WLG was insolvent under the balance
7 sheet test on and after September 6, 2000. The court found
8 Sabnekar’s opinions to be unreliable. It was especially troubled
9 by Sabnekar’s decision to exclude WIP and AR as assets of WLG for
10 balance sheet purposes:

11 The balance sheet could not be adjusted for either
12 accounts receivable or accounts payable as complete
13 monthly reports were either not maintained in the normal
14 course of business or not provided. We did test the
15 accounts receivable reports that could be traced. For
16 the five months for which beginning and ending accounts
17 receivable and monthly case receipts were available,
(see Exhibit VIII), we found that more than \$221,000 in
18 receivables was written off. Given this fact, it would
19 appear that inclusion of the net realizable value of the
20 accounts receivable would not materially affect the
21 results of our insolvency assessments.

22 (Sabnekar’s Report at 9).

23 The bankruptcy court found Sabnekar’s approach illogical. It
24 considered it indisputable that law firms generate income by
25 creating WIP, billing WIP to create AR, and collecting AR. Since
26 it was uncontroverted that WLG reported over \$2 million in gross
27 revenue for the period covered by Sabnekar’s report, the
28 bankruptcy court discounted Sabnekar’s conclusion that there were
no WIP or AR assets to be included in the WLG balance sheet for
the periods in question.

The bankruptcy court also disagreed with Sabnekar’s decision
to include WLG’s lease liability of \$165,000 on the balance sheet

1 without entering any corresponding asset for the value of the
2 lease. The court first observed that, generally, only capital
3 leases are entered on a balance sheet, and they are always entered
4 as both an asset and a liability. Second, the court noted that
5 Sabnekar was aware that the lease was fully paid through December
6 2001. Thus the court found Sabnekar's opinion testimony was not
7 credible because it assumed the lease was a WLG liability without
8 also recognizing some value to the lease as an asset.

9 An additional deficiency in Sabnekar's testimony concerned
10 the treatment of accounts payable in the balance sheet analysis.
11 Based on what he perceived her testimony to be on this issue, Oney
12 has argued that the court failed to include between \$50,000 and
13 \$65,000 a month in accounts payable as liabilities. A fair view
14 of the evidence before the court, however, indicates that Oney,
15 through Sabnekar, did not provide the court with reliable evidence
16 on the amount of the accounts payable.

17 Sabnekar's expert report does not mention any specific amount
18 of accounts payable. The only reference to payables occurs on
19 page nine of Sabnekar's Report: "The balance sheet could not be
20 adjusted for either accounts receivable or accounts payable as
21 complete monthly reports were either not maintained in the normal
22 course of business or not provided." Later, though, as part of
23 her testimony, Oney submitted his Exhibit 19 prepared by Sabnekar,
24 which estimated accounts payable of \$50,000 per month for each
25 month in 2000 and 2001.

26 ONEY: So the second column from the left says,
27 "Estimated accounts payable." And those are your
estimates?

28 SABNEKAR: That's correct.

1 ONEY: What did you base those estimates on?

2 SABNEKAR: I only had two accounts receivable reports
3 provided by the company. Both of those reports exceeded
4 \$50,000. I just used 50,000 as a conservative estimate,
5 as I don't have any better evidence.

6 ONEY: When you say "accounts receivable" reports, you
7 mean -

8 SABNEKAR: I mean, forgive me, accounts payable. I'm
9 sorry.

10 Trial Tr. 130:6-23 (February 22, 2006).

11 However, under cross-examination, Sabnekar twice admitted
12 that her "estimates" were pure speculation.

13 CARMEL (atty for Weinberg): You did not conduct any
14 analysis of accounts payable during the relevant time
15 period.

16 SABNEKAR: I was unable to conduct an analysis during the
17 relevant time frame.

18 CARMEL: In fact you stated that any opinion on accounts
19 payable would be pure speculation as to their actual
20 value. Isn't that correct?

21 SABNEKAR: That's correct, sir.

22 Trial Tr. 62:19 - 63: 1 (February 22, 2006).

23 CARMEL: The accounts payable item, it was just a pure
24 guess; is that correct?

25 SABNEKAR: Absolutely.

26 CARMEL: You had no evidence that on a month-to-month
27 basis the firm had \$50,000 in accounts payable from
28 September 2000 through the end of December [2001].

SABNEKAR: No, sir.

. . .

CARMEL: And you did not conduct any independent analysis
on accounts payable.

SABNEKAR: I could not, sir.

CARMEL: And just to tie this loose end, you do not know
for a fact that every month there was \$50,000 in

1 accounts payable.

2 SABNEKAR: No, sir.

3 Trial Tr. 113:16 – 114:6 (February 22, 2006).

4 The only evidence presented to the bankruptcy court regarding
5 the accounts payable was this testimony from Sabnekar. The
6 bankruptcy court did not err in failing to consider evidence that
7 the expert witness herself admitted was not based on analysis and
8 was “pure speculation” and a “pure guess.”

9 We cannot say that the bankruptcy court clearly erred in
10 severely discounting Sabnekar’s opinions. A trial court has very
11 broad discretion whether to discredit expert opinion if it is not
12 reliable or does not aid the fact finder in its task. See, e.g.,
13 Kumho Tire Co. v. Carmichael, 526 U.S. 137, 152, 119 S. Ct. 1167,
14 143 L. Ed. 2d 238 (1999) (“[T]he trial judge must have
15 considerable leeway in deciding in a particular case how to go
16 about determining whether particular expert testimony is
17 reliable.”); Mukhtar v. Cal. St. Univ., 299 F.3d 1053, 1063 (9th
18 Cir. 2002) (citing Kumho Tire for the trial court’s “special
19 obligation” to determine the relevance and reliability of an
20 expert’s testimony).

21 Oney conceded in his testimony at trial that, in connection
22 with his § 523(a)(4) claim, he bore the burden of proof in
23 establishing WLG’s insolvency. See Diamant v. Hansen (In re Curry
24 & Sorensen, Inc.), 112 B.R. 324, 327 (9th Cir. BAP 1990) (the
25 plaintiff has the burden of proof relative to insolvency and must
26 prove it by a preponderance of the evidence). The bankruptcy
27 court could conclude that, by providing a seriously flawed expert
28 report and testimony as his principal evidence that WLG was

1 insolvent on September 6, 2000, Oney failed to meet his burden of
2 proof that September 6, 2000, was the insolvency date and that any
3 transfers after that date should be considered preferences.

4 Having rejected Oney's suggested date of insolvency, the
5 bankruptcy court examined WLG's financial status in a series of
6 factual determinations for each month between September 2000 and
7 December 2001. The court determined that, by adjusting the
8 Sabnekar report for AR and WIP, and employing other evidence in
9 the record from such sources as the Johnson Bank collateral report
10 and WLG's tax returns, WLG became insolvent in November 2001. At
11 that point, gross revenue had significantly declined, and there
12 was evidence that the firm was winding down (e.g., reimbursements
13 received from their new firm for Weinberg's and Cummerford's
14 expenses; sale of most of WLG's office equipment; the decline in
15 monthly payroll from \$32,000 in August 2001 to \$10,900 at the end
16 of October 2001).

17 The bankruptcy court did not clearly err in its analysis of
18 the evidence and ruling that WLG first became insolvent in
19 November 2001. A bankruptcy court is free to consider subsequent
20 events, such as the collection rate for AR, in valuing and
21 adjusting assets and determining liabilities for insolvency
22 determinations. Sierra Steel, Inc. v. Totten Tubes, Inc. (In re
23 Sierra Steel, Inc.), 96 B.R. 275, 278 (9th Cir. BAP 1989). Here,
24 the bankruptcy court determined that the evidence presented by
25 Oney favoring insolvency in earlier months was flawed based
26 principally on an expert report that the court did not find
27 credible. We give special deference to credibility findings of a
28 trial court. Anderson, 470 U.S. at 573. The bankruptcy court's

1 determination of the fact and date of insolvency, as questions of
2 fact, are also entitled to deference. Rule 8013. Because there
3 is substantial evidence in the record to support its finding, it
4 was not clear error for the bankruptcy court to fix November 2001
5 as WLG's insolvency date.

6 The bankruptcy court also determined that at no point was WLG
7 insolvent under the cash flow standard. That finding is also not
8 clearly erroneous. Under the cash flow standard as applied in
9 Arizona, insolvency means the "inability of a corporation to pay
10 its debts as they become due in the usual course of its business."
11 A.R.S. § 10-140; see also A.R.S. § 44-1002(B): "A debtor who is
12 generally not paying his debts as they become due is presumed to
13 be insolvent." The bankruptcy court correctly noted that Oney
14 provided no evidence that WLG was either unable to pay its debts
15 as they became due in the usual course of its business, or that it
16 was generally not paying its debts as they became due. On the
17 contrary, there was evidence in the record to support the court's
18 conclusion that all WLG debts were paid in the ordinary course of
19 business, at least through November 2001. This was supported by
20 the testimony of Weinberg which the court found credible.
21 Additionally, the court observed that there were numerous possible
22 sources which WLG could have tapped to pay Oney's debt, and thus
23 Oney had not met his burden of proving that WLG was "unable" to
24 pay Oney's debt when due. These findings are not clearly
25 erroneous.

26 ///

27 ///

28 ///

1 II.

2 The bankruptcy court did not clearly err in ruling that
3 certain transfers from WLG to Weinberg after
4 November 1, 2001, did not violate Arizona's Trust Fund Doctrine.

5 Having established WLG's date of insolvency as November 1,
6 2001, the bankruptcy court then considered whether transfers from
7 WLG to Weinberg after that date violated the Arizona Trust Fund
8 Doctrine, and thus constituted nondischargeable debts for
9 fiduciary defalcation under § 523(a)(4).

10 The bankruptcy court found that Weinberg received certain
11 transfers from WLG totaling \$43,484.98 after November 1, 2001. We
12 agree that these transfers violated Arizona's Trust Fund Doctrine
13 because WLG paid Weinberg's debts in full via these payments, at a
14 time when WLG was insolvent, and thereby preferred Weinberg over
15 the other creditors of WLG. To reflect his proportionate share of
16 the funds transferred, the bankruptcy court awarded Oney 60.7
17 percent of that \$43,484.98, or \$26,395.38, as a nondischargeable
18 claim pursuant to § 523(a)(4).

19 Oney, however, contends that numerous, other post-November 1,
20 2001 payments give rise to nondischargeable debts. In his opening
21 brief, Oney states that it is undisputed that approximately
22 \$400,000 was paid by WLG after November 1, 2001, to Weinberg and
23 creditors other than Oney. Oney Opening Br. at 14. At another
24 point in the opening brief, Oney alleges that Weinberg transferred
25 over \$300,000 in discretionary payments to its officers,
26 shareholders and directors. Oney Opening Br. at 18. Regarding
27 the \$400,000 allegation, this is supported in the statement of
28 agreed facts in the Pretrial Order, but we note that at least

1 \$230,000 of that sum were payments to Johnson Bank on the WLG line
2 of credit, which we have no reason to believe should be imputed to
3 Weinberg's benefit.¹⁰ As to the \$300,000 allegation, Oney cites
4 only his own affidavit as proof, does not indicate that all these
5 funds were allegedly paid after November 1, 2001, and provides no
6 breakdown of the numbers.

7 Oney argues that the largest of these payments should be
8 considered distributions to shareholders rather than wages or
9 other business expenses. Oney does not clearly articulate in his
10 briefs which payments he is referring to. However, the bankruptcy
11 court found that "WLG records and the account statements do
12 evidence that there were significant business expenses paid [to
13 Weinberg] which were clearly legitimate WLG expenses."

14 For example, Oney targeted WLG's payment of various credit
15 card bills of Weinberg. The bankruptcy court found that Weinberg
16 had used his credit card for WLG business purposes, and was then
17 reimbursed by WLG for those expenses, and that the reimbursements
18 were not "distributions." In making this finding, the court
19 "carefully reviewed the various payments by WLG [to Weinberg] from
20 and after November 1, 2001, and the account statements[.]" In

22 ¹⁰ Courts apply the Trust Fund Doctrine as a fiduciary rule,
23 prohibiting transfer of assets to insiders of an insolvent
24 corporation. It has not been applied to payments or transfers to
25 non-insider creditors in the ordinary course of business. See,
26 e.g., Production Resources Group, L.L.C. v. NCT Group, Inc., 863
27 A.2d 772, 791-92 (Del. Ch. 2004) (Interpreting the Trust Fund
28 Doctrine, "the mere fact that directors of an insolvent firm favor
certain creditors over others of similar priority does not
constitute a breach of fiduciary duty, absent self-dealing."); see
also Sharp Int'l Corp. v. State St. Bank & Trust Co. (In re Sharp
Int'l Corp.), 403 F.3d 43, 54 (2d Cir. 2005) (insolvent
corporation may pay certain creditors and leave others unpaid,
excluding insiders).

1 other words, the bankruptcy court found, based upon the evidence,
2 that the payments made after November 1, 2001, were for legitimate
3 business expenses.

4 That Oney considers those payments were for nonbusiness
5 purposes merely amounts to a second view of the evidence. Where
6 there are two permissible views of the evidence, the trial court's
7 choice between them cannot be clearly erroneous. Anderson, 470
8 U.S. at 574. The bankruptcy court did not clearly err in ruling
9 that the other post-November 1, 2001 transfers were not payments
10 violating the Trust Fund Doctrine for which Oney should receive
11 his proportionate share.¹¹

12 III.

13 The bankruptcy court did not err in denying Oney's
14 claims under § 523(a)(2)(A) and (6).

15 Oney argues that his judgment also should be excepted from
16 discharge under § 523(a)(2)(A) and (6). Oney's argument lacks
17 merit.

18 Section 523(a)(2)(A) provides that, "A discharge under . . .
19 this title does not discharge an individual debtor from any debt -

20
21 ¹¹ At the conclusion of Oney's discussion of the post-
22 November 1, 2001 payments, he observes that "even assuming that
23 all of the monies received by the Weinbergs were for legitimate
24 corporate debts to them and not distributions (which the Oneys
25 dispute), their pro-rata portion of WLG's total debt (60.7
26 percent), using the court's formula, was only 9.2 percent. . . .
27 Yet the court allowed the Weinbergs to retain \$17,089.60 (or 39.3
28 percent of the \$43,484.98) of the payments from WLG after November
1, 2001." Oney's Opening Br. at 17.

It is not clear what point Oney seeks to make by this
statement. The bankruptcy court awarded Oney a portion of the
payments from WLG to Weinberg. It took no action regarding the
balance still in Weinberg's hands. To the extent that Oney
suggests that the balance should be distributed to other creditors
in proportion to their debt, Oney has no standing to make such an
argument.

1 (2) for money, property, services, or an extension, renewal or
2 refinancing of credit, to the extent obtained by – (A) false
3 pretenses, a false representation, or actual fraud, other than a
4 statement respecting the debtor’s or an insider’s financial
5 condition.” To prevail on a claim under § 523(a)(2)(A), a
6 creditor must demonstrate five elements: “(1) misrepresentation,
7 fraudulent omission or deceptive conduct by the debtor; (2)
8 knowledge of the falsity or deceptiveness of his statement or
9 conduct; (3) an intent to deceive; (4) justifiable reliance by the
10 creditor on the debtor’s statement or conduct; and (5) damage to
11 the creditor proximately caused by its reliance on the debtor’s
12 statement or conduct.” Turtle Rock Meadows Homeowners Ass’n v.
13 Slyman (In re Slyman), 234 F.3d 1081, 1085 (9th Cir. 2000) citing
14 Am. Express Travel Related Servs. Co. v. Hashemi (In re Hashemi),
15 104 F.3d 1122, 1125 (9th Cir. 1997). The creditor bears the
16 burden of proof to establish all five of these elements by a
17 preponderance of the evidence. In re Slyman, 234 F.3d at 1085.

18 Oney insists that Weinberg defrauded and deceived Oney in
19 connection with the events of September 2000. He alleges that, at
20 that time, Weinberg promised to pay him on a quarterly basis and
21 failed to do so, and that during his last month with WLG, he would
22 have access to office services, but did not.

23 There was no evidence at trial that Weinberg made any “false
24 representations” to Oney, acted under “false pretenses” or
25 committed other actual fraud. The critical inquiry under
26 § 523(a)(2) is intent to defraud, not intent to pay. Still,
27 the bankruptcy court found several factors militating against any
28 finding of fraud. For example, WLG paid Oney over \$72,000 on

1 September 12, 2000, which was more than he had requested in his
2 memorandum demanding payment of \$69,000 in back pay. Weinberg's
3 memorandum to Oney of September 11, 2000, had offered various
4 options for a continuing association with WLG, or establishing of
5 procedures for terminating the relationship. In addition, WLG
6 faithfully paid Oney his share of accounts receivable as collected
7 over a period of several months thereafter. We agree with the
8 bankruptcy court that these circumstances weigh against the notion
9 that Weinberg intended to defraud Oney for purposes of
10 § 523(a)(2)(A).

11 Section 523(a)(6) provides that, "A discharge under . . .
12 this title does not discharge an individual debtor from any debt –
13 (6) for willful and malicious injury by the debtor to another
14 entity or to the property of another entity."

15 As a preliminary matter, Oney's claim under § 523(a)(6)
16 appears to be based on the assumption that Oney was an employee of
17 Weinberg, and that his claim arises for breach of employment
18 contract. However, Oney was never Weinberg's employee; he was
19 employed by WLG. Oney relies heavily on Petralia v. Jercich (In
20 re Jercich), 238 F.3d 1202, 1209 (9th Cir. 2001)). Jercich dealt
21 with a corporation wholly controlled by one individual who
22 ruthlessly exploited the corporation's assets and staff. There
23 did not appear to be any question that Jercich was the alter ego
24 of the corporation. Oney has given us no authority or argument
25 specifically for piercing the corporate veil in this case and
26 assigning responsibility for WLG's alleged actions to Weinberg.
27 But even if we were to consider for argument's sake that Weinberg
28 was responsible for an alleged breach of Oney's employment

1 contract, Oney's argument is without merit.

2 As the bankruptcy court held, Oney's dispute with Weinberg
3 concerns a breach of contract action without an associated tort,
4 and is not the kind of injury addressed in § 523(a)(6). Lockerby
5 v. Sierra, 535 F.3d 1038, 1041 (9th Cir. 2008) ("Something more
6 than a knowing breach of contract is required before conduct comes
7 within the ambit of § 523(a)(6), and Jercich defined that
8 'something more' as tortious conduct."); Kawaauhau v. Geiger, 523
9 U.S. 57, 61, 118 S. Ct. 974, 140 L. Ed. 2d 90 (1998) (A "willful"
10 injury is a "deliberate or intentional injury, not merely a
11 deliberate or intentional act that leads to injury."); Carrillo v.
12 Su (In re Su), 290 F.3d 1140, 1146-47 (9th Cir. 2002) (a willful
13 and malicious injury under § 523(a)(6) involves "(1) a wrongful
14 act, (2) done intentionally, (3) which necessarily causes injury,
15 and (4) is done without just cause or excuse." (quoting In re
16 Jercich, 238 F.3d at 1209).

17 While a breach of contract, when accompanied by conduct
18 constituting a tort, may support an exception to discharge under
19 § 523(a)(6), Oney's heavy reliance on Jercich, the Ninth Circuit
20 decision establishing this principle, is misplaced. Although both
21 Jercich and this appeal involve claims for unpaid wages, there are
22 many significant differences in the facts. Notably, Jercich
23 involved an employer who not only failed to pay his employee, but
24 used business funds for personal investments, including a horse
25 ranch, and who engaged in "despicable conduct that subjects a
26 person to cruel and unjust hardship in conscious disregard of that
27 person's rights." In re Jercich, 238 F.3d 1209 (citation
28 omitted). In contrast, Oney was paid more than he originally

1 requested, and WLG faithfully continued to pay Oney his percentage
2 of accounts receivable as collected. This hardly represents the
3 type of despicable conduct Jercich condemns.

4 Jercich is not the only, or even most recent, case law in
5 this circuit interpreting nondischargeability under § 523(a)(6).
6 The court in In re Su, mentioned above, provided an extended
7 discussion of the willfulness prong in § 523(a)(6). 290 F.3d at
8 1143-44. The test for willful injury in In re Su is a subjective
9 one. The subjective standard correctly focuses on the debtor's
10 state of mind and precludes application of § 523(a)(6)'s
11 nondischargeability provision short of the debtor's actual
12 knowledge that harm to the creditor was substantially certain.
13 Id. Here, the court properly looked to the behavior of Weinberg
14 in paying the disputed wages and continuing to pay Oney's share of
15 the accounts receivable as evidence that there was no willful
16 intent to cause injury.

17 The bankruptcy court did not err in denying that Oney's
18 claims were nondischargeable under § 523(a)(2) and (6).

19 IV.

20 The bankruptcy court did not err in denying
21 Oney prejudgment interest on his claim based upon the
22 dates of the transfers.

23 In its final judgment, the bankruptcy court awarded
24 prejudgment interest to Oney. In doing so, it set the accrual of
25 that interest from the date of its order fixing the amount owed by
26 Weinberg to Oney on the nondischargeable claim, August 27, 2007.
27 We believe, in this regard, that the bankruptcy court was correct.

28 It is settled that where a debt that is found to be

1 nondischargeable arose under state law, "the award of prejudgment
2 interest on that debt is also governed by state law." Otto v.
3 Niles (In re Niles), 106 F.3d 1456, 1463 (9th Cir. 1997). Oney's
4 claim against Weinberg for violation of the Trust Fund Doctrine is
5 governed by Arizona law. The Arizona Supreme Court has held that
6 prejudgment interest on a liquidated claim is a matter of right.
7 Fleming v. Pima County, 141 Ariz. 149, 155, 685 P.2d 1301, 1307
8 (Ariz. 1984). "Prejudgment interest accrues from the date damages
9 are liquidated 'as compensation for the detention of the money
10 from the judgment creditor.'" Pueblo Santa Fe Townhomes Owners'
11 Ass'n v. Transcontinental Ins. Co., 218 Ariz. 13, 178 P.3d 485,
12 496 (Ariz. Ct. App. 2008) (quoting Ariz. E.R.R. Co. v. Head, 26
13 Ariz. 259, 262, 224 P. 1057, 1059 (Ariz. 1924)). However, if
14 damages are not liquidated, "no interest is allowed upon the
15 theory that the person liable does not know the sum he owes and
16 therefore can be in no default for not paying." Head, 224 P. at
17 1059. Damages are liquidated if "the evidence of damages
18 furnish[es] data which, if believed, makes it possible to compute
19 the amount of damages with exactness, without relying upon opinion
20 or discretion." Banner Realty, Inc. v. Turek, 113 Ariz. 62, 64-
21 65, 546 P.2d 798, 800-01 (Ariz. 1976); Employer's Mut. Cas. Co. v.
22 McKeon, 170 Ariz. 75, 77, 821 P.2d 766, 769 (Ariz. Ct. App. 1991)
23 (same).

24 Oney relies on two cases for his argument that the bankruptcy
25 court made precise findings of the transfers to Weinberg in 2001
26 and 2002, and thus Oney's claim was liquidated under Arizona law,
27 with prejudgment interest payable from the dates of the transfers.
28 Gemstar Ltd. v. Ernst & Young, 185 Ariz. 493, 509, 917 P.2d 222,

1 237-38 (Ariz. 1996); Fleming v. Pima County, 141 Ariz. 149, 155,
2 685 P.2d 1301, 1307 (Ariz. 1984). However, both Gemstar and
3 Fleming were contract disputes, and the precise amounts of the
4 claims of the parties were never in dispute. Fleming was a
5 wrongful discharge action, where the court awarded prejudgment
6 interest on withheld paychecks. Gemstar was a dispute among
7 investors where one investor diverted funds from commonly held
8 property, and there was no dispute over the percentage of
9 ownership of the property by each investor. In short, in both
10 these cases, the claims met the liquidation test under Arizona law
11 because each was "at all times susceptible to exact computation,
12 no part of the amount was subject to opinion or discretion, [and]
13 it could have been determined with precision." Costanzo v.
14 Stewart Title & Trust of Phoenix, 23 Ariz. App. 313, 317, 533 P.2d
15 73, 77 (Ariz. Ct. App. 1975) (emphasis added).

16 Oney's argument is flawed because he equates the amount of
17 the transfers (which could be determined with exactness before the
18 bankruptcy court's judgment) with the amount of his claim. Oney
19 has never argued that he was entitled to recover the full amount
20 of the transfers. The bankruptcy court properly awarded Oney a
21 percentage of those transfers, and determination of the proper
22 percentage was an exercise of its "opinion and discretion," an
23 aspect of the decision which defeats the liquidation test under
24 Arizona law. In other words, Oney's nondischargeable claim could
25 not be computed with exactness until the bankruptcy court fixed
26 the amount owed by Weinberg to Oney on August 27, 2007, by making
27 the calculations. Consequently, the bankruptcy court's decision
28 to award prejudgment interest from that date, not the date of the

1 subject transfers, is consistent with Arizona law.

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CONCLUSION

We AFFIRM the decision of the bankruptcy court establishing a nondischargeable claim in favor of Oney under § 523(a) (4) for Weinberg's violation of the Arizona Trust Fund Doctrine, its calculation of the amount of that claim, and its decision to award prejudgment interest only from the date of its order. We also AFFIRM the bankruptcy court's decision rejecting Oney's claims under § 523(a) (2) (A) and (6).