

AUG 03 2012

NOT FOR PUBLICATION

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

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

5	In re:)	BAP No.	CC-11-1696-MkDKi
6	JAVIER TOVAR,)	Bk. No.	LA-10-41664-BR
7	Debtor.)	Adv. No.	LA-10-03016-BR
8	_____)		
9	JAVIER TOVAR,)		
10	Appellant,)		
11	v.)	MEMORANDUM*	
12	HERITAGE PACIFIC FINANCIAL,)		
13	LLC,)		
14	Appellee.)		
	_____)		

Argued and Submitted On
July 20, 2012 at Pasadena, California

Filed - August 3, 2012

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

Honorable Barry Russell, Bankruptcy Judge, Presiding

Appearances: _____
Christopher L. Hoglin of the Law Offices of
Christopher L. Hoglin, P.C. for Appellant Javier
Tovar; Brad A. Mokri of the Law Offices of Mokri &
Associates for Appellee Heritage Pacific
Financial, LLC.

Before: MARKELL, DUNN, and KIRSCHER, Bankruptcy Judges.

*This disposition is not appropriate for publication.
Although it may be cited for whatever persuasive value it may
have (see Fed. R. App. P. 32.1), it has no precedential value.
See 9th Cir. BAP Rule 8013-1.

1 **INTRODUCTION**

2 Appellant-Debtor Javier Tovar ("Tovar") appeals the
3 bankruptcy court's judgment against him with respect to a
4 nondischargeability claim brought by Heritage Pacific Financial,
5 LLC ("HPF") pursuant to Section 523(a)(2)(B).¹ For the reasons
6 set forth below, we AFFIRM.

7 **FACTS²**

8 Some years prior to filing his bankruptcy petition, on
9 November 15, 2006, Tovar executed a promissory note ("Note") for
10 a secured, cash-out refinance loan ("Refinance Loan") in the
11 amount of \$120,000. The collateral for the Note was a second
12 deed of trust on real property located in Sylmar, California
13 91342 ("Property"). Both the Note and deed of trust were made in
14 favor of WMC Mortgage Corp. ("WMC"). Tovar signed and submitted
15 a Uniform Residential Loan Application ("Loan Application") for
16 the Refinance Loan. Tovar subsequently defaulted on some or all

17
18 ¹Unless otherwise specified, all chapter and section
19 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532; all
20 "Rule" references are to the Federal Rules of Bankruptcy
21 Procedure, Rules 1001-9037; all "Civil Rule" references are to
the Federal Rules of Civil Procedure; and all "Evidence Rule"
references are to the Federal Rules of Evidence.

22 ²The Excerpts of Record provided by Tovar do not include all
23 the documents listed in his Designation of Record and Statement
24 of Issues to be Presented on Appeal ("Designation of Record").
25 Accordingly, we exercise our discretion to independently review
the docket in Tovar's above referenced adversary proceeding, and
26 documents electronically filed therein through the court's CM/ECF
system. See O'Rourke v. Seaboard Sur. Co. (In re E.R. Fegert,
27 Inc.), 887 F.2d 955, 957-58 (9th Cir. 1989) (appellate court may
take judicial notice of underlying bankruptcy records); Kirton v.
28 Valley Health Sys. (In re Valley Health Sys.), 471 B.R. 555, 558
n.2 (9th Cir. BAP 2012) (same).

1 of the obligations relating to the Property, and the Property was
2 sold at a non-judicial foreclosure sale.

3 Tovar filed a voluntary chapter 7 bankruptcy petition on
4 July 30, 2010. On November 5, 2010, HPF initiated the adversary
5 proceeding giving rise to the instant appeal by filing a
6 nondischargeability complaint against Tovar. In its complaint,
7 HPF contended it now owned the Note; sought judgment in the
8 amount of \$120,000; and requested a determination that such
9 judgment was nondischargeable within the meaning of Section
10 523(a)(2)(A) and (a)(2)(B) due to misrepresentations made when
11 the loan was originated.

12 The bankruptcy court scheduled a bench trial for November 9,
13 2011. On July 26, 2011, the bankruptcy court entered an Order of
14 Representation of Evidence by Declaration For Court Trial
15 ("Evidence Order"). This order required both parties to submit
16 witness testimony by declaration; conditioned the admission of
17 such declarations on the declarant's presence at trial; and set
18 deadlines to submit the declarations, optional trial briefs and
19 evidentiary objections.³

20 The bankruptcy court next entered a Pre-Trial Order on
21 August 3, 2011, which the parties had jointly submitted to the
22 court. The Pre-Trial Order established certain admitted facts,
23 and provided that only certain issues of law remained to be
24 litigated, including the elements of reasonable reliance and
25 intent to deceive under Section 523(a)(2)(B). The parties also

26
27 ³The order further provided that no other declarations or
28 briefs were permitted, and that any oral testimony would be
limited to rebuttal testimony or cross-examination.

1 included a list of the exhibits they intended to introduce, and a
2 list of witnesses they planned to call at trial.

3 Pursuant to the Evidence Order, Tovar and HPF each submitted
4 declarations; Tovar filed a declaration on his own behalf, and
5 HPF submitted the declaration of Benjamin Ganter ("Ganter"),
6 HPF's Director of Client Relations and a Managing Partner.⁴
7 Ganter's declaration was accompanied by two exhibits: a copy of
8 the Loan Application and a copy of the Note. Both parties filed
9 trial briefs. HPF also filed a supplemental exhibit list on
10 September 7, 2011, then filed an amended exhibit list ("Amended
11 Exhibit List")⁵ the next day so as to include a copy of an
12 allonge ("Allonge") to the Note.

13 In his declaration, Ganter stated that HPF purchased the
14

15 ⁴HPF also submitted the declaration of Mark Schuerman. The
16 admission of that declaration, however, is not presented for
17 review; Schuerman was not present at trial and thus, his
18 declaration was not admitted into evidence.

19 ⁵The Amended Exhibit List consisted of 13 exhibits:

- 20 1. Loan Application;
- 21 2. Note;
- 22 3. Deposition transcript;
- 23 4. Borrower's Certification & Authorization
24 ("Certification Form");
- 25 5. Deed of Trust;
- 26 6. Settlement Statement;
- 27 7. Occupancy Statement;
- 28 8. Amortization Schedule;
9. Latin Services Letter ("Latin Services Letter");
10. Tovar Landscape Design brochure ("Brochure");
11. Wells Fargo Bank Statements ("Bank Statements");
12. Letter of Employment: To Support Purpose of Refinance
("Letter in Support of Refinance");
13. Allonge.

1 Refinance Loan from RP Financial Services, LLC ("RP Financial"),
2 and that HPF was currently in possession of the Note as a result
3 of that purchase. Ganter further declared that through an
4 independent investigation, HPF discovered a number of material
5 misrepresentations on the Loan Application, including
6 misrepresentations related to Tovar's monthly income, his
7 employment, and his intent to live on the Property.

8 In its trial brief, HPF asserted that it was the current
9 owner and holder of the Note, and accordingly, could enforce the
10 Note and all claims for relief against Tovar. HPF further
11 asserted that the disputed elements under Section 523(a)(2)(A)
12 and (a)(2)(B) were established by the false statements Tovar made
13 in his Loan Application. These included that the Loan
14 Application listed Tovar's monthly income as \$11,000; that he
15 owned Tovar Landscape Design and was self-employed through the
16 company; and that he lived at the Property.

17 In his trial declaration, Tovar stated that he did not read
18 or understand English, and that a loan officer named Jannet
19 Medina translated and filled out the Loan Application on his
20 behalf, directing him where to sign. He also stated that he had
21 no knowledge as to the various documents that HPF asserted were
22 in his mortgage file.

23 Tovar's trial brief countered HPF's assertion of standing;
24 he argued that HPF had not shown that it was a "person entitled
25 to enforce" the Note pursuant to various provisions of the
26 California Commercial Code. He further argued that because he
27 was an uneducated man who did not read, write, or speak English,
28 it was impossible for him to ensure the accuracy of the

1 statements made in the Loan Application. Finally, he argued
2 that HPF could not establish the reasonable reliance required by
3 Section 523(a)(2)(B), as only WMC, the original lender, could
4 have relied on Tovar's Loan Application.

5 Tovar also submitted evidentiary objections to Ganter's
6 declaration, and HPF's Amended Exhibit List. He objected to
7 Ganter's declaration pursuant to Evidence Rules 401, 402, 602 and
8 701. Tovar also objected to HPF's exhibits pursuant to Evidence
9 Rules 901, 1002, 802, and Civil Rule 37.

10 At the bench trial, the bankruptcy court heard testimony
11 from both Ganter and Tovar. Ganter testified that HPF purchased
12 the Note from RP Financial at the beginning of 2009, as part of a
13 purchase of a pool of mortgage promissory notes. He stated that
14 at the time of the purchase, HPF was a relatively small company,
15 and he was a key employee; thus, he personally oversaw the
16 transaction relating to the Note. Ganter further testified
17 that HPF began investigating the Refinance Loan when it became
18 aware that Tovar had never actually lived on the Property. He
19 also stated that the Allonge was always attached to the Note
20 (both the Note and Allonge were produced at trial). Finally,
21 Ganter testified that HPF's claim for \$120,000 encompassed the
22 amount due under the Note, and did not include attorneys' fees or
23 other costs and expenses incurred in litigating the
24 nondischargeability claims.

25 On cross examination, Tovar testified that it was his
26 signature that appeared on the Loan Application, the Note, the
27 Certification Form, and the Deed of Trust. He further stated
28 that he never: lived at the Property; earned monthly income in

1 the amount of \$11,000; had a bank account at Wells Fargo Bank; or
2 owned his own business. Instead, Tovar testified that he
3 purchased the Property for his brother as his brother could not
4 finance a home on his own.

5 Following cross examination testimony, the bankruptcy court
6 overruled Tovar's evidentiary objections. In doing so, the
7 bankruptcy court stated:

8 I'm satisfied that these are the proper documents that
9 were in the file. So, I'm going to overrule the
10 objections. The question of discovery I'm not
11 concerned about that. As far as the allonge it's
12 pretty clear to me. I listened to the testimony. As
13 far as the issue of the transfer that there's no harm
14 on that. So, I'm going to admit the exhibits.

15 Trial Tr. 48:10-17, Nov. 9, 2011.

16 Following the conclusion of all testimony, the bankruptcy
17 court ruled in favor of HPF. It found that Tovar's testimony
18 lacked credibility, particularly in light of the other various
19 documents in Tovar's mortgage file, including the Occupancy
20 Statement and Latin Services Letter.⁶ The bankruptcy court
21 directed HPF to prepare a proposed judgment, and proposed
22 findings of fact and conclusions of law. After these were filed,
23 the court entered the judgment and findings of fact and
24 conclusions of law on December 21, 2011.

25 On December 7, 2011, Tovar filed the appeal presently before
26 the Panel.

27 ⁶The Latin Services Letter is an undated letter signed by a
28 woman (whose printed name is illegible) on behalf of Latin
Services, which states that she had prepared Tovar's individual
tax returns since 2004, and that he had been self-employed by
Tovar Landscaping Design during the two previous years.

1 **JURISDICTION**

2 The bankruptcy court had jurisdiction under 28 U.S.C.
3 §§ 1334 and 157(b)(2)(I). If the judgment is a final order, then
4 we have jurisdiction under 28 U.S.C. § 158(b).

5 The only question we see to the finality of the judgment on
6 appeal is that it only refers to the Section 523(a)(2)(B) claim,
7 notwithstanding that the complaint was brought pursuant to both
8 Section 523(a)(2)(A) and Section 523(a)(2)(B).

9 In response to a clerk’s order from this Panel requesting an
10 explanation as to why the judgment was final, Tovar filed a
11 written response in which he asserted that the elements of
12 Section 523(a)(2)(B) essentially encompassed the elements of
13 Section 523(a)(2)(A); and thus, the judgment was final. This, of
14 course, is wrong, as well as unhelpful.

15 Not relying solely on Tovar, a motions panel considered the
16 matter, and on May 25, 2012, entered an order deeming the
17 judgment to be a final disposition of the adversary proceeding.
18 The motions panel determined that judgment on one of two mutually
19 exclusive claims for relief renders the claim not addressed
20 denied, and that no further action was necessary. See McCrary v.
21 Barrack (In re Barrack), 217 B.R. 598, 605 (9th Cir. BAP 1998)
22 (“It is well established that [Section 523(a)(2)(A) and
23 523(a)(2)(B)] are mutually exclusive.”). Although we are not
24 bound by determinations made by the motions panel, see Couch v.
25 Telescope Inc., 611 F.3d 629, 632 (9th Cir. 2010), here, we agree
26 with them, and hold that the judgment is a final order.
27 Therefore, we have jurisdiction over this appeal.
28

1 **ISSUES⁷**

- 2 1. Whether HPF established its standing as a real party in
3 interest in relation to pursuing its nondischargeability
4 claims against Tovar?
- 5 2. Whether the bankruptcy court erred by overruling Tovar's
6 evidentiary objections with respect to the Allonge?
- 7 3. Whether the bankruptcy court erred by overruling Tovar's
8 evidentiary objections with respect to Ganter's declaration
9 and testimony?
- 10 4. Whether the bankruptcy court erred by finding that Tovar
11 obtained the Refinance Loan through fraud, and that the debt
12 was nondischargeable under Section 523(a)(2)(B)?

13 **STANDARDS OF REVIEW**

14 Standing is a legal issue that the Panel reviews de novo.
15 Veal v. Am. Home Mortg. Servicing, Inc. (In re Veal), 450 B.R.
16 897, 906 (9th Cir. BAP 2011).

17 The bankruptcy court's evidentiary rulings, such as
18 admission of testimony, are reviewed for abuse of discretion. See
19 Int'l Ass'n of Firefighters v. City of Vallejo (In re City of
20 Vallejo), 408 B.R. 280, 291-92 (9th Cir. BAP 2009). Moreover, an
21 erroneous evidentiary ruling will only be reversed if that error
22 was prejudicial. Id. at 292.

23 _____

24 ⁷In his Designation of Record, Tovar presented 33 enumerated
25 issues for review on appeal. Tovar, however, did not address a
26 majority of these issues in his opening brief. The Panel thus
27 declines to address any issues that Tovar did not fully argue in
28 his brief. See Padgett v. Wright, 587 F.3d 983, 986 n.2 (9th
Cir. 2009)(per curiam)(appellate courts "will not ordinarily
consider matters on appeal that are not specifically and
distinctly raised and argued in appellant's opening brief.").

1 Abuse of discretion is determined under a two-prong inquiry.
2 United States v. Hinkson, 585 F.3d 1247, 1261-62 (9th Cir. 2009)
3 (en banc). The Panel first determines de novo whether the
4 bankruptcy court applied the correct legal standard. See id. If
5 the bankruptcy court failed to do so, it necessarily abused its
6 discretion. See id. at 1262.

7 If, however, the bankruptcy court applied the correct legal
8 standard, the inquiry moves to the second prong and the Panel
9 examines whether the bankruptcy court's factual findings were
10 clearly erroneous. See id. at 1262. The bankruptcy court's
11 factual findings are clearly erroneous if they are "illogical,
12 implausible, or without support in inferences that may be drawn
13 from the record." See id. at 1263 (internal quotation marks
14 omitted).

15 As indicated above, factual issues, such as credibility and
16 the authenticity of documents, are reviewed under the clearly
17 erroneous standard. Rule 8013(a). Retz v. Samson (In re Retz),
18 606 F.3d 1189, 1196 (9th Cir. 2010) (citing Hinkson, 585 F.3d at
19 1261-62 & n.21). Under this standard, when there are two
20 permissible views of the evidence, the bankruptcy court's choice
21 between them cannot be clearly erroneous. Palmdale Hills Prop.,
22 LLC v. Lehman Commercial Paper, Inc. (In re Palmdale Hills Prop.,
23 LLC), 457 B.R. 29, 40 (9th Cir. BAP 2011) (citing Anderson v.
24 City of Bessemer City, N.C., 470 U.S. 564, 574 (1985)).

25 Many of the issues in this case - including whether a
26 creditor reasonably relied on a debtor's written statement, and
27 whether a debtor made that statement with intent to deceive -
28 are factual questions that are reviewed for clear error. Smith

1 v. Lachter (In re Smith), 242 B.R. 694 (9th Cir. BAP 1999); see
2 also Candland v. Ins. Co. of N. Am. (In re Candland), 90 F.3d
3 1466, 1469 (9th Cir. 1996).

4 DISCUSSION

5 **I. HPF Established its Standing as a Real Party in Interest to** 6 **Pursue its Nondischargeability Claims Against Tovar.**

7 Tovar challenges whether HPF established its standing as a
8 "real party in interest" pursuant to Civil Rule 17(a)(1). He
9 contends that HPF never provided proof that it was the current
10 holder of the Note, and thereby, that it was a "person entitled
11 to enforce" the note under California commercial law.

12 Standing is required in every federal case and determines
13 whether the court may entertain the proceeding. In re Veal,
14 450 B.R. at 906. Standing has both constitutional and prudential
15 dimensions. See Edwards v. Wells Fargo Bank, N.A. (In re
16 Edwards), 454 B.R. 100, 103 (9th Cir. BAP 2011). In turn,
17 prudential standing implicates the real party in interest
18 requirement under Civil Rule 17.⁸ In re Veal, 450 B.R. at 907.
19 A party requesting relief must establish that it is the real
20 party in interest under applicable substantive law. See id. at
21 907-08.

22 In mortgage cases involving a negotiable instrument secured
23 by real property, the substantive law is generally supplied by
24 the Uniform Commercial Code ("UCC"), as adopted or implemented by
25 state law. See id. at 908-10 (discussing Article 3 and Article 9
26 of the UCC). Under this construct, a party may establish its

27 ⁸Civil Rule 17 applies in bankruptcy proceedings through
28 Rules 7017 and 9014(c).

1 standing by showing it is the "person entitled to enforce" the
2 promissory note as that phrase is defined by UCC Article 3. See
3 id. When a person is not the original payee identified on the
4 note, the person establishes that it is a "person entitled to
5 enforce" the note by showing it is either a holder⁹ of the note,
6 or a nonholder in possession of the note with the rights of a
7 holder.¹⁰ See Cal. Com. Code § 3301.¹¹

8 Negotiation is defined as a "transfer of possession, whether
9 voluntary or involuntary, of an instrument by a person other than
10 the issuer to a person who thereby becomes its holder." Id.
11 § 3201(a). When the note is payable to an identified person,
12 "negotiation requires transfer of possession of the instrument
13 and its endorsement by the holder." See id. § 3201(b) (emphasis
14 added). An endorsement is "a signature . . . that alone or
15 accompanied by other words is made on an instrument for the
16 purpose of (1) negotiating the instrument" Id.
17 § 3204(a). Once a note is negotiated, the subsequent party
18 becomes a holder, and thereby, a person entitled to enforce the
19 note. See id. §§ 3201(a); 1201(b)(21); 3301.

20 It is undisputed here that WMC was the original payee on the
21

22 ⁹See Cal. Com. Code § 1201(b)(21) (defining "holder").

23 ¹⁰A person may also be a person entitled to enforce if they
24 are not in possession of the negotiable instrument but are
25 entitled to enforce pursuant to Cal. Com. Code §§ 3309 or
3418(d).

26 ¹¹Application and analysis under the California Commercial
27 Code is appropriate here given that the situs of the Property is
28 California and pursuant to the governing law provision in the
Deed of Trust.

1 Note. Because HPF was not the original payee, it had to show it
2 was a person entitled to enforce the Note, either as a "holder"
3 of the Note, or a "nonholder" in possession of the Note who has
4 the rights of a holder. See id. § 3301.

5 The court found that the evidence established that the Note
6 was properly negotiated by WMC to RP Financial. The last page of
7 the Note contains a stamp endorsing the Note to RP Financial.
8 There was no evidence presented that this was made for a purpose
9 other than endorsement. As such, this constituted a proper
10 endorsement to RP Financial. See id. § 3204(a). Ganter
11 testified that HPF took possession of the Note when it purchased
12 the Note from RP Financial, and thus, it is inferred
13 that transfer of possession occurred as RP Financial was not the
14 original holder. Therefore, the Note was properly negotiated to
15 RP Financial. See id. § 3201(b).

16 The inquiry thus moves to whether the Note was properly
17 negotiated or transferred from RP Financial to HPF. This, in
18 turn, requires examination of the validity of the Allonge, since
19 it is the paper that bears the signature of RP Financial
20 indicating a negotiation to HPF. Tovar argues that HPF failed to
21 show that the Allonge was affixed to the Note, as it must be to
22 effectuate a valid negotiation. Cal. Comm. Code § 3204(a) ("For
23 the purpose of determining whether a signature is made on an
24 instrument, a paper affixed to the instrument is a part of the
25 instrument."). He also continues to challenge the effect of the
26 Allonge as it was undated and unrecorded.

27 Contrary to Tovar's argument, there is nothing in the UCC or
28 the California Commercial Code requiring that an allonge be dated

1 or recorded with the county recorder. Tovar advances no
2 substantive argument or case law to support this proposition.
3 Nor, at least since the 1992 amendments to UCC Article 3, is it
4 relevant that there may be space on a promissory note for
5 additional endorsements. See Comment 1 to UCC § 3-204 ("An
6 indorsement on an allonge is valid even though there is
7 sufficient space on the instrument for an indorsement.").

8 Here, the Allonge attached to the Amended Exhibit List is a
9 single exhibit titled "Allonge to Promissory Note." The document
10 identifies Tovar, the Property and his loan number. There is
11 language stating "Without Recourse, Pay to the Order of: Heritage
12 Pacific Financial, LLC d/b/a/ Heritage Pacific Financial,"
13 followed by the signature of Richard A. Panter, on behalf of RP
14 Financial. If affixed to the Note, this information would be
15 sufficient to constitutes an endorsement from RP Financial to
16 HPF. See Cal. Com. Code § 3204(a).

17 According to Ganter's testimony at the trial, the Note and
18 Allonge were in HPF's possession since its purchase of the Note,
19 and in fact, were both produced at the trial during Ganter's
20 cross-examination. This infers that transfer of possession
21 occurred as HPF was not the prior holder of the Note.

22 Even so, in order for RP Financial to have properly
23 negotiated the Note to HPF through the Allonge, the Allonge must
24 have been affixed to the Note. See id. § 3204 ("For the purpose
25 of determining whether a signature is made on an instrument, a
26 paper affixed to the instrument is a part of the instrument.").
27 The record before us raises some questions as to this. The Note
28 attached to Ganter's declaration and HPF's Amended Exhibit List

1 contains two faint hole punch marks at the top of the document.
2 The Allonge attached to the Amended Exhibit List, however, does
3 not bear any indication of similar punch hole marks. There are
4 no other visible marks that are consistent between the copies of
5 the Note in the record and the Allonge.

6 Even slightly more perplexing, the copy of the Allonge
7 that Tovar included in his Excerpts of Record clearly bears
8 visible hole punch marks at the top of the document. This
9 seemingly appears to be consistent with the facial marks on the
10 copy of the Note. Tovar's copy of the Allonge, however, does not
11 contain ECF markings at the top of the document, which indicates
12 that it was not filed on the docket. In fact, Tovar's copy
13 appears to be different than HPF's copy of the Allonge attached
14 to the Amended Exhibit List. It is unclear where Tovar obtained
15 his copy of the Allonge.

16 While these issues may be debated, it is undisputed that
17 the Allonge was produced and examined by the bankruptcy court at
18 trial. Ganter testified that the Allonge was always affixed to
19 the Note. Tovar's counsel examined the Allonge, and did not
20 address any issues as to inconsistent facial marks between the
21 Note and Allonge; in fact, Tovar's counsel only inquired as to a
22 post-it note that was apparently affixed to the Allonge. Based
23 on the testimony and production of the Note and Allonge at trial,
24 it was reasonable to assume that the Allonge was affixed to the
25 Note. And that finding is implicit in the bankruptcy court's
26 ruling, which is entitled to stand unless clearly erroneous, as
27 it goes to identity or authenticity. See Rule 8013(a). On this
28 record, with various possible inferences, we cannot say the

1 bankruptcy court erred in picking one of the possible scenarios
2 and validating the Allonge. Anderson, 470 U.S. at 574; In re
3 Palmdale Hills Prop., LLC, 457 B.R. at 40.

4 For the reasons stated above, the bankruptcy court's finding
5 that the Note was properly negotiated from RP Financial to HPF
6 was not clearly erroneous. The bankruptcy court was thereby
7 entitled to treat HPF as the "holder" of the Note, and thus, the
8 "person entitled to enforce" the instrument. See Cal. Com. Code
9 §§ 3201(a); 1201(b)(21); 3301. In turn, this conferred the
10 status of real party in interest on HPF pursuant to In re Veal.
11 Therefore, HPF had standing to pursue its nondischargeability
12 action against Tovar.

13 **II. The bankruptcy court did not err in overruling Tovar's**
14 **evidentiary rulings.**

15 **A. The Allonge**

16 Tovar focuses a significant portion of his appeal on the
17 admission of the Allonge into evidence at trial. He contends
18 that the bankruptcy court erred by admitting the Allonge when HPF
19 failed to properly authenticate or satisfy the best evidence rule
20 under the Federal Rules of Evidence. Tovar also contends that
21 the bankruptcy court erred by admitting the Allonge when HPF
22 failed to produce the document pursuant to the Evidence Order, or
23 during the discovery period.

24 **1. Best Evidence Rule - Evidence Rule 1002**

25 Evidence Rule 1002 provides that "[a]n original writing,
26 recording, or photograph is required in order to prove its
27 content unless these rules or a federal statute provides
28 otherwise." A copy is admissible to the same extent as an

1 original "unless a genuine question is raised about the
2 original's authenticity or the circumstances make it unfair to
3 admit the duplicate." Fed. R. Evid. 1003.

4 Tovar argues that HPF failed to prove that the Allonge was
5 affixed to the Note, particularly when the Note was originally
6 executed in 2006; thus, without a "certified copy of the
7 original, in its complete form," the Allonge was inadmissible to
8 show that HPF owned the Note. Appellant's Opening Brief ("Op.
9 Br.") at 12.

10 The bankruptcy court admitted the Allonge into evidence
11 following Ganter's testimony. Contrary to Tovar's arguments, the
12 Best Evidence Rule does not require that HPF have submitted a
13 certified or dated copy of the Allonge. The Allonge was produced
14 at trial, subject to inspection, and Ganter was available for
15 questioning. Although the bankruptcy court did not explicitly
16 state the basis for doing so, all of the elements were present to
17 allow admission of the Allonge, and Tovar's misplaced and
18 irrelevant best evidence objection was not a bar to admitting the
19 Allonge.

20 2. Authentication - Evidence Rule 901

21 Evidence Rule 901 provides that a "proponent must produce
22 evidence sufficient to support a finding that the item is what
23 the proponent claims it is." Fed. R. Evid. 901(a). A witness
24 with knowledge of the item can authenticate it by testifying that
25 the "item is what it is claimed to be." Fed. R. Evid. 901(b)(1).
26 The proponent of the evidence "need make only a prima facie
27 showing of authenticity." See United States v. Iribe, 564 F.3d
28 1155, 1159 (9th Cir. 2009) (internal citation and quotation marks

1 omitted).

2 Tovar argues that "unrecorded documents, which are required
3 to be recorded, fail to satisfy the authentication requirements
4 of [Evidence Rule] 901 or the self-authenticating provisions of
5 [Evidence Rule] 902." Op. Br. at 13. Once again, he argues that
6 without a "certified copy of the original, in its complete form,"
7 the Allonge was inadmissible to show that HPF owned the Note.
8 Id. at 14.

9 This is simply not the law. Indeed, under state substantive
10 law related to negotiable instruments, a note's "signature[s are]
11 presumed to be authentic and authorized" without the need for
12 certifications of signatures. Cal. Comm. Code § 3308(a); see
13 also Comment 1 to UCC § 3-308. As previously stated, the
14 bankruptcy court admitted the Allonge into evidence following
15 Ganter's testimony. Ganter testified that the Allonge had always
16 been affixed to the Note. Moreover, he testified that HPF was a
17 relatively small company at the time that it purchased the Note,
18 and he was a key employee; thus, he personally oversaw the
19 transaction relating to the Note. As such, Ganter sufficiently
20 testified that the document was what HPF claimed it was - an
21 allonge to the Note executed by Tovar.

22 Contrary to Tovar's arguments, Evidence Rule 901 does not
23 require that HPF have submitted a certified or dated copy of the
24 Allonge. Although the bankruptcy court did not explicitly state
25 the basis for doing so, the record supports that the Allonge was
26 properly admitted pursuant to Evidence Rule 901.

27

28

1 3. Untimely Submission

2 Tovar next argues that the bankruptcy court erred by
3 admitting the Allonge into evidence when HPF submitted the
4 exhibit one day after the deadline established by the court.

5 It is unclear from the record whether the bankruptcy court
6 required that the exhibits be filed on the docket, and if so,
7 whether it imposed a deadline to do so. Local Bankruptcy
8 Rule¹² 7016 states that a joint pre-trial order must include an
9 attached list of exhibits that each party intends to offer at
10 trial. See LBR 7016(b)(2)(D) (C.D. Cal). This rule, however,
11 does not require that the parties file their actual exhibits on
12 the docket.¹³

13 Tovar and HPF each listed their exhibits in the Pre-Trial
14 Order entered by the bankruptcy court on August 3, 2011. It
15 appears that HPF supplemented its exhibit list on September 7,
16 2011, and then filed its Amended Exhibit List the following day
17 on September 8, 2011. The Evidence Order established deadlines
18 for HPF and Tovar to submit their declarations, optional trial
19 briefs, or optional evidentiary objections to the bankruptcy
20 court in advance of trial. In terms of other evidence, the
21 Evidence Order further provided that “[t]he only additional
22 evidence a party may offer at trial is true rebuttal evidence.”
23 EOR, Ex. 9 ¶ 2(e).

24
25 ¹²This is in reference to the Local Bankruptcy Rules for the
26 United States Bankruptcy Court for the Central District of
California.

27 ¹³In fact, we observe that Tovar did not file his exhibits
28 on the docket.

1 Even assuming that the Pre-Trial Order or Evidence Order
2 established some sort of deadline to identify or file exhibits,
3 the bankruptcy court generally has discretion during discovery to
4 admit evidence if there is no prejudice to the other party.
5 Although Tovar argues that the Allonge was submitted past the
6 "deadline," HPF amended its exhibit list just one day after its
7 declarations were due pursuant to the Evidence Order. Given that
8 Tovar still had over one month to submit evidentiary objections,
9 and that Tovar actually did so, it does not appear that he
10 suffered any prejudice. Accordingly, the record supports that
11 the court properly admitted the Allonge despite Tovar's objection
12 based on HPF's purported untimeliness.

13 4. Civil Rule 37

14 In relevant part, Civil Rule 37(d) provides that a court may
15 issue appropriate sanctions where a party fails to serve its
16 answers, objections, or written responses to interrogatories
17 under Civil Rule 33, or to requests for production under Civil
18 Rule 34. Fed. R. Civ. P. 37(d)(A)(ii).

19 Tovar argues that the bankruptcy court erred by admitting
20 the Allonge under Civil Rule 37 when HPF failed to produce the
21 Allonge despite Tovar's discovery requests. Admittedly, HPF
22 initiated the nondischargeability action in November 2010; yet,
23 the record reflects that the Allonge was first identified as an
24 exhibit in September 2011, just two months prior to trial. It
25 appears that none of HPF's pleadings or other documents include
26 or refer to the Allonge prior to filing the Amended Exhibit List.

27 Even so, HPF responded to Tovar's interrogatories and
28 requests for production. This is not a situation where HPF

1 refused to provide any documents prior to trial. See Advisory
2 Committee's Notes to Fed. R. Civ. P. 37(d)(1970) (Civil Rule
3 37(d) is concerned with "total noncompliance . . . [that] may
4 impose severe inconvenience or hardship on the discovering party
5 and substantially delay the discovery process.") (emphasis
6 added). Tovar still filed his evidentiary objections within the
7 deadline established in the Evidence Order.

8 Moreover, Tovar initially raised this issue in his
9 evidentiary objections to HPF's exhibits; he did not
10 independently move for sanctions under Civil Rule 37(d), nor move
11 to exclude the Allonge under Civil Rule 37(c). Although HPF
12 should have identified the Allonge as an exhibit sooner than two
13 months prior to trial, the record supports the bankruptcy court's
14 ruling.

15 In conclusion, the bankruptcy court did not abuse its
16 discretion on its evidentiary rulings as to the Allonge.

17 **B. Ganter's Declaration and Trial Testimony - Evidence**
18 **Rule 602**

19 Tovar next argues that the bankruptcy court erred by
20 admitting Ganter's declaration and testimony at trial when Ganter
21 lacked personal knowledge with respect to the Note and its
22 transfer. He asserts that whether the Note was transferred, and
23 the effect of any such transfer, is a conclusion of law that
24 Ganter lacked knowledge to testify as to. Evidence Rule 602
25 provides that "[a] witness may testify to a matter only if
26 evidence is introduced sufficient to support a finding that the
27 witness has personal knowledge of the matter."

28 Ganter testified at the trial that the Refinance Loan was

1 purchased by HPF in 2009. At that time, HPF consisted of nine or
2 ten employees, and Ganter was then a key employee who was
3 personally involved with HPF's transactions and purchases of
4 secondary mortgages such as the Refinance Loan. The bankruptcy
5 court was well within its discretion in finding that this
6 testimony established sufficient personal knowledge as to HPF's
7 purchase of the Note.

8 **C. Relevance of Exhibits - Evidence Rules 401 and 402**

9 Tovar finally argues that the bankruptcy court erred by
10 admitting HPF's 13 exhibits pursuant to Evidence Rules 401 and
11 402. He asserts that extrinsic evidence is inadmissible under
12 the Federal Rules of Evidence to determine an action, that HPF
13 failed to cite to any exhibits in its trial brief, and thus, it
14 failed to demonstrate the probative value of the exhibits. He
15 concludes that the bankruptcy court should have excluded all of
16 HPF's exhibits based on the lack of probative value or relevancy.

17 Tovar, however, did not make these evidentiary objections
18 before the bankruptcy court. Instead, he perfunctorily attempts
19 to advance these arguments for the first time on appeal. To the
20 extent that he lodged such objections against Tovar's declaration
21 and testimony before the bankruptcy court, Tovar does not make
22 any substantive arguments on that issue in his brief. Therefore,
23 the Panel declines to address this issue. See Padgett, 587 F.3d
24 at 986 n.2 (appellate courts "will not ordinarily consider
25 matters on appeal that are not specifically and distinctly raised
26 and argued in appellant's opening brief.").

1 **III. The bankruptcy court did not err in determining that the**
2 **Refinance Loan was Nondischargeable Pursuant to 11 U.S.C.**
3 **§ 523(a)(2)(B).**

4 Lastly, Tovar argues that the bankruptcy court erred by
5 finding that he committed fraud when he applied for and obtained
6 the Refinance Loan, and that this fraud gave rise to a
7 nondischargeable debt within the meaning of Section 523(a)(2)(B).

8 In relevant part, Section 523(a)(2)(B) provides that a debt
9 is nondischargeable if the debtor obtained "money, property,
10 services, or an extension, renewal, or refinancing of credit" by
11 using a statement in writing-

- 12 (I) that is materially false;
- 13 (ii) respecting the debtor's or an insider's financial
14 condition;
- 15 (iii) on which the creditor to whom the debtor is liable
16 for such money, property, services, or credit
17 reasonably relied; and
- 18 (iv) that the debtor caused to be made or published with
19 intent to deceive

20 11 U.S.C. § 523(a)(2)(B).

21 The first two elements were not contested at trial, and are
22 not contested on appeal. That is, we take as given that the
23 documents at issue were materially false, and were made with
24 respect to Tovar's financial condition.

25 Tovar maintains that the bankruptcy court erred in finding
26 that HPF satisfied the last two elements of Section 523(a)(2)(B);
27 namely, that Tovar acted with the requisite intent to deceive the
28 original lender, and that HPF satisfied the reasonable reliance
29 requirement. These arguments are addressed in reverse order.

30 **A. Reasonable Reliance**

31 For the purposes of Section 523(a)(2)(B)(iii), a creditor/
32 assignee is not required to independently establish its own

1 reasonable reliance. See New Falls Corp. v. Boyajian (In re
2 Boyajian), 367 B.R. 138, 141-44 (9th Cir. BAP 2007), aff'd,
3 564 F.3d 1088 (9th Cir. 2009). Rather, the creditor need only
4 establish reasonable reliance by the original lender who extended
5 credit to the debtor. See id. at 145-46. Accordingly, the only
6 party's reliance at issue here is that of WMC, the original
7 lender.

8 Tovar first argues that information as to WMC's lending
9 practices was necessary to determine whether WMC relied on the
10 Loan Application. He contends that despite his discovery
11 requests for this information, HPF failed to produce any of this
12 information, including whether WMC adhered to those practices on
13 Tovar's application. HPF counters that the Loan Application is
14 in and of itself sufficient to establish WMC's reasonable
15 reliance, as it represented Tovar's financial and employment
16 information when WMC approved and disbursed the Refinance Loan.

17 "Reasonable reliance" is not defined by the Code, but is
18 analyzed under a "prudent person" test, which "courts can apply
19 without additional help." Cashco Fin. Servs., Inc. v. McGee
20 (In re McGee), 359 B.R. 764, 774 (9th Cir. BAP 2006) (internal
21 citations omitted). While a creditor cannot claim reliance on
22 representations that are obviously false, "minor clues of falsity
23 in financial statements that on the whole have the appearance of
24 being very complete and reliable . . ." do not negate reasonable
25 reliance. Gosney v. Law (In re Gosney), 205 B.R. 418, 421 (9th
26 Cir. BAP 1996); Gertsch v. Johnson & Johnson, Fin. Corp. (In re
27 Gertsch), 237 B.R. 160, 170 (9th Cir. BAP 1999). "[W]hen there
28 is evidence of materially fraudulent statements, little

1 investigation is required for a creditor to have reasonably
2 relied on the representations." In re Gertsch, 237 B.R. at 170
3 (citing In re Gosney, 205 B.R. at 421). This determination is
4 made on a case-by-case basis, based on the totality of the
5 circumstances. In re McGee, 359 B.R. at 774.

6 Here, in rendering its decision, the bankruptcy court did
7 not explicitly state its findings as to reasonable reliance.
8 During Tovar's closing argument at trial, however, the bankruptcy
9 court referred to various loan documents with respect to the
10 element of reliance. Specifically, Tovar's counsel stated:

11 WMC's standard of reliance would have been to verify
12 the information that was being provided on the stated
13 income loan. There's been no evidence produced showing
14 that WMC took any of those steps to confirm the
15 information.

16 To which the bankruptcy court responded:

17 What about the additional documents that were done
18 about three weeks later? They're in the file. That is
19 the statement, the bank statement, the statement as to
20 residency, the -- let's see there were four of them.
21 There was the occupancy statement. There's the bank
22 statement. There's the Latin services statement, and
23 then there's that landscaping brochure.

24 [Trial Tr. 58:12-23.]

25 We also observe that the record contains a Certification
26 Form, which Tovar signed on November 15, 2006. In this document,
27 Tovar certified that he applied for a mortgage loan from WMC; and
28 that by applying for the loan, he "completed a loan application
containing various information on the purpose of the loan, the
amount and source of the down payments, employment and income
information, and assets and liabilities." Pl.'s Ex. 11 at 193.
Tovar also certified that he understood and agreed that WMC
reserved the right to change the mortgage loan review process to

1 a full documentation program," including "verifying the
2 information provided on the application with the employer and/or
3 financial institution." Id.

4 Contrary to Tovar's arguments, a creditor's actual
5 verification of information is not an explicit requirement as to
6 reasonable reliance. See In re Smith, 242 B.R. at 702 ("[W]hen
7 there is evidence of materially fraudulent statements, little
8 investigation is required for a creditor to have reasonably
9 relied on the representations."). Nothing in the record suggests
10 that WMC did not adhere to normal business practices, or that
11 Tovar's misrepresentations were blatantly apparent in the Loan
12 Application. Based on the totality of the circumstances, the
13 record supports the bankruptcy court's inference of reasonable
14 reliance on the Loan Application and other documents in the
15 record.

16 **B. Intent to Deceive**

17 Tovar next argues that the bankruptcy court erred in finding
18 that he satisfied the requisite intent to deceive WMC (and
19 subsequently HPF) when he applied for and obtained the Refinance
20 Loan.

21 For the purposes of Section 523(a)(2)(B), intent is
22 "established by showing either actual knowledge of the falsity of
23 a statement, or reckless disregard for its truth" In re
24 Gertsch, 237 B.R. at 167.

25 The bankruptcy court did not find Tovar's testimony
26 credible. It specifically noted that in order to make Tovar's
27 account plausible, it would have to find that WMC essentially
28 fabricated various documents in Tovar's mortgage file - including

1 a brochure for a business that Tovar said existed on his Loan
2 Application but which was fictitious:

3 I mean that portion of it weighs heavily in my mind
4 that it would have been an extraordinary event
5 happening at the lender to prepare to go through and
6 prepare a brochure for Tovar Landscape Design, to
7 prepare all that. I just can't believe that that
8 actually happened.

9 [Trial Tr. 64:12-23.]

10 The court further noted:

11 Mr. Tovar added a dimension here to not only saying he
12 was going to live in there, it was clear this loan
13 would never have been made had they known. That's a
14 pretty basic thing for the very reason if you have no
15 interest in it yourself or not living there, you're
16 less likely to perform.

17 [Trial Tr. 65: 4-9.]

18 The bankruptcy court thus found that Tovar submitted the
19 Loan Application with the requisite intent to deceive based on a
20 number of factors: that Tovar Landscape Design never existed;
21 that Tovar's monthly stated income was never \$11,000; and that
22 Tovar never intended to live on the Property. The court further
23 determined that other documents in Tovar's loan file, such as the
24 Latin Services Letter and Brochure, similarly demonstrated
25 Tovar's intent to deceive.

26 We are unpersuaded by Tovar's contention that he was not
27 aware of the misrepresentations stated in the Loan Application,
28 or the other documents submitted or contained in his mortgage
file. To the extent that there is any validity to his
allegations, Tovar nonetheless executed various legal documents
and certified that the information made therein was correct and
true. This is no different than signing and submitting a

1 bankruptcy petition under the penalty of perjury, regardless of
2 whether the debtor is an individual with limited English
3 proficiency. Ultimately, the person signing a document bears the
4 legal responsibility as to the statements made therein.

5 Based on this record, the bankruptcy court did not err in
6 finding that Tovar made written statements with the intent to
7 deceive. We therefore conclude that the bankruptcy court did not
8 err in determining that HPF's claim was nondischargeable under
9 Section 523(a)(2)(B).

10 **CONCLUSION**

11 For the reasons set forth above, the judgment of the
12 bankruptcy court is AFFIRMED.