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

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

In re: ) BAP No. CC-07-1467-KBmd  
 )  
 6 ALAN DOLCH; JERUND DOLCH, ) Bk. No. LA 05-40150-EC  
 )  
 7 Debtors. )  
 )  
 8 AMERICAN EXPRESS TRAVEL RELATED )  
 SERVICES COMPANY, INC.; MBNA )  
 9 AMERICA (DELAWARE), N.A., )  
 )  
 10 Appellants, )  
 )  
 11 v. ) **MEMORANDUM\***  
 )  
 12 JOHN MENCHACA, Chapter 7 )  
 Trustee; ALAN DOLCH; JERUND )  
 13 DOLCH; UNITED STATES TRUSTEE, )  
 )  
 14 Appellees. )  
 )

Argued and Submitted on March 19, 2008  
at Pasadena, California

Filed - April 17, 2008

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

Honorable Ellen A. Carroll, Bankruptcy Judge, Presiding

Before: KLEIN, BRANDT,\*\* and MACDONALD,\*\*\* 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.

\*\*Hon. Philip H. Brandt, U.S. Bankruptcy Judge for the  
Western District of Washington, sitting by designation.

\*\*\*Hon. Donald MacDonald, Chief U.S. Bankruptcy Judge for the  
District of Alaska, sitting by designation.

1 Two creditors appeal an order sustaining the chapter 7  
2 trustee's objections to claims totaling \$387,959.01 premised on  
3 the individual debtors' liability for credit card debts on  
4 corporate accounts. The debtors were officers, directors, and 40  
5 percent shareholders of the corporation.

6 Without stating its findings of fact and conclusions of law  
7 either on the record or in writing, the bankruptcy court  
8 concluded that the appellants did not provide sufficient  
9 documentation to prove personal liability of the debtors or of  
10 the estate for the corporate expense.

11 Nor did the bankruptcy court conduct the evidentiary hearing  
12 with witnesses available for direct and cross-examination on the  
13 disputed material factual issues, as required by Federal Rule of  
14 Bankruptcy Procedure 9014(d).

15 The result is that we are left with a record that does not  
16 permit appropriate appellate review of an important question.  
17 Hence, we VACATE and REMAND to the bankruptcy court for, at a  
18 minimum, explicit findings of fact and conclusions of law and the  
19 evidentiary basis for such rulings. The bankruptcy court may  
20 elect to conduct further proceedings in light of Rule 9014(d).

21  
22 FACTS

23 Appellees Alan and Jerund Dolch are joint debtors in a  
24 chapter 7 case filed on October 14, 2005, in which appellee John  
25 J. Menchaca is the chapter 7 trustee.

26 According to the debtors' Schedule B and Statement of  
27 Financial Affairs, they were officers, directors and 40 percent  
28 shareholders of MC2 Custom Alloys, Inc., a California

1 corporation.<sup>1</sup> The corporation is insolvent.

2 In dispute are three general unsecured proofs of claim.  
3 American Express' Claim Nos. 6 (\$169,909.27) and 7 (\$197,386.87)  
4 and MBNA's Claim No. 16 (\$20,662.87). All of these proofs of  
5 claim were timely filed by the same law firm.

6 The trustee objected to Claim Nos. 6, 7, and 16, on July 3,  
7 2007, as part of an omnibus objection to eight claims.<sup>2</sup> The  
8 objections to Claim Nos. 6, 7, and 16 were on grounds that the  
9 claims lacked sufficient documentation which would give rise to  
10 liability on the part of the debtors or the estate for the debts.

11 Hearing on the trustee's objections to the American Express  
12 claims and the MBNA claim occurred on August 29, 2007, in which  
13 the court continued the hearing until October 31, 2007, to  
14 provide additional time for the appellants to present the court  
15 with further evidence to prove that the debtors were liable for  
16 the corporate expenses.<sup>3</sup>

17 At the continued hearing, the court sustained the trustee's  
18 objections to the American Express claims and the MBNA claim,  
19 apparently because of the insufficiency of evidence provided by  
20 appellants. The court, however, neither actually conducted an  
21 evidentiary hearing in compliance with Rules 9014(d) and (e), nor

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22  
23 <sup>1</sup>Other principals of the corporation are apparently being  
pursued as putative guarantors of the corporation's debt.

24 <sup>2</sup>Such an omnibus objection to claim is now generally not  
25 permitted by Federal Rule of Bankruptcy Procedure 3007, as  
26 amended effective December 1, 2007.

27 <sup>3</sup>Four of the other five claims (Claim Nos. 2, 3, 15, and 17)  
28 in the omnibus objection were resolved by order entered on  
September 7, 2007. The trustee withdrew the objection to Claim  
No. 14 on September 4, 2007.

1 made findings of fact and conclusions of law in compliance with  
2 Civil Rule 52. Fed. R. Civ. P. 52(a), incorporated by Fed. R.  
3 Bankr. P. 7052 & 9014.

4 The order disallowing Claim Nos. 6, 7, and 16 in their  
5 entirety was entered on November 9, 2007.

6 This timely appeal ensued.

#### 8 JURISDICTION

9 The bankruptcy court had jurisdiction via 28 U.S.C. § 1334  
10 over this core proceeding under 28 U.S.C. § 157(b)(2)(B). We  
11 have jurisdiction under 28 U.S.C. § 158(a)(1).

#### 13 ISSUE

14 Whether the bankruptcy court erred in sustaining the  
15 trustee's objection to the appellants' filed proofs of claim  
16 without conducting an evidentiary hearing to resolve contested  
17 material facts and without stating findings of fact or  
18 conclusions of law.

#### 20 STANDARD OF REVIEW

21 We review findings of fact for clear error and issues of law  
22 de novo. Hoopai v. Countrywide Home Loans, Inc. (In re Hoopai),  
23 369 B.R. 506, 509 (9th Cir. BAP 2007).

#### 25 DISCUSSION

26 This appeal presents potentially important questions  
27 regarding evidence in support of proofs of claim in the context  
28 of transactions that are conducted electronically. It presents

1 variations on the theme that we addressed in our so-called  
2 Vinhnee decision where the issue related to introducing account  
3 statements in evidence. Am. Express Travel Related Servs. Co. v.  
4 Vinhnee (In re Vinhnee), 336 B.R. 437 (9th Cir. BAP 2005). Here,  
5 the issue relates to the manner of proving the existence and  
6 terms of underlying contracts, the outcome of which involves  
7 fundamental assumptions underlying electronic commerce.

8 We are presented with a record, however, that does not  
9 permit meaningful review of such an important question. The  
10 basic problem is that the bankruptcy court did not employ the  
11 requisite procedure for hearing the dispute, considering  
12 testimonial and documentary evidence admitted pursuant to the  
13 Federal Rules of Evidence, and making findings of fact and  
14 conclusions of law. While we have done our best to attempt to  
15 resolve the appeal on the merits, we would have to make so many  
16 assumptions about facts and procedures that we could not do so in  
17 good conscience on such an important question.

18  
19 I

20 An objection to a claim is a "contested matter" governed by  
21 Federal Rule of Bankruptcy Procedure 9014. Litton Loan Serv'g,  
22 LP v. Garvida (In re Garvida), 347 B.R. 697, 704 (9th Cir. BAP  
23 2006); see Advisory Committee Note to Fed. R. Bankr. P. 3007.

24 Under Rule 9014(d), "[t]estimony of witnesses with respect  
25 to disputed material factual issues shall be taken in the same  
26 manner as testimony in an adversary proceeding." Fed. R. Bankr.  
27 P. 9014(d).

1 Rule 9014(d) was adopted in 2002 to stop a practice by which  
2 some courts required that Rule 9014 contested matters be resolved  
3 based on affidavits, as is permitted with respect to motions by  
4 virtue of Federal Rule of Civil Procedure 43(e). The Advisory  
5 Committee Note is explicit on the point:

6 Subdivision (d) is added to clarify that if the motion  
7 cannot be decided without resolving a disputed material  
8 issue of fact, an evidentiary hearing must be held at which  
9 testimony of witnesses is taken in the same manner as  
10 testimony is taken in an adversary proceeding or at a trial  
11 in a district court civil case. Rule 43(a), rather than  
12 Rule 43(e), F.R. Civ. P. would govern the evidentiary  
13 hearing on the factual dispute. Under Rule 9017, the  
14 Federal Rules of Evidence also apply in a contested matter.  
15 Nothing in the rule prohibits a court from resolving any  
16 matter that is submitted on affidavits by agreement of the  
17 parties.

18 Fed. R. Bankr. P. 9014(d), Advisory Committee Note.

19 There plainly were disputed material issues of fact. Nor  
20 does it appear that the parties agreed that the matter could be  
21 submitted on affidavits. The transcripts, rather, support the  
22 proposition that the parties were required by the court to  
23 present affidavits. Moreover, there is no indication in the  
24 record that the court complied with the requirement under Rule  
25 9014(e) that there be procedures "that enable the parties to  
26 ascertain at a reasonable time before any scheduled hearing  
27 whether the hearing will be an evidentiary hearing at which  
28 witnesses may testify." Fed. R. Bankr. P. 9014(e).

Even if we inferred that the parties' conduct at the  
hearings indicated that they de facto consented to the  
proceedings as if stipulating to admission of the affidavits  
without cross-examination, we are reluctant to overlook the  
procedural error, especially in light of the absence of

1 evidentiary rulings and findings of fact and conclusions of law.

3 II

4 Rule 9014 incorporates the provisions of Federal Rule of  
5 Civil Procedure 52, which require that findings and conclusions  
6 be stated on the record after the close of the evidence or to  
7 appear in an opinion or memorandum of decision filed by the  
8 court. Specifically, in an action tried on the facts without a  
9 jury, "the court must find the facts specially and state its  
10 conclusions of law separately." Fed. R. Civ. P. 52(a)(1),  
11 incorporated by Fed. R. Bankr. P. 7052.

12 These findings must be sufficient to indicate the factual  
13 basis for the court's ultimate conclusion. Unt v. Aerospace  
14 Corp., 765 F.2d 1440, 1444 (9th Cir. 1985).

15 The Supreme Court has explained that without "statements of  
16 the preliminary and basic facts" on which the trial court relied,  
17 "their findings are useless for appellate purposes." Dalehite  
18 v. United States, 346 U.S. 15, 24 n.8 (1953); Mattel, Inc. v.  
19 Walking Mountain Prods., 353 F.3d 792, 815 (9th Cir. 2003).

20 The findings must be explicit enough to give the appellate  
21 court a clear understanding of the basis of the trial court's  
22 decision, and to enable it to determine the ground on which the  
23 trial court reached its decision. Mattel, Inc., 353 F.3d at 815;  
24 Unt, 765 F.2d at 1444.

25 Effective review should not depend upon the intuition of the  
26 appellate judges or their ability to divine the critical facts or  
27 the trial court's reasons for its judgment. Williams v. Levi (In  
28 re Williams), 323 B.R. 691, 700 (9th Cir. BAP 2005).

1 It is difficult to review the bankruptcy court's ruling in  
2 this instance because there are no detailed findings of fact or  
3 conclusions of law, either on the record or in a separate opinion  
4 or memorandum decision.

5 With respect to American Express Claim Nos. 6 and 7, the  
6 court's complete findings and conclusion regarding Claim Nos. 6  
7 and 7 are as follows:

8 THE COURT: I'm going to sustain these two  
9 objections as well. I just think there hasn't been  
10 adequate documentation to show that these individuals  
11 who may have been officers of the corporate entity are  
12 personally liable on these corporate credit card  
13 accounts, and I also find the -- the newer arguments  
14 relating to Section 1624 of the Civil Code [Statute of  
15 Frauds] to be not persuasive.

16 Hr'g Tr. at 3:12-18 (Oct. 31, 2007).

17 As to MBNA Claim No. 16, the bankruptcy court made no  
18 findings of fact and summarily concluded, "I'm going to sustain  
19 the objection to this claim," after listening to appellant's  
20 argument regarding legibility of the account application. Hr'g  
21 Tr. at 2:10-11 (Oct. 31, 2007).

22 These findings are inadequate to support a conclusion that  
23 the trustee's objections to \$387,959.01 in claims should be  
24 sustained. Findings of fact and conclusions of law are essential  
25 to appellate review of the order sustaining these objections. We  
26 cannot divine the critical facts or the trial court's reasons for  
27 its judgment. Williams, 323 B.R. at 700.

28 Moreover, as indicated, this case is too complex and too  
important to be decided without the benefit of focused findings  
of fact and conclusions of law by the trial judge.



