

OCT 16 2008

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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NOT FOR PUBLICATION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. NC-08-1092-DJUT
	)	
SHAHAB EDDIN FOTOUHI,	)	
	)	Bk. No. 05-44839-RN7
Debtor.	)	
<hr/>		
SHAHAB EDDIN FOTOUHI,	)	
	)	
Appellant,	)	
	)	
v.	)	<b>M E M O R A N D U M</b> <sup>1</sup>
	)	
PHILLIPS, SPALLAS & ANGSTADT,	)	
LLP; ROBERT K. PHILLIPS; and	)	
GREGORY L. SPALLAS,	)	
	)	
Appellees.	)	
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Argued and Submitted on September 17, 2008  
at San Francisco, California

Filed - October 16, 2008

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

Honorable Randall J. Newsome, Chief Bankruptcy Judge, Presiding

Before: DUNN, JURY and TAYLOR,<sup>2</sup> Bankruptcy Judges.

<sup>1</sup>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.

<sup>2</sup>Hon. Laura S. Taylor, U.S. Bankruptcy Judge for the Southern District of California, sitting by designation.

1 Debtor's former law partners, individually and on behalf of  
2 the partnership, obtained a \$2.4 million arbitration award  
3 against debtor based on debtor's breach of the partnership  
4 agreement. After debtor sought bankruptcy protection, the  
5 appellees filed a timely complaint ("Complaint") seeking denial  
6 of debtor's discharge pursuant to 11 U.S.C. § 727(a)(4)(A),<sup>3</sup>  
7 asserting that the debtor had knowingly and fraudulently  
8 scheduled his interest in his new law partnership as having no  
9 value. More than one year after it was filed, the bankruptcy  
10 court authorized amendment of the Complaint. Three further  
11 amendments to the Complaint were made prior to a four-day trial,  
12 one over debtor's objection and two with debtor's stipulation.  
13 After trial, but before the bankruptcy court issued its decision  
14 on the merits, the debtor moved to amend his answer and for  
15 judgment on the pleadings on the basis that the amendments to the  
16 Complaint were untimely under Rules 4004(a) and (b) and  
17 9006(b)(3). The bankruptcy court denied the motions. Debtor  
18 appealed the denial of the motions as well as the ultimate  
19 judgment ("Judgment") which denied his discharge. We AFFIRM all  
20 issues on appeal.

21 //

22 //

23 //

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24  
25 <sup>3</sup>Unless otherwise indicated, all chapter and section  
26 references are to the Bankruptcy Code, §§ 101-1330, as enacted  
27 and promulgated prior to October 17, 2005, the effective date of  
28 most of the provisions of the Bankruptcy Abuse Prevention and  
Consumer Protection Act of 2005, Pub. L. 109-8, 119 Stat. 23, and  
all rule references are to the Federal Rules of Bankruptcy  
Procedure.

1 **I. FACTS**

2 A. The Underlying Dispute

3 Beginning in 1996, the debtor, Shahab Fotouhi ("Fotouhi"),  
4 was a named partner in Phillips, Spallas & Fotouhi, LLP (the  
5 "Partnership"), a law firm which specialized in insurance defense  
6 work in construction cases. On April 1, 2004, Fotouhi withdrew  
7 from the Partnership, taking with him both major clients and  
8 employees of the Partnership. This failed business relationship,  
9 and Fotouhi's subsequent actions to avoid responsibility to the  
10 Partnership for his withdrawal, created the issues before this  
11 panel on appeal.

12 Soon after leaving the Partnership, Fotouhi demanded from  
13 the Partnership a complete accounting of its finances, Fotouhi's  
14 alleged share in certain Lake Tahoe properties owned by the  
15 Partnership, and indemnification and costs of defense in a  
16 lawsuit pending against Fotouhi. Most significantly for purposes  
17 of subsequent litigation in bankruptcy, Fotouhi demanded a buyout  
18 of his partnership interest, specifying that the buyout must take  
19 into account outstanding accounts receivable and work in  
20 progress.

21 In response to these demands, the Partnership filed a  
22 petition to arbitrate. In the escalating dispute, Fotouhi filed  
23 a lawsuit in San Francisco Superior Court, which referred the  
24 matter to arbitration. Arbitration in the matter took place in  
25 March 2005.

26 On May 17, 2005, the arbitrators determined that Fotouhi had  
27 breached his agreement with the Partnership and liquidated the  
28 damages suffered by the Partnership as a result of Fotouhi's

1 breach. The arbitrators entered an award against Fotohoui and in  
2 favor of the Partnership in the amount of \$2.4 million. Fotouhi  
3 not only rejected the Partnership's subsequent efforts to settle  
4 the dispute, but also vowed that his former partners would "never  
5 get a dime out of him."

6 On May 25, 2005, Fotouhi had his first meeting with  
7 bankruptcy counsel. On August 29, 2005, Fotouhi filed his  
8 chapter 7 petition.

9  
10 B. The Adversary Proceeding

11 1. The Initial Complaint

12 On November 23, 2005, the Partnership filed a timely  
13 complaint ("Complaint"), seeking a determination that Fotouhi  
14 should be denied his discharge. The Complaint asserted a single  
15 claim for relief, specifically, that Fotouhi violated  
16 § 727(a)(4)(A), by knowingly and fraudulently, in or in  
17 connection with the bankruptcy case, making a false oath. The  
18 Complaint asserted that the false oath "includ[ed], without  
19 limitation," Fotouhi's scheduling at \$0 the value of his interest  
20 in his new law practice, known as Fotouhi, Epps, Hillger &  
21 Gilroy, LLP ("FEHG"), which Fotouhi had formed upon leaving the  
22 Partnership. The bankruptcy court ruled that Fotouhi made a  
23 false oath in his bankruptcy schedules when he listed the value  
24 of his interest in FEHG at \$0, with the consequence that  
25 Fotouhi's discharge was denied.

26 In reaching its conclusion, the bankruptcy court found that  
27 Fotouhi was "motivated by his expressed intention to deprive his  
28 former partners of any recovery on their massive judgment, and to

1 mislead all parties as to the value of his interest in  
2 FEHG. . . .”

3 The bankruptcy court determined that by leaving virtually no  
4 paper trail, Fotouhi maximized his ability to obfuscate the  
5 extent and nature of his property and his business dealings. The  
6 acquisition of the commercial building where FEHG’s Santa Maria  
7 office is located (“Santa Maria Property”) is reflective of the  
8 ambiguity with which Fotouhi conducted his business affairs.

9  
10 a. FEHG and the Santa Maria Office Property

11 In March 2005, while the arbitration proceedings were being  
12 conducted, Darren Epps (“Epps”), a named partner in FEHG, entered  
13 into an agreement on behalf of FEHG to purchase the Santa Maria  
14 Property for the law firm. FEHG paid the \$10,000 earnest money  
15 deposit into escrow on April 8, 2005. The FEHG partners then  
16 formed a limited liability company, FEHG 1 LLC (“LLC”), to  
17 purchase the Santa Maria Property, with the intent that the LLC  
18 would lease the premises to FEHG. Articles of organization for  
19 the LLC were filed with the California Secretary of State on  
20 April 28, 2005. Fotouhi was to be one of the members of the LLC,  
21 and he was listed initially as the LLC’s agent for service of  
22 process. Epps replaced Fotouhi as the LLC’s agent for service  
23 after the arbitration award was entered against Fotouhi.

24 On June 17, 2005, Epps signed an application to obtain a  
25 \$420,000 loan for the purchase of the Santa Maria Property. The  
26 Bank of America (“Bank”) representative in charge of documenting  
27 the loan was told that Fotouhi owned only 8% of FEHG, and that  
28 the other 3 partners each owned 30.6%. Because the Bank required

1 only partners who owned at least 25% of a partnership to  
2 participate in a transaction, Fotouhi was not required to sign  
3 any documents in connection with the purchase of the Santa Maria  
4 Property.

5 Notwithstanding that the LLC was the purported purchaser of  
6 the Santa Maria Property, FEHG paid the \$3,000 appraisal fee for  
7 the Santa Maria Property on July 27, 2005. Further, in the late  
8 summer of 2005, the three FEHG partners other than Fotouhi signed  
9 an unlimited guaranty which obligated FEHG for the entire amount  
10 of the indebtedness on the Santa Maria Property. The \$10,000  
11 earnest money that FEHG paid toward the purchase of the Santa  
12 Maria Property never was repaid by the LLC.

13 Fotouhi took the position at trial that the Santa Maria  
14 Property was an asset of the LLC, and that he had no ownership  
15 interest in the LLC. In support of this assertion, Fotouhi  
16 presented Exhibit A to the LLC's Operating Agreement, which  
17 indicates that FEHG's three partners other than Fotouhi each  
18 contributed \$35,000 to the LLC, and each owned a one-third  
19 interest in the LLC.

20 The bankruptcy court noted that although the Operating  
21 Agreement is dated May 2, 2005, Epps testified that it was not  
22 signed until, at the earliest, the latter part of June, 2005. In  
23 the interim, the arbitration award had been entered against  
24 Fotouhi, after which Epps replaced Fotouhi as the LLC's  
25 registered agent. Additionally, the bankruptcy court found it a  
26 matter of curiosity that the copy of the LLC's Operating  
27 Agreement produced in discovery by Epps, the registered agent at  
28 the time of its purported execution, did not have a copy of

1 Exhibit A attached. Finally, the bankruptcy court stated that  
2 Fotouhi presented no evidence either that the contributions  
3 reflected in Exhibit A to the LLC's Operating Agreement actually  
4 had been made, or if made, the source of the contributions.

5 The bankruptcy court also found significant a change in the  
6 pattern of FEHG partner draws before and after the arbitration  
7 award was entered against Fotouhi. For example, on May 5, 2005,  
8 each of the FEHG partners, including Fotouhi, took an equal  
9 withdrawal in the amount of \$20,000, which they characterized as  
10 a bonus. This is consistent with Epps' testimony at trial that  
11 FEHG was owned equally by each of the four partners. However,  
12 the following month, after the arbitration award had been  
13 entered, the three FEHG partners other than Fotouhi took draws  
14 totaling \$63,750 more than their usual draws. Sometime  
15 thereafter each of these partners made a \$20,000 undocumented  
16 "loan" to Fotouhi for the purpose of enabling Fotouhi to purchase  
17 the non-exempt equity in his house from the chapter 7 trustee  
18 ("Trustee"). The bankruptcy court found it more probable than  
19 not that the purpose of the excess draws was (1) to decrease the  
20 value of FEHG assets that Fotouhi's creditors could look to for  
21 payment, (2) to provide a source of funds for the down payment on  
22 the Santa Maria Property, and (3) to "provide a vehicle for the  
23 syphoning off of [FEHG] assets" to enable Fotouhi to purchase  
24 from his bankruptcy estate the non-exempt equity in his house.

25  
26 b. Valuation of Interest in FEHG

27 Without addressing the issue of whether all or part of the  
28 value of the Santa Maria Property should be included in any

1 valuation of Fotouhi's interest in FEHG, the bankruptcy court  
2 found

3 . . . by more than a preponderance of the evidence that  
4 by listing his ownership interest in [FEHG] as being  
5 worth \$0, Fotouhi deliberately and consciously made a  
6 material false statement; that he knew it was false at  
the time it was made; and that he made it with the  
purpose and intent of deceiving the trustee and his  
creditors.

7 Findings of Fact, Opinion and Conclusions of Law, December 18,  
8 2007 ["Opinion"], 19:14-18.

9 The record reflects that Fotouhi has taken inconsistent  
10 positions with respect to how to value an interest in a law  
11 partnership. As noted previously, when he left the Partnership,  
12 he demanded a buyout of his partnership interest and specifically  
13 demanded that calculation of his interest take into account  
14 outstanding accounts receivable and work in progress.

15 Furthermore, the balance sheet Fotouhi prepared for FEHG to  
16 support the Bank's loan with respect to the purchase of the Santa  
17 Maria Property included both accounts receivable and work in  
18 progress. That balance sheet reflects that as of June 28, 2005,  
19 Fotouhi believed the value of FEHG to be \$531,612. At the same  
20 time Fotouhi prepared for the Bank a profit and loss statement  
21 for FEHG which reflects net income of \$525,000 during the period  
22 January 1, 2005 through June 22, 2005.

23 Two months later, Fotouhi represented in his Schedule B  
24 that the value of his interest in FEHG was \$0. When the Trustee  
25 requested that Fotouhi provide a balance sheet for FEHG, Fotouhi  
26 requested that his accountant, Eric Briese ("Briese"), prepare  
27 one. However, when Briese advised Fotouhi that an accrual basis  
28 balance sheet would have to include accounts receivable and work

1 in progress, Fotouhi himself prepared a cash basis balance sheet  
2 which he submitted to the Trustee, reflecting a negative value of  
3 \$14,084.34.<sup>4</sup>

4 At trial, Fotouhi's expert, Christian Tregillis  
5 ("Tregillis"), estimated the "theoretical value" of Fotouhi's  
6 interest in FEHG to be between \$5,521 and \$22,771, which  
7 Tregillis characterized as "functionally zero." As noted by the  
8 bankruptcy court, however, Tregillis inappropriately included  
9 hypothetical costs of sale in his valuation. The Partnership's  
10 expert, Jay D. Crom ("Crom"), estimated the value of FEHG as of  
11 August 29, 2005, at \$388,277. Crom further determined that  
12 Fotouhi's interest in FEHG ranged between 24.58% and 35.80%, such  
13 that the value of Fotouhi's interest was estimated to be \$95,438  
14 at a minimum, and could be as high as \$139,003. The bankruptcy  
15 court accepted Crom's valuation.

16  
17 2. Amendments to the Complaint

18 As noted above, the Complaint explicitly asserted only the  
19 Valuation Claim. On January 24, 2007, in the face of expanding  
20 discovery and related disputes, the bankruptcy court held a  
21

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22 <sup>4</sup>In subsequent proceedings, Fotouhi mischaracterized the  
23 nature of this balance sheet as having been prepared on an  
24 accrual basis. Specifically, on January 17, 2007, in connection  
25 with a discovery dispute in the adversary proceeding, Fotouhi  
submitted a declaration, under oath, which stated:

26 At the time the petition was filed, [FEHG] had a  
27 negative balance sheet from an accrual perspective.  
28 (The balance sheet along with many other documents were  
supplied to the trustee and the trustee's accountant.)

1 hearing in the adversary proceeding. The pleadings submitted  
2 raised the issue of the scope of discovery in light of the  
3 allegations in the Complaint. At the hearing, the bankruptcy  
4 court authorized the Partnership to file an amended complaint and  
5 set a deadline both for the amended complaint and for a response  
6 by Fotouhi, in the event the Partnership filed an amended  
7 complaint.

8 The Partnership filed the First Amended Complaint on  
9 February 2, 2007, which stated seventeen claims for relief,  
10 including claims pursuant to § 727(a)(2)(A), (a)(2)(B), and  
11 (a)(4)(A). Fotouhi filed his answer to the First Amended  
12 Complaint on February 13, 2007, without alleging as an  
13 affirmative defense that causes of action stated in the First  
14 Amended Complaint were barred by limitations.

15 On March 26, 2007, the parties filed a stipulation allowing  
16 the Partnership to file a Second Amended Complaint. The  
17 stipulation expressly stated that the Court could enter an order  
18 permitting the Partnership to file the Second Amended Complaint  
19 "to allege new claims based on information learned through  
20 discovery." Fotouhi "reserved" his right to challenge "any and  
21 all matters" alleged in the Second Amended Complaint. The Second  
22 Amended Complaint, filed April 3, 2007, stated thirty claims for  
23 relief. Fotouhi filed his answer to the Second Amended Complaint  
24 on April 10, 2007, and asserted for the first time reliance on  
25 advice of counsel as an affirmative defense to the Valuation  
26 Claim. He also affirmatively stated that each of the claims for  
27 relief was barred "by such other and further defenses as  
28 [Fotouhi] may assert at or prior to the trial of this matter."

1 On June 17, 2007, the Partnership moved to amend the Second  
2 Amended Complaint. Fotouhi opposed the motion on the basis that  
3 the additional claims for relief were untimely because the  
4 Partnership knew they existed when it filed the Second Amended  
5 Complaint. The bankruptcy court allowed the amendment on the  
6 basis that the motion to amend was filed promptly after the  
7 deposition of Fotouhi on June 14, 2007, and that the deposition  
8 had been necessary to "flesh out" the facts surrounding the  
9 claims for relief. The bankruptcy court expressly found that  
10 Fotouhi would not suffer prejudice by the amendment because the  
11 only additional discovery required would be from people who  
12 essentially were under Fotouhi's control. The Third Amended  
13 Complaint was filed on July 3, 2007, asserting thirty-four claims  
14 for relief. Among the new claims for relief was one brought  
15 pursuant to § 727(a)(5). Fotouhi filed his answer to the Third  
16 Amended Complaint on July 10, 2007, through which he repeated the  
17 affirmative defenses previously pled but did not assert any new  
18 affirmative defense.

19 On October 10, 2007, the parties stipulated to the filing of  
20 a Fourth Amended Complaint on the basis that the Partnership was  
21 dismissing various claims for relief and renumbering the  
22 remaining claims. The parties also stipulated that Fotouhi's  
23 answer to the Third Amended Complaint would be deemed his answer  
24 to the Fourth Amended Complaint. The Fourth Amended Complaint  
25 was filed October 11, 2007; it contained eighteen claims for  
26 relief, including claims pursuant to § 727(a)(2)(A), (a)(4)(A),  
27 and (a)(5).

1 The four-day trial in the adversary proceeding took place  
2 October 15-18, 2007. At the commencement of trial, the  
3 Partnership withdrew its claims for relief based upon  
4 § 727(a)(2)(A) and (a)(5), leaving for trial only claims for  
5 relief based upon allegations that Fotouhi made a false oath in  
6 or in connection with his bankruptcy case under § 727(a)(4)(A).

7 Ultimately, the bankruptcy court determined that Fotouhi's  
8 discharge should be denied under the First, Ninth, Tenth,  
9 Eleventh, and Fourteenth claims for relief. The First Claim for  
10 Relief was the Valuation Claim. The Ninth, Tenth, and Fourteenth  
11 Claims for Relief were based upon Fotouhi's failure to include in  
12 his bankruptcy schedules and Statement of Financial Affairs  
13 information regarding payments made to him under an oral revenue-  
14 sharing agreement.<sup>5</sup> The Eleventh Claim for Relief was based on  
15 Fotouhi's failure to include his ownership interest in the LLC  
16 and the Santa Maria Property owned by the LLC in his bankruptcy  
17 schedules and Statement of Financial Affairs.

18  
19  
20 <sup>5</sup>At the same time he formed FEHG, Fotouhi entered into a  
21 revenue-sharing agreement with another law firm, Fredrickson,  
22 Mazeika & Grant, LLP ("FMG"), which specialized in business and  
23 construction litigation. Pursuant to his agreement with FMG,  
24 Fotouhi received on a monthly basis 15% of the net revenues FMG  
25 received from cases involving insurance clients that Fotouhi took  
26 when he left the Partnership. Between September 2004 and August  
27 2005, Fotouhi received more than \$86,000 from FMG as a result of  
28 this revenue sharing, notwithstanding that the work was performed  
in Nevada, a state in which Fotouhi was not licensed to practice,  
or that any billable hours expended by Fotouhi to work on the  
cases which generated the revenue were de minimis. The revenue  
sharing agreement never was reduced to writing, and neither the  
clients nor his new partners at FEHG knew of Fotouhi's revenue  
sharing agreement with FMG.

1           3.    Post-Trial Motions

2           On November 7, 2007, approximately two weeks after the close  
3 of trial but before the bankruptcy court had issued its decision,  
4 Fotouhi filed a motion which sought to limit the issue to be  
5 decided solely to the Valuation Claim. In his motion, Fotouhi  
6 relied on Rules 4004(a) and (b) and 9006(b)(3) ("Rule 4004  
7 Affirmative Defense"), to assert that all claims for relief but  
8 the Valuation Claim were time-barred. Fotouhi requested leave to  
9 amend his answer to assert the Rule 4004 Affirmative Defense, and  
10 for judgment on the pleadings on the time-barred causes of  
11 action. The bankruptcy court denied the motion, holding that the  
12 time limit in Rule 4004(a) is not jurisdictional and was subject  
13 to both forfeiture and waiver. The bankruptcy court then found  
14 that Fotouhi had both waived and forfeited the affirmative  
15 defense "by waiting until the matter had been fully litigated  
16 before raising it." Fotouhi first moved for reconsideration of  
17 the denial of his motion and then moved for clarification of the  
18 bankruptcy court's denial of the motion for reconsideration.

19  
20           4.    Post-Judgment Motions

21           The bankruptcy court entered its Opinion on December 18,  
22 2007, and contemporaneously entered a judgment denying Fotouhi  
23 his discharge. On December 27, 2007, Fotouhi moved for a new  
24 trial, or alternatively, for the bankruptcy court to make  
25 additional findings of fact. The substance of the motion was  
26 that the bankruptcy court committed manifest error when it  
27 refused to recognize that the claims for relief contained in the  
28 amended complaints, with the exception of the Valuation Claim,

1 were time barred. The motion also sought recusal of the  
2 bankruptcy judge in further proceedings. Following a hearing on  
3 the motion held February 13, 2007, the bankruptcy court denied  
4 the motion on written findings and by order entered March 24,  
5 2008.

6 Fotouhi filed a timely appeal. He asserts primarily that  
7 the bankruptcy court committed fundamental error when it allowed  
8 trial on any claim for relief except the Valuation Claim.  
9 Fotouhi also contends that the bankruptcy court erred in its  
10 determination that he made a false oath regarding the valuation  
11 of his interest in FEHG.

12 In its response brief, the Partnership asserts that the  
13 bankruptcy court decided only the claims for relief based upon  
14 § 727(a)(4)(A), and that its pleading in the Complaint was  
15 sufficient to cover claims for relief in addition to the  
16 Valuation Claim:

17 Plaintiffs are informed and believe and thereon allege  
18 that Defendant, as debtor in the Case, violated  
19 Bankruptcy Code § 727(a)(4)(A), knowingly and  
20 fraudulently, in or in connection with the Case, by  
making a false oath, including, without limitation, his  
scheduling Defendant's interest in [FEHG] as having a  
\$0.00 value.

21 The Partnership also points out that in addition to failing to  
22 raise the Rule 4004 Affirmative Defense prior to trial, Fotouhi  
23 did not raise it either in his opening statement or in his  
24 closing argument. Further, while more than one hundred exhibits  
25 were introduced during trial, Fotouhi did not object to the  
26 admission of a single one based on the Rule 4004 Affirmative  
27 Defense, and once the trial was concluded, all exhibits offered  
28 were admitted by stipulation of the parties. In addition, after

1 trial Fotouhi moved for the admission of documents from the Bank  
2 that were relevant only to the claims for relief he now seeks to  
3 be declared time-barred. Finally, at trial, Fotouhi did not  
4 object to any question posed to any witness on the basis of the  
5 Rule 4004 Affirmative Defense. In fact, the Partnership contends  
6 that Fotouhi introduced testimony through his own examination of  
7 witnesses that supported the bankruptcy court's findings on  
8 claims other than the Valuation Claim.

## 9 10 **II. JURISDICTION**

11 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.  
12 § 1334 and 157(b) (2) (J). We have jurisdiction pursuant to 28  
13 U.S.C. § 158.

## 14 15 **III. ISSUES**

16 Whether the bankruptcy court erred as a matter of law when  
17 it denied debtor's discharge pursuant to § 727(a) (4) (A) based on  
18 the Valuation Claim.

19 Whether the bankruptcy court abused its discretion in  
20 allowing amendments to the Complaint more than one year after the  
21 deadline for filing complaints objecting to debtor's discharge.

22 Whether the bankruptcy court abused its discretion in  
23 denying debtor's post-trial motion for leave to amend his answer  
24 to assert the Rule 4004 Affirmative Defense.

25 Whether the bankruptcy court erred as a matter of law when  
26 it denied debtor's motion for judgment on the pleadings.

27 Whether the bankruptcy court erred as a matter of law when  
28 it denied debtor's discharge pursuant to § 727(a) (4) (A) based on

1 the Ninth, Tenth, Eleventh, and Fourteenth claims for relief.

2  
3 **IV. STANDARDS OF REVIEW**

4 ... the Ninth Circuit standard of review of a judgment  
5 on an objection to discharge is that: (1) the court's  
6 determinations of the historical facts are reviewed for  
7 clear error; (2) the selection of the applicable legal  
8 rules under § 727 is reviewed de novo; and (3) the  
9 application of the facts to those rules requiring the  
10 exercise of judgments about values animating the rules  
11 is reviewed de novo.

12 Khalil v. Developers Surety & Indemn. Co. (In re Khalil), 379  
13 B.R. 163, 171 (9th Cir. BAP 2007), quoting Searles v. Riley (In  
14 re Searles), 317 B.R. 368, 373 (9th Cir. BAP 2004) (citations  
15 omitted), aff'd, 212 Fed. Appx. 589 (9th Cir. 2006). Clear error  
16 will only be found if we are "left with the definite and firm  
17 conviction that a mistake has been committed." Easley v.  
18 Cromartie, 532 U.S. 234, 242 (2001). De novo means that our  
19 review is independent, i.e., that we give no deference to the  
20 bankruptcy court's conclusion. Rule 8013.

21 We review a bankruptcy court's interpretation and  
22 application of the Rules de novo. All Points Capital Corp. v.  
23 Meyer (In re Meyer), 373 B.R. 84, 87 (9th Cir. BAP 2007) (citing  
24 Ruvacalba v. Munoz (In re Munoz), 287 B.R. 546, 550 (9th Cir. BAP  
25 2002)).

26 A trial court's decision to allow amendment of a complaint  
27 is reviewed for an abuse of discretion. National Audubon Soc'y,  
28 Inc. v. Davis, 307 F.3d 835, 853 (9th Cir.), amended by 312 F.3d  
416 (9th Cir. 2002). "A question concerning the waiver of an  
affirmative defense involves the interpretation of Rule 8(c) of  
the Federal Rules of Civil Procedure, and, as such, is a question

1 of law reviewed de novo." Harbeson v. Parke Davis, Inc., 736  
2 F.2d 517, 520 (9th Cir. 1984). However, a motion to allow a  
3 defendant to plead an affirmative defense not raised in the  
4 initial pleading must be raised before trial. See Kern Oil &  
5 Refining Co. v. Tenneco Oil Co., 840 F.2d 730, 735 (9th Cir.  
6 1988).

7 We review de novo the trial court's denial of a motion for  
8 judgment on the pleadings under Fed. R. Civ. P. 12(c). See 3550  
9 Stevens Creek Ass'n v. Barclays Bank of Cal., 915 F.2d 1355, 1357  
10 (9th Cir. 1990).

## 11

## 12 V. DISCUSSION

### 13 A. Denial of Discharge Based on the Valuation Claim

14 Fotouhi concedes that the Valuation Claim was timely and  
15 therefore properly heard by the bankruptcy court. Further,  
16 Fotouhi does not argue that the original Complaint did not state  
17 a § 727(a)(4)(A) claim based on his \$0 valuation of his interest  
18 in FEHG. Therefore, because we may affirm on any basis supported  
19 by the record, Olsen v. Idaho State Bd. of Med., 363 F.3d 916,  
20 922 (9th Cir. 2004), we address first Fotouhi's contention that  
21 the bankruptcy court erred when it determined that Fotouhi made a  
22 false oath under § 727(a)(4)(A) when he scheduled the value of  
23 his interest in FEHG as "\$0.00."

24 To prevail on a § 727(a)(4)(A) claim based on a false oath,  
25 the plaintiff must show by a preponderance of the evidence as to  
26 each element: "(1) the debtor made a false oath in connection  
27 with the case; (2) the oath related to a material fact; (3) the  
28 oath was made knowingly; and (4) the oath was made fraudulently."

1 Roberts v. Erhard (In re Roberts), 331 B.R. 876, 882 (9th Cir.  
2 BAP 2005), aff'd, 241 Fed. Appx. 420 (9th Cir.); see also Fogal  
3 Legware of Switz., Inc. v. Wills (In re Wills), 243 B.R. 58, 62  
4 (9th Cir. BAP 1999).

5  
6 1. False Oath

7 All debtors are required by § 521 to "file a list of  
8 creditors, and unless the court orders otherwise, a schedule of  
9 assets and liabilities, a schedule of current income and current  
10 expenses, and a statement of the debtor's financial affairs."  
11 Rule 1008, which implements § 521, requires that "[a]ll  
12 petitions, lists, schedules, statements and amendments thereto  
13 shall be verified or contain an unsworn declaration as provided  
14 in 28 U.S.C. § 1746."<sup>6</sup> Therefore, a false statement or omission  
15

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16 <sup>6</sup>28 U.S.C. § 1746 provides:

17  
18 Wherever, under any law of the United States or under  
19 any rule, regulation, order, or requirement made  
20 pursuant to law, any matter is required or permitted to  
21 be supported, evidenced, established, or proved by the  
22 sworn declaration, verification, certificate,  
23 statement, oath, or affidavit, in writing of the person  
24 making the same (other than a deposition, or an oath of  
25 office, or an oath required to be taken before a  
26 specified official other than a notary public), such  
27 matter may, with like force and effect, be supported,  
28 evidenced, established, or proved by the unsworn  
declaration, certificate, verification, or statement,  
in writing of such person which is subscribed by him,  
as true under penalty of perjury, and dated, in  
substantially the following form:

27 . . .  
28 (2) If executed within the United States, its  
territories, possessions, or commonwealths: "I declare  
(continued...)

1 in a debtor's schedules or statement of financial affairs  
2 qualifies as a false oath for purposes of § 727(a)(4)(A).  
3 Kavanagh v. Leija (In re Leija), 270 B.R. 497, 502-03 (Bankr.  
4 E.D. Cal. 2001).

5 Fotouhi contends that his "zero valuation" of FEHG cannot  
6 constitute a false oath for two reasons. First, more than three  
7 years have passed since the bankruptcy petition was filed, and  
8 the Trustee has not been able to liquidate the interest.  
9 However, the fact that a trustee has not yet liquidated an asset  
10 does not support a conclusion that the asset has no value. As  
11 noted by the bankruptcy court, "in chapter 7 cases involving  
12 individuals, the debtor is often the prime prospect for  
13 purchasing the estate's interest in his assets." As the owner of  
14 Fotouhi's interest in FEHG, the Trustee can seek to dissolve the  
15 partnership to claim Fotouhi's interest. Given the vigorous  
16 dispute as to the value of Fotouhi's interest, it is no surprise  
17 that the Trustee in this case might wait until the valuation  
18 issue is resolved before attempting to liquidate that interest.

19 Second, Fotouhi asserts that because Tregillis, a highly  
20 respected forensic accountant, testified that the value of the  
21 interest was "functionally zero," Fotouhi's valuation of his  
22 interest in FEHG at \$0 cannot constitute a false oath. However,  
23 the bankruptcy court did not accept Tregillis' valuation  
24 testimony, both because it included a deduction for costs of  
25

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26 <sup>6</sup>(...continued)  
27 (or certify, verify, or state) under penalty of perjury  
28 that the foregoing is true and correct. Executed on  
(date).

(Signature)".

1 sale, and because it did not consider Fotouhi as a potential  
2 purchaser of the interest in FEHG.

3 Undervaluation of an asset can be a sufficient basis for  
4 denial of a discharge under § 727(a)(4)(A), if the evidence  
5 establishes that the debtor deliberately and knowingly  
6 undervalued the asset. See Weiner v. Perry, Settles & Lawson,  
7 Inc., 208 B.R. 69 (9th Cir. BAP 1997), rev'd on other grounds,  
8 161 F.3d 1216 (9th Cir. 1998).

9 The bankruptcy court found that Fotouhi "deliberately and  
10 consciously made a material false statement" when he listed his  
11 ownership interest in FEHG as having \$0 value. This finding is  
12 adequately supported by the record, which reflects, based on his  
13 demand to the Partnership for an accounting, that Fotouhi knew  
14 the value of a partnership interest should include accounts  
15 receivable and work in progress; that Fotouhi prepared an accrual  
16 basis balance sheet in connection with the purchase of the Santa  
17 Maria Property through which he established that FEHG had net  
18 assets of \$531,612, including \$217,676 in accounts receivable and  
19 \$222,554 work in progress, as of June 28, 2005; and that Fotouhi  
20 prepared a cash basis balance sheet for the Trustee, reflecting  
21 assets of \$104,243.97, consisting solely of cash, only after  
22 Briese told him that an accrual basis balance sheet would have to  
23 include accounts receivable and work in progress. We conclude  
24 that the bankruptcy court did not clearly err in its finding that  
25 Fotouhi made a false oath when he listed his ownership interest  
26 in FEHG as having \$0 value in his Schedule B.

1           2.    Materiality

2           Materiality is broadly defined: "A false statement is  
3           material if it bears a relationship to the debtor's  
4           business transactions or estate, or concerns the  
            discovery of assets, business dealings, or the  
            existence and disposition of the debtor's property."

5   Roberts, 331 B.R. at 883 (citing Wills, 243 B.R. at 62).

6           The bankruptcy court accepted the testimony of the  
7   Partnership's expert witness, Crom, that the value of Fotouhi's  
8   interest in FEHG was between \$95,438 and \$139,003. Without  
9   question, the interest constitutes a substantial asset in which  
10   Fotouhi's creditors have an interest. Fotouhi's affirmative  
11   valuation of this asset at \$0 clearly was material. Had the  
12   Trustee or the Partnership not investigated the true value of the  
13   interest, a substantial asset would have become unavailable as a  
14   source to pay creditors' claims.

15  
16           3.    Knowingly Made

17           For purposes of § 727(a)(4)(A), a debtor "acts knowingly if  
18   he or she acts deliberately and consciously." Roberts, 331 B.R.  
19   at 883. The bankruptcy court expressly found that Fotouhi made  
20   the false oath concerning valuation of his interest in FEHG  
21   "deliberately and consciously." That Fotouhi's false oath in his  
22   valuation was knowingly made is evidenced by his deliberate  
23   choice to provide the Trustee with a cash basis balance sheet  
24   with the purpose of keeping the value of accounts receivable and  
25   work in progress from the Trustee.

26  
27           4.    Evidence of Intent

28           In addition to the evidence in the record which establishes

1 Fotouhi's manipulation of value of FEHG depending on the  
2 audience, and Fotouhi's decision to provide a cash basis balance  
3 sheet only after Briese advised that an accrual basis balance  
4 sheet would have to reflect both accounts receivable and work in  
5 progress, the record also establishes, as the bankruptcy court  
6 found, that Fotouhi's "conduct was motivated by his expressed  
7 intention to deprive his former partners of any recovery on their  
8 massive judgment against him, and to mislead all parties as to  
9 the value of his interest in [FEHG]. . . ." Opinion, 16:12-14.

10 Our review of the record persuades us that the bankruptcy  
11 court did not clearly err in finding that Fotouhi made a false  
12 oath in his schedule B with the requisite fraudulent intent to  
13 warrant a denial of his discharge under § 727(a)(4)(A).

14  
15 5. Reliance on Counsel

16 Fotouhi asserts on appeal that the bankruptcy court erred in  
17 rejecting Fotouhi's defense that he relied on his attorney in  
18 setting the value of his interest in FEHG at \$0. Fotouhi  
19 contends that the uncontroverted evidence established that  
20 Fotouhi conveyed the overall condition of FEHG to Shier.  
21 Clearly, this is not true. Fotouhi's attorney testified that he  
22 did not ask Fotouhi for information regarding FEHG's hard assets,  
23 accounts receivable, and work in progress, nor did Fotouhi  
24 provide such information to Shier. Instead, the attorney relied  
25 on Fotouhi's stated value of FEHG.

26 "Generally, a debtor who acts in reliance on the advice of  
27 his attorney lacks the intent required to deny him a  
28 discharge . . . However, the debtor's reliance must be in good

1 faith." In re Adeeb, 787 F.2d 1339, 1343 (9th Cir. 1986). As  
2 noted by the bankruptcy court, Fotouhi was not a mere naif on the  
3 subject of law firm valuation. The bankruptcy court determined  
4 that since Fotouhi did not give his attorney all of the  
5 information necessary for a proper valuation of his interest in  
6 FEHG, he cannot claim either good faith or reasonable reliance on  
7 his attorney's advice. The finding of the bankruptcy court in  
8 this regard was not clearly erroneous.

9 The bankruptcy court did not err in denying Fotouhi a  
10 discharge pursuant to § 727(a)(4)(A) based on the Valuation  
11 Claim.

12 By the time of trial in the adversary proceeding, the  
13 operative pleading, the Fourth Amended Complaint, contained  
14 numerous claims for relief based on § 727(a)(4)(A). The  
15 bankruptcy court determined that Fotouhi's discharge should be  
16 denied under the First, Ninth, Tenth, Eleventh, and Fourteenth  
17 claims for relief. In extended post-trial and post-judgment  
18 proceedings, Fotouhi challenged the timeliness of all but the  
19 First claim for relief, i.e., the Valuation Claim. Typically, we  
20 would not reach the timeliness issue where we have determined  
21 that the bankruptcy court did not err when it denied Fotouhi's  
22 discharge based upon the Valuation Claim, particularly where  
23 Fotouhi concedes the Valuation Claim was timely and that it  
24 stated a claim for relief.

25 However, Fotouhi contends that the bankruptcy court  
26 committed "fundamental error" when it allowed the Partnership to  
27 file its time-barred claims for relief. Fotouhi further contends  
28 that this alleged "fundamental error" tainted the evidence in the

1 case upon which the bankruptcy court based its decision on the  
2 Valuation Claim. Accordingly, we address Fotouhi's contentions  
3 that the bankruptcy court erred both when it authorized amendment  
4 of the Complaint, which he characterizes as a "fundamental  
5 error," and when it denied Fotouhi's efforts through his post-  
6 trial and post-judgment motions to "undo" the "fundamental  
7 error."

8  
9 B. Amendment of the Complaint

10 We note that the scope of any error the bankruptcy court  
11 might have committed in allowing amendment of the Complaint is  
12 not as great as Fotouhi contends. In the end, all claims for  
13 relief other than those made pursuant to § 727(a)(4)(A) and based  
14 on a false oath were voluntarily dismissed by the Partnership  
15 prior to trial. The limited review we make therefore ultimately  
16 is whether the bankruptcy court erred in allowing amendments of  
17 the Complaint to include the Ninth, Tenth, Eleventh, and  
18 Fourteenth claims for relief.

19 Rule 7015, which applies Fed. R. Civ. P. 15 to adversary  
20 proceedings in bankruptcy cases, provides that after a responsive  
21 pleading has been filed, but before trial, "a party may amend its  
22 pleading only with the opposing party's written consent or the  
23 court's leave. The court should freely give leave when justice  
24 so requires."

25 An amended pleading filed under Fed. R. Civ. P. 15(a)  
26 supersedes the pleading it modifies, with the result that the  
27 original pleading no longer serves any function in the case.  
28 Wright & Miller, Federal Practice and Procedure: Civil 3d § 1476.

1 At the time of trial in the adversary proceeding, the "live"  
2 pleading in the case was the Fourth Amended Complaint. Fotouhi  
3 stipulated to the filing of the Fourth Amended Complaint, thus  
4 consenting in writing to its filing for purposes of Fed. R. Civ.  
5 P. 15(a)(2).

6 Because the Fourth Amended Complaint was filed based on  
7 Fotouhi's consent rather than an order of the bankruptcy court,  
8 there is no action of the bankruptcy court which can be subject  
9 to review in connection with the amendment.

10 Fotouhi appears to argue that rather than focusing on the  
11 Fourth Amended Complaint, we must look farther back in time for  
12 the fundamental error in the case. That is, the bankruptcy court  
13 should not have authorized the filing of the First Amended  
14 Complaint at the outset.

15 It was after the bankruptcy court heard the parties'  
16 discovery disputes in January 2007, after a discussion of  
17 unresolved issues with counsel, that the bankruptcy court  
18 authorized the filing of an amended complaint with a deadline.

19 At that time the bankruptcy judge stated:

20 At present, counsel for the plaintiff should note that  
21 you can't just say 727(a)(4) and say well - and we'll  
22 prove whatever we want to under that. It's a fraud  
23 statute, and under Rule 9(b), you're required to plead  
24 fraud with particularity . . . at this point you ought  
25 to have enough to know what it is you're going to go  
26 forward on in this complaint. You've got ten days to  
27 amend that complaint, and you've got another ten days,  
28 counsel for the Debtor, to respond to that - to answer  
the amended complaint.

26 Tr. of January 24, 2007 H'r'ng 12:4-23. When the multiple cause  
27 of action First Amended Complaint was filed, Fotouhi simply filed  
28 an answer without raising a time bar defense.

1 Fed. R. Civ. P. 15(a) not only authorizes the court to allow  
2 the filing of an amended pleading, it mandates that leave to file  
3 an amended pleading "shall be freely given when justice so  
4 requires."

5 Based on our review of the record, in these circumstances,  
6 we do not have a clear and definite conviction that the  
7 bankruptcy court abused its discretion in allowing the First  
8 Amended Complaint to be filed.

9  
10 C. Amendment of the Answer

11 Fed. R. Civ. P. 8(c), applicable in adversary proceedings in  
12 bankruptcy cases pursuant to Rule 7008, requires that a statute  
13 of limitations defense be stated affirmatively. Further,

14 [i]t is a frequently stated proposition of virtually  
15 universal acceptance by the federal courts that a  
16 failure to plead an affirmative defense as required by  
Federal Rule 8(c) results in the waiver of that defense  
and its exclusion from the case.

17 Wright & Miller, Federal Practice and Procedure: Civil 3d § 1278.

18 The Ninth Circuit has held that a motion to allow a  
19 defendant to plead an affirmative defense not raised in the  
20 initial pleading must be raised before trial. See Kern Oil &  
21 Refining Co. v. Tenneco Oil Co., 840 F.2d at 735. Requiring that  
22 an affirmative defense be pleaded serves the purpose of providing  
23 notice to a plaintiff that a defendant intends to assert a claim  
24 for relief is completely barred. Wright & Miller, Federal  
25 Practice and Procedure: Civil 3d § 1270.

26 Fotouhi contends that the trial court abused its discretion  
27 when it refused to allow Fotouhi to amend his answer to assert  
28 the Rule 4004 Affirmative Defense. Because the motion to amend

1 his answer was not filed until after the close of evidence in the  
2 case, we look to Fed. R. Civ. P. 15(b) to determine whether such  
3 amendment is appropriate under the circumstances of this case.

4 Fed. R. Civ. P. 15(b) applies only to amendments either  
5 based on an objection made at trial or where an issue has been  
6 tried by consent notwithstanding that the issue was not contained  
7 in the pleadings. As the Partnership points out, Fotouhi made no  
8 objection based upon a Rule 4004 Affirmative Defense to the  
9 admission of evidence or to any question posed to any witness at  
10 trial. Also, Fotouhi stipulated to the admission of all exhibits  
11 offered at trial, including those supporting the Ninth, Tenth,  
12 Eleventh, and Fourteenth claims for relief. In addition, after  
13 trial, Fotouhi moved for the admission of documents from the Bank  
14 that were relevant only to the claims for relief he now seeks to  
15 be declared time-barred. Furthermore, Fotouhi introduced  
16 testimony through his own examination of witnesses that supported  
17 the bankruptcy court's findings on claims other than the  
18 Valuation Claim. Fotouhi has established no basis under Fed. R.  
19 Civ. 15(b) for the amendment of his answer post-trial.

20  
21 D. Motion for Judgment on the Pleadings

22 Fotouhi contends that the bankruptcy court erred when it  
23 determined that his motion for judgment on the pleadings was  
24 untimely. He asserts he brought the motion pursuant to Fed. R.  
25 Civ. P. 12(h)(2), which authorizes that certain defenses may be  
26 made by motion under Fed. R. Civ. P. 12(c) or at trial.

27 First, we observe that when an affirmative defense may be  
28 pled is governed by Fed. R. Civ. P. 8(c), not Fed. R. Civ. P.

1 12(h) (2). Second, although certain defenses may be raised by a  
2 motion made pursuant to Fed. R. Civ. P. 12(c), Fed. R. Civ. P.  
3 12(c) contains its own time limitation: "After the pleadings are  
4 closed--but early enough not to delay trial--a party may move for  
5 judgment on the pleadings." If the language of Fed. R. Civ. P.  
6 12(c) were not specific enough to determine that a motion not  
7 brought before trial is untimely, Fed. R. Civ. P. 12(I) clarifies  
8 the matter by stating that "a motion under Rule 12(c) must be  
9 heard and decided before trial. . . ."

10 Finally, Fotouhi relies on Kontrick v. Ryan, 540 U.S. 443  
11 (2004), for the proposition that his Rule 4004 Affirmative  
12 Defense could be brought at any time before the bankruptcy court  
13 issued its decision. Fotouhi misreads Kontrick v. Ryan. In that  
14 case, the debtor was denied a discharge pursuant to § 727(a) (2).  
15 In his motion for reconsideration of the court's decision, the  
16 debtor asserted for the first time that the bankruptcy court  
17 lacked jurisdiction over a claim raised in an amended complaint  
18 on the basis that the claim was untimely pursuant to Rules  
19 4004(a) and (b) and 9006(b) (3). The bankruptcy court held that  
20 Rule 4004 was not jurisdictional and denied the motion for  
21 reconsideration. The district court affirmed, as did the Seventh  
22 Circuit, which commented that "[t]he policy concerns of  
23 expeditious administration of bankruptcy matters and the finality  
24 of the bankruptcy court's decision hardly are fostered by  
25 requiring the bankruptcy court to consider the timeliness of an  
26 issue that it already has adjudicated." In re Kontrick, 295 F.3d  
27 724, 735 (7th Cir. 2002). The Supreme Court granted certiorari  
28 because of a split in decisions regarding whether Rule 4004 is

1 jurisdictional.

2 The Supreme Court affirmed, holding that "the filing  
3 deadlines prescribed in Bankruptcy Rules 4004 and 9006(b)(3) are  
4 claim-processing rules that do not delineate what cases  
5 bankruptcy courts are competent to adjudicate." Kontrick v.  
6 Ryan, 540 U.S. at 454. The Supreme Court held that the time  
7 limits set forth in Rules 4004(a) and (b) and 9006(b)(3) do  
8 afford a debtor an affirmative defense to a complaint filed  
9 outside of those limits. However, the Supreme Court then noted  
10 that the sole issue before it was whether the debtor forfeited  
11 the right to assert the affirmative defense by failing to raise  
12 the issue until the complaint had been adjudicated on the merits.  
13 As noted above, Fotouhi reads this statement as a holding, i.e.,  
14 that only after the complaint has been decided on the merits is  
15 it too late to raise the affirmative defense. The Supreme Court,  
16 however, had more to say on the subject of timeliness.

17 First, time bars generally must be raised in an answer or  
18 responsive pleading pursuant to Fed. R. Civ. P. 8(c). If an  
19 affirmative defense is inadvertently omitted from a pleading,  
20 Fed. R. Civ. P. 15 provides an avenue for amending to incorporate  
21 the defense. The Supreme Court observed that while a defense  
22 might be considered waived if not brought as provided above,  
23 certain defenses may be protected by Fed. R. Civ. P. 12(h)(2)<sup>7</sup> or  
24

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25 <sup>7</sup>Fed. R. Civ. P. 12(h)(2) provides:

26 Failure to state a claim upon which relief can be  
27 granted, to join a person required by Rule 19(b), or to  
28 state a legal defense to a claim may be raised:

(A) in any pleading allowed or ordered under Rule 7(a);  
(continued...)

1 (3).<sup>8</sup> However, the Court expressly stated that time  
2 prescriptions are not among the defenses that are protected by  
3 these rules. Kontrick v. Ryan, 540 U.S. at 458-60.

4 We conclude that the bankruptcy court did not err when it  
5 determined the motion for judgment on the pleadings, filed weeks  
6 after a four-day trial, was untimely and therefore not available  
7 as a method for Fotouhi to raise the Rule 4004 Affirmative  
8 Defense.

9  
10 E. The Alleged "Tainted" Evidence

11 Where there was no error in allowing the amendments to the  
12 Complaint, any evidence the bankruptcy court may have considered  
13 in connection with the determination of the Ninth, Tenth,  
14 Eleventh, and Fourteenth claims for relief could not "taint" the  
15 bankruptcy court's determination of the Valuation Claim. To the  
16 extent any evidence may have been admitted in error on any other  
17 basis, Fotouhi did not preserve the issue for appeal. Not only  
18 did Fotouhi not object to the presentation of any evidence at  
19 trial, he affirmatively stipulated that all evidence offered  
20 should be admitted.

21 In any event, there is sufficient evidence in the record  
22

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23 <sup>7</sup>(...continued)  
24 (B) by a motion under Rule 12(c); or  
25 (C) at trial.

26 <sup>8</sup>Fed. R. Civ. P. 12(h) (3) provides:

27 If the court determines at any time that it lacks  
28 subject-matter jurisdiction, the court must dismiss the  
action.

1 relating solely to Fotouhi's valuation of his interest in FEHG at  
2 \$0 to support a determination that his discharge should be denied  
3 on that basis alone. First, based on his demand to the  
4 Partnership for an accounting, Fotouhi knew that the value of a  
5 partnership interest should include accounts receivable and work  
6 in progress. Second, Fotouhi prepared an accrual basis balance  
7 sheet in connection with the purchase of the Santa Maria Property  
8 through which he established that FEHG had net assets of  
9 \$531,612, including \$217,676 in accounts receivable and \$222,554  
10 work in progress, as of June 28, 2005. Third, Fotouhi prepared a  
11 cash basis balance sheet for the Trustee, reflecting assets of  
12 \$104,243.97, only after Briese told him that an accrual basis  
13 balance sheet would have to include accounts receivable and work  
14 in progress.

15  
16 F. Ninth, Tenth, Eleventh, and Fourteenth Claims for Relief

17 Appellate courts do not consider matters on appeal unless  
18 they are "specifically and distinctly" raised in the opening  
19 brief. See TRW Inc. v. Andrews, 534 U.S. 19, 34 (2001);  
20 Independent Towers of Wash. v. State of Wash., 350 F.3d 925, 929  
21 (9th Cir. 2003). In the appeal before us, Fotouhi did not assert  
22 in his opening brief on appeal that the bankruptcy court erred  
23 substantively when it entered judgment against him on the Ninth,  
24 Tenth, Eleventh, and Fourteenth claims for relief. He relied  
25 solely on his contention that the bankruptcy court could not, as  
26 a matter of law, decide those claims for relief. That Fotouhi  
27 did not intend to challenge the bankruptcy court's determination  
28 of the Ninth, Tenth, Eleventh, and Fourteenth claims for relief

1 on any basis other than timeliness is further suggested by the  
2 fact that he failed to address entry of the judgment under the  
3 Ninth, Tenth, Eleventh, and Fourteenth claims for relief on any  
4 basis other than the Rule 4004 time bar, even after this issue  
5 was raised by the Partnership in its response brief on appeal.

6 Further, in his reply brief, Fotouhi specifically concedes  
7 that on appeal he "has raised only the legal issues created by  
8 the trial court and seeks a new trial on what *should* have been  
9 tried, not what was actually tried." Appellant's Reply Brief,  
10 p. 1 n.2 (emphasis in original). As such, the bankruptcy court's  
11 determinations that Fotouhi's discharge should be denied based  
12 upon the Ninth, Tenth, Eleventh, and Fourteenth claims for relief  
13 are not issues properly reserved by Fotouhi. Accordingly, the  
14 bankruptcy court's determinations of those claims for relief,  
15 right or wrong, do not change the outcome of the adversary  
16 proceeding.

## 17 18 **VI. CONCLUSION**

19 Because Fotouhi stipulated to the filing of the Fourth  
20 Amended Complaint, there was no action of the bankruptcy court in  
21 connection with the amendment that could constitute abuse of  
22 discretion. Fotouhi waived and forfeited any affirmative defense  
23 he might have had to the timeliness of the Ninth, Tenth,  
24 Eleventh, and Fourteenth claims for relief when he did not raise  
25 it prior to the commencement of trial. Accordingly, the  
26 bankruptcy court did not err when it denied the Fed. R. Civ. P.  
27 12(c) motion and Fotouhi's motion to amend his answer.

28 Where there was no error in allowing the amendments to the

1 Complaint, any evidence the bankruptcy court may have considered  
2 in connection with the determination of the Ninth, Tenth,  
3 Eleventh, and Fourteenth claims for relief could not "taint" the  
4 bankruptcy court's determination of the Valuation Claim. In any  
5 event, there is sufficient evidence in the record relating solely  
6 to Fotouhi's valuation of his interest in FEHG at \$0 to support a  
7 determination that his discharge should be denied on that basis  
8 alone. The bankruptcy court did not err when it denied Fotouhi's  
9 discharge based on the Valuation Claim.

10 Finally, the bankruptcy court's substantive determinations  
11 on the Ninth, Tenth, Eleventh, and Fourteenth claims for relief  
12 stand unchallenged on appeal.

13 We AFFIRM.