

JUN 27 2008

HAROLD S. MARENUS, CLERK  
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NOT FOR PUBLICATION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. SC-07-1290-MoCK  
 )  
 STEVEN H. SALOMON AND VICTORIA ) Bk. No. 05-14843  
 Y. SALOMON, )  
 ) Adv. No. 07-90015  
 Debtors. )  
 \_\_\_\_\_ )  
 STEVEN H. SALOMON; VICTORIA Y. )  
 SALOMON, )  
 Appellants, )  
 v. ) **MEMORANDUM**<sup>1</sup>  
 GERALD H. DAVIS, Chapter 7 )  
 Trustee, )  
 Appellee. )  
 \_\_\_\_\_ )

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

Filed - June 27, 2008

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

Honorable James W. Meyers, Bankruptcy Judge, Presiding

\_\_\_\_\_  
Before: MONTALI, CASE<sup>2</sup> and KLEIN, 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. Charles G. Case, II, Bankruptcy Judge for the District of Arizona, sitting by designation.

1 Appellants, Chapter 7 debtors, Steven H. Salomon and  
2 Victoria Y. Salomon, appeal from a default judgment revoking  
3 their discharge pursuant to sections 727(d)(1) and (d)(2),<sup>3</sup> and  
4 from a default entered pursuant to Federal Rule of Civil  
5 Procedure 55 ("FRCP"), as incorporated by Rule 7055, in favor of  
6 Appellee, Chapter 7 Trustee, Gerald H. Davis. Because the  
7 default judgment is based upon insufficient findings and  
8 conclusions, and the court did not exercise its discretion to  
9 consider evidence from the debtors at the prove-up hearing as to  
10 the revocation of discharge, we VACATE the default judgment and  
11 REMAND for further proceedings.

#### 12 **FACTS**

13 Appellants, Debtors Steven H. Salomon and Victoria Y.  
14 Salomon ("Salomons") filed a joint voluntary Chapter 7 bankruptcy  
15 petition on October 15, 2005. At the time of filing, Salomons  
16 were represented by the Pacific Law Center. Because Salomons  
17 wanted to file prior to the October 17, 2005 effective date of  
18 BAPCPA, their attorney "rushed through the process," completing  
19 most of their petition over the phone in a question and answer  
20 method with an employee of the Pacific Law Center. However, both  
21 Salomons admit they were given at least one opportunity to look  
22 over their petition prior to signing. The Salomons's section 341  
23 hearing took place on November 15, 2005, during which they filled  
24 out their questionnaire, swearing under oath that everything was

---

25  
26 <sup>3</sup> Unless otherwise indicated, all chapter, section and rule  
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and  
28 to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037, as  
enacted and promulgated prior to the effective date of The  
Bankruptcy Abuse Prevention and Consumer Protection Act of 2005,  
Pub. L. 109-8, 119 Stat. 23. ("BAPCPA")

1 accurate to the best of their knowledge. Salomons received their  
2 discharge on January 17, 2006.

3 In a related adversary proceeding, Greenfield v. Salomon  
4 (A.P. 06-90083), evidence that Salomons may have committed  
5 bankruptcy fraud was presented to the Chapter 7 Trustee, Gerald  
6 H. Davis ("Trustee") by Greenfield's counsel, Alan Nahmias. In  
7 that proceeding, the Salomons did not cooperate in the discovery  
8 process, and both were ordered to pay significant sanctions. The  
9 Salomons then agreed, via a court-approved stipulation, to Rule  
10 2004 examinations conducted by Trustee to investigate further  
11 their already-discharged bankruptcy case. Those examinations  
12 commenced on January 2 and 3, 2007, at which Salomons were  
13 represented by Frederick C. Phillips.

14 On January 16, 2007, just one day prior to the expiration of  
15 the one-year statute of limitations of section 727(e), Trustee  
16 filed an adversary proceeding against Salomons, seeking to revoke  
17 their discharge pursuant to sections 727(d)(1) and (2), based on  
18 what he believed to be numerous instances of fraud and  
19 misappropriation of bankruptcy estate property.

20 Salomons were served with the Summons and Complaint to  
21 Revoke Discharge ("Complaint") on January 19, 2007. They had  
22 until February 15, 2007, to file an answer. On February 16,  
23 2007, Mr. Nahmias<sup>4</sup> received correspondence from Mr. Phillips  
24 stating that his firm would not be representing the Salomons in

---

25  
26 <sup>4</sup> Mr. Nahmias was first employed as counsel to Mr.  
27 Greenfield, a former business partner and potential creditor of  
28 Salomons. It was during the Greenfield v. Salomon discovery that  
Mr. Nahmias obtained evidence indicating possible bankruptcy  
fraud by Salomons, which he presented to Trustee. Mr. Nahmias  
then became Trustee's Special Counsel.

1 this adversary proceeding, and that:

2 [I]n light of their inability to hire any other attorney  
3 to represent them, the Salomons have decided that they  
4 will be unable to adequately defend the complaint and  
that they will be required to allow their defaults to be  
entered in that proceeding.

5 On February 21, 2007, Trustee filed a Request to Enter  
6 Default with the Clerk of Court, pursuant to Rule 7055.  
7 Consequently, the Clerk of Court entered the default ("Default")  
8 and gave notice of its entry that same day.

9 Following the Default, in May, 2007, Trustee filed an  
10 Application for Entry of Default Judgment ("Application").  
11 Although Salomons did not answer the Complaint, on May 31, 2007,  
12 they filed their "Opposition to Application of Gerald H. Davis,  
13 Chapter 7 Trustee, for Entry of Default Judgment" ("Opposition").  
14 In that Opposition, Salomons explained that since the Default,  
15 they had educated themselves with the legal process and were now  
16 prepared to offer a defense, pro se.

17 In his Complaint and Application, Trustee alleged under  
18 section 727(d)(2) that Salomons acquired or became entitled to  
19 various property belonging to the estate, and knowingly and  
20 fraudulently failed to report or deliver it to Trustee,  
21 including:

- 22 • a country club/golf membership;
- 23 • wedding/engagement rings;
- 24 • two checking accounts;
- 25 • household furniture and a big-screen television; and
- 26 • various unidentified personal property.

27 Salomons rebutted each of the allegations in their Opposition  
28 with the potentially meritorious defense that they were unaware

1 certain items were property of the estate, and/or that they had  
2 to report or possibly deliver those items to Trustee.

3 To support his allegations that Salomons's discharge was  
4 obtained through fraud pursuant to section 727(d)(1), Trustee  
5 contended that Salomons:

- 6 • did not report a set of golf clubs;
- 7 • understated the value of:
  - 8 • jewelry;
  - 9 • a checking account balance on date of petition;
  - 10 • cash on hand;
  - 11 • furniture and personal property;
- 12 • did not report income for years 2003, 2004, and 2005;
- 13 • did not report income from selling a country club/golf  
14 membership;
- 15 • disclosed the net proceeds received on sale of their home  
16 instead of gross proceeds;
- 17 • did not report financial statements given to financial  
18 institutions and/or creditors within 2 years of filing;
- 19 • made misrepresentations at the 341 meeting that:
  - 20 • they had not made any payment or transferred any  
21 property, other than regular periodic contract required  
22 payments, to any person or entity within four years of  
23 filing their petition, yet they actually:
    - 24 1. transferred/sold a home
    - 25 2. transferred/sold a golf membership
    - 26 3. transferred a valuable clock to a family member  
27 for no consideration;
- 28 • did not list all creditors in their schedules; and

1 • repeatedly admitted at the 2004 examination that their  
2 schedules and statement of financial affairs ("SOFA") were  
3 incorrect.

4 Salomons rebutted each of the allegations in their Opposition  
5 with the potential meritorious defense that they never  
6 intentionally or fraudulently misrepresented themselves at any  
7 time. They also contended that errors or omissions in their  
8 schedules and SOFA were honest oversights, and had Trustee been  
9 more thorough in reviewing their documents, those mistakes would  
10 have been discovered and easily remedied, thus avoiding his  
11 revocation action against them.

12 To support the proposition that he was unaware of the  
13 alleged fraud prior to discharge pursuant to section 727(d)(2),  
14 Trustee argued that none of the misrepresentations by Salomons  
15 were discovered until Mr. Nahmias conducted discovery in the  
16 section 523 nondischargeability action, which Greenfield  
17 commenced on January 16, 2006, just one day before the Salomons  
18 received their discharge. Furthermore, since Salomons were not  
19 complying with discovery requests, much of the potential fraud  
20 information was not discovered until at least September, 2006,  
21 when Salomons finally provided partial responses and documents.

22 A prove-up hearing on Trustee's Application was held on June  
23 28, 2007, pursuant to FRCP 55(b)(2), as incorporated by Rule  
24 7055. Salomons attended and urged the court to consider their  
25 Opposition and not revoke their discharge. Salomons argued they  
26 had complied and answered everything correctly and honestly in  
27 their petition, to the best of their knowledge. They contended  
28 they were not aware of any errors until Trustee pointed them out.

1 Salomons then asked the court for an opportunity to go through  
2 each of Trustee's allegations because they believed them to be  
3 false. However, the bankruptcy court reminded them that the  
4 issue before it was whether their Default should be set aside -  
5 it was not a trial in which they could present evidence.<sup>5</sup>

6 After a brief recess, the bankruptcy court ruled on the  
7 Salomons's request to set aside the default and Trustee's  
8 Application stating:

9 Here the debtors failed to respond and the default was  
10 entered and they now claim they should have been given  
11 further opportunity to defend. In evaluating their  
12 request, the court must note that they may be lacking  
13 funds necessary to fully engage in this process.  
14 However, they offer no adequate excuse for failing to  
15 answer . . .

16 . . . .

17 The court also notes that in the other complaint that  
18 there was a sanction for failing to properly respond.  
19 So, I think in this case the request to set aside the  
20 default will be denied.

21 With respect to the Application, the court stated:

22 I've looked over the pleadings and it does appear that  
23 the trustee has satisfied this court. He has the  
24 wherewithal, the evidentiary sense to show that debtors  
25 have failed in their duties as debtors before this court  
26 and the discharge order should be revoked.

27 The court then ordered Trustee's counsel to draft proposed  
28 findings and conclusions, which it later adopted in their  
entirety. Unfortunately, those findings are devoid of any actual  
findings under FRCP 52, as incorporated by Rule 7052, and merely

---

29 <sup>5</sup> Salomons filed only one pleading with the bankruptcy  
30 court regarding the revocation action - their Opposition.  
31 However, in that Opposition, Salomons also requested the court  
32 set aside the Default. Although Salomons did not file a separate  
33 motion for that request, to which Trustee objected, the  
34 bankruptcy court treated it as a formal motion nonetheless.

1 recite a procedural history of the case. They do not state any  
2 facts relevant to revocation under sections 727(d)(1) or (d)(2).  
3 Furthermore, the conclusions in their entirety are boilerplate  
4 statutory language of those same sections, lack any specificity,  
5 and are not supported by requisite factual findings.

6 Judgment revoking the discharge was entered on July 31,  
7 2007. Salomons filed a premature Notice of Appeal on July 24,  
8 2007, that was deemed timely upon entry of the judgment, pursuant  
9 to Rule 8002(a).<sup>6</sup> This Panel heard oral argument by the parties  
10 on March 19, 2008.

#### 11 JURISDICTION

12 The bankruptcy court had jurisdiction under 28 U.S.C.  
13 §§ 157(b)(2)(J), (O) and 1334. We have jurisdiction under 28  
14 U.S.C. § 158.

#### 15 ISSUES

- 16 1. Did the bankruptcy court err in granting Trustee's  
17 Application without sufficient findings of fact and  
18 conclusions of law?
- 19 2. Did the bankruptcy court err in granting Trustee's  
20 Application without considering Salomons's Opposition?

---

21  
22 <sup>6</sup> On December 17, 2007, Trustee filed an objection to  
23 deficiencies in Appellants' Revised Opening Brief and Excerpts of  
24 Record and requested that the appeal be dismissed, or in the  
25 alternative, that Appellants be required to cure all defects and  
26 pay sanctions before the brief and excerpts be accepted for  
27 filing. On December 20, 2007, the Panel entered an order denying  
28 the request to dismiss the appeal, but took under advisement the  
request for sanctions. Appellants' brief does not contain page  
references, a table of cases, a statement of jurisdiction, or a  
statement of issues presented and standard of appellate review as  
required by Rule 8009. While we do not condone such errors, we  
will not sanction Appellants. By separate order we will deny  
Appellee's request.



1 court denied them the opportunity to disprove Trustee's  
2 allegations, denying them due process.<sup>7</sup>

3 Because the bankruptcy court's judgment in favor of Trustee  
4 is supported by insufficient findings and conclusions, we believe  
5 the bankruptcy court erred when it granted his Application.  
6 Furthermore, we believe the court, under an incorrect assumption  
7 of law, erred by not exercising its discretion to consider  
8 Salomons's testimony as to revocation. Thus, we will vacate the  
9 default judgment granting Trustee's Application and remand for  
10 further proceedings on the merits.

11 **I. The Bankruptcy Court Erred When It Granted Trustee's**  
12 **Application on Insufficient Findings and Conclusions.**

13 In this case, granting Trustee's Application resulted in  
14 Salomons losing their discharge - one of the harshest penalties a  
15 debtor in bankruptcy can receive.

16 Revocation of discharge is a drastic measure that runs  
17 contrary to the Bankruptcy Code's general policy of giving  
18 Chapter 7 debtors a "fresh start." In re Poole, 177 B.R. 235  
19 (Bankr. E.D. Pa. 1995); see Tighe v. Valencia (In re Guadarrama),  
20 284 B.R. 463, 469 (C.D. Cal. 2002) (revocation is an extraordinary  
21 remedy) (citing Bowman, 173 B.R. at 924) (emphasis added).

22 Judgment by default is appropriate only in extreme  
23 circumstances. Falk v. Allen, 739 F.2d 461, 463 (9th Cir. 1984).  
24 Default judgments are generally disfavored and a case should,  
25 whenever possible, be decided on its merits. Meadows v.

---

27 <sup>7</sup> Because service was proper in every circumstance and  
28 Salomons attended the prove-up hearing, we conclude they were not  
denied due process.

1 Dominican Republic, 817 F.2d 517, 521 (9th Cir. 1987) (citing  
2 Schwab v. Bullock's Inc., 508 F.2d 353, 355 (9th Cir. 1974)).

3       The power to grant a default judgment is within the broad  
4 discretion of the trial court. Robert Kubick et. al. v. FDIC (In  
5 re Kubick), 171 B.R. 658, 659 (9th Cir. BAP 1994). Factors  
6 courts consider in exercising that discretion include: (1) the  
7 possibility of prejudice to the plaintiff; (2) the merits of  
8 plaintiff's substantive claim; (3) the sufficiency of the  
9 complaint; (4) the sum of money at stake in the action; (5) the  
10 possibility of a dispute concerning material facts; (6) whether  
11 the default was due to excusable neglect; and (7) the strong  
12 policy underlying the Federal Rules of Civil Procedure favoring  
13 decisions on the merits. Eitel, 782 F.2d at 1472 (citing 6  
14 Moore's Federal Practice § 55-05[2], at 55-24 to 55-26). See  
15 also Kubick, 171 B.R. at 661 (citing Eitel factors to determine  
16 whether to grant or deny default judgment).

17       According to FRCP 52(a)(1), as incorporated by Rule 7052, in  
18 an action tried on the facts without a jury, the court must find  
19 the facts specialy and state its conclusions of law separately.  
20 Such findings and conclusions may be stated on the record, or may  
21 appear in an opinion or a memorandum of decision filed by the  
22 court. Although FRCP 52(a)(1) and Rule 7052 apply to trials and  
23 not specifically to prove-up hearings under Rule 7055, the  
24 bankruptcy court exercised its discretion under the latter rule,  
25 conducted a prove-up hearing, and chose to make findings and  
26 conclusions with regard to Trustee's Application. We must  
27 therefore review the adequacy of those findings in order to  
28

1 determine the appropriateness of the default judgment.<sup>8</sup>

2 If there is an absence of indication by the court as to how,  
3 why, or on what basis the finding of fact rested, there has not  
4 been sufficient compliance with Rule 52(a). Theriault et. al. v.  
5 Silber et. al., 547 F.2d 1279, 1280-1281 (5th Cir. 1977).

6 However, it is harmless error when a court's insufficient formal  
7 findings can be supported by explicit oral statements made at  
8 trial. Griffin v. U.S., 513 F.2d 1321, 1323 (9th Cir. 1975).

9 A trial court's "findings should be explicit enough to give  
10 the appellate court a clear understanding of the basis of the  
11 trial court's decision, and to enable it to determine the ground  
12 on which the trial court reached its decision." Alpha Distrib.  
13 Co. of Cal., Inc., v. Jack Daniel Distillery, Inc., 454 F.2d 442,  
14 453 (9th Cir. 1972).

15 An appropriate review by the appellate court is not possible  
16 when the trial court provides only conclusory findings,  
17 illuminated by no subsidiary findings or reasoning on all  
18 relevant facts; such findings lack that "detail and exactness" on  
19 material issues of fact necessary for rational determination on  
20 whether findings of the trial court are clearly erroneous.

21 E.E.O.C. v. United Va. Bank/Seaboard Nat'l, 555 F.2d 403, 406  
22 (4th Cir. 1977).

23 \_\_\_\_\_  
24 <sup>8</sup> We acknowledge that in In Adriana Intern. Corp. v.  
25 Thoeren the Ninth Circuit held a default judgment generally  
26 precludes a trial of the facts except as to damages, and  
27 therefore Rule 52 is inapplicable except as to damages. 913 F.3d  
28 1406, 1414 (9th Cir. 1990) (citing Brown v. Kenron Aluminum &  
Glass Corp., 447 F.2d 526, 531 (8th Cir. 1973)) (emphasis added).  
However, since the "damages" here is revocation of discharge, we  
believe adequate findings and conclusions were appropriate and  
necessary.

1 As a result, "[t]he absence of findings . . . leaves no  
2 pediment on which a judgment can stand," Waialua Agr. Co. v.  
3 Maneja, 178 F.2d 603, 607 (9th Cir. 1949), and under such  
4 circumstances the appellate court may appropriately vacate the  
5 judgment and remand the cause to the district court for  
6 supplemental findings. Alpha Distrib., 454 F.2d at 453.

7 In this case, the bankruptcy court ordered Trustee's  
8 counsel to draft the proposed findings and conclusions, which the  
9 court adopted wholesale. The Ninth Circuit reviews a district  
10 court's findings of fact "'with special scrutiny'" 'when a  
11 district court' "'engage[s] in the regrettable practice of  
12 adopting the findings drafted by the prevailing party  
13 wholesale.'" Silver v. Executive Car Leasing Long-Term  
14 Disability Plan, 466 F.3d 727, 733 (9th Cir. 2006) (citing Sealy,  
15 Inc. v. Easy Living, Inc., 743 F.2d 1378, 1385 (9th Cir. 1984)).  
16 See Commodity Futures Trading Comm'n v. Topworth Int'l, Ltd., 205  
17 F.3d 1107, 1112 (9th Cir. 1999) (factual findings are "'reviewed  
18 for clear error, but with particularly close scrutiny [where] the  
19 district court adopt[s][one party's] proposed findings'").

20 Regardless of whether the instant findings and conclusions  
21 were drafted by the court or Trustee's counsel, or the stricter  
22 scrutiny applied when drafted by the prevailing party, they are  
23 devoid of any actual findings under Rule 7052, and merely recite  
24 a procedural history of the case. For example, on the issue of  
25 fraud, there is not one "found fact" which shows that Salomons  
26 did (or did not do) "a, b, and c," and therefore they committed  
27 fraud justifying revocation. There is simply a conclusion that  
28 Salomons committed fraud. On that same note, the conclusions, in

1 their entirety, are boilerplate statutory language of sections  
2 727(d)(1) and (d)(2), lack any specificity, and are not supported  
3 by requisite factual findings.

4 Even though the court stated at the conclusion of the prove-  
5 up hearing that Trustee had shown Salomons failed at their duties  
6 as debtors and that their discharge should be revoked, without  
7 any specific findings as to how, why, or on what basis Trustee  
8 satisfied the elements of (d)(1) and/or (d)(2), it is impossible  
9 for us to review or make any rational determination on whether  
10 its findings and conclusions are clearly erroneous. In fact,  
11 since there are essentially no actual findings or supported  
12 conclusions on the record before us, that alone sustains our  
13 decision to vacate and remand.

14 **II. The Bankruptcy Court Erred When It Granted Trustee's**  
15 **Application Without Considering Salomons's Opposition.**

16 In general, the effect of an entry of default, if not set  
17 aside, is to establish the liability of the defaulting party as a  
18 basis for default judgment. 10 Moore's Federal Practice  
19 § 55.32[1][a] (3d. ed. 2007). After defaulting, the defaulted  
20 party has no right to dispute the issue of liability. Id. See  
21 Geddes v. United Fin. Group, 559 F.2d 557, 560 (9th Cir. 1977)  
22 (default by defendants established their liability, but not  
23 extent of damages).

24 However, that is not the case as to damages. Such evidence  
25 by a defaulted defendant on damages is allowed pursuant to FRCP  
26 8(b)(6), as incorporated by Rule 7008, which states, "[a]n  
27 allegation - other than one relating to the amount of damages -  
28 is admitted if a responsive pleading is required and the

1 allegation is not denied." "As defendant by his default has  
2 admitted all the transversable facts which were properly pleaded  
3 in the declaration or complaint . . . he usually is not permitted  
4 on the hearing of an application for a default judgment to  
5 introduce any evidence controverting plaintiff's cause of action  
6 and his liability thereon; but . . . he may, in a proceeding for  
7 the assessment of damages, offer evidence in mitigation or  
8 reduction of the damages claimed by plaintiff." 49 C.J.S.  
9 Judgments § 223 (2008) (emphasis added). Therefore, even in a  
10 default situation, the claimant must establish the amount of  
11 damages and the defaulting party is entitled to be heard in  
12 opposition on the matter. 10 Moore's Federal Practice  
13 § 55.32[1][c].

14 Moreover, a defaulted defendant can present evidence to  
15 attack the sufficiency of a plaintiff's complaint for failing to  
16 state a claim upon which relief can be granted, as legally  
17 insufficient, or that it simply parrots mere conclusions of law  
18 with no supporting facts. Id. at §§ 55.32[1][a], [b]; and see  
19 DirectTV, Inc. v. Hoa Huynh, 503 F.3d 847, 854 (9th Cir. 2007).

20 Most, if not all, of the case law on the issue of damages or  
21 remedy stems from the tort arena, where there are clear lines of  
22 distinction between liability and damages. Unfortunately, this  
23 clear distinction does not lend itself to the realm of  
24 bankruptcy, particularly in an action to deny or revoke a  
25 discharge. The lines between liability and damages or remedy are  
26 blurred and difficult to parse out into two neat categories.  
27 Furthermore, in a revocation case there is no "damaged"  
28 plaintiff, per se, but only a potentially damaged system should a

1 dishonest debtor get the benefit of the "fresh start" that  
2 bankruptcy guarantees.

3 Yet, even though the lines are blurred between liability and  
4 damages or remedy in bankruptcy actions, parallels to tort  
5 actions can be made. Much like damages are the natural  
6 consequence of a defendant's tortious conduct, a denial or  
7 revocation of discharge is the natural consequence of a debtor's  
8 violation of the rules set out in section 727. In this case, the  
9 damage is revocation.

10 Although with the default in place the Salomons were  
11 prevented from disputing Trustee's well-pleaded facts as to their  
12 liability under sections 727(d)(1) and (d)(2), their evidence  
13 offered possibly to mitigate, reduce, or eliminate the damages -  
14 i.e., defeat the revocation of their of discharge - should have  
15 been considered by the court before it entered judgment in favor  
16 of Trustee.

17 The prove-up hearing transcript does not contain any  
18 indication that the court focused on the damages or remedy  
19 aspects of default judgment procedure. To the contrary, based on  
20 colloquy at the prove-up hearing, the court appeared to be under  
21 the incorrect assumption that it could not receive evidence from  
22 the Salomons as to the revocation unless the default was vacated.  
23 Furthermore, Trustee, misstating pertinent law, argued that, "if  
24 the court decides that their default should not be vacated, then  
25 I don't believe they have the right to appear on the trustee's  
26 application and be heard." The court apparently accepted this  
27 position.

1           The transcript suggests the court's focus was purely on  
2 whether to set aside the Default. However, based on the  
3 testimony of Ms. Salomon it is clear the Salomons were offering  
4 to explain why they should not suffer the legal consequence of  
5 losing their discharge, i.e., they were trying to offer evidence  
6 to dispute the damage or remedy. Because the court has such  
7 broad discretion in deciding whether to grant or deny a default  
8 judgment, such evidence should not have only been allowed but  
9 considered by the court in its decision. Although the court  
10 heard it, it is apparent it did not consider it.

11           The problems inherent in proving fraud, when combined with  
12 explanations proffered by the Salomons, suggest that if the  
13 court had applied the Eitel standards it might have required a  
14 trial on the merits, which is the preferred course of action.

15           Even though we vacate the default judgment, in light of the  
16 discussion above it does not follow that we necessarily have to  
17 vacate the Default. It is plausible that the bankruptcy court  
18 could, on remand, conduct a more extensive hearing and consider  
19 what Salomons have to offer as to the nature of the damages - the  
20 revocation of their discharge - as distinguished from their  
21 liability, which may have been established by the well-pleaded  
22 facts in the Complaint. It is also possible the court may  
23 conclude the more practicable solution is to vacate the Default  
24 so as to eliminate the potential for confusion about what is  
25 being considered. Hence, the bankruptcy court may choose to  
26 exercise its discretion, vacate the Default, and proceed to a  
27 full trial on the merits.

28

**CONCLUSION**

Based upon the foregoing reasons, we VACATE the judgment granting Trustee's Application and REMAND for further proceedings on the merits.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28