

FEB 28 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NOT FOR PUBLICATION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. SC-07-1017-DBaMo
)	
BURNETT W. WATKINS and)	Bk. No. 02-08035
JUDITH A. WATKINS,)	
)	Adv. No. 04-90006
Debtors.)	
<hr/>		
BURNETT W. WATKINS,)	
)	
Appellant,)	
)	
v.)	M E M O R A N D U M ¹
)	
MARKET EXPRESS TRANSPORTATION,)	
INC.,)	
)	
Appellee.)	
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Argued by Telephone Conference on November 28, 2007

Submitted on January 31, 2008

Filed - February 28, 2008

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

Honorable Peter W. Bowie, Chief Bankruptcy Judge, Presiding

Before: DUNN, BAUM² and MONTALI, Bankruptcy Judges.

¹This 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.

²Hon. Redfield T. Baum, Sr., Chief Judge of the U.S. Bankruptcy Court for the District of Arizona, sitting by designation.

1 Debtor, defendant in an adversary proceeding asserting
2 claims pursuant to 11 U.S.C. §§ 523(a)(2)(A) and (a)(4),³
3 appealed several evidentiary and procedural rulings made by the
4 bankruptcy court in the course of a two-day trial, as well as the
5 ultimate determination of the bankruptcy court (1) that the debt
6 was nondischargeable pursuant to § 523(a)(2)(A), and (2) that
7 debtor was a fiduciary such that his debt to plaintiff was
8 nondischargeable under § 523(a)(4). We AFFIRM.

9
10 **I. FACTS**

11 A. The Relationship Between the Parties

12 In April 1989, debtor, Burnett W. Watkins ("Watkins"),
13 incorporated Equity Insurance Services, Inc. ("Equity") in
14 Arizona for the purpose of "performing insurance servicing and
15 the sale of insurance." Watkins served as Equity's operations
16 manager; at all relevant times, he also was either President or
17 Vice President of Equity.

18 In the course of its operations, Equity entered into
19 management agreements with Universal Security Insurance Company,
20 Ltd. ("Universal"), and with Combined General Insurance Company
21 ("Combined General") to "produce" insurance coverages for
22 taxicabs, intrastate trucks, limousines and used car dealers in
23 California. Both Universal and Combined General were off-shore
24 companies; Watkins asserted that each was authorized by the

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

1 California Department of Insurance to underwrite surplus lines
2 insurance business in California.

3 Each of the management agreements contained the following
4 provisions:

5 5.1 All premiums received by the manager either before
6 or after termination of this Agreement, shall be held
7 by the Manager as trustee for the Company until
8 deposited in the Company's account

9 15.4 Ernie Garrison and Burnett Watkins each
10 personally guarantee and each shall be personally
11 liable for the performance of this agreement.⁴

12 Appellee, Market Express Transportation, Inc. ("Market
13 Express"), entered into an insurance contract on October 13,
14 1990, pursuant to which Combined General agreed to provide Market
15 Express with liability insurance coverage. Market Express also
16 entered into insurance contracts on June 30, 1990, and August 30,
17 1991, pursuant to which Universal agreed to provide Market
18 Express with liability insurance coverage.

19 Beginning in or about August 1993, Combined General ceased
20 paying claims on behalf of Market Express, and failed to provide
21 a defense in connection with litigation commenced against Market
22 Express. On October 4, 1993, Equity notified counsel it had
23 retained, assertedly on behalf of Combined General, to defend
24 Combined General's claims in litigation, that Equity "has been
25 unable to communicate with Combined General," and that Equity had

26 ⁴Neither management agreement was signed in an individual
27 capacity. However, the Universal management agreement was
28 executed by Watkins as Equity's president on January 1, 1989,
approximately three months before Equity was incorporated. The
Combined General management agreement was executed by Watkins as
Equity's vice president of administration. We cannot determine
the execution date from the record.

1 "not received any funds from Combined General to pay settlement
2 of claims, judgments and/or verdicts."

3 Similarly, beginning in or about October 1994, Universal
4 ceased paying claims on behalf of Market Express and failed to
5 provide a defense in connection with litigation commenced against
6 Market Express.

7
8 B. The State Court Litigation

9 Market Express sued both Watkins and Equity⁵ in the
10 California (San Bernardino County) Superior Court ("State
11 Court"). In its amended complaint filed on May 31, 1995, in the
12 State Court, Market Express sought damages from Watkins and
13 Equity for breach of contract, breach of fiduciary duty,
14 negligence, fraud and "suppression of facts." In effect, it is
15 Market Express's position that neither Universal nor Combined
16 General existed, that Equity was operating as an insurance
17 company, and that Watkins was the alter ego of Equity. Watkins
18 contends that Equity was at all times merely an administrator,
19 i.e., a managing general agent under the California Insurance
20 Code, for the insurance policies issued to Market Express by
21 Universal and Combined General.

22 Although initially represented by counsel in the State Court
23 litigation, Watkins substituted as his own legal representative
24 on May 29, 1997, and thereafter proceeded in pro per. On March
25 9, 1998, the State Court entered its order striking Watkins'

26
27
28

⁵Market Express named numerous other defendants in the State
Court litigation; the disposition of those claims is not relevant
to this appeal.

1 answer and placing him in default based on his actions
2 "undertaken . . . to obstruct and delay these proceedings. . . ."
3 On May 28, 1998, the State Court denied Watkins' motion to set
4 aside the default.

5 On Market Express's motion for entry of judgment against
6 Watkins, the State Court held a "proving up hearing" for which
7 Market Express submitted a substantial record ("State Court
8 Factual Record").⁶ The State Court entered a substantial default
9 judgment ("Judgment") in favor of Market Express and against
10 Watkins on November 30, 1998.⁷

11 Watkins did not appeal the Judgment.
12

13 C. The Proceedings in the Bankruptcy Court

14 Watkins filed a no-asset voluntary Chapter 7 case on
15 August 12, 2002. His discharge was entered on November 21, 2002,
16 and the case was closed on December 3, 2002. Watkins thereafter
17 moved to reopen the case, asserting that Market Express's
18 judgment debt "inadvertently" was not included on his bankruptcy
19 schedules. The case was reopened December 8, 2003, and Watkins
20 filed an amended schedule F on January 9, 2004, adding Market
21 Express as judgment creditor with an unsecured claim in the
22

23 ⁶The State Court Factual Record was admitted into evidence
24 at the trial in the adversary proceeding.

25 ⁷The Judgment awarded Market Express damages against Watkins
26 as follows: jointly and severally with other defendants in the
27 amount of \$259,764.26 for net compensatory and consequential
28 damages; individually in the amount of \$551,477.66 for punitive
damages. The Judgment was amended March 8, 1999, to include an
award of attorneys fees in the amount of \$116,601.00 and costs in
the amount of \$16,035.45, for which Watkins also was jointly and
severally liable.

1 amount of \$943,878.37. Market Express promptly filed an
2 adversary proceeding seeking a determination that its debt was
3 nondischargeable.

4 The initial complaint in the adversary proceeding asserted a
5 single cause of action, i.e., that the Judgment was
6 nondischargeable based on fraud that was willful and malicious,
7 and relied on § 523(a)(6). More than a year later, Market
8 Express sought leave to amend the complaint "to include
9 additional statutory provisions." Specifically, Market Express
10 wanted to add causes of action under §§ 523(a)(2)(A) and (a)(4).
11 Over Watkins' objection, the bankruptcy court granted leave to
12 amend as requested.⁸

13 Because the State Court did not make findings at the time
14 the Judgment was entered, the bankruptcy court disagreed with
15 Market Express's assertion that the Judgment was entitled to
16 preclusive effect, except with respect to the amount of damages.

17 [W]hat this case is about is there's a judgment from
18 the state court under California law and federal law;
19 it's normally entitled to issue preclusion effect if I
20 can determine that the findings of the superior court
21 were findings that would allow me to conclude that the
22 elements of a nondischargeability cause of action,
23 whether under 523(a)(2)(a), [(a)(4)] or (a)(6) have
24 been established.

25 Based upon the findings, or the lack of findings, by
26 the superior court, I told you that I couldn't make
27 that determination. I told you that the amount of
28 damages had been determined by the superior court, and
that was there. The issue for me is whether or not
[it's] dischargeable.

26 ⁸Although Watkins' Notice of Appeal states that he was
27 appealing the final judgment of the bankruptcy court "and all
28 orders relative to this case," nothing in the briefs or the
record raises any issue with respect to the bankruptcy court's
order allowing amendments to the complaint.

1 Partial Trial Transcript (Nov. 17, 2006 Court Ruling), p. 3:4-17.

2
3 1. The motion in limine

4 At the opening of the two-day trial ("Trial"), which
5 commenced on November 16, 2006, Watkins brought to the bankruptcy
6 court's attention a motion in limine he had filed, and through
7 which he sought (1) to restrict the admission of a declaration
8 and expert opinion report prepared by Market Express's insurance
9 expert, Harris Rutsky ("Rutsky Expert Opinion Report"), and (2)
10 to preclude the testimony of Mr. Rutsky at trial. The bankruptcy
11 court declined to rule on the motion until Market Express had a
12 witness on the stand and made an attempt to introduce the report
13 into evidence. Partial Trial Transcript (Nov. 16, 2006 Motion in
14 Limine), p. 3:21-25. In its colloquy with Watkins, the bankruptcy
15 court suggested the possibility that the proper focus might not
16 be on admissibility of Mr. Rutsky's declaration, the Rutsky
17 Expert Opinion Report and testimony, but rather on the weight
18 that the bankruptcy court, as the trier of fact, should give that
19 evidence. Id. at p. 4:11-18.

20 Because neither party provided us with a complete copy of
21 the transcript of the Trial, it is unclear whether the bankruptcy
22 court ruled on the motion in limine. In its oral ruling at the
23 conclusion of the case, however, the bankruptcy court made clear
24 that in reaching its decision it had placed no reliance on
25 anything contained in the Rutsky Expert Opinion Report.

26 I do want to make one thing very clear, and that is
27 that in making that determination, I do not rely at all
28 on Mr. Rutsky's declaration.

I have to say . . . that I found some of the leaps that
he makes in the instances where he even purports to

1 have something that he bases something on - some of the
2 leaps that he makes were just - strained my credulity -
3 well, didn't strain it, broke it. In fact, I rely on
4 Mr. Rutsky not at all in making my determination.

5 Partial Trial Transcript (Nov. 17, 2006 Court Ruling), p. 6:13-
6 22.

7 2. The bankruptcy court's rulings on the admission of
8 exhibits

9 The bankruptcy court refused to admit certain exhibits
10 Watkins offered as evidence at trial and to which Market Express
11 had filed objections. Watkins has appealed the bankruptcy
12 court's failure to admit into evidence his exhibits B, O, P, Q,
13 S, and T. In addition, Watkins has appealed the bankruptcy
14 court's admission into evidence of numerous impeachment exhibits
15 offered by Market Express. We address the specifics of the
16 evidentiary rulings on these exhibits later in this Memorandum.

17
18 3. The bankruptcy court's rulings on the substantive
19 issues

20 The bankruptcy court ruled with respect to the cause of
21 action asserted by Market Express pursuant to § 523(a)(2)(A),
22 that Market Express had met its burden of establishing a prima
23 facie case of fraud against Watkins, and that Watkins had failed
24 to present evidence to rebut that prima facie case. Further, the
25 bankruptcy court found, based on the management agreements
26 between Equity and Universal and Combined General, and on
27 Watkins' trial testimony, that Equity and/or Watkins was a
28 fiduciary, for purposes of § 523(a)(4), for Market Express with

1 respect to the insurance premiums paid, for which no accounting
2 has ever been provided. Accordingly, the bankruptcy court held
3 that the Judgment was not dischargeable in Watkins' bankruptcy
4 case.

5 Watkins filed a timely notice of appeal.

6
7 D. The Proceedings In This Appeal

8 At oral argument we informed the parties of our concerns
9 over the absence of significant portions of the trial transcript
10 in the record on appeal. At the close of argument we took the
11 appeal under submission. Two weeks later, Market Express sought
12 leave "in the interest of justice" to lodge the "**complete**
13 transcript from November 16, 2006" ("Late Transcript").⁹ Watkins
14 objected. However, because the absence of the Late Transcript
15 was more problematic for Watkins, and in light of the reality
16 that Watkins was prosecuting this appeal without the assistance
17 of counsel, we granted Market Express's request to lodge the Late
18 Transcript, but we gave Watkins the opportunity to prepare a
19 supplemental brief to direct our attention to portions of the
20 Late Transcript that support the arguments he was making on
21 appeal. Watkins filed a timely supplemental brief, followed by a
22 "Notice of Errata to January 9, 2008 Submission," which both have
23

24
25 ⁹The emphasis is in the original document filed by Market
26 Express. Watkins points out in his response that Market Express
27 did not include the complete transcript because the Late
28 Transcript did not include all testimony presented on Friday,
November 17, 2006. We note that Market Express was explicit that
the Late Transcript only pertained to November 16, 2006. Watkins
made no attempt to include a complete transcript of the
November 17, 2006 testimony.

1 been considered in the preparation of this Memorandum. Market
2 Express did not avail itself of its opportunity to respond.

3
4 **II. JURISDICTION**

5 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
6 §§ 1334 and 157(b) (1) and (b) (2) (I). We have jurisdiction
7 pursuant to 28 U.S.C. § 158.

8
9 **III. ISSUES**

10 Whether the bankruptcy court abused its discretion in
11 denying Watkins' motion in limine.

12 Whether the bankruptcy court abused its discretion when it
13 did not admit Watkins' exhibits.

14 Whether the bankruptcy court abused its discretion in
15 admitting Market Express's impeachment exhibits.

16 Whether the bankruptcy court erred in excepting Watkins'
17 debt to Market Express from Watkins' discharge pursuant to
18 § 523(a) (2) (A).

19 Whether the bankruptcy court erred in excepting Watkins'
20 debt to Market Express from Watkins' discharge pursuant to
21 § 523(a) (4).

22
23 **IV. STANDARDS FOR REVIEW**

24 The bankruptcy court's evidentiary rulings are reviewed for
25 abuse of discretion. In re Renovizor's, Inc., 282 F.3d 1233,
26 1237 n.1 (9th Cir. 2002). See also U.S. v. Geston, 299 F.3d
27 1130, 1138 (9th Cir. 2002) (trial court's ruling on motion in
28 limine reviewed for abuse of discretion). To reverse on the

1 basis that an evidentiary ruling was erroneous, we must conclude
2 not only that the bankruptcy court abused its discretion, but
3 also that the error was prejudicial. See McEuin v. Crown Equip.
4 Corp., 328 F.3d 1028, 1032 (9th Cir. 2003). An evidentiary
5 ruling is prejudicial if it is more probable than not that the
6 erroneous ruling tainted the judgment. Id.

7 A determination that a claim is nondischargeable presents
8 mixed issues of law and fact which we review de novo. See Hamada
9 v. Far East Nat'l Bank (In re Hamada), 291 F.3d 645, 649 (9th
10 Cir. 2002).

11 **V. DISCUSSION**

12 **A. Limited Transcripts in the Excerpts of Record**

13 As a preliminary matter, we note the limited transcript
14 record before us for consideration of this appeal. From the two
15 day trial, we have the following partial transcripts for review:

16 Partial Trial Transcript (Nov. 17, 2006 Court Ruling)

17 Partial Trial Transcript (Nov. 16, 2006 Motion in
18 Limine)

19 Partial Trial Transcript (Nov. 17, 2006 Closing
20 Argument)

21 Partial Trial Transcript (Nov. 17, 2006 Request for
22 Admission of Exhibits B, O, P, Q, S, and T)

23 Partial Trial Transcript (Nov. 16, 2006 Market
24 Express's Direct Examination of Watkins)

25 The BAP Rules provide for the filing by a party of an
26 Appendix to its brief, which is comprised of a party's excerpts
27 of the record. 9th Cir. BAP Rule 8009(b)-1. We generally limit
28 our review of the record to an examination of those excerpts
which have been provided by the parties, and are not obligated to

1 examine portions of the record not included in the excerpts. See
2 In re Kritt, 190 B.R. 382, 386-87 (9th Cir. BAP 1995); In re
3 Anderson, 69 B.R. 105, 109 (9th Cir. BAP 1986). "The excerpts of
4 the record shall include the transcripts necessary for adequate
5 review in light of the standard of review to be applied to the
6 issues before the Panel. The Panel is required to consider only
7 those portions of the transcript included in the excerpts of the
8 record. . . ." BAP Rule 8006-1.

9 The incomplete transcript record provided for our review in
10 the excerpts of record has, in some instances, limited our
11 ability to determine whether the bankruptcy court's rulings were
12 correct in light of the appropriate standards of review, despite
13 the opportunities provided to supplement the record on appeal.

14
15 B. Evidentiary Rulings

16 Watkins appeals from several evidentiary rulings made by the
17 bankruptcy court during the course of trial: denial of Watkins'
18 motion in limine, failure to admit into evidence certain trial
19 exhibits offered by Watkins, and admitting into evidence exhibits
20 offered by Market Express for the purpose of impeaching Watkins'
21 testimony.

22 1. The motion in limine

23 At the commencement of trial, Watkins submitted his motion
24 in limine, the purpose of which was to exclude both the affidavit
25 and the testimony of Market Express's expert witness, Harris
26 Rutsky. The bankruptcy court deferred ruling on the motion until
27 Market Express had a witness on the stand and made an attempt to
28 introduce the Rutsky Expert Opinion Report into evidence.

1 Watkins asserts the bankruptcy court erred in failing to rule on
2 his motion in limine.

3 The burden was on Watkins to obtain a ruling on the motion
4 in limine; if the bankruptcy court never ruled on the motion,
5 there is no error to review. See U.S. v. Wagoner, 713 F.2d 1371,
6 1374 (8th Cir. 1983).

7 The excerpts of record provide only partial transcripts of
8 the testimony taken during the two-day trial, and provide no
9 transcript of any ruling by the bankruptcy court on Watkins'
10 motion in limine. Accordingly, we are unable to determine
11 whether the bankruptcy court ultimately ruled on the motion in
12 limine.

13 To raise an evidentiary error on appeal, counsel must
14 not only satisfy Rule 103 but the rules of appellate
15 procedure; for example, it does little good to have a
16 transcript containing a proper record of the objection
if that transcript is not made part of the record on
appeal.

17 21 Wright & Graham, FEDERAL PRACTICE AND PROCEDURE: EVIDENCE 2D § 5038,
18 p. 828. "Nor will making it part of the record avail the
19 appellant if the brief does not properly designate the portion of
20 the record where the objection can be found." Id.

21 On the record before us, we find no error.

22 Even if we had an adequate record of the bankruptcy court's
23 ruling on the motion, Watkins cannot demonstrate that a denial of
24 the motion in limine was prejudicial to him where the bankruptcy
25 court explicitly and repeatedly stated that it had not relied on
26 the Rutsky Expert Opinion Report that was the subject of the
27
28

1 motion in limine in deciding the issues before it.^{10 11} See
2 McEuin v. Crown Equip. Corp., 328 F.3d at 1032.

3 Further, any ruling to admit the Rutsky Expert Opinion
4 Report offered by Market Express could not have prejudiced
5 Watkins, where it appears Watkins himself offered the Rutsky
6 Expert Opinion Report as his Exhibit A, which the bankruptcy
7 court admitted into evidence. Thus, the motion in limine remains
8 relevant only with respect to any testimony of Mr. Rutsky.
9 Nothing in the record before us indicates that Mr. Rutsky
10 testified.

11
12 2. The bankruptcy court's failure to admit exhibits into
13 evidence

14 Watkins has appealed the bankruptcy court's failure to admit
15 certain exhibits into evidence. We address the evidentiary
16 ruling with respect to each proposed exhibit separately.

17 a. Exhibit B

18 Watkins asserts that Exhibit B was a transcript of a hearing
19 in the bankruptcy court held October 17, 2005 ("October 2005
20 Hearing Transcript"). As reflected in the Late Transcript,
21

22
23 ¹⁰The judgment entered by the bankruptcy court states with
24 respect to the § 523(a)(2)(A) cause of action: "The court
25 further states that in rendering these findings it did not rely
26 on the declaration of Harris Rutsky." Order and Judgment of
Nondischargeable Debt, p. 2:12-14.

27 ¹¹Further, it appears that Watkins offered the Rutsky Expert
28 Opinion Report, or some version of it, as his Exhibit A, which
was admitted into evidence at Trial. See List of Trial Exhibits,
p. 8; Partial Trial Transcript (Nov. 17, 2006 Closing Argument),
p. 13:2-13.

1 Exhibit B was not the October 2005 Hearing Transcript:¹²

2 Q Going to Exhibit B.

A Okay.

3 Q You have responses to special interrogatories.
4 Are you wanting to offer these to simply show what
Market Express has said about a particular issue
you questioned them about?

5 A Well, part of the -- we questioned Market Express
6 on a number of issues, and they gave a certain
response. Part of the defense, the response that
they gave is critical to our position.

7 Q Let me just ask you briefly, is that why you're
8 offering it, is simply to support your position?

A That's correct.

9 Partial Trial Transcript (Nov. 16, 2006 Market Express's Direct
10 Examination of Watkins), p. 64:10-22.

11 The bankruptcy court in fact admitted Watkins' Exhibit B.
12 Partial Trial Transcript (Nov. 16, 2006 Market Express's Direct
13 Examination of Watkins), p. 90:10-13. We therefore reframe
14 Watkins' issue on appeal to be whether the bankruptcy court erred
15 in excluding the October 2005 Hearing Transcript.

16 Watkins has not provided us with a copy of the October 2005
17 Hearing Transcript as a part of his excerpts of record.
18 Accordingly, we are not in a position to review whether the
19 ruling of the bankruptcy court in excluding the October 2005
20 Hearing Transcript was an abuse of discretion. Regardless, if
21 the bankruptcy court was correct in its analysis that the October
22 2005 Hearing Transcript merely contained a record of a procedural
23 discussion which served as a "blueprint" for the upcoming trial,
24 we agree that it was properly excluded.

25

26 ¹²We note that Watkins, but not the bankruptcy court, refers
27 to the October 2005 Hearing Transcript as Exhibit B in the
28 discussion whether the October 2005 Hearing Transcript should be
admitted. Partial Trial Transcript (Nov. 17, 2006 Request for
Admission of Exhibits B, O, P, Q, S, and T), p. 9:10-10:2.

1 To be admissible, evidence must be "relevant." Fed. R.
2 Evid. 402.

3 "Relevant evidence" means evidence having any tendency
4 to make the existence of any fact that is of
5 consequence to the determination of the action more
probable or less probable than it would be without the
evidence.

6 Fed. R. Evid. 401.

7 Nothing in a transcript which only sets forth a discussion
8 of the procedural parameters for an upcoming trial can constitute
9 evidence of any fact, here, to demonstrate that Watkins was or
10 was not a fiduciary, or that Watkins did or did not commit fraud
11 with respect to his actions concerning Market Express.

12 b. Exhibit O

13 Exhibit O purported to be a fax from the surplus lines
14 association in California, specifying the language to be included
15 on a "deck sheet" to insureds when an insurance policy was issued
16 to the insured by a "non-admitted" carrier. The language advised
17 insureds that because the insurance company was not admitted in
18 California, the policy was not covered by California's insurance
19 guarantee fund. Market Express objected that Exhibit O lacked
20 relevance and foundation, and was inadmissible hearsay. The
21 bankruptcy court ruled that Exhibit O would not be admitted, both
22 because the document was not authenticated and because the
23 document was an "updated version" which would not have been
24 applicable at the time the insurance policies at issue were
25 written. Partial Trial Transcript (Nov. 17, 2006 Request for
26 Admission of Exhibits B, O, P, Q, S, and T), pp. 3:7 - 4:1.
27 Again, because Watkins did not supply the proposed Exhibit O for
28 our review, we have no basis for determining whether the

1 bankruptcy court abused its discretion. We do note, generally,
2 that, as set forth in Fed. R. Evid. 901(a), authentication is a
3 condition precedent to admissibility. Further, because the
4 specific document at issue, which the court characterized as an
5 "updated version," was not even effective at the time the events
6 at issue in this dispute occurred, we find it difficult to
7 imagine how it could have been relevant to the proceedings before
8 the bankruptcy court.

9 c. Exhibit P

10 Watkins asserts that his proposed Exhibit P consisted of
11 three letters: one from West Arrow to Equity; one from
12 Universal's attorney, Jay Bartz, to Charles Ibold of the law firm
13 Ibold & Anderson; and another to Equity from West Arrow. Watkins
14 offered these letters to establish the "separateness" between
15 Equity and the insurance companies for which Equity was providing
16 contract services. The bankruptcy court correctly ruled that the
17 letters, if offered for the stated purpose, constituted
18 inadmissible hearsay where they were offered to prove the
19 contents of the letters. Partial Trial Transcript (Nov. 17, 2006
20 Request for Admission of Exhibits B, O, P, Q, S, and T), pp. 4:2
21 - 6:3. See generally Fed. R. Evid. 801 and 802. Again, our
22 ability to find an abuse of discretion in this evidentiary ruling
23 is limited by Watkins' failure to provide a copy of the proposed
24 Exhibit P for our review.¹³

27 ¹³Watkins' ER Tab N pp. 18-20 may be copies of the subject
28 letters, which were intended as Exhibit P. However, Watkins does
not direct the Panel's attention to this exhibit in his briefs,
and no index to his ER identifies the letters.

1 d. Exhibit Q

2 Watkins' proposed Exhibit Q assertedly was a letter from
3 Universal's attorney, Jay Bartz, to John LePire, a surplus lines
4 broker, regarding a name change between Criterion Casualty
5 Limited and Universal Security Limited. The record reflects that
6 the bankruptcy court ruled that proposed Exhibit Q constituted
7 inadmissible hearsay, and that the hearsay was compounded because
8 Equity was neither the sender nor the party to whom the letter
9 was written. Partial Trial Transcript (Nov. 17, 2006 Request for
10 Admission of Exhibits B, O, P, Q, S, and T), p. 6:4-17. As with
11 the other disputed evidentiary rulings we have reviewed, our
12 ability to find an abuse of discretion in the bankruptcy court's
13 failure to admit proposed Exhibit Q is limited by Watkins'
14 failure to provide a copy of the proposed Exhibit Q for our
15 review.¹⁴

16 e. Exhibit S

17 Watkins contends that his proposed Exhibit S was one of
18 Universal's financial statements, which Equity received from
19 First Management International, the consulting firm that prepared
20 the financial statement on behalf of Universal. The bankruptcy
21 court refused to admit proposed Exhibit S into evidence because
22 the document was not properly authenticated. Partial Trial
23 Transcript (Nov. 17, 2006 Request for Admission of Exhibits B, O,
24 P, Q, S, and T), pp. 6:18 - 8:17. Watkins did not properly
25

26
27 ¹⁴Watkins' ER Tab N pp. 16-17 may be the letter which was
28 intended as Exhibit Q. However, Watkins does not direct the
Panel's attention to this exhibit in his briefs, and no index to
his ER identifies the letter.

1 present a copy of the proposed Exhibit S for our review.¹⁵

2 Nothing in the record suggests that the bankruptcy court abused
3 its discretion in refusing to admit proposed Exhibit S over
4 Market Express's objection.

5 f. Exhibit T

6 Finally, Watkins asserts that the bankruptcy court abused
7 its discretion in refusing to admit his proposed Exhibit T, which
8 purported to be registration certificates for Universal and for
9 Combined General, which had been sent to Watkins by the corporate
10 registrar in Universal and Combined General's respective
11 jurisdictions at Watkins' request. We agree, based on the
12 description in the transcript of the ruling alone, that the
13 bankruptcy court correctly excluded proposed Exhibit T because it
14 had not been authenticated. Partial Trial Transcript (Nov. 17,
15 2006 Request for Admission of Exhibits B, O, P, Q, S, and T), pp.
16 8:18 - 9:9. The documents which comprise proposed Exhibit T were
17 not included in Watkins' excerpts of the record for our review.¹⁶

18
19 3. The admission of exhibits for impeachment purposes

20 Watkins complains that the bankruptcy court abused its
21 discretion when it allowed Market Express to present

22
23 ¹⁵Watkins' ER Tab N pp. 4-9 may be the financial statement
24 which was intended as Exhibit S. However, Watkins does not
25 direct the Panel's attention to this exhibit in his briefs, and
no index to his ER identifies the document.

26 ¹⁶Watkins' ER Tab N pp. 1-3 and 21-24 may be parts of the
27 documents which were intended as Exhibit T. However, Watkins
28 does not direct the Panel's attention to these pages as the
exhibit in his briefs, and no index to his ER identifies the
documents.

1 approximately 75 additional items of evidence that Market Express
2 had not disclosed in its pretrial submissions to the court and to
3 Watkins. He asserts the admission of these exhibits violates
4 Fed. R. Civ. P. 37¹⁷ and Fed. R. Evid. 608.

5 As a threshold matter it appears from the Late Transcript
6 that Watkins preserved for appeal his objection to the admission
7 of these exhibits. Nevertheless, Watkins faces several obstacles
8 in obtaining our review of the bankruptcy court's ruling.

9 First, Watkins asserts that Fed. R. Civ. P. 37 precludes the
10 use of the additional exhibits at trial where Market Express
11 failed to disclose the additional exhibits in advance of trial.
12 As relevant to Watkins' position on the issue, Fed. R. Civ. P.
13 37(c) provides: "A party that without substantial justification
14 fails to disclose information required by Rule 26(a) . . . is
15 not, unless such failure is harmless,¹⁸ permitted to use as
16 evidence at a trial . . . any . . . information not so
17 disclosed." However, Watkins concedes on appeal that the
18 additional exhibits were admitted solely for impeachment
19 purposes. Accordingly, Market Express was not required to make
20 pretrial disclosure of the additional exhibits. See Fed. R. Civ.

22 ¹⁷Fed. R. Civ. P. 37 is incorporated into this adversary
23 proceeding by Fed. R. Bankr. P. 9037. Subsequent references to a
24 Federal Rule of Civil Procedure means the corresponding Federal
Rule of Bankruptcy Procedure.

25 ¹⁸We note that in its brief filed in this appeal, Market
26 Express asserts that the checks which comprised the impeachment
27 exhibits were obtained through a subpoena duces tecum in the
28 State Court litigation, and were produced in the ordinary course
of discovery such that Watkins should have been aware of their
existence, and of Market Express's awareness that the checks
existed.

1 P. 26(a)(3)(C) ("a party must provide to other parties and
2 promptly file with the court the following information regarding
3 the evidence that it may present at trial other than solely for
4 impeachment: . . . identification of each document or other
5 exhibit . . . (emphasis added)."). Clearly, under Fed. R. Civ.
6 P. 26(a)(3)(C), Market Express was excused from making pretrial
7 disclosure of its intended use of the additional exhibits.

8 Second, Watkins objects to 75 additional exhibits being
9 admitted for impeachment purposes. The court's list of admitted
10 exhibits appears to identify 93 such exhibits. Watkins does not
11 advise the panel which 75 of the 93 additional exhibits he
12 contends were inappropriately admitted.

13 Finally, we are not provided with any of the additional
14 exhibits for review in determining whether the bankruptcy court
15 abused its discretion in ruling them admissible.

16 In sum, applying Fed. R. Civ. P. 26(a)(3)(C) and 37(c) to
17 the sparse record before us, we cannot determine that the
18 bankruptcy court abused its discretion in admitting exhibits not
19 disclosed in pretrial submissions, whether 75 or 93 of them, for
20 purposes of impeaching Watkins' testimony.

21
22 C. The Bankruptcy Court's Ruling on the § 523(a)(2)(A) Cause of
23 Action

24 In ruling on Market Express's § 523(a)(2)(A) cause of
25 action, the bankruptcy court stated:

26 As to the fraud issue . . . Market Express put on
27 a prima facie case attempting to establish a number of
28 things. And what a prima facie case does is it shifts
the burden of coming forward with some evidence to
rebut it, and the failure to do that allows -- does not
require but allows the court to accept the plaintiff's

1 version of events. The plaintiff, of course, always
2 retains in that context the burden of persuasion and
the burden of proof.

3 That said, it's this court's view that Market
4 Express did set forth a prima facie case, and it is
5 this court's view that Mr. Watkins, for the reasons he
testified, but the fact is did not provide evidence
that would rebut, I think, a lot of the questions . . .

6 Partial Trial Transcript (Nov. 17, 2006 Court Ruling), p. 5:9-25.

7 Here we are faced with a finding reduced to its essence:
8 Market Express established a prima facie case under
9 § 523(a)(2)(A). Normally, we require more extensive findings to
10 allow us to understand the bankruptcy court's factual basis for
11 its ruling. See 10 COLLIER ON BANKRUPTCY ¶ 7052.01, at p. 7052-1
12 (15th rev. ed. 2007). "If the obligation of the trial court
13 under Rule 52(a) is not complied with, such as a failure to make
14 findings or the making of incomplete or conclusory findings on
15 material issues, an appellate court will normally remand and
16 vacate the judgment in order for appropriate findings to be
17 made." 10 COLLIER ON BANKRUPTCY ¶ 7052.02, at pp. 7052-5 - 7052-6.
18 Nevertheless, we see no basis to remand for further findings in
19 this instance, where Watkins did not raise the issue until after
20 oral argument. Based on our review of the entire record in this
21 appeal, including the Late Transcript, we conclude that the
22 bankruptcy court did not err in finding that Market Express had
23 presented sufficient evidence to establish a prima facie case to
24 except Watkins' debt to Market Express from his discharge
25 pursuant to § 523(a)(2)(A).

26 Generally, appellate courts do not consider matters on
27 appeal unless they are "specifically and distinctly" raised in
28 the opening brief. See TRW Inc. v. Andrews, 534 U.S. 19, 34

1 (2001); Independent Towers of Wash. v. State of Wash., 350 F.3d
2 925, 929 (9th Cir. 2003). We are to read an opening brief so as
3 to avoid the possibility of waiver. Holley v. Crank, 400 F.3d
4 667, 670 (9th Cir. 2005).

5 In the appeal before us, Watkins did not assert in his
6 opening brief on appeal that the bankruptcy court made inadequate
7 findings under § 523(a)(2)(A). Instead, he asserts that the
8 failure of the bankruptcy court to admit his exhibits precluded
9 him from rebutting the prima facie case presented by Market
10 Express. That Watkins did not intend to challenge the bankruptcy
11 court's fraud findings is further suggested by the fact that he
12 failed to provide any factual record, i.e., testimony, for our
13 review. In addition, Watkins did not raise the issue at oral
14 argument.

15 Once the Late Transcript was in the record on appeal,
16 Watkins had the opportunity to refer to Market Express's
17 examination of him in establishing its prima facie case. Without
18 explanation or analysis, but noting that the Late Transcript
19 contains "numerous references to fraudulent activity," Watkins
20 directed us to portions of the Late Transcript which he asserts
21 "more closely relate to the question of fraud."¹⁹ Watkins also
22 directed our attention to his excerpts of record which contain
23 the management agreements, the text of §§ 769.80-769.87 of the
24 California Insurance Code, and certain publications of the
25 Internal Revenue Service.

26
27
28 ¹⁹With respect to the issue of fraud, Watkins refers us to
the following excerpts from the Late Transcript: 19:10-21:10;
23:11-24:25; 42:20-43:25; 45:19-46:25; and 52:10-53:22.

1 As best we can determine, Watkins refers to these portions
2 of his testimony to support his arguments (1) that he is not
3 personally liable to Market Express because under California law,
4 Equity was a managing agent, not an insurance company, and (2)
5 Equity was required under federal tax law to pay the IRS \$18,000
6 on behalf of Universal.

7 To the extent these references are intended to challenge the
8 limited finding of the bankruptcy court that Market Express had
9 made its prima facie case as to fraud, these are too little, too
10 late, in that they represent an attempt to raise an issue which
11 has been waived by Watkins on appeal, and as a matter of
12 substance, they are inadequate to warrant reversing the
13 bankruptcy court's finding as error. While we may consider an
14 issue not properly raised in the opening brief to prevent
15 "manifest injustice,"²⁰ this is not a case where it would be
16 appropriate to do so, particularly where Watkins raised other
17 issues for our review, and oral argument already has taken place
18 on those issues. See Greenwood v. FAA, 28 F.3d 971, 977 (9th
19 Cir. 1994) ("We will not manufacture arguments for an appellant,
20 and a bare assertion does not preserve a claim, particularly
21 when, as here, a host of other issues are presented for
22 review.").

23 As noted above, the bankruptcy court's determination that
24 the Judgment is nondischargeable pursuant to § 523(a)(2)(A) is
25 not an issue properly reserved and argued to us by Watkins. The
26 matters in dispute, as stated in Watkins' opening brief, relate
27

28 ²⁰See Kohler v. Inter-Tel Technologies, 244 F.3d 1167, 1182
(9th Cir. 2001).

1 only to the evidentiary issues and the § 523(a)(4) determination
2 of fiduciary duty. Accordingly, the bankruptcy court's
3 determination under § 523(a)(4), right or wrong, does not change
4 the outcome of the adversary proceeding. Nevertheless, we
5 address the issue raised by Watkins with respect to the
6 § 523(a)(4) cause of action.

7
8 D. The Bankruptcy Court's Ruling on the § 523(a)(4) Cause of
9 Action

10 In ruling on Market Express's § 523(a)(4) cause of action
11 the bankruptcy court stated:

12 I was looking for some kind of evidence with respect to
13 the existence of a fiduciary duty on behalf of Mr.
14 Watkins and Equity to Market Express and/or somebody
15 else where Market Express is a beneficiary.

16 I'm satisfied that yesterday's evidence provided
17 exactly that for me, specifically from the program
18 management agreements for both Combined General and
19 Universal Security, which not only recite it, but more
20 fundamentally and more clearly for me was Mr. Watkins'
21 testimony about the funds that would come into Equity
22

23 Partial Trial Transcript (Nov. 17, 2006 Court Ruling),
24 pp. 3:23 - 4:9 (emphasis added).

25 Watkins asserts the bankruptcy court erred in determining
26 that he was a fiduciary under the management agreements based on
27 California law. However, the bankruptcy court clearly relied
28 more heavily on Watkins' testimony in determining whether Watkins
was a fiduciary. As has been the prevailing theme of this
appeal, we have a limited record to review where Watkins has
elected to provide us no transcript of his complete November 17,
2006, testimony. Accordingly, although Watkins has provided
references to testimony contained in the Late Transcript, these

1 reference are not sufficient. As a consequence, he has offered
2 us no basis for determining that the bankruptcy court erred in
3 its ultimate § 523(a)(4) determination and judgment. But that
4 being said, at oral argument, counsel for Market Express was
5 unable to provide us with any authority under California or
6 federal law that would characterize Watkins as a fiduciary of a
7 technical or express trust of which Market Express (his or
8 Equity's customer) is a beneficiary, as would be required to
9 establish an exception to discharge under § 523(a)(4). It seems
10 more likely to us that the record establishes a fiduciary
11 relationship between Watkins and Equity as agents of Combined
12 General and Universal, and thus trustees as to moneys received
13 for their benefit. Whether that is so, however, is of no moment
14 here, but it does give us substantial doubt that we could affirm
15 the bankruptcy court's ultimate § 523(a)(4) determination if we
16 had a complete transcript of the trial to review.

17 18 **VI. CONCLUSION**

19 The bankruptcy court did not abuse its discretion in any of
20 the evidentiary matters raised by Watkins on appeal. Although
21 the findings of the bankruptcy court on the fraud issue were
22 conclusory, Watkins did not appeal the bankruptcy court's
23 determination that Market Express presented a prima facie case
24 for fraud under § 523(a)(2)(A). That determination stands
25 unchallenged. Accordingly, we AFFIRM the bankruptcy court's
26 decision to except the Judgment from discharge under § 523(a)(2);
27 we do not need to determine whether the bankruptcy court erred
28 when it excepted the Judgment from discharge under § 523(a)(4).