

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**NOT FOR PUBLICATION**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.	)	<b>M E M O R A N D U M<sup>1</sup></b>
	)	
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, BAUM<sup>2</sup> and MONTALI, 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. 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),<sup>3</sup>  
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 <sup>3</sup>Unless 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.<sup>4</sup>

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

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26 <sup>4</sup>Neither 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 Equity<sup>5</sup> 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'

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27  
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<sup>5</sup>Market 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").<sup>6</sup> The State Court entered a substantial default  
9 judgment ("Judgment") in favor of Market Express and against  
10 Watkins on November 30, 1998.<sup>7</sup>

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

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

25 <sup>7</sup>The 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.<sup>8</sup>

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.

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26 <sup>8</sup>Although 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").<sup>9</sup> 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

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24  
25 <sup>9</sup>The 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.

## 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.

## 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).

## 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.<sup>10 11</sup> 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 <sup>10</sup>The 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 <sup>11</sup>Further, 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:<sup>12</sup>

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  
5 Market Express has said about a particular issue  
6 you questioned them about?

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

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

13 A That's correct.

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

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

21 Watkins has not provided us with a copy of the October 2005  
22 Hearing Transcript as a part of his excerpts of record.  
23 Accordingly, we are not in a position to review whether the  
24 ruling of the bankruptcy court in excluding the October 2005  
25 Hearing Transcript was an abuse of discretion. Regardless, if  
26 the bankruptcy court was correct in its analysis that the October  
27 2005 Hearing Transcript merely contained a record of a procedural  
28 discussion which served as a "blueprint" for the upcoming trial,  
we agree that it was properly excluded.

29

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30 <sup>12</sup>We note that Watkins, but not the bankruptcy court, refers  
31 to the October 2005 Hearing Transcript as Exhibit B in the  
32 discussion whether the October 2005 Hearing Transcript should be  
33 admitted. Partial Trial Transcript (Nov. 17, 2006 Request for  
34 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.<sup>13</sup>

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25  
26  
27 <sup>13</sup>Watkins' 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.<sup>14</sup>

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

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26  
27           <sup>14</sup>Watkins' 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.<sup>15</sup>

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.<sup>16</sup>

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

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22  
23 <sup>15</sup>Watkins' 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 <sup>16</sup>Watkins' 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. 37<sup>17</sup> 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,<sup>18</sup> 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.

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22 <sup>17</sup>Fed. 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 <sup>18</sup>We 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."<sup>19</sup> 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.

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26  
27  
28 <sup>19</sup>With 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,"<sup>20</sup> 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

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28           <sup>20</sup>See 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).