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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NOT FOR PUBLICATION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

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In re:)	BAP No.	WW-04-1538-KSD
)		
PEI TI TUNG,)	Bk. No.	02-16797
)		
Debtor.)	Adv. No.	02-01647
)		
_____)		
CHENG-LU HSIEH,)		
)		
Appellant,)		
)		
v.)	MEMORANDUM*	
)		
PEI TI TUNG,)		
)		
Appellee.)		
_____)		

Argued and Submitted on January 19, 2006
at Seattle, Washington.

Filed - February 24, 2006

Appeal from the United States Bankruptcy Court
for the Western District of Washington.

Honorable Karen A. Overstreet, Bankruptcy Judge, Presiding.

Before: KLEIN, SMITH and DUNN,** Bankruptcy Judges.

*This disposition is not appropriate for publication and may not be cited except when pertinent under the doctrine of law of the case or the rules of res judicata, including issue and claim preclusion. See 9th Cir. BAP Rule 8013-1.

**Hon. Randall L. Dunn, United States Bankruptcy Judge for the District of Oregon, sitting by designation.

1 This is a sufficiency-of-evidence appeal arising from a five-
2 day trial in which the trial court made clear that the outcome
3 turned on credibility of testimony. Appellant, Ms. Cheung-Lu
4 Hsieh ("Hsieh"), appeals from a judgment declining to hold
5 nondischargeable a debt based on the alleged fraud of debtor, Ms.
6 Pei Ti Tung ("Tung"). We AFFIRM.

7
8 **FACTS**

9 Tung and her husband operated Browsing Asia, LLC, which
10 business distributed Addison Biological Laboratory ("Addison")
11 products in certain Asian countries from January 1999 to May 2001,
12 during which time they were authorized to be sold only in the
13 veterinary market.

14 Browsing Asia wished to market Addison products for human
15 use, which required obtaining regulatory approvals that entailed
16 degrees of effort that varied depending upon whether the approved
17 human use would be as cosmetics or pharmaceuticals.

18 Hsieh is a film actress, whose family owns China Chemical and
19 Pharmaceutical, a business in Taipei that has regulatory and
20 importing experience dating back to 1952.

21 Tung and Hsieh first met in April 2001 and apparently formed
22 a bond based on the assumption that they shared common personal
23 and professional experiences.

24 Tung did not disclose to Hsieh that her experience included
25 time served in prison on a 1998 insurance fraud conviction for
26 faking her former husband's death.

27 Eventually, Tung sent an e-mail in June 2001 soliciting Hsieh
28 to invest \$450,000 to become her business partner for a "once in a

1 life time opportunity" to exploit the fruits of a written
2 agreement Browsing Asia had with Addison to sell Addison products
3 to the human market in certain Asian countries. The e-mail touted
4 that after more than two years of work and \$950,000 in investment,
5 Tung had human products for sale for the first time. The e-mail
6 also stated that Hsieh would bear very little risk since Tung had
7 over 20 years of business experience and had always made money in
8 her ventures.

9 Tung's business plan was to form a new corporation with Hsieh
10 as co-owner to import Addison products to sell in the human market
11 as "comfort care" or for human use without claiming a medicinal
12 effect. Theretofore, the main obstacle to Browsing Asia selling
13 Addison products to the human market was that the governments
14 involved had not granted regulatory approval for such products.
15 Tung promised that products could be sold in the human market in a
16 relatively short period of time and projected sales in the human
17 market within two months.

18 Hsieh arranged a meeting between Tung and China Chemical and
19 Pharmaceutical to discuss regulatory and licensing issues related
20 to importing products for human use. Hsieh attended the meeting
21 and knew the intent was to import Addison's products for cosmetic
22 use, which licenses could be obtained in as little as two weeks.

23 Tung also provided Hsieh with a business plan; a profit and
24 loss statement of Browsing Asia indicating no profits and
25 \$1,000,000 in net losses; a balance statement of Browsing Asia
26 indicating \$300,000 in cash, \$79,000 in prepaid withheld taxes,
27 and \$960,840 in deferred expenses; a list of expected startup
28 expenses for the new corporation; and a future projection of sales

1 for the new corporation. The documents did not indicate that
2 Browsing Asia only sold a total of \$16,000 of Addison's product in
3 its two and half years of operation.

4 Hsieh decided to invest in the new enterprise and signed an
5 investor agreement in July 2001. Pursuant to the investor
6 agreement, Hsieh transferred \$300,000 to Tung's husband. Tung,
7 also in accord with the investor agreement, transferred \$150,000
8 back to Hsieh.

9 Tung made efforts to fulfill her duties in the new venture
10 company. She and her spouse moved to Taipei. She provided
11 documents to Hsieh's brother, Scott Hsieh, to complete the
12 governmental registration process to obtain licenses for import.
13 She visited clients to develop the customer base and received
14 \$10,000 in salary in September 2001.

15 Shortly thereafter, the relationship between Tung and Hsieh
16 deteriorated. No one registered the company contemplated by the
17 investor agreement, which company was to be known as "Biozn."

18 The court found that Hsieh and her family created another
19 company called "BioZinc" in which Tung had no interest and found
20 that BioZinc applied for the permits that Biozn was supposed to
21 obtain. It concluded that Hsieh, not Tung, sabotaged the deal.¹

22 The court noted that no evidence indicates that the permits

23 ¹The court ruled:

24 Ms. Hsieh testified that she filed these documents [for
25 BioZinc] because she was waiting for Ms. Tung to set up the
26 new corporation. I did not find her testimony credible.
27 Instead, the evidence supports Ms. Tung's contention that it
28 was Ms. Hsieh who had no intention of going through with the
deal.

Tr. of Oral Ruling, at p. 29.

1 were not obtained. Hsieh eventually locked Tung out of the
2 company offices.

3 Tung filed a voluntary petition under chapter 7 in June 2002.
4 Hsieh filed a complaint to except an alleged \$300,000 debt,
5 representing her \$300,000 investment, from discharge under 11
6 U.S.C. § 523(a)(2)(A). The court conducted a five-day trial.

7 At trial, the court, after initially refusing to admit
8 evidence of Tung's conviction for insurance fraud, admitted it in
9 two phases. The evidence of the conviction was first proffered
10 and rejected under Federal Rule of Evidence 404(b) during Hsieh's
11 case in chief to show motive, opportunity, and intent on the
12 theory that the two schemes were virtually identical. The court
13 was not persuaded that the two schemes were sufficiently similar
14 so as to afford useful probative value in the bench trial.

15 Evidence of the conviction was then admitted for a limited
16 purpose during Hsieh's cross-examination of Tung's spouse for the
17 limited purpose of establishing certain dates of overseas travel
18 that supposedly could not have occurred while Tung was still under
19 probation. The court overruled Tung's objection to such use of
20 the evidence and admitted it for the limited purpose of
21 establishing the dates of travel, which was relevant to whether
22 Tung's alleged travel expenses were justified.

23 Finally, evidence of the conviction was admitted under
24 Federal Rule of Evidence 609(b)(2) to impeach Tung as a witness
25 when she testified during her case in chief.

26 The court made findings after the completion of closing
27 argument. The court made clear that much of its analysis was
28 based upon its assessment of credibility reached during the five-

1 day trial and that neither party was entirely credible.

2 In brief, the court held that Hsieh proved only one instance
3 of misrepresentation by Tung: that Tung always made money in her
4 20 years of business ventures. The court ruled that such a
5 misrepresentation did not constitute fraud because Hsieh did not
6 prove all the essential elements of nondischargeable fraud under
7 § 523(a)(2)(A), including fraudulent intent, justifiable reliance,
8 and proximate causation of damages.

9 Since Hsieh's substantive claim was based solely on fraud
10 (i.e., the tort of misrepresentation), the court dismissed her
11 claim, which would at most be for \$150,000 plus \$10,000 in salary,
12 not \$300,000.² Judgment was entered on October 25, 2004.

13 This timely appeal ensued.

14

15

ISSUES

- 16 1. Whether the court erred in concluding that the appellant's
17 evidence did not persuade it of the essential elements of
18 nondischargeable fraud by a preponderance of evidence.
- 19 2. Whether the court erred in concluding that appellee has no
20 substantive liability to appellant.
- 21 3. Whether the court erred when it declined to impeach appellee
22 as a witness under Federal Rule of Evidence 609(a)(2).

23

24

STANDARD OF REVIEW

25 A bankruptcy court's findings of fact are reviewed for clear

26

27 ²Since Tung received \$300,000 but immediately transferred
28 \$150,000 back to Hsieh, the net investment was \$150,000. Tung
also received \$10,000 in salary for the month of September 2001.

1 error and its conclusions of law are reviewed *de novo*. Peklar v.
2 Ikerd (In re Peklar), 260 F.3d 1035, 1037 (9th Cir. 2001).
3 Whether a creditor relied upon false statements is a question of
4 fact, which is reviewed under a clearly erroneous standard. The
5 clearly erroneous standard also applies to findings of intent to
6 defraud, to findings that the fraud proximately caused the alleged
7 damages, and to materiality. Candland v. Ins. Co. of N. Am. (In
8 re Candland), 90 F.3d 1466, 1469 (9th Cir. 1996).

9 10 **DISCUSSION**

11 We begin with a review of the purported proof of
12 nondischargeable fraud, followed by the dismissal of the
13 underlying substantive claim and the evidentiary question
14 regarding Tung's prior conviction.

15 16 I

17 The Ninth Circuit has set forth five elements of fraud, which
18 a creditor must prove by a preponderance of the evidence in order
19 to except a debt from discharge under § 523(a)(2)(A):

- 20 1. that the debtor made the representations;
- 21 2. that at the time he knew they were false;
- 22 3. that he made them with the intention and purpose of
- 23 deceiving the creditor;
4. that the creditor justifiably relied on them;
5. that the creditor sustained damage as the proximate

24 Eugene Parks Law Corp. Defined Benefit Pension Plan v. Kirsh (In
25 re Kirsh), 973 F.2d 1454, 1457 (9th Cir. 1992).

26 Appellant was required to establish each of these essential
27 elements by a preponderance of the evidence in order to state a
28 claim for money damages and a claim for nondischargeability.

1 A

2 As one alleged misrepresentation, Hsieh asserts that Tung
3 concealed her prior insurance fraud conviction. Hsieh asserts
4 that any such concealment is a form of fraud per se and that no
5 proof of reliance is needed. Under this theory, proof of
6 concealment of the prior conviction would eliminate the other
7 essential elements of nondischargeable fraud. The law of the
8 Ninth Circuit is to the contrary. Kirsh, 973 F.2d at 1457.

9 At the end of plaintiff's case in chief, the trial court
10 ruled that evidence that Tung had "concealed" her prior insurance
11 fraud conviction was inadmissible. At that point, Hsieh had only
12 attempted to admit evidence of the conviction under Federal Rule
13 of Evidence 404(b). The court regarded the prior insurance fraud
14 as dissimilar from the fraud at hand, i.e. the fact of the prior
15 fraud conviction was not material nor relevant. The court,
16 however, denied the defense motion to dismiss at the close of the
17 plaintiff's case.

18 The materiality of a representation (or omission) is an
19 element reviewed under the clearly erroneous standard. Candland,
20 90 F.3d at 1469. The prior insurance fraud involved Tung faking
21 the death of her former husband and seeking to collect insurance
22 proceeds. The alleged fraud now in issue involves numerous
23 representations as to a speculative business venture, most of
24 which were true; followed by reciprocal investments, as Tung also
25 invested \$150,000 new capital into the venture; and followed by
26 performance by Tung to make the operation succeed.

27 The two incidents were sufficiently dissimilar that we cannot
28 say that the trial court clearly erred in excluding the evidence

1 of the prior insurance fraud to prove motive or intent as to the
2 current fraud issue. The court also did not clearly err in
3 finding that "concealment" of the prior fraud was not material
4 and, accordingly, not fraudulent. The essential determination was
5 necessarily based upon the trial court's assessment of credibility
6 as to which we perceive no clear error.

7
8 B

9 The only instance of actual misrepresentation that the trial
10 court found to have occurred was that Tung misrepresented that she
11 had 20 years of business experience in her various businesses.
12 The trial court found that the representation that Tung always
13 made money in her business ventures was false.³

14 Nonetheless, the trial court refused to find fraud in this
15 misrepresentation because it was not persuaded that there was: (1)
16 intent to deceive (Tung and her spouse intended to obtain
17 investments to start the new business and actually made
18 significant efforts towards that goal following the investment);
19 (2) justifiable reliance (even if Tung had always made money in
20 her business ventures, the risk of this particular business
21 venture was fairly presented in the documentation that was
22 provided to Hsieh); and (3) proximate causation (the evidence
23 showed that Hsieh relied on her own relatives at China Chemical
24 and Pharmaceutical Corporation in determining whether the venture

25
26 ³Besides Browsing Asia, Tung's failed ventures included
27 Exportus and New Home Map guide. Also related to the issue of
28 Tung's credentials is whether Tung misrepresented that she was a
Stanford graduate. The court found that Hsieh did not prove the
misrepresentation. Hsieh, on appeal, provides no reason as to how
this ruling was in clear error.

1 could obtain the necessary licenses and be successful).

2 We discern no clear error in the court's assessment of any of
3 these essential elements for nondischargeable fraud.

4 Hsieh also asserts that the trial court incorrectly applied
5 the justifiable reliance standard by not taking into account that
6 Hsieh is of Chinese nationality, living in Hong Kong, with no
7 ability to read a financial statement, let alone a western
8 financial statement. This standard is subjective and based upon
9 the particular plaintiff. Field v. Mans, 516 U.S. 59 (1995).

10 We do not agree that the trial court misapprehended the
11 standard or ignored the implications of the plaintiff's individual
12 situation. The court explained that the proper reliance by the
13 creditor was justifiable reliance and that it was required to
14 "take into account the knowledge and relationship of the parties
15 themselves ... [and] ... look into all the surrounding
16 circumstances of the particular transaction and particularly
17 consider the subjective effect of those circumstances upon the
18 creditor." So as a matter of law, the court did use the correct
19 standard of justifiable reliance.

20 Whether a creditor justifiably relied upon false statements
21 is a question of fact. Candland, 90 F.3d at 1469. We must affirm
22 if the record contains evidence that supports the court's
23 conclusion. The evidence indicates that, after receiving Hsieh's
24 investment, Tung and her husband moved to Asia and performed
25 business activities such as investigating licensing issues and the
26 client base. Tung accurately disclosed that Browsing Asia never
27 made money and had net losses exceeding \$1,000,000 during its two
28 and half years of operation.

1 Hsieh testified that her family-owned company, China Chemical
2 and Pharmaceutical, a "prestigious company in Taipei," had
3 regulatory and importing experience since 1952. Hsieh arranged a
4 meeting between Tung and China Chemical and Pharmaceutical, and
5 Hsieh attended that meeting. At the meeting, the parties
6 discussed licensing Addison products for human use.

7 These facts support an inference that there was no fraudulent
8 intent by Tung and that Hsieh did not justifiably rely on Tung's
9 prior business success alone. The court's ruling was not
10 erroneous.

11
12 C

13 The court did not perceive misrepresentation in Tung's
14 assertion that she and her spouse had invested \$950,000 in
15 business expenses in Browsing Asia to "get the business where it
16 is today," which allegedly was made to induce Hsieh to invest
17 \$450,000. In the initial e-mail to Hsieh soliciting the
18 investment, Tung did not explain the nature of the business
19 expenses nor how that figure was arrived at.

20 Tung later disclosed the nature of Browsing Asia's former
21 expenses in a set of documents provided to Hsieh before Hsieh's
22 investment. The court found that many of the expenses consisted
23 of accrued expenses that had not been paid. A balance sheet for
24 January 1999 through May 2001 shows \$960,840 in deferred expenses,
25 specifically identified as deferred salary, deferred taxes
26 payable, deferred travel, and deferred trade shows. Further, a
27 profit and loss statement provided to Hsieh prior to her
28 investment shows a net loss of \$1,182,850 for the period of

1 January 1999 to May 2001. The court concluded, consistent with
2 Hsieh's testimony, that she relied on the documents.

3 Hsieh on appeal asserts that such expenses were
4 "hypothetical" and such "hypothetical expenses is a fraud by
5 itself." Hsieh also is aggrieved that a large portion of the
6 former expenses consisted of a \$30,000-per-month, deferred salary
7 to Tung for running a business that netted only \$16,000 in sales
8 for two and half years of operations. While this appears to be an
9 unwise business decision, the fact of the salary was not
10 misrepresented to Hsieh. Accordingly, the court concluded that
11 the salary drawn by Tung was not a fraudulent misrepresentation.
12 This was not error.

13 Hsieh argues on appeal that many of the "deferred expenses"
14 were not justified, but does not show where in the record that
15 testimony regarding these expenses was developed. The court did
16 not make a specific ruling on this issue in the oral ruling on
17 July 2, 2004. However, we can infer a ruling consistent with the
18 court's general ruling: no misrepresentation occurred. The
19 evidence supports the conclusion that, since these expenses
20 occurred over the period of two and a half years, the monthly
21 breakdown of these expenses was not unreasonable.⁴

22 The real issue is whether the assertion of \$950,000 in
23 expenses is actually a misrepresentation. The evidence indicates

24
25 ⁴Browsing Asia operated from January 1999 through May 2001,
approximately 28 months. The monthly breakdown is:
26 \$66,000 for salaries and wages (\$2357 per month)
\$53,000 for payroll expenses (\$1892 per month)
27 \$26,000 for salary taxes (\$928 per month)
\$36,000 for auto expenses (\$1285 per month)
28 \$36,000 for rent (\$1285 per month)
\$157,000 for travel (\$5607 per month)

1 that documented expenses of \$960,840 were presented to Hsieh.
2 Tung never represented that the \$950,000 was based upon a cash
3 method, instead of an accrual method, of accounting. Thus, the
4 deferral of these expenses was neither concealed nor
5 misrepresented to Hsieh. The court's ruling was not erroneous.

6
7 D

8 Hsieh asserts that her investment was induced by
9 misrepresentations that Tung's former business was in sound
10 financial condition. A balance sheet provided to Hsieh shows that
11 Browsing Asia had \$300,000 in cash on hand and \$79,000 in prepaid,
12 withheld taxes. Also, an e-mail from Tung to Hsieh stated,
13 "[t]oday we have incurred business expenses in excess of \$950,000
14 USD to get the business where it is today, especially considering
15 that we have finally after more than two years of work have human
16 products available for the first time."

17 Tung did not withhold the risks and negative information
18 either. In the e-mail, Tung disclosed that part of Hsieh's
19 investment would be used to reimburse Tung for her former
20 investment. Tung provided a profit and loss statement that
21 indicated net losses exceeding one million from the operation of
22 Browsing Asia. Finally, Tung and Hsieh both knew that "human use"
23 meant cosmetic or non-medicinal usage from the meeting between
24 Tung and Hsieh's relatives at China Chemical and Pharmaceutical
25 Corporation.

26 On appeal, Hsieh asserts that the alleged expenses and the
27 balance sheet, not the profit and loss statement, were the basis
28 of Hsieh's "justifiable reliance" that Browsing Asia was in sound

1 financial condition. Hsieh does not explain how the financial
2 statements constitute a misrepresentation.

3 The court was not persuaded that a representation was made
4 that Browsing Asia was in sound financial condition or had
5 sufficient capital. The record supports this conclusion.

6 Hsieh's assertion that she was justified in relying on only
7 selected positive portions of the financials but not on other
8 portions is not persuasive. The assertion that she does not
9 understand Western financial statements is unconvincing. She was
10 advised by her family company, China Chemical and Pharmaceutical,
11 and by her brother, Scott Hsieh, an experienced individual who was
12 able to form a Taiwanese corporation and apply for import permits.
13 Hsieh has not given us any reason to believe that the court's
14 ruling on the issue was in clear error.

15

16

E

17 The alleged representations regarding when marketing for
18 human use could occur involve projections of the future. The
19 court ruled that projections and optimism regarding the potential
20 profitability of an investment are expressions of opinion that
21 cannot support a claim of false representation and cited decisions
22 from other circuits. Caldwell v. Hanes (In re Hanes), 214 B.R.
23 786, 810 (Bankr. E.D. Va. 1997); Lisk v. Criswell (In re
24 Criswell), 52 B.R. 184, 196 (Bankr. E.D. Va. 1985); Wilder v.
25 Waller (In re Waller), 210 B.R. 370, 378 (Bankr. D. Colo. 1997).

26 The court's ruling is consistent with the decisions in the
27 Ninth Circuit. Although the Ninth Circuit mentioned the issue in

28

1 Candland without deciding it,⁵ the court of appeals had previously
2 touched upon the question of whether an opinion and a promise
3 could provide the basis for nondischargeable fraud. Rubin v.
4 West, 875 F.2d 755, 759 (9th Cir. 1989).

5 In Rubin, a real estate investor told individuals whose
6 residence was in foreclosure that there was not time to obtain a
7 loan and that he would help them repurchase it if only they sold
8 it to him. In fact, the investor knew how to, and did, obtain a
9 timely loan and did not intend to permit a repurchase. In the
10 investor's later chapter 7 case, the Ninth Circuit affirmed the
11 finding of nondischargeable fraud under § 523(a)(2). It reasoned
12 that an opinion that one does not actually hold and a promise made
13 with positive intent not to perform may support a trier of fact's
14 inference of misrepresentation even though the usual rule is that
15 opinions and promises are not fraudulent. Id. at 759.

16 The evidence presented by Hsieh does not appear to have been
17 of a nature or quality that would support the inference that the
18 trial court had made in Rubin. Moreover, even if the evidence
19 might have permitted such a conclusion, it did not compel such a
20 conclusion. The reality is that the trial court was not persuaded
21 by Hsieh's evidence in this regard, and there was ample evidence
22 to support the conclusion that the court reached.

23 Hsieh does not cite Rubin and contends that there is no Ninth
24 Circuit decision on point for purposes of § 523(a)(2)(A)

25
26 ⁵Candland, 90 F.3d at 1470, states that "[w]hether a lender
27 can rely on a borrower's projections represents a difficult
28 question." The court in Candland did not need to reach the issue
because it found that other false statements of the debtor
satisfied the requirements of Section 523(a)(2)(B).

1 nondischargeability and that we should fill the gap by borrowing
2 securities fraud doctrine where cautionary language is required to
3 make future projections nonactionable. Livid Holdings Ltd. v.
4 Salomon Smith Barney, Inc., 403 F.3d 1050, 1056 (9th Cir. 2005);
5 Worlds of Wonder Sec. Litig., 35 F.3d 1407, 1415 n.3 (9th Cir.
6 1994); Halkin v. VeriFone Inc. (In re VeriFone Sec. Litig.), 11
7 F.3d 865, 868-69 (9th Cir. 1993). We think, however, that the
8 separate regime under securities laws, where disclosure is
9 required and regulated by liability, is not a fertile source of
10 authority for deciding basic tort questions. We are aware of no
11 decision that applies securities fraud doctrine regarding
12 defective disclosure to the tort of misrepresentation.

13 The court held that Tung's representation that she could
14 obtain a license to sell veterinary products in the human market
15 and generate human sales within two months was a promise to do
16 something in the future and was not a representation made with
17 reckless indifference. The evidence supports this conclusion.

18 The "two month" representation appears to have been based on
19 the future sales projection, which showed that July 2001 would be
20 the first month of operations and projected \$19,714.29 in sales in
21 the human market in August 2001, or within two months.⁶

22 Tung was required to have two types of licenses to export
23 human products to Asia: a license from Addison and a license
24 required by the applicable government entities. A written
25 agreement between Addison and Browsing Asia indicates that Addison
26 had given Browsing Asia the right to market Addison products for

27
28 ⁶The pro forma figure was 690,000 Taiwan dollars. A
conversion rate of \$1 USD to \$35 NT was stated in the document.

1 human use in certain geographical areas.

2 On the government license issue, Hsieh was aware that the
3 products would be marketed for human use as "comfort care" with no
4 medical claims. The "comfort care" language was carefully used
5 throughout the business plan provided to Hsieh. Hsieh arranged
6 and attended a meeting between her family company, China Chemical
7 and Pharmaceutical, and Tung. At the meeting, Tung was advised to
8 seek importation of Addison products as cosmetics. Tung took
9 steps to seek government approval after the investment by
10 providing Hsieh's brother, Scott, with the necessary documents for
11 an application to import as cosmetics. The evidence shows that
12 Hsieh was as much a part of the process as Tung.

13 Also, there was no evidence that the permits could not be
14 obtained shortly or were not actually obtained.⁷ Rather, the
15 parties' relationship broke down before Tung could complete the
16 process. Hsieh locked Tung out of the office of the new
17 corporation shortly after it was opened, so Tung was never given
18 the opportunity to complete the licensing process.

19 In short, the court's ruling was not clearly erroneous.
20

21 F

22 Hsieh asserts that Tung misrepresented that Tung could assign
23 the distributorship agreement between Tung and Addison because
24 such an agreement contemplating personal services is not
25 assignable. The court held the investment agreement between Hsieh

26 ⁷The court found that Hsieh's family created a new, separate
27 company (which Tung had no ownership interest in) and applied for
28 the very same permits that Tung was supposed to get. There was no
evidence that these permits were not obtained.

1 and Tung never stated that Tung's company, Browsing Asia, would
2 assign the contract rights to Hsieh personally. Rather, it stated
3 that the distributorship rights would be jointly "shared" and that
4 a new joint Taiwanese company would be set up. The court
5 concluded that the contract was assignable.

6 The evidence indicates Tung and Hsieh, as partners, were in
7 the process of forming a new company to market and sell Addison
8 products. There is no evidence of an outright sale or assignment
9 of the Addison distributorship license. Tung testified that
10 Addison was notified of the new company and of Hsieh as a partner.
11 The court's ruling was not clearly erroneous.

12
13 G

14 Hsieh asserted that Tung concealed an agreement with Addison
15 to raise prices charged to the new joint company by 10 percent and
16 then kickback that same amount to Tung. Tung asserted that she
17 requested this 10 percent fee to cover shipping costs.

18 The court found no evidence that an agreement between Tung
19 and Addison to kick back part of the purchase price existed and no
20 evidence that any kickbacks were paid. On appeal, Hsieh does not
21 show how the court clearly erred in its findings on this issue.
22 Hsieh does not directly address the issue. The court's ruling was
23 not clearly erroneous.

24 Nor did the court err in finding that Tung did not commit
25 fraud against Hsieh in any of the seven particular representations
26 or omissions. Since Hsieh did not establish the existence of
27 fraud by Tung, the court's refusal to find any debt excepted from
28 discharge under § 523(a)(2)(A) was not error.

The court also concluded that Hsieh did not prove the existence of liability for an underlying debt that could form the basis for a claim as a matter of substantive nonbankruptcy law.

The asserted basis for liability sounded solely in tort. Since the alleged fraud occurred in Washington, any substantive claim based upon fraud must apply Washington law.

The Washington Supreme Court has set forth nine elements of fraud that the party alleging fraud must prove:

1. representation of an existing fact;
2. materiality of the representation;
3. falsity of the representation;
4. knowledge of the falsity or reckless disregard of its truth;
5. intent to induce reliance on the representation;
6. ignorance of the falsity;
7. reliance on the truth of the representation;
8. justifiable reliance
9. damages.

E.g., In re Estate of Lint, 957 P.2d 955, 963 n.4 (Wash. 1998).

Thus, the elements of a claim based on fraud under Washington law and the elements of § 523(a)(2)(A) exception to discharge under federal law are essentially the same. In both cases, the burdens of proof are on the party alleging the fraud. Hence, a finding of dischargeability is necessarily fatal to the underlying substantive fraud claim as well.

Since Hsieh did not establish the existence of fraud by Tung under the federal elements of nondischargeable fraud, the court's denial of Hsieh's underlying claim, which was based solely upon fraud under Washington law, was not error.

1 III

2 Hsieh also complains that the court should have admitted
3 evidence of Tung's criminal conviction at an earlier point in the
4 trial than when it was admitted.

5 Hsieh first attempted to introduce evidence that Tung pled
6 guilty to insurance fraud in 1998, for the purpose of showing
7 motive, opportunity, or intent under Federal Rule of Evidence
8 404(b). Hsieh asserted that the prior scheme of fraud and the
9 present alleged scheme of fraud were virtually identical. The
10 court refused to admit the evidence of the prior insurance fraud
11 because it regarded the issue as too dissimilar to the issue of
12 fraud at hand. Furthermore, when, at the close of Hsieh's case in
13 chief, the court denied Tung's motion to dismiss, it indicated
14 that any evidence that Tung had concealed a conviction for
15 insurance fraud was inadmissible.

16 Next, the court admitted the evidence of Tung's probation for
17 the specific purpose of impeaching a specific portion of Michael
18 Bell's testimony. Bell testified that he made business trips to
19 Asia with Tung, incurring business start-up expenses, but Hsieh
20 pointed out that Tung was on probation during the period of the
21 alleged business travel.

22 The court ultimately admitted the evidence of Tung's prior
23 insurance fraud conviction under Federal Rule of Evidence
24 609(a)(2) for the purpose of impeaching Tung when she testified as
25 a witness during the defense case in chief.

26 By the time the court made its findings, the conviction was
27 in evidence. To the extent there was any error in not admitting
28 the evidence during Hsieh's case in chief, the subsequent

1 admission of the evidence during Tung's case in chief in this
2 bench trial rendered any error harmless.

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CONCLUSION

For the foregoing reasons, we AFFIRM.