NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

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.

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[*]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.

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

FACTS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The court noted that no evidence indicates that the permits

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[1]The court ruled:

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

Tr. of Oral Ruling, at p. 29.

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

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

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

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

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

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

day trial and that neither party was entirely credible.

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

Since Hsieh's substantive claim was based solely on fraud (i.e., the tort of misrepresentation), the court dismissed her claim, which would at most be for $150,000 plus $10,000 in salary, not $300,000.[2] Judgment was entered on October 25, 2004.

This timely appeal ensued.

ISSUES

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

STANDARD OF REVIEW

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

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

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

DISCUSSION

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

I

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

> 1. that the debtor made the representations;
> 2. that at the time he knew they were false;
> 3. that he made them with the intention and purpose of deceiving the creditor;
> 4. that the creditor justifiably relied on them;
> 5. that the creditor sustained damage as the proximate result of the representations having been made.

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

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

A

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

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

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

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

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

B

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

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

[3]Besides Browsing Asia, Tung's failed ventures included Exportus and New Home Map guide. Also related to the issue of 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.

could obtain the necessary licenses and be successful).

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

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

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

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

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

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

C

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

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

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

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

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

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

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

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

D

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

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

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

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

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

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

E

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

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

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

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

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

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

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[5] Candland, 90 F.3d at 1470, states that "[w]hether a lender can rely on a borrower's projections represents a difficult 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).

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

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

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

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

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

human use in certain geographical areas.

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

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

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

F

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

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

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

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

G

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

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

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

II

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.

III

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

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

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

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

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

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

CONCLUSION

For the foregoing reasons, we AFFIRM.