

MAY 06 2013

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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NOT FOR PUBLICATION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. CC-12-1304-TaMoMk  
 )  
 MERUELO MADDUX PROPERTIES, ) Bk. No. 09-13356-VK  
 INC., )  
 )  
 Debtor. )  
 \_\_\_\_\_ )  
 )  
 RICHARD MERUELO, individually )  
 and as Trustee of the Richard )  
 Meruelo Living Trustee U/D/T )  
 dated September 15, 1989, )  
 )  
 Appellant, )  
 )  
 v. ) **MEMORANDUM\***  
 )  
 MERUELO MADDUX PROPERTIES, )  
 INC., )  
 )  
 Appellee. )  
 \_\_\_\_\_ )

Argued on February 21, 2013 at Pasadena, California  
Submitted on February 28, 2013\*\*

Filed - May 6, 2013

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

Honorable Victoria Kaufman, Bankruptcy Judge, Presiding

\* 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.

\*\* At oral argument, the parties were given an additional  
week in which to file supplements that specifically identified  
certain evidence in the record on appeal. Submission of the  
matter was thus postponed for one week following oral argument.

1 Appearances: Gregory M. Salvato of Salvato Law Offices on  
2 behalf of Appellant; Christopher E. Prince of  
Lesnick Prince & Pappas LLP on behalf of Appellee.

3  
4 Before: TAYLOR, MONTALI,<sup>\*\*\*</sup> and MARKELL, Bankruptcy Judges.

5 **INTRODUCTION<sup>1</sup>**

6 Reorganized debtor and Appellee Meruelo Maddux Properties,  
7 Inc. ("MMPI") and related reorganized debtors (collectively,  
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17 <sup>\*\*\*</sup> The Honorable Dennis Montali, Bankruptcy Judge for the  
18 Northern District of California, sitting by designation.

19 <sup>1</sup> We exercised our discretion to independently review  
20 documents electronically filed in the Debtors' bankruptcy cases.  
21 See O'Rourke v. Seaboard Sur. Co. (In re E.R. Fegert, Inc.),  
22 887 F.2d 955, 957-58 (9th Cir. 1989); Atwood v. Chase Manhattan  
Mortg. Co. (In re Atwood), 293 B.R. 227, 233 n.9 (9th Cir. BAP

23 2003).  
24 In so doing, we determined that on April 7, 2009, the  
25 bankruptcy court ordered the joint administration of MMPI's  
26 bankruptcy case with 53 related bankruptcy cases ("Joint  
27 Administration Order"), and designated MMPI as the lead  
28 bankruptcy case, Case No. 09-13356. Dkt# 30. The Joint  
Administration Order instructed a claimant to file a proof of  
claim in the bankruptcy case directly subject to the claimant's  
claim. The Joint Administration Order also designated the MMPI  
docket as the single docket for all other main case documents in  
the jointly administered cases.

1 "Debtors")<sup>2</sup> objected to proofs of claim<sup>3</sup> (collectively, "Claims")  
2 filed by Appellant Richard Meruelo ("Richard")<sup>4</sup> and moved for  
3 disallowance. In the Claims, Richard sought indemnification for  
4 liabilities that he incurred in defending actions and proceedings  
5 based on guaranties that he executed for the benefit of the  
6 Debtors, for fees he incurred in connection with the Debtors'  
7 bankruptcies, and for payment on a judgment. The bankruptcy  
8 court granted the Debtors' motion and Richard appealed.

9 Here, we address only the issues related to the guaranty  
10 liabilities and bankruptcy legal fees. We decline to address the  
11 issue related to the payment on the judgment as it was not  
12 addressed by Richard in his statement of issues on appeal, in his  
13 opening or reply brief, or in a substantive fashion at oral  
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15 <sup>2</sup> The Notice of Appeal identified the appellee as "Meruelo  
16 Maddux Properties, Inc., et al. (the Reorganized Debtors)". For  
17 reasons not clear to us, in the present appeal the parties  
18 interchangeably and inconsistently refer to the appellee as MMPI  
19 (singular) and MMPI, et. al (multiple). We use the term  
20 "Debtors" to describe the appellees here. The term "Debtors"  
21 refers to all debtors who objected to one of the Claims. We also  
22 use the term broadly to describe them in their respective  
23 pre-confirmation and post-confirmation form as, given the  
24 context, is appropriate.

25 <sup>3</sup> Appellant submitted one proof of claim in MMPI's  
26 bankruptcy case and identical proofs of claim in six of the  
27 jointly administered bankruptcy cases.

28 <sup>4</sup> The Notice of Appeal identified the Appellant as Richard  
Meruelo, individually and as Trustee of the Richard Meruelo  
Living Trust U/D/T dated September 15, 1989. The instant appeal  
was concurrently heard with a separate appeal in which Richard  
Meruelo's mother, Belinda Meruelo, was the appellant. See BAP  
Case No. CC-12-1303. For clarity and ease of reference, and  
without intending any disrespect, we refer to the appellant as  
"Richard" in this memorandum.

1 argument. Thus, we VACATE and REMAND in part and AFFIRM in part.

2 **FACTS**<sup>5</sup>

3 On March 26, 2009, Debtors initiated chapter 11 bankruptcy  
4 cases (collectively, "Cases"). Richard previously served as  
5 MMPI's Chairman, CEO, and major shareholder.

6 On September 24, 2009, Richard filed the Claims. In each of  
7 the Claims, Richard sought reimbursement and indemnification for  
8 incurred or anticipated liabilities. He based the Claims on two  
9 pre-petition agreements: a Contribution Agreement dated  
10 September 19, 2006 and an Indemnification Agreement dated  
11 January 30, 2007 (collectively, the "Agreements"). Richard  
12 asserted that he had possible exposure to liability on guaranties  
13 that he executed for the benefit of seven different lenders or  
14 lessors ("Guaranties"). He further asserted that the Agreements  
15 contractually obligated the Debtors to indemnify him and to  
16 reimburse him in connection with any payment under or in  
17 connection with the Guaranties.

18 At some point, the parties holding the Guaranties threatened  
19 or initiated litigation. Richard retained Neufeld Marks &  
20 Gralnek ("Neufeld") to represent him in his defense of these  
21 claims. During the course of the Cases, Richard also retained  
22 Levene, Neale, Bender, Rankin & Brill ("Levene") as personal  
23 bankruptcy counsel.

24 Meanwhile, the Debtors moved for and obtained an order of

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26 <sup>5</sup> Unless otherwise indicated, all chapter and section  
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532.  
28 "Rule" references are to the Federal Rules of Bankruptcy  
Procedure and "Civil Rule" references are to the Federal Rules  
of Civil Procedure.

1 the bankruptcy court that authorized the employment of  
2 professionals. The order allowing retention required that each  
3 retained professional submit a declaration of disinterestedness.  
4 As required, Neufeld submitted its declaration of  
5 disinterestedness and therein disclosed its concurrent  
6 representation of one or more of the Debtors. Neufeld, however,  
7 failed to disclose that it represented Richard in connection with  
8 the Guaranties.

9 The bankruptcy court confirmed a third party's plan in the  
10 Cases on June 24, 2011. The Debtors subsequently objected to  
11 proofs of claim for pre-petition legal services filed by Neufeld  
12 to the Debtors and moved for disallowance. The Debtors also  
13 objected to Neufeld's request for payment of an administrative  
14 claim for post-petition fees. The bankruptcy court heard all  
15 Neufeld fee related matters on March 1, 2012. The bankruptcy  
16 court determined, among other things, that Neufeld improperly  
17 failed to disclose its simultaneous representation of Richard  
18 (and other insiders) in non-bankruptcy proceedings and that, as a  
19 result of the concurrent representations, Neufeld was not  
20 disinterested for purposes of section 327(a). The bankruptcy  
21 court, thus, ordered Neufeld to disgorge fees previously received  
22 and denied its various requests for further payment.<sup>6</sup>

23 The Debtors also moved to disallow the Claims ("Motion to  
24 Disallow"). They argued that neither of the Agreements formed a

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26 <sup>6</sup> In an order jointly addressing Neufeld's proofs of claim  
27 and administrative claim, the bankruptcy court ordered Neufeld to  
28 disgorge a \$30,000 payment that it received from MMPI in February  
2010 and a \$100,000 payment that it received from Meruelo  
Maddux - 845 S. Flower Street, LLC in June 2010.

1 basis for Richard's reimbursement claims and that disallowance  
2 under section 502(e)(1)(B) was warranted because the Claims were  
3 contingent. In response to the Motion to Disallow, Richard  
4 submitted an amended proof of claim in the MMPI case ("Amended  
5 Proof of Claim") and filed opposition. In the Amended Proof of  
6 Claim, Richard reiterated that he was entitled to reimbursement  
7 and indemnification based on the Agreements and listed total  
8 claims in the amount of \$316,294.39, consisting of three  
9 different categories of liabilities:

- 10 (1) \$151,453.53 in attorneys' fees paid to Neufeld on account  
11 of its representation of Richard in proceedings related  
12 to the Guaranties and in the Cases ("Neufeld Claim");
- 13 (2) \$142,224.48 in attorneys' fees paid to Levene on account  
14 of its representation of Richard in the Cases ("Levene  
15 Claim"); and
- 16 (3) \$22,526.38 on account of Richard's payment of a state  
17 court judgment against Richard and a related entity  
18 pursuant to a guaranteed lease ("Nemiroff Claim").

19 Apparently, the Debtors failed to properly serve Richard  
20 with the Motion to Disallow.<sup>7</sup> Consequently, the parties  
21 stipulated to a continuance of the hearing. Pursuant to a  
22 subsequent bankruptcy court order, the Debtors submitted a  
23 supplemental memorandum ("Supplemental Brief") in support of the  
24 Motion to Disallow. They renewed their prior objections and also  
25 asserted that Richard waived his indemnity rights under the terms  
26

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27 <sup>7</sup> At some point, Richard began appearing *pro se*; the  
28 Debtors, however, continued to serve his prior counsel.

1 of the Guaranties, which contained Gradsky<sup>8</sup> waivers. The Debtors  
2 also made other new arguments, including that Richard failed to  
3 comply with certain notice provisions in the Contribution  
4 Agreement, that the Indemnification Agreement did not encompass  
5 guaranty obligations, and that Richard was not entitled to  
6 indemnification for fees incurred in the Cases. The Debtors  
7 further argued that the Nemiroff Claim was unenforceable because  
8 Nemiroff failed to file a proof of claim, and that the Neufeld  
9 Claim should be disallowed based on the disallowance of the law  
10 firm's direct claims against the Debtors.

11 In opposition, Richard argued that based on his execution of  
12 new agreements with lenders and the Debtors in the Cases, the  
13 waiver argument was inapplicable as the new agreements paid the  
14 outstanding debt in full. He also asserted that the Debtors'  
15 other arguments relating to notice, scope of indemnity, and  
16 conflicts were irrelevant or lacked a legal basis.

17 The bankruptcy court heard the Motion to Disallow on May 11,  
18 2012 and, after argument, granted it in its entirety. It  
19 disallowed the Levene Claim because the fees were not related to  
20 an indemnification purpose. It disallowed the Neufeld claim  
21 based on the law firm's prior disqualification in the Cases.  
22 Finally, it disallowed the Nemiroff Claim because the underlying  
23 Claim was unenforceable in the bankruptcy case.

24 On May 29, 2012, the bankruptcy court entered an order  
25 ("Disallowance Order") that sustained the Debtors' objections and  
26 disallowed the Claims. Richard timely filed his appeal.

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28 <sup>8</sup> Union Bank v. Gradsky, 265 Cal. App. 2d 40 (1968).

1 **JURISDICTION**

2 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.  
3 §§ 1334 and 157(b)(2)(B). We have jurisdiction under 28 U.S.C.  
4 § 158.

5 **ISSUE**

6 Did the bankruptcy court err in disallowing the Claims?

7 **STANDARD OF REVIEW**

8 We review the bankruptcy court's legal conclusions de novo,  
9 and its findings of fact for clear error. See Allen v. US Bank,  
10 N.A. (In re Allen), 472 B.R. 559, 564 (9th Cir. BAP 2012). The  
11 court's findings of fact are clearly erroneous if illogical,  
12 implausible, or lacking support from the record. Retz v. Sampson  
13 (In re Retz), 606 F.3d 1189, 1196 (9th Cir. 2010). We review the  
14 bankruptcy court's Disallowance Order de novo. Continental Ins.  
15 Co. v. Thorpe Insulation Co. (In re Thorpe Insulation Co.),  
16 671 F.3d 1011, 1020 (9th Cir. 2012), cert. denied, 133 S. Ct. 119  
17 (2012); see also Varela v. Dynamic Brokers, Inc. (In re Dynamic  
18 Brokers, Inc.), 293 B.R. 489, 493 (9th Cir. BAP 2003) (issues  
19 related to disallowance are questions of law reviewed de novo).

20 Contract interpretation and the meaning of contractual  
21 provisions are reviewed de novo. DP Aviation v. Smiths Indus.  
22 Aerospace & Def. Sys. Ltd., 268 F.3d 829, 836 (9th Cir. 2001).

23 **DISCUSSION**

24 On appeal, Richard argues that the bankruptcy court erred  
25 by: (1) failing to articulate the grounds for the disallowance  
26 under section 502(b); (2) finding that Richard was not entitled  
27 to indemnity under the Agreements; (3) finding that Richard was  
28 not entitled to indemnity for legal fees that he individually



1 incurred in the Cases; (4) finding that the Neufeld Claim was  
2 disallowed based on Neufeld's disqualification in the Cases;  
3 (5) finding that Richard's rights under the Agreements were  
4 waived by his payment of guaranteed obligations; and (6) finding  
5 that the notice provisions in the Agreements barred Richard's  
6 claims. We address these issues as follows.

7 **A. Statutory grounds for disallowance of the Claims.**

8 Richard first argues that the bankruptcy court erred by  
9 failing to identify the statutory basis for disallowance. In  
10 response, the Debtors maintain that the bankruptcy court properly  
11 disallowed the claims under California substantive law.

12 Section 502(b) provides that upon an objection to a claim by  
13 a party in interest, the bankruptcy court must allow and  
14 determine the amount of the claim, unless a statutory exception  
15 exists. 11 U.S.C. § 502(b). It is well-established that  
16 section 502(b)(1)-(9) provides the exclusive grounds for the  
17 disallowance of claims. Heath v. Am. Express Travel Related  
18 Servs. Co., Inc. (In re Heath), 331 B.R. 424 (9th Cir. BAP 2005).  
19 And, there is a general presumption that claims enforceable under  
20 applicable state law are allowed in bankruptcy unless expressly  
21 disallowed. Travelers Cas. and Sur. Co. of Am. v. Pac. Gas and  
22 Elec. Co., 549 U.S. 443 (2007) (citing 11 U.S.C. § 502(b)); see  
23 also Wells Fargo Fin. Acceptance v. Rodriguez (In re Rodriguez),  
24 375 B.R. 535, 545 (9th Cir. BAP 2007) (unless there is a basis  
25 under section 502(b) to disallow, the bankruptcy court must allow  
26 the claim).

27 Here, the bankruptcy court did not identify the subsection  
28 of section 502(b) under which it disallowed the Claims. The

1 bankruptcy court did not make findings in this regard, and the  
2 Disallowance Order simply and broadly provides that it is based  
3 on the papers filed by both parties and the hearing in the  
4 matter. The Debtors briefly refer to section 502(e)(1)(B) in the  
5 Motion to Disallow, but solely in relation to Richard's then-  
6 contingent claims. And in the Supplemental Brief, the Debtors  
7 refer to section 502(e)(1)(A), but solely in relation to the  
8 Nemiroff Claim. Based on the record, however, including  
9 Richard's own acknowledgment, it appears that the basis for the  
10 disallowance lies in section 502(b)(1). Therefore, we find no  
11 error in not identifying the applicable sub-paragraph of  
12 section 502(b).

13 Section 502(b)(1) provides that a claim is disallowed if  
14 it is unenforceable under an applicable agreement or law. Thus,  
15 our review here focuses on whether the Claims were enforceable  
16 under the Agreements and, if so, whether other non-bankruptcy law  
17 bars recovery.

18 **B. The record lacks findings necessary for interpretation**  
19 **of ambiguities in the Agreements.**

20 Richard contends that the Contribution Agreement provides  
21 indemnification to all contributors, including indemnification of  
22 Richard's obligations under the Guaranties. The Debtors maintain  
23 that the Contribution Agreement makes no reference to  
24 indemnification of such obligations. Instead, they assert that  
25 the Contribution Agreement solely indemnified Richard in the  
26 event that he was sued by a third party, based on the Debtors'  
27 breach of the terms of a particular transaction, and as to the  
28 properties that were the subject of that transaction.

1 The Contribution Agreement was entered into between MMPI and  
2 related entities<sup>9</sup> and pertained to the consolidation of ownership  
3 of various commercial and residential development and  
4 redevelopment projects. In relevant part, the Contribution  
5 Agreement provides:

6 [MMPI] . . . shall indemnify and hold harmless [the  
7 related entities] and its directors, officers,  
8 employees, agents, representatives, beneficiaries,  
9 equity interest holders and Affiliates (each of which  
10 is an "Indemnified Contributor Party") from and against  
11 any and all Losses arising out of or relating to,  
12 asserted against, imposed upon or incurred by the  
13 Indemnified Contributor Party in connection with:  
14 (a) any breach of a representation, warranty or  
15 covenant of [MMPI] . . . contained in this Agreement .  
16 . . (b) [MMPI's] . . . operation of any Participating  
17 Entities or the Properties following the Closing, and  
18 (c) all of (i) the liabilities and obligations of the  
19 Participating Entities whether arising before or after  
20 the Closing . . . .

21 Contribution Agreement § 3.2.

22 Under its terms, California law governs interpretation of  
23 the Contribution Agreement. Under California law, a contract  
24 must be interpreted so as to give effect to the parties'  
25 intentions at the time that they entered into the contract. Cal.  
26 Civ. Code § 1636; see also Levy v. Ross, 269 Cal. App. 2d 231,  
27 238 (1969). The Contribution Agreement defined "Participating  
28 Entities" as the commercial and residential development and  
redevelopment projects. The Claims clearly do not fall under  
either of the first two grounds for indemnification. The  
possibility of indemnity under the last subsection, however,

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<sup>9</sup> Richard, as Trustee of The Richard Meruelo Living Trust  
U/D/T Dated September 15, 1989; Merco Group - Roosevelt Building,  
LLC; Sunstone Bella Vista, LLC; Meruelo Maddux Properties, L.P.;  
and Meruelo Maddux Properties, Inc.

1 exists. The language in subsection 3.2(c)(i), however, may  
2 permit more than one reasonable interpretation and we require an  
3 adequate factual record prior to conducting de novo review.

4 Richard similarly contends that the Indemnification  
5 Agreement provides a basis for indemnity from the Debtors. He  
6 maintains that it is now disingenuous for the Debtors to dispute  
7 that the fees and expenses he incurred in defending the  
8 Guaranties were not a result of his prior position with the  
9 Debtors. The Debtors counter that Richard's guaranty liabilities  
10 arose from agreements with third parties, and not because he was  
11 a director or officer of MMPI.

12 In relevant part, the Indemnification Agreement provides:

13 [MMPI] hereby agrees to hold harmless and  
14 indemnify . . . [Richard], from and against any and all  
15 expenses (including attorneys fees), judgments, fines,  
16 taxes, penalties and amounts paid in settlement  
17 actually and reasonably incurred by [Richard] in  
18 connection with any threatened, pending or completed  
19 action, suit or proceeding, whether civil, criminal,  
20 administrative or investigative, **by reason of the fact**  
21 that he or she is or was a director or officer of  
22 [MMPI] **or** is or was serving at the request of [MMPI] as  
23 a director, trustee, partner, member, officer, employee  
24 or agent of another corporation, partnership, limited  
25 liability company, joint venture, trust or other  
26 enterprise **and** whether or not such action is by or in  
27 the right of [MMPI] or that other corporation,  
28 partnership, limited liability company, joint venture,  
trust or other enterprise with respect to which  
[Richard] serves or has served . . . .

Indemnification Agreement § 2(a) (emphasis added).

Delaware law governs interpretation of the Indemnification  
Agreement. Under Delaware law, contracts must be "interpreted as  
written, and effect must be given to their clear and unambiguous  
terms." Shifan v. Morgan Joseph Holdings, Inc., 57 A.3d 928,  
934-35 (Del. Ch. 2012).

1 It is unclear in what capacity Richard litigated or  
2 participated in the non-bankruptcy proceedings.<sup>10</sup> Neither party  
3 disputes that most, if not all, of the non-bankruptcy proceedings  
4 were based on or in connection with the Guaranties. We, however,  
5 lack certainty in this regard and, thus, questions of  
6 interpretation arise in relation to the Indemnification  
7 Agreement.

8 Because of the ambiguities in the Agreements, the bankruptcy  
9 court's findings are critical to our review. See Pierce v.  
10 Carson (In re Rader), 488 B.R. 406, 412 (9th Cir. BAP 2013) (when  
11 language is ambiguous, we look to the record to interpret or  
12 determine what the bankruptcy court decided). In contested  
13 matters, such as a motion to disallow a claim, the bankruptcy  
14 court must render its findings of fact and conclusions of law as

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16 <sup>10</sup> The record includes a snippet of the deposition testimony  
17 of Gaelle Gralnek, a Neufeld partner, taken by Charleston Capital  
18 Advisory LLC and Hartland Asset Management Corporation on  
19 January 13, 2011. Charleston Capital Advisory LLC eventually  
20 confirmed a chapter 11 plan that involved all the Cases, with the  
21 exception of one debtor entity. The Debtors subsequently used  
22 Gralnek's deposition to support the opposition to Neufeld's  
23 request for fees. In the deposition, Gralnek discussed the cases  
24 where Neufeld represented Richard personally and who the law firm  
25 considered as its client in the cases discussed. Gralnek  
26 subsequently submitted a declaration in support of the law firm's  
27 opposition to the Debtors' motion to disallow its fees. Gralnek  
28 contested the Debtors' characterization of his testimony and  
declared that the law firm represented Richard and other insiders  
on behalf of the company in which their interests were aligned.

There appears to be correlation between the cases discussed  
at Gralnek's deposition and the actions listed in Richard's  
Amended Proof of Claim. Even so, given the complex record and  
number of parties involved, and the paucity of findings in the  
record, we cannot be reasonably or confidently sure of which  
actions and proceedings were litigated and in what context.

1 required by Civil Rule 52(a), incorporated by Rule 7052, and by  
2 Rule 9014. Even if the bankruptcy court rules without  
3 articulating such findings, there is no reversible error where  
4 the record provides the reviewing court with a full, complete,  
5 and clear view of the issues on appeal. First Yorkshire Holdings  
6 Inc. v. Pacifica L 22, LLC (In re First Yorkshire Holdings,  
7 Inc.), 470 B.R. 864, 871 (9th Cir. BAP 2012) (internal citation  
8 omitted). Findings are adequate when the record contains clear  
9 references to the factual basis supporting the bankruptcy court's  
10 ultimate conclusions. Id. If, however, the record provides no  
11 clear basis for the court's ruling or there is an absence of  
12 complete findings, we may vacate the bankruptcy court's order and  
13 remand for further proceedings. In re First Yorkshire Holdings,  
14 470 B.R. at 871.

15 Here, the record shows that the bankruptcy court made no  
16 findings in relation to either the Contribution Agreement or the  
17 Indemnification Agreement. The bankruptcy court broadly  
18 discussed indemnification in regards to the Levene Claim, and  
19 seemed to decide that indemnification was possible under one or  
20 both of the Agreements. It did not, however, identify which of  
21 the Agreements supplied the possible basis for indemnification.  
22 The absence of such findings and general inability to glean such  
23 information from the record hampers our ability to conduct a  
24 proper review of the Agreements. Therefore, we cannot complete a  
25 de novo review of whether one or both of the Agreements  
26 established a basis for the Claims.

27 Due to this lack of necessary findings, we hereafter vacate  
28 and remand as to two of the specific disallowed claims. On

1 remand, the bankruptcy court will need to make findings as to  
2 whether Richard is entitled to indemnity or contribution under  
3 the Agreements if it does not disallow the Claims on the  
4 alternative grounds discussed below.

5 **C. The record lacks findings as to the bankruptcy court's**  
6 **disallowance of the Levene Claim.**

7 Richard contends that the bankruptcy court erred when it  
8 found that he incurred the Levene attorneys' fees in furtherance  
9 of his personal interests and not in his capacity as guarantor.  
10 He maintains that he obtained separate counsel to assist him with  
11 his own legal and financial obligations under the Guaranties,  
12 which he executed for the Debtors' benefit.

13 The Debtors respond that while Richard was entitled to seek  
14 separate counsel, it was inappropriate for him to request that  
15 the Debtors indemnify him in connection with these fees. They  
16 contend that the Levene time records reflect tasks that  
17 exclusively supported Richard's personal interests in the Cases,  
18 rather than his legal and financial obligations under the  
19 Guaranties. Indeed, the Debtors assert that the word "guaranty"  
20 is no where to be found in the Levene time records attached to  
21 the Amended Proof of Claim.

22 At the hearing, the bankruptcy court found that Richard  
23 retained Levene to protect his own interests, which were not  
24 subject to indemnification. It concluded that the Levene Claim  
25 did not constitute an "indemnification situation," because it was  
26 not related to guaranty claims against Richard, but rather, was  
27 based on Richard's self-interests as a shareholder and principal  
28 of the Debtors.

1           As discussed below, we understand the general logic of the  
2 bankruptcy court's ruling. The lack of adequate findings,  
3 however, makes it impossible for us to affirm, as we cannot  
4 obtain a full, complete, and clear view of the issue on appeal as  
5 to the Levene Claim.

6           We note that the bankruptcy court was free to draw on its  
7 personal experience in presiding over the Cases. We can assume  
8 that the bankruptcy court did so. We acknowledge that in  
9 presiding over the Cases, the bankruptcy court became  
10 knowledgeable as to the key parties and relevant proceedings  
11 involved. Thus, the bankruptcy court could use its own  
12 experience in large measure to determine whether the Levene Claim  
13 entailed fees and expenses beyond the scope of the Agreements.

14           A review of the Levene time records also largely supports  
15 the bankruptcy court's determination. Some entries clearly  
16 relate solely to Richard's personal interests. Others relate to  
17 general bankruptcy activities in the Cases. What Richard fails  
18 to grasp is the distinction between legal representation that he  
19 desired because he was an officer or director and legal  
20 representation that was required by his prior officer, director,  
21 and guarantor status. In short, Richard was absolutely entitled  
22 to obtain personal advice regarding the Debtors' bankruptcies,  
23 but, for the most part, the relationship between his officer and  
24 director status and his desire for these fees may be too tenuous  
25 for proper inclusion as an indemnified obligation.

26           But a review of the time records also raises questions that  
27 cannot be explained in the absence of findings. One time code  
28 titled "Other Litigation," references litigation that may or may



1 not bear any connection or relevancy to the Guaranties. Claim  
2 No. 78-2 at 218-220. There is also at least one time entry,  
3 contrary to the Debtors' assertion, that relates to a meeting  
4 with Richard to discuss "Actions on Guaranties." Id. at 230.  
5 And if there ultimately is an award of any type on the Claims,  
6 the fees incurred in preparing the Claims may be recoverable.

7 At oral argument, the Debtors asserted that Richard "waived"  
8 remand because he attached numerous time records without  
9 articulating which time records were pertinent to his request for  
10 indemnity. They asserted that the bankruptcy court was not  
11 required to sift through the time records to make its  
12 determination and, thus, that Richard failed to meet his burden  
13 in seeking indemnity as to the fees.

14 Even if this is true, the bankruptcy court did not rule on  
15 this basis so far as we can tell. And if the bankruptcy court  
16 reviewed the records and found an entry facially relating to a  
17 guaranty to be unrelated to a guaranty, then we require a finding  
18 to determine the appropriateness of such a determination.

19 On this record, we cannot conduct an appropriate review as  
20 to the entirety of the Levene Claim. And while those fees  
21 subject to indemnity, if any, may not be significant in amount,  
22 the lack of sufficiently detailed findings makes it impossible  
23 for us to determine whether the bankruptcy court erred in making  
24 a blanket finding that all of the Levene fees were based on  
25 Richard's personal interests in the Cases. Therefore, we vacate  
26 the Disallowance Order relating to the Levene Claim and remand  
27 with instructions that the bankruptcy court make the required  
28 findings supporting its determination pursuant to Civil

1 Rule 52(a).

2 **D. The record lacks findings as to the bankruptcy court's**  
3 **disallowance of the Neufeld Claim.**

4 Richard also contends that the bankruptcy court erred by  
5 improperly imputing Neufeld's disqualification to his claim. He  
6 argues that his request for indemnity implicates completely  
7 different attorneys' fees than the law firm's claim for fees that  
8 was disallowed by the bankruptcy court. He also contests the  
9 argument that as a matter of state law, Neufeld was not entitled  
10 to payment from him, and, thus, that he was not entitled to  
11 indemnity because his payments to Neufeld were gifts. Richard  
12 finally contends that the bankruptcy court could not properly  
13 base disallowance on section 328(c).

14 The Debtors maintain that the bankruptcy court properly  
15 barred recovery of the fees under California law and that Neufeld  
16 was barred from recovering fees from the Debtors, either directly  
17 through Neufeld's own claims or indirectly through  
18 indemnification of Richard. They assert that under the  
19 California Rules of Professional Conduct, incorporated into  
20 bankruptcy proceedings by the Local Bankruptcy Rules of the  
21 United States Bankruptcy Court for the Central District of  
22 California, the bankruptcy court properly and thoroughly  
23 determined that Neufeld was not entitled to fees from the Debtors  
24 or Richard. Finally, the Debtors argue that section 328(c) does  
25 not supplant the California Rules of Professional Conduct or  
26 California law regarding ethical violations by an attorney, and,

1 thus, that Richard's argument in this regard is inappropriate.<sup>11</sup>

2 Assuming that Richard had a right to indemnification in  
3 connection with the disputes where Neufeld provided  
4 representation, under one or both of the Agreements, the Debtors  
5 could still defend against payment if the fees were unreasonable.  
6 And the fees could be unreasonable, in whole or in part, if  
7 Richard paid them when he had a complete defense to payment due  
8 to a conflict. Here, however, the record lacks findings in  
9 critical areas and, thus, we cannot conduct an appropriate  
10 appellate review.

11 We know that the bankruptcy court found that Neufeld failed  
12 in its disclosure obligations and that this justified  
13 disallowance of its request for fees for services rendered  
14 directly to the Debtors. But the record does not show that  
15 conflicts existed in relation to all areas where Neufeld  
16 represented Richard. And if conflicts existed, we do not know  
17 whether they would have justified Richard's refusal to pay  
18 Neufeld, thus negating any obligation by Debtors to indemnify  
19 him.

20 At the Motion to Disallow hearing, the Debtors asserted that  
21 they did not "think [they] should be obligated to pay for an  
22 attorney that had a conflict that was not disclosed." Hr'g Tr.

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24 <sup>11</sup> The Debtors also argue that the Disallowance Order was  
25 proper pursuant to the bankruptcy court's broad grant of power  
26 under section 105. That argument was not raised before the  
27 bankruptcy court, and thus, we do not address it in this appeal.  
28 See Samson v. W. Capital Partners, LLC (In re Blixseth), 684 F.3d  
865, 872 n. 12 (9th Cir. 2012) (appellate court may decline to  
address argument not raised before bankruptcy court) (citation  
omitted).

1 (May 11, 2012) at 12:19-20. When Richard then asserted that the  
2 settlements Neufeld represented him on were beneficial, the  
3 bankruptcy court responded, "that doesn't get around [that  
4 Neufeld] had a conflict." Id. at 13:5-6. In noting that Neufeld  
5 had simultaneously represented Richard, the Debtors, and Belinda  
6 Meruelo, the bankruptcy court further stated that it was  
7 "inappropriate and wrong. That's all. So, yeah, no money for  
8 [Neufeld]." Id. at 13-14. After examining the remaining claims,  
9 the bankruptcy court concluded: "Well, I think that's all of it,  
10 so I think I'm granting the motion." Id. at 15:20-21. Thus, the  
11 bankruptcy court's findings as to the conflicts disqualification  
12 are non-existent.

13 The record on appeal does little more to assist us in this  
14 regard. At oral argument, the Debtors argued that the record on  
15 appeal clearly supported the bankruptcy court's finding of  
16 conflicts as to Neufeld's representation of Richard. Indeed,  
17 they argued that Richard was "not innocent" and engaged in  
18 litigation tactics with the law firm, which supplied an  
19 additional basis for the determination of conflicts. Based on  
20 these assertions, we gave the parties an additional week after  
21 arguments to file supplements; the parties were instructed to  
22 specifically identify where in the record on appeal the  
23 bankruptcy court made such findings.

24 The Debtors filed an eight page supplement on February 28,  
25 2013. They provide citations to documents related to Neufeld's  
26 request for fees and the Debtors' motion to disallow those fees,  
27 as well as citations to documents related to a payment  
28 inappropriately made to Neufeld by the pre-reorganization Debtors

1 and subject to the bankruptcy court's disgorgement order.

2 The Debtors also provided citations to documents relating to  
3 an approved bankruptcy settlement agreement entered into among  
4 the Debtors, Richard, and creditors Wells Fargo Bank and Berkadia  
5 Commercial Mortgage, Inc. ("Wells Fargo/Berkadia"). The Debtors  
6 noted that Richard moved for and obtained the bankruptcy court's  
7 approval for an indemnity agreement in connection with that  
8 particular settlement, but that the bankruptcy court did not  
9 approve the portion of the Wells Fargo/Berkadia indemnity  
10 agreement relating to payments to Neufeld.

11 It is true that the bankruptcy court's order approved the  
12 indemnity agreement in the Wells Fargo/Berkadia settlement on the  
13 condition that the Debtors delete a provision that would have  
14 required immediate payment of attorneys' fees. The order further  
15 provided, however, that nothing in the order itself or in the  
16 indemnity agreement, as revised, would prejudice Richard's rights  
17 to seek indemnity for fees incurred in the Wells Fargo/Berkadia  
18 litigation. Moreover, at the Motion to Disallow hearing, the  
19 Debtors clarified that the prior bankruptcy judge had "carved  
20 out" the indemnity issue in regards to that settlement. Thus,  
21 Debtors' reliance on the Wells Fargo/Berkadia settlement is not  
22 helpful.

23 The other citations in the Debtors' supplement similarly  
24 fail to assist the Panel. There is much ado about Neufeld and  
25 there are many oblique references to improper conduct. None of  
26 the Debtors' specific citations in their supplement, however,  
27 directly support the allegations they advanced at oral argument:  
28 that the bankruptcy court specifically found or determined that

1 Richard was a bad actor or engaged in nefarious conduct as a  
2 guarantor or former director/officer of MMPI.

3 We also emphasize that even if we assume that the bankruptcy  
4 court properly found disqualifying conflicts under the California  
5 Rules of Professional Conduct, another concern arises: nothing in  
6 the record shows that the bankruptcy court considered the  
7 appropriate remedy for the law firm's violation or whether the  
8 violation provided Richard with a defense to payment of fees.

9 California case law establishes that violation of an  
10 attorney's ethical obligations may lead to forfeiture of fees for  
11 services rendered. See Pringle v. La Chapelle, 73 Cal. App. 4th  
12 1000, 1006 (1999); Cal Pak Delivery, Inc. v. United Parcel  
13 Service, Inc., 52 Cal. App. 4th 1, 14-16 (1997); Jeffry v.  
14 Pounds, 67 Cal. App. 3d 6, 11 (1977); see also Rodriguez v.  
15 Disner, 688 F.3d 645, 655 (9th Cir. 2012) (courts have "broad  
16 discretion to deny fees to an attorney who commits an ethical  
17 violation."). But such violations are not a *per se* bar to all  
18 recovery of fees. See Pringle, 73 Cal. App. 4th at 1006; Cal  
19 Pak, 52 Cal. App. 4th at 16; Jeffry, 67 Cal. App. 3d at 11.

20 Here, there are insufficient factual findings to support the  
21 bankruptcy court's disallowance of the Neufeld Claim. We cannot  
22 determine what the conflict was as to Richard. As such, we  
23 cannot determine whether the violation was so serious that it  
24 provided Richard with a defense to a Neufeld payment claim that  
25 negated the Debtors' indemnification obligations.

26 We extended our review beyond the record on appeal, but were  
27 unable to construct an adequate record capable of review. While  
28 we may draw inferences from the record, the paucity of necessary

1 findings here requires us to make an inferential leap of  
2 inappropriate length. Therefore, we vacate the Disallowance  
3 Order relating to the Neufeld Claim and remand with instructions  
4 that the bankruptcy court make the required findings supporting  
5 its determination pursuant to Civil Rule 52(a).

6 **E. Richard waived all his arguments as to the Nemiroff**  
7 **Claim.**

8 Richard appeals the entirety of the Disallowance Order, but  
9 did not address the Nemiroff Claim in his opening brief. In his  
10 Statement of Issues on Appeal, Richard identified the sole issue  
11 as whether the bankruptcy court erred in granting the Motion to  
12 Disallow. At oral argument, however, Richard requested that we  
13 remand to the bankruptcy court so that he could, among other  
14 things, address issues including the Nemiroff Claim. He did not  
15 advance any substantive argument as to the Nemiroff Claim at any  
16 point on appeal.

17 Given that Richard did not address the Nemiroff Claim in his  
18 opening brief, his reply brief, or at oral argument, we deem his  
19 arguments as to that particular claim waived. See Res. Funding,  
20 Inc. v. Pac. Cont'l Bank (In re Wash. Coast I, LLC), 485 B.R.  
21 393, 402 n.8 (9th Cir. BAP 2012) (issues not specifically and  
22 expressly argued in opening brief are waived); see also Diener v.  
23 McBeth (In re Diener), 483 B.R. 196, 202 n.7 (9th Cir. BAP 2012)  
24 (same). While the bankruptcy court may or may not have rendered  
25 sufficient findings on the Nemiroff Claim, we cannot and do not  
26 suppose Richard's arguments on appeal with respect to that  
27 particular claim. He bears the burden of articulating a basis  
28 for reversal as the appellant and simply appealing the

1 Disallowance Order in its entirety is insufficient to support his  
2 challenge to the Nemiroff Claim. Therefore, we do not consider  
3 the Nemiroff Claim on appeal.

4 **CONCLUSION**

5 For the reasons stated above, we VACATE the Disallowance  
6 Order with respect to the Levene and Neufeld Claims and REMAND to  
7 the bankruptcy court so that it may make the required findings  
8 regarding those claims.<sup>12</sup> We AFFIRM the Disallowance Order as to  
9 the Nemiroff Claim.

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<sup>12</sup> Based on the foregoing, we decline to address Richard's  
26 remaining arguments relating to waiver and notice under the  
27 Agreements. There is no evidence in the record that they  
28 provided any basis for the bankruptcy court's determinations, and  
we cannot reach any independent conclusions regarding these  
issues on this record.