NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP No. CC-09-1016 PaRMo
MARK NELSON and KIMBERLY NELSON,	Bk. No. SV-06-11455-MT
Debtors.	Adv. No. SV-07-01014-MT
MARK NELSON and KIMBERLY NELSON,	
Appellants,	
v.	**M E M O R A N D U M**[1]
UNION BANK OF CALIFORNIA,	
Appellee.	

Argued and Submitted on July 31, 2009
at Pasadena, California

Filed - August 27, 2009

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

Hon. Maureen T. Tighe, United States Bankruptcy Judge, Presiding.

Before: PAPPAS, RIEGLE[2] and MONTALI, Bankruptcy Judges.

[1] 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.

[2] The Honorable Linda B. Riegle, United States Bankruptcy Judge for the District of Nevada, sitting by designation.

Chapter 7[3] debtors Mark Nelson ("Nelson") and Kimberly Nelson ("Mrs. Nelson" and, collectively, "Nelsons") appeal the judgment of the bankruptcy court determining that the debt they owe to Union Bank of California ("UBOC") is excepted from discharge under § 523(a)(4). We AFFIRM.

FACTS

Nelsons are the sole shareholders, officers and directors of Imperial Chair Components, Inc. ("Imperial"). Imperial, a California corporation, engaged in importing and distributing engineered furniture components. Nelson alleges that, at its height, Imperial serviced 80 percent of the United States arm chair market, equivalent to 40,000 chairs a week in production.

On June 24, 2004, Imperial executed a Trade Finance Agreement and Trade Promissory Note in favor of UBOC (the "Agreement"). Under the Agreement, UBOC agreed to extend a Trade Finance Credit Facility to Imperial in the principal amount of $2 million (the "Loan"). At the time of executing the Loan, Imperial used approximately $1.85 million to pay off its prior lender, Bank of the West.

The Agreement provided that UBOC would advance sums to Imperial to purchase inventory from overseas vendors. The advances would be paid directly to vendors upon confirmation of clearance from U.S. customs. Within 120 days of each advance, Imperial was required to repay the advanced funds to UBOC from the receipt of accounts receivable from the sale of the inventory for

[3] Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

which the advance was made. Imperial agreed to repay the entire principal amount plus interest upon the maturity of the Loan. UBOC was Imperial's only term creditor, and the amounts owed to UBOC accounted for essentially all of Imperial's debts.

Imperial executed a Security Agreement on June 24, 2004, to secure the Loan with all of Imperial's personal property. The same day Nelsons executed unconditional guarantees of Imperial's obligations under the Loan. Nelsons also executed Subordination Agreements, agreeing that any debt owed by Imperial to Nelsons would be subordinated to, and be paid after, the debt owed by Imperial to UBOC under the terms of the Loan.

From June 24, 2004, through November 28, 2005, Nelsons allege that they infused $1,269,818.35 of their personal funds into Imperial, and that they paid $396,127.19 of Imperial's business expenses from their personal accounts, for a total contribution of $1,665,945.54. There are no loan or other agreements in the record supporting these contributions, and Nelson admitted in his response to interrogatories that he had no such documents.

Beginning in September 2004, UBOC issued several trade advances totaling approximately $250,000 to an Asian vendor on behalf of Imperial for its purchase of certain chair pads (the "New Inventory"). The New Inventory was needed by Imperial to fulfill an order for chairs from one of its customer, Steelcase, Inc., a major office products supplier. The advances were set to mature starting on January 27, 2005.

On January 18, 2005, Nelson contacted Mark Brutto ("Brutto"), the loan officer responsible for Imperial's accounts at UBOC. Nelson informed Brutto that Steelcase had reported there were

latent defects in the New Inventory in that the chair pads secreted an offensive odor, and that Steelcase would not pay for the New Inventory. Given this development, Nelson told Brutto Imperial would be forced to take a writeoff of approximately $180,000. In addition to discussing the New Inventory problem at this meeting, Nelson and Brutto also spoke about Imperial's insufficient cash flow to pay the advances. Nelson proposed reducing the Loan from $2 million to $1.8 million, and sought an additional term loan from UBOC of $350,000 for two years to pay off the New Inventory advances and for other projects.

UBOC rejected Imperial's request for the additional term loan, but extended the time to repay the advances on the New Inventory to February 20, 2005. And, on or about February 5, 2005, UBOC downgraded its risk grade on the Loan and reassigned the Imperial account to Salvador Lopez ("Lopez") of UBOC's special assets division ("SAD").

Imperial failed to repay the advances on the New Inventory on the maturity date of February 20, 2005, or at any time thereafter. Consequently, as of that date, Imperial was in default on the Loan, and, under the terms of the loan agreement, the full amount of the loan, $1,994,928, plus interest and costs, was due and payable in full.

As of April 20, 2005, Nelsons had not been able to refinance their property and infuse cash into Imperial because the loan-to-value ratio on their property was too high and Nelsons had poor credit scores. Nelsons requested that UBOC forebear from exercising their remedies under the Loan agreement until May 31, 2005, to allow Nelsons additional time to infuse cash into

Imperial. UBOC continued to forebear by allowing Imperial to use its limited cash flow to pay down some old advances and permitting additional advances on the credit line, provided that the total indebtedness did not exceed the $2 million line.

As of May 31, 2005, Imperial and Nelsons had been unable to pay the advances or pay down the loan. On June 6, 2005, UBOC charged off the majority of the Loan, based on Imperial's "weak cash flow, insufficient collateral coverage and losses from the write-downs of defective inventory resulting in serious liquidity issues."

During this time, Nelson was in negotiation with various asset-based lenders. Lopez testified that he spoke with Richard Gilbert of BFI Business Finance, an asset-based lender that was considering a possible line of credit of $1 million for Imperial. Gilbert sent Lopez a copy of an unsigned proposal addressed to Imperial on December 8, 2005. The negotiations between BFI and Imperial were unsuccessful.

On January 23, 2006, and for the next several months, Lopez and Nelson discussed Nelsons' continuing efforts to pay down the Loan and their joint efforts at a workout agreement. However, on April 28, 2006, Lopez informed Nelson that there had been too many delays. Nelson allegedly told Lopez that he would "do his best" to close with an asset-based lender by May 31, 2006, but Imperial did not pay down the Loan by the May 31, 2006 deadline.

On June 22, 2006, UBOC filed a complaint in Los Angeles County Superior Court, Union Bank of Cal. v. Imperial Chair Components, Inc., et al., Case no. LC075032 (the "State Court Action"). The complaint alleged causes of action for breach of

contract against Imperial and breach of the guarantees against Nelsons.

On August 29, 2006, Nelsons filed a petition for relief under chapter 7 of the Bankruptcy Code. On their Schedule F, Nelsons list a contingent, disputed, unsecured nonpriority claim of $1,999,974.94 to UBOC.

On January 22, 2007, UBOC commenced an adversary proceeding against Nelsons seeking to determine that its claim should be excepted from dischargeable under § 523(a)(4). The complaint alleges that on or about February 20, 2005, Imperial's debt obligation to UBOC became due and payable; that as of that date, and thereafter, Imperial was insolvent; that Nelsons, as the sole directors and officers of Imperial during the period of insolvency, had a fiduciary duty to Imperial's creditors; and that Nelsons had violated that duty by making significant payments to themselves to the detriment of Imperial's creditors. Nelsons answered on March 15, 2007, generally denying the allegations.

On October 18, 2007, Nelsons moved for summary judgment. Nelsons argued they owed no fiduciary duty to UBOC, there was no express trust between UBOC and Nelsons, and there was no evidence that Nelsons misappropriated any of Imperial's assets. UBOC replied on November 14, 2007, asserting that California's Trust Fund Doctrine imposed an express trust on Imperial's assets and a fiduciary duty on Nelsons, that the withdrawals of money by Nelsons from Imperial were defalcations, and that there remained material issues to be determined by the trier of fact. After taking the issues under submission at a hearing on December 5, 2007, the bankruptcy court issued a memorandum of decision on the

summary judgment motion on April 18, 2008. In the decision, the court denied the motion, concluding that genuine issues of material fact existed as to the elements of UBOC's claim.

The bankruptcy court then conducted a five-day trial from June 2 through June 11, 2008. Nelsons, Lopez, and Brutto testified. On January 5, 2009, the court entered its judgment in favor of UBOC and against Nelsons, determining that the debt owed by Nelsons to UBOC was nondischargeable under § 523(a)(4). The following day, the court entered findings of fact and conclusions of law in support of the judgment. Among those findings and conclusions are the following:

- "Nelson was overly general in much of his direct testimony about many entries on the financial statements. When pressed to explain the financial statements on cross-examination, he was evasive." Nelson "just hoped to keep UBOC at bay while he provided insufficient financial statements, did not allow an audit, and kept failing to find financing from elsewhere."

- "[UBOC] did not ever agree to write-off, discount, release or waive any portion of the outstanding obligation owed by Imperial and [Nelsons] to [UBOC]. . . . Lopez' testimony was credible and persuasive[.]"

- Nelsons "committed defalcation under 11 U.S.C. § 523(a)(4) when they caused Imperial, as its officers and directors, to repay themselves for purported loans they made to the company, ahead of Imperial's other creditors, including [UBOC]."

- "As of February 20, 2005, Imperial was insolvent as it could not pay its debts as they matured. [Nelsons] admitted in their responses to [UBOC]'s Special Interrogatories that 'Imperial

was unlikely to meet its liabilities when due.'"

- "Upon Imperial's insolvency, an express trust was created whereby all the assets of Imperial became a trust fund for the benefit of all of its creditors, including [UBOC]."

- "[Nelsons] were fiduciaries to [UBOC] at the time the debt was created because at all relevant times [Nelsons] were Imperial's only officers and directors."

- "[UBOC] has proven the elements of Bankruptcy Code Section 523(a)(4), and [Nelsons] are liable to [UBOC] thereunder for a total of $772,361.32."

Nelsons filed a timely appeal of the bankruptcy court's judgment on January 12, 2009.

JURISDICTION

The bankruptcy court had jurisdiction under 28 U.S.C. §§ 1334 and 157(b)(2)(I). The Panel has jurisdiction under 28 U.S.C. § 158.

ISSUES

Whether the Panel may review a denial of a motion for summary judgment where there has been an intervening trial and judgment on the merits.

Whether the bankruptcy court erred in determining that Imperial was insolvent by February 20, 2005.

Whether the bankruptcy court erred in finding Nelsons' debt to UBOC nondischargeable under § 523(a)(4).

Whether the bankruptcy court erred or abused its discretion in its rulings on evidentiary and equitable issues.

STANDARDS OF REVIEW

An appellate court in the Ninth Circuit does not review the denial of summary judgment where there has been an intervening trial and judgment on the merits. LoCricchio v. Legal Servs. Corp., 833 F.2d 1352, 1358 (9th Cir. 1987).

The bankruptcy court's determinations regarding insolvency resolve questions of fact which are reviewed for clear error. Akers v. Koubourlis (In re Koubourlis), 869 F.2d 1319, 1322 (9th Cir. 1989); Flegel v. Burt & Assocs., P.C. (In re Kallmeyer), 242 B.R. 492, 495 (9th Cir. BAP 1999).

The Panel reviews the bankruptcy court's findings of fact for clear error and conclusions of law de novo, and applies de novo review to "mixed questions" of law and fact that require consideration of legal concepts and the exercise of judgment about the values that animate the legal principles. Wolkowitz v. Beverly (In re Beverly), 374 B.R. 221, (9th Cir. BAP 2007), citing Murray v. Bammer (In re Bammer), 131 F.3d 788, 791-92 (9th Cir. 1997). Clear error exists when, on the entire evidence, the reviewing court is left with the definite and firm conviction that a mistake was made. Hoopai v. Countrywide Home Loans, Inc. (In re Hoopai), 369 B.R. 506, 509 (9th Cir. BAP 2007).

The bankruptcy court's witness credibility findings are entitled to special deference, and are also reviewed for clear error. Rule 8013; Anderson v. City of Bessemer City, N.C., 470 U.S. 564, 573 (1985).

Evidentiary rulings are reviewed for abuse of discretion. Tritchler v. County of Lake, 358 F.3d 1150, 1155 (9th Cir. 2004). Likewise, we apply an abuse of discretion standard when reviewing

a trial court's grant or denial of equitable relief. Forest Grove School Dist. v. T.A., 523 F.3d 1078, 1084 (9th Cir. 2008). A bankruptcy court abuses its discretion if it bases its decision on an erroneous view of the law or clearly erroneous factual findings. Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405 (1990). Otherwise, to reverse for abuse of discretion we must have a definite and firm conviction that the bankruptcy court committed a clear error of judgment in the conclusion it reached. Stasz v. Gonzalez (In re Stasz), 387 B.R. 271, 274 (9th Cir. BAP 2008).

DISCUSSION

I.

The Panel will not review a denial of a motion for summary judgment where there has been a subsequent trial and judgment on the merits.

Nelsons ask us to review the bankruptcy court's denial of their motion for summary judgment. We decline.

A denial of a motion for summary judgment is not properly reviewable on an appeal when there has been a subsequent trial and judgment on the merits. Lakeside-Scott v. Multnomah County, 556 F.3d 797, 801 n.4 (9th Cir. 2009) ("The denial of a motion for summary judgment is not reviewable on an appeal from a final judgment entered after a full trial on the merits.") (quoting Locricchio v. Legal Servs. Corp., 833 F.2d 1352, 1359 (9th Cir. 1987). This rule has not only been uniformly followed by appellate panels in this circuit, but is the rule in all other circuits that have considered the issue.[4]

[4] See Pahuta v. Massey-Ferguson, 170 F.3d 125, 130 (2d Cir. (continued...)

There is but one exception to the Locricchio rule:

> If a [trial] court denies a motion for summary judgment on the basis of a question of law that would have negated the need for a trial, this court should review that decision. If, however, a [trial] court denied a motion for summary judgment based on a disputed issue of fact, and that issue of fact was decided in a subsequent trial, this court will not engage in the pointless academic exercise of deciding whether a factual issue was disputed after it has been decided.

Banuelos v. Constr. Laborers' Trust Funds for S. Cal., 382 F.3d 897, 903 (9th Cir. 2004).

In this action, the bankruptcy court, in a well reasoned memorandum decision, denied summary judgment because of the existence of three disputed issues: whether the funds transferred from Imperial to Nelsons were repayment of loans; whether, and when, any express trust arose as a result of insolvency; and whether Nelsons owed a fiduciary duty to UBOC. These are factual questions or, at least, mixed questions of fact and law. None are pure questions of law such that, if answered favorably to Nelsons, would bring this appeal within the exception to Locricchio.

Nelsons suggest that the bankruptcy court did decide an issue of law in its consideration of summary judgment. Nelsons complain that the bankruptcy court "gave every inference to [UBOC's} alleged evidence, rather than construing it narrowly and construing [Nelson's] evidence liberally. . . . Thus, [the]

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[4](...continued)
1999); Metropolitan Life Ins. Co. v. Golden Triangle, 121 F.3d 351, 354 (8th Cir. 1997); Chesapeake Paper Prods. Co. v. Stone & Webster Eng'g Corp., 51 F.3d 1229, 1237 (4th Cir. 1995); Lama v. Borras, 16 F.3d 473, 476 n.5 (1st Cir. 1994); Black v. J.I. Case Co., 22 F.3d 568, 570-71 (5th Cir. 1994); Watson v. Amedco Steel, Inc., 29 F.3d 274, 277 (7th Cir. 1994); Whalen v. Unit Rig, Inc., 974 F.2d 1248, 1250-51 (10th Cir. 1992); Jarrett v. Epperly, 896 F.2d 1013, 1016 (6th Cir. 1990); Glaros v. H.H. Robertson Co., 797 F.2d 1564, 1569 (Fed. Cir. 1986).

Court's ruling failed to take into consideration the fresh start evidentiary analysis required of In re Miller, 39 F.3d 301, 304 (11th Cir. 1994), in ruling on the summary judgment." Nelsons' Br. at 7, 9. In short, Nelsons argue that because this is dischargeability litigation, in considering Nelsons' motion for summary judgment, the bankruptcy court must view the evidence in the light most favorable to the moving party, the Nelsons.

This argument misperceives the required analysis. In resolving a motion for summary judgment, the proper test is that "facts must be viewed in the light most favorable to the nonmoving party . . . [unless] the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party." Scott v. Harris, 550 U.S. 372, 380 (2007) (emphasis added); accord Friedman v. Boucher, 568 F.3d 1119 (9th Cir. 2009). There is nothing in the record to suggest that the case presented by UBOC at the summary judgment "could not lead a rational trier of fact to find for the nonmoving party." Indeed, UBOC's positions ultimately prevailed, as shown in the thorough findings of fact and conclusions of law entered by the bankruptcy court in support of its judgment on nondischargeability.[5]

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[5] Nelsons' citation to In re Miller refers to the general bankruptcy policy that "exceptions to discharge be narrowly construed against the creditor and liberally against the debtor, thus effectuating the fresh start policy of the Code." 39 F.3d 301, 304 (11th Cir. 1994). The Miller case and the fresh start rule, however, apply to the bankruptcy court's evaluation of the weight of evidence in considering entry of final judgment on nondischargeability, not to the sufficiency of evidence or existence of questions of material fact at the summary judgment stage of discharge litigation.

Simply put, under these circumstances, the Panel will not review the bankruptcy court's denial of summary judgment where there has been an intervening trial and judgment on the merits.

II.

The bankruptcy court did not err in determining that Nelsons' debt to UBOC was excepted from discharge under § 523(a)(4).

Section 523(a)(4) provides that a "discharge under section 727 . . . of this title does not discharge an individual debtor from any debt — . . .(4) for fraud or defalcation while acting in a fiduciary capacity, embezzlement or larceny." In an action to except a debt from discharge under § 523(a)(4), a creditor must establish three elements: (1) that an express trust existed between the debtor and creditor; (2) that the debt was caused by the debtor's fraud or defalcation; and (3) that the debtor was a fiduciary to the creditor at the time the debt was created. In re Niles, 106 F.3d 1456, 1459 (9th Cir. 1997); In re Jacks, 266 B.R. 728, 735 (9th Cir. BAP 2001). The standard of proof for discharge exceptions is preponderance of the evidence. Grogan v. Garner, 498 U.S. 279 (1991); Melton v. Moore, 964 F.2d 880 (9th Cir. 1992) (holding that the "preponderance of evidence" standard rather than "clear and convincing evidence" standard applies in bankruptcy dischargeability proceedings).

A defalcation is the "misappropriation of trust funds or money held in a fiduciary capacity; failure to properly account for such funds." Lewis v. Scott (In re Lewis), 97 F.3d 1182, 1186 (9th Cir. 1996). A defalcation may include innocent, as well as

intentional or negligent, defaults in performing trust duties. Woodworking Enters. v. Baird (In re Baird), 114 B.R. 198, 204 (9th Cir. BAP 1990) (cited with approval in In re Lewis, 97 F.3d at 1186).

Whether a relationship is a fiduciary one within the meaning of § 523(a)(4) is a question of federal law. Ragsdale v. Haller, 780 F.2d 794, 795 (9th Cir. 1986). In the dischargeability context, the fiduciary relationship must arise from an express or technical trust that was imposed before and without reference to the wrongdoing that caused the debt. Id. at 796. Whether a fiduciary is a trustee chargeable under § 523(a)(4) is determined by reference to state law. Id.

The Panel has previously examined whether, under California law, an express trust arises in favor of creditors upon the insolvency of a corporation, and whether corporate officers are fiduciaries as to those creditors. We decided that, indeed, under the Trust Fund Doctrine as adopted in California, an express trust sufficient for purposes of the application of § 523(a)(4) exists under such circumstances. In re Jacks, 266 B.R. at 728; see also In re Kallmeyer, 242 B.R. at 492.

A. The Trust Fund Doctrine in California

"The theory of the trust fund doctrine is that all of the assets of a corporation, immediately on its becoming insolvent, become a trust fund for the benefit of all of its creditors." 15A William Meade Fletcher, FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 7369 (Thomson Reuters/West 2009). The Trust Fund Doctrine is a time-honored principle in our legal system. It replaced the earlier common law rule that, upon dissolution of a corporation,

its real estate reverted to the grantors and its personalty to the state. 19 AM. JUR. 2D CORPORATIONS § 2419 (2008).

The Panel recently reaffirmed the vitality of the Trust Fund Doctrine as the basis for an exception to discharge, albeit in a case from Arizona. See Oney v. Weinberg (In re Weinberg), ___ B.R. ___, 2009 Bankr. LEXIS 2112, 2009 WL 2437044 (9th Cir. BAP, July 31, 2009).[6] Along with other states, California courts have also embraced the Trust Fund Doctrine. See Saracco Tank & Welding Co., Ltd. v. Platz, 65 Cal. App.2d 306, 315, 150 P.2d 918, 923 (Cal Ct. App. 1944) ("All the assets of a corporation, immediately upon its becoming insolvent, become a trust fund for the benefit of all its creditors."); In re Jacks, 266 B.R. at 736; see also Lawrence T. Lasagna, Inc., v. Foster, 609 F.2d 392, 396 (9th Cir. 1979) (holding that, under California law, director of an insolvent corporation is a fiduciary for purposes of § 34(a)(4), the predecessor of § 523(a)(4)).[7]

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[6] Our opinion in In re Weinberg was issued but not yet published on the day of oral argument in this appeal. At that hearing, the parties were given copies of the Weinberg opinion and invited to submit supplementary briefs addressing the implications of our holdings in Weinberg, if any, in this appeal. Both parties filed supplemental briefs. In theirs, Nelsons argue that the Trust Fund Doctrine has been superseded in California by certain amendments to the California Corporations Code and decisions of the California Supreme Court. But Nelsons' arguments were addressed and rejected in our previous decision wherein the Panel noted that "California's corporate statutes, while modifying remedies, do not eliminate the trust comprised of corporate assets that arises upon a corporation's insolvency." In re Jacks, 266 B.R. at 737.

[7] Section 34(a)(4) of the Bankruptcy Act, repealed upon enactment of the Code in 1978, provided: "A discharge in bankruptcy shall release a bankrupt from all of his provable debts . . . except such as . . . (4) were created by his fraud, embezzlement, misappropriation or defalcation while acting as an (continued...)

Other California law, although not specifically invoking the Trust Fund Doctrine, recognizes that a director of an insolvent corporation who is also a creditor owes a fiduciary duty to other creditors. Commons v. Schine, 35 Cal. App. 3d 141, 144 (Cal. Ct. App. 1973) ("One who dominates and controls an insolvent corporation may not . . . use his power to secure for himself an advantage over other creditors of the corporation. [Citations omitted.] [A] director of an insolvent corporation [] thus occupies a fiduciary relationship to its creditors."); 1-6 BALLANTINE & STERLING CAL. CORP. LAWS § 102 n.31 (Matthew Bender 2009) (citing Schine for the principle that a director who is a creditor of an insolvent corporation is a fiduciary to other creditors); see also Rankin v. Tilley, 47 Cal. App.3d 75, 89 (Cal. Ct. App. 1975 ("To be sure, directors of [an insolvent] corporation cannot secure to themselves any preference or advantage over the other creditors in the payment of their claims.").

In short, under the Trust Fund Doctrine in California, a corporate officer owes fiduciary duties to creditors when the corporation is insolvent. An officer's violation of these duties may therefore give rise to a nondischargeable debt under § 523(a)(4).

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[7](...continued)
officer or in any fiduciary capacity." Section 523(a)(4) of the Code provides: "A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt — . . . (4) for fraud or defalcation while acting in a fiduciary capacity, embezzlement or larceny."

B. The bankruptcy court did not err in determining that Imperial was insolvent on February 20, 2005, under the equity insolvency test.

Because a corporation's insolvency is a requisite for application of the Trust Fund Doctrine under California law, determining the date of insolvency of Imperial is at the heart of this appeal. We conclude that the bankruptcy court applied the correct insolvency test under California law, and did not err in fixing the date of Imperial's insolvency.

Under California law, a corporation is insolvent when it is "likely to be unable to meet its liabilities . . . as they mature." CAL. CORP. CODE § 501; In re Jacks, 266 B.R. at 736; see also CAL. CIV. CODE § 3439.2(c) ("A debtor who is not paying his or her debts as they become due is presumed to be insolvent."). Here, the bankruptcy court correctly applied Cal. Corp. Code § 501 in determining that Imperial was insolvent as of February 20, 2005:

> Under California Corporate Code § 501, a corporation is insolvent when it is unlikely to be able to meet its liabilities as they mature.

Court's Conclusion of Law no. 4.

> By February 20, 2005, Imperial failed to pay its trade advances to UBOC as they matured. Concurrently, Imperial's financial statements as of March 2005 showed a negative cash flow of nearly $100,000, evidencing Imperial's inability to pay its debts as they matured. Thus, Imperial was insolvent no later than February 20, 2005 pursuant to California Corporate Code § 501.

Court's Finding of Fact no. 25.

Whether a party is paying its debts as they come due is a question of fact reviewed for clear error. Liberty Tool v. Vortex Fishing Sys. (In re Vortex Fishing Sys.), 277 F.3d 1057, 1072

(9th Cir. 2002). Nelson admitted that Imperial was unable to pay the trade advances when they became due in February 2005. Nelsons conceded that UBOC was Imperial's largest single creditor and constituted almost all of its debt. The bankruptcy court may base an equity insolvency determination, in part, on the failure to pay a single creditor where, as here, that creditor constitutes a substantial percentage of the total debt. Concrete Pumping Serv., Inc. v. King Constr. Co. (In re Concrete Pumping Serv.), 943 F.2d 627 (6th Cir. 1991); In re Food Gallery of Valley Brook, 222 B.R. 480, 488 (Bankr. W.D. Pa. 1998); In re Int'l Teldata Corp., 12 B.R. 879, 882-83 (Bankr. D. Nev. 1981). That Imperial was unable to pay its debts to UBOC as they became due on February 20, 2005, is adequate evidence to support a finding by the bankruptcy court that Imperial was insolvent as of that date under the equity insolvency test.

Besides Imperial's admitted inability, and actual failure, to pay its principal creditor the advances due on February 20, 2005, the bankruptcy court also relied on other grounds, supported in the record, to conclude that Imperial was unable to pay its debts as they became due. One of the documentary exhibits admitted at trial was a chart, prepared with information taken from Imperial's own financial statements, showing that, as of March 2005, Imperial had a negative cash flow of almost $100,000. Although Nelsons objected to the admission of this exhibit, they provided no persuasive argument disputing that figure. As shown by this chart, the bankruptcy court found that the "negative cash flow of $100,000 evidence[d] Imperial's inability to pay its debts as they matured."

Although not cited by the bankruptcy court in its findings of fact and conclusions of law, there was other evidence in the record to support a finding of insolvency as of February 20, 2005. Beginning in March 2005, Lopez arranged a "hand to mouth" approach where the bank would allow Imperial to make a limited paydown of the credit line and then open up an equivalent amount for inventory purchases. However, Imperial was never able to catch up or pay down the trade advances that had been due on February 20, 2005. By February 20, Imperial had lost its largest customer, Steelcase, which Nelson testified was particularly harmful in a relatively small market.

And, significantly, the bankruptcy court heard testimony from Nelson and Lopez regarding the financial relations between Imperial and UBOC. The court found Nelson evasive on financial questions and not credible. In contrast, the court found Lopez credible. We give special deference to the court's determinations of credibility in a trial. Rule 8013; Anderson, 470 U.S. at 573.

Given Nelson's admission that Imperial could not and did not pay its principal creditor the advances due on February 20, 2005, after it had been granted a one-month extension to obtain the funds, together with other evidence in the record that Imperial was experiencing a significant negative cash flow, and the court's findings that Nelson's testimony on financial matters was not credible and Lopez' testimony was, we conclude that the bankruptcy court did not clearly err in determining that Imperial was insolvent as of February 20, 2005.

Nelsons' principal arguments against insolvency on that date fall into two areas. First, Nelson asserts that, based on a

balance sheet standard, Imperial was solvent on February 20, 2005. This argument lacks merit.

There is evidence in the record that the preparation of Imperial's balance sheets was faulty. The balance sheet for September 2004 was a "CPA Draft," and was never signed off by Imperial's CPA. Imperial would not allow UBOC to perform an independent audit. Moreover, all Imperial balance sheets on or after December 2004 were prepared by Nelson, who is not an accountant. The balance sheets submitted to UBOC or the bankruptcy court did not provide any record of the shareholder loans that Nelsons admit to providing Imperial between 2004 and 2006; even if they had adjusted the balance sheet, Nelsons admit that they had no documentation of the loans. The bankruptcy court found that these balance sheets were "incomplete and misleading." And, as mentioned above, the bankruptcy court found Nelson's testimony to be evasive and not credible when discussing the financial statements. Under these circumstances, the bankruptcy court was justified in rejecting Nelsons' balance sheet evidence, and relying on the equity test in determining Imperial's insolvency.

Nelsons were the sole directors, officers and shareholders of Imperial at all relevant times in this dispute. Because the bankruptcy court did not clearly err in determining that Imperial was insolvent on February 20, 2005, the Nelsons were fiduciaries to the creditors of Imperial, including UBOC, from and after that date under the Trust Fund Doctrine. As a result, repayments of any loans by Imperial to Nelsons while other creditors went unpaid

constituted defalcations as that term is understood in § 523(a)(4).

III.

The bankruptcy court did not abuse its discretion in its rulings on Nelsons' equitable defenses or evidentiary objections.

A. Equitable Arguments.

Nelsons offer equitable defenses to application of the Trust Fund Doctrine in this case. Nelsons' first equitable argument is that they infused money into Imperial at the demand of UBOC based upon UBOC's promise in return that it would restructure the Loan, or waive terms of the Agreement. As a result, according to Nelsons:

> There could not have been misappropriation of funds out of Imperial such that it caused Imperial to be insolvent. Rather the evidence demonstrated that based upon the representations of Sal Lopez the NELSONS advanced to Imperial $1,269,818.35.

Nelsons' Br. at 8 (emphasis added). Nelsons argue that UBOC should be estopped from denying that an agreement existed that would allow Nelsons to trace their personal funds, set off the funds, or claim damages for breach from UBOC. In tandem with their estoppel argument, Nelsons assert that the bankruptcy court "failed to recognize that . . . there could not have been misappropriation of funds [defalcation] as Nelson put more money into Imperial th[a]n was repaid to them." They assert that, in response to Lopez' "offer" to restructure the Loan and demand that Nelsons infuse more funds into Imperial, they contributed $1,269,818.35 from personal funds and paid $396,127.19 of Imperial's business expenses from personal funds, for a total

contribution of $1,665,254.38. Since they also repaid themselves $1,177,619.32 for these "loans" to Imperial, Nelsons suggest that Imperial owes them $488,326.22. Nelsons' Br. at 8.

There are both credibility problems and mathematical flaws in Nelsons' argument.

The bankruptcy court made a credibility determination and found, contrary to Nelsons' insistence, that there never was a binding offer by UBOC to restructure the Loan in exchange for Nelsons' cash infusions:

> [UBOC] did not ever agree to write-off, discount, release or waive any portion of the outstanding obligation owed by Imperial and [Nelsons] to [UBOC]. In his testimony, Nelson kept stressing that UBOC never modified the loan despite all he did to save his business, but he never provided any evidence that UBOC was ever under a duty to modify the loan. To the contrary, Lopez's testimony, all documentary evidence, and even Nelson's testimony showed that UBOC's instructions were clear that Nelson needed to bring in at least some outside financing for UBOC to consider releasing their liens. Lopez' testimony was credible and persuasive.

Court's Finding of Fact 30 (emphasis added). As mentioned before, we give deference to this credibility determination of the bankruptcy court. Anderson, 470 U.S. at 573.

But even if there had been a formal offer, the record shows that Nelsons did not contribute the amounts they state in their brief. Although there is evidence that Nelsons contributed $1,269,818.35 to Imperial, $1,064,771 of that amount was given to the company in 2004 and the first week of 2005, before Imperial defaulted on its obligations to UBOC, before UBOC had any discussions with Nelsons, and in fact before Lopez was even involved with their loan. Even viewing the evidence in a light most favorable to Nelsons, they at most contributed only $205,047

after the loan default or in response to some hypothetical offer from UBOC, not $1,269,818.35. They may have paid $396,127.19 of Imperial business expenses from their personal funds for a total contribution of $601,174.19 after default (and, for our purposes, while Imperial was insolvent). In contrast, there is evidence in the record that Nelsons took $809,461.35 in repayments of these "loans" from Imperial after default.[8]

On this record, the bankruptcy court was not required to conclude that Nelsons made a net contribution of funds to Imperial after default on its obligation to UBOC and while it was insolvent. Indeed, it appears that Nelsons received a net $207,186.16 from Imperial while it was insolvent. Thus, the bankruptcy court did not abuse its discretion in rejecting Nelsons' equitable argument that UBOC should be estopped from arguing defalcation, nor in refusing to offset the contribution.[9]

Nelsons' second equitable argument is based on the doctrine of unclean hands. However, while their brief generally discusses this equitable doctrine, they fail to explain how UBOC violated the principle of unclean hands. We decline to consider on appeal any argument that is not clearly and adequately addressed in the opening brief. Martinez-Serrano v. INS, 94 F.3d 1256, 1260

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[8] Just as we reduce the $1,269,818.35 by the contribution of $1,064,771 made in 2004 to get a net contribution after default of $205,047, we also reduce the $1,177,619.34 total repayments by the $368,157.99 in repayments taken out of Imperial in 2004, leaving a net repayment from Imperial to Nelsons after default and while insolvent of $809,461.35.

[9] At several points in their brief, Nelsons inflate their alleged contribution by an additional $775,000 in "deferred salary." Obviously, deferring payment of an expense is not a cash infusion.

(9th Cir. 1996). Even so, we note that the bankruptcy court explicitly addressed this defense, ruling that UBOC "did not act in any way that would constitute unclean hands." Nelsons have provided no cogent reason why this ruling constituted an abuse of discretion.

B. Evidentiary Issues

Nelsons' objections to the evidentiary rulings by the bankruptcy court also lack merit.

In their brief, Nelsons begin their attack on the evidentiary rulings of the bankruptcy court by arguing that the court should not have allowed Brutto to testify at trial:

> [Nelsons] made a motion to exclude Witness Mark Brutto, a UBOC employee. [Citing to Trial Tr. 44:16—45:2 (June 3, 2008)]. This employee was not identified in UBOC's pre-Trial Order Witness List. . . . The court denied the motion stating the UBOC could call the witness for impeachment. [Citing to Trial Tr. 44:16—45:2 (June 3, 2008)]. Witnesses not identified in the pre-trial order are barred from being called under Campbell [Indus.] v. M/V Gemini (9th Cir. 1980) 619 F.2d 24, 27-28. Thus, it was error for the court to allow Mark Brutto to testify.

Nelsons' Br. at 22.

We have carefully examined all of the trial transcripts in addition to the portion cited above. Nelsons never moved to exclude Brutto as a witness, and the bankruptcy court never ruled on such a motion. Nelsons' transcript citation above refers to a colloquy between Nelsons' attorney, Lozoya, and the court, in which the court agreed with counsel that only Nelsons could call Brutto as a witness in their case-in-chief. However, at no time did the bankruptcy court indicate that Brutto could not be called as an impeachment witness.

As it turned out, neither Nelsons nor UBOC called Brutto as a witness in their cases-in-chief. Brutto was called as a rebuttal witness by UBOC. Trial Tr. 182:4-5 (June 5, 2008), 117:21—147:20 (June 11, 2008). Nelsons did not object to calling Brutto at that time nor did they move to strike any of Brutto's testimony. Nelsons' counsel cross-examined Brutto.

Nelsons never raised any objection to Brutto as a rebuttal witness in the bankruptcy court or specifically in the issues on appeal. Simply put, the facts do not support Nelsons' statement in their brief that they "made a motion to exclude Witness Mark Brutto" or that the court denied that motion.

Nor would the law support such a motion. Nelsons cite to Campbell Indus. for the principle that "witnesses not identified in the pre-trial order are barred from being called[.]" That is not the holding of Campbell Indus. Instead, in that decision the Ninth Circuit held that a trial judge did not abuse his discretion by declining to amend a pre-trial order allowing the addition of witnesses. Id. at 27. Neither Campbell Indus. nor other circuit case law restricts the calling of impeachment witnesses not identified in pre-trial orders. Indeed, the Local Bankruptcy Rules of the Central District of California provide that impeachment witnesses need not be identified in pre-trial orders. Bankr. C.D. Cal. LBR 7016-1(2)(E).

Nelsons' real objection to Brutto's testimony appears to relate to certain documents about which Brutto testified and that Nelsons allege were withheld from Nelsons during discovery. Nelsons filed three motions in limine to exclude the documents.

The transcript shows the bankruptcy court and counsel discussed Nelsons' motions at length at the commencement of the trial. After hearing arguments of counsel, the court ruled that the declarations and evidence submitted by Nelsons to support the motions in limine were not credible or not supported by the facts. "The declarations and evidence submitted by [Nelsons] as to whether or not they received this document are very vague." Trial Tr. 37:5-7 (June 3, 2008). The bankruptcy court further noted that Nelsons' objections related to documents produced in discovery over a year before trial that had been discussed during the court's earlier hearing on Nelsons' summary judgment motion. During that earlier hearing, the court had indicated that Nelsons should bring a motion to exclude the documents. Having failed to bring that motion in a timely manner, the court noted that the objections should not have been raised one week before the beginning of trial. At least as to one document, the bank's charge-off file, the court admonished Nelsons that the objection was "too little, too late, and I really think it's an unfortunate last-minute attempt to delay a trial." Trial Tr. 40:5-7. The court also found that the information in the charge-off file was also contained in other documents that Nelsons agreed to having received in discovery. Trial Tr. 38:6-7.

Based upon our review of the entire record, we conclude that the bankruptcy court did not abuse its discretion. Home Indem. Co. v. Lane Powell Moss & Miller, 43 F.3d 1322, 1329 (9th Cir. 1995) ("Trial courts have broad discretion in making evidence rulings and handling late objections.").

Nelsons also object to the Lopez testimony regarding documents that he did not create, and was thus not competent to authenticate. However, these were apparently business records for which Lopez was the designated custodian by UBOC. He was therefore competent to authenticate them under Fed. R. Evid. 901(b)(1) ("By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule: . . . (1) Testimony of a witness with knowledge. Testimony that a matter is what it is claimed to be.").[10]

Nelsons object to the bankruptcy court's failure to exclude Lopez' testimony because it allegedly contradicted his prior, deposition testimony wherein Lopez repeatedly used the term "offer" in his deposition to refer to a binding contractual offer. At trial, Lopez insisted that he never made a formal offer to change the contract terms, waive provisions or otherwise restructure the Loan.

The bankruptcy court heard considerable testimony on this topic and, as discussed above, did not clearly err in ruling that there was no formal offer by UBOC. The bankruptcy court's finding of fact no. 30 shows that it made this finding in light of "all documentary evidence," so we assume that the bankruptcy court was aware of Lopez' deposition.

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[10] To the extent that Nelsons appear to argue that Lopez could not testify regarding documents prepared by other officers of UBOC on the basis of hearsay, such documents authenticated by an officer charged with their custody are not excluded by the hearsay exception. FED. R. EVID. 803(6) (excluding from hearsay any memorandum, report, record, or data compilation made and kept in the regular course of business and authenticated by the business's custodian of those documents).

In sum, there was no abuse of discretion in the bankruptcy court's evidentiary determinations.

CONCLUSION

The judgment of the bankruptcy court is AFFIRMED.