NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP No. CC-09-1414-KiTaPa
PECK/JONES CONSTRUCTION CORP.,	Bk. No. LA 04-35757-VZ
Debtor.	Adv. No. LA 07-1060-VZ
D&M STEEL, INC.,	
Appellant,	
v.	**M E M O R A N D U M**[1]
R. TODD NEILSON, Chapter 7 Trustee,	
Appellee.	

Argued and Submitted on July 23, 2010
at Pasadena, CA

Filed - August 26, 2010

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

Honorable Vincent Zurzolo, Bankruptcy Judge, Presiding

Before: KIRSCHER, TAYLOR,[2] and PAPPAS, 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 Hon. Laura Taylor, Bankruptcy Judge for the Southern District of California, sitting by designation.

Appellant D&M Steel, Inc. ("D&M") appeals from a judgment in favor of Appellee chapter 7 trustee, R. Todd Neilson ("Trustee"), to recover a preference paid to D&M from debtor Peck/Jones Construction Corporation ("Peck/Jones") under 11 U.S.C. § 547(b).[3] For the reasons stated below, we AFFIRM.

I. BACKGROUND AND PROCEDURAL HISTORY

A. Factual Background

Peck/Jones was a general contractor of large commercial construction projects. In December, 2002, Peck/Jones entered into a contract with Hotel Dieu to build living quarters for seniors and the disabled. D&M is a subcontractor in the business of providing structural steel and iron works for large and small commercial and residential projects.

On February 17, 2004, Peck/Jones entered into a subcontract agreement with D&M, which required D&M to provide all labor, materials, equipment, tools, scaffolding, and the like for fabrication and erection of all structural steel and other items for the Hotel Dieu project (the "Subcontract Agreement").

The payment method between the parties was as follows: D&M submitted invoices to Peck/Jones as services were rendered; Peck/Jones in turn submitted a payment application to Hotel Dieu; Hotel Dieu paid Peck/Jones; Peck/Jones then paid D&M by check.

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[3] Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037, as enacted and promulgated prior to the effective date of The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), Pub. L. 109-8, 119 Stat. 23.

The Federal Rules of Civil Procedure shall be referred to as "FRCP" and the Federal Rules of Evidence shall be referred to as "FRE."

Such payments are referred to as "progress payments." Payments by Peck/Jones to D&M were usually made 60-90 days after invoice.

On June 15, 2004, D&M submitted an invoice for the period from June 1, 2004 to June 30, 2004, which sought payment from Peck/Jones for $94,808.20. On June 24, 2004, Peck/Jones submitted Application 19 to Hotel Dieu for $462,681.00, the total amount due to various subcontractors for that time period, including the $94,808.20 to D&M. Hotel Dieu paid Peck/Jones the sum of $312,681.00 on Application 19 via check, dated July 9, 2004. Peck/Jones deposited the check into its general account on July 16, 2004. On or about September 10, 2004, Peck/Jones issued a check to D&M for $94,808.20, which cleared Peck/Jones's account on September 20, 2004. A total of 66 days elapsed between the date Peck/Jones deposited the Hotel Dieu check on July 16, and the date that its payment to D&M cleared Peck/Jones's account. This payment prompted this preference litigation.

B. Procedural History

An involuntary petition under chapter 7 was filed against Peck/Jones on December 14, 2004. On January 19, 2007, Trustee filed complaints against several creditors of Peck/Jones to avoid and recover preferential transfers to them made within 90 days before the petition date. Trustee sought to recover a total of $137,618.20 from D&M.[4]

[4] Trustee also tried to avoid a "retention payment" of $42,809.53. The bankruptcy court found in favor of D&M on that payment. Trustee does not appeal that ruling.

D&M and Trustee stipulated that the elements of section 547(b) were met.[5] However, D&M asserted that the payment in question fell under the exception to preferential transfers pursuant to section 547(c)(2), invoking the "ordinary course of business" defense.[6] Trustee later stipulated that D&M satisfied section 547(c)(2)(A)- that the transfer was in payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the transferee.

The bankruptcy court's trial scheduling order, entered on December 20, 2007, provided deadlines by which D&M was to designate an expert witness and submit his or her report. D&M retained expert witness, Tom Keeton ("Keeton"), and filed Keeton's report.

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[5] Section 547(b) provides: [T]he trustee may avoid any transfer of an interest of the debtor in property--

(1) to or for the benefit of a creditor;
(2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
(3) made while the debtor was insolvent;
(4) made--
(A) on or within 90 days before the date of the filing of the petition; or
(B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and
(5) that enables such creditor to receive more than such creditor would receive if--
(A) the case were a case under chapter 7 of this title;
(B) the transfer had not been made; and
(C) such creditor received payment of such debt to the extent provided by the provisions of this title.

[6] Under section 547(c)(2), a trustee may not avoid a transfer to the extent the transfer was (A) in payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the transferee; (B) made in the ordinary course of business or financial affairs of the debtor and the transferee; and (C) made according to ordinary business terms.

On or around November 7, 2008, Trustee filed a motion in limine seeking to exclude Keeton's testimony for various reasons under FRCP 26(a)(2) and because his report allegedly failed to comply with the standards set forth in Daubert and Kumho Tire.[7] The bankruptcy court held a hearing on Trustee's motion on December 11, 2008. At the start, the court announced that a court-appointed expert would be the only expert in the proceeding, and that no party would be allowed to call its own expert at trial. Neither D&M nor Trustee orally objected to this ruling.

An Order Striking Designation of Experts and Setting Procedure For Court Expert was entered on January 26, 2009. The order instructed the various defendants to provide a list of five potential expert witnesses to Trustee, who then was to select one (or none). No party filed a motion to reconsider the court's order. Trustee chose expert Lonnie Andrews ("Andrews") from the list proffered by defendants.

On January 29, 2009, the bankruptcy court entered an order appointing Andrews as the expert witness "to testify solely with respect to [§ 547(c)(2)(C) (2005)] as to whether or not each of the payments at issue were made according to ordinary business terms in the Debtor's industry, which was the construction of multi-million dollar private industrial and commercial construction projects . . . ."

[7] Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993); Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137 (1999).

The parties deposed Andrews on April 10, 2009. With respect to the industry standard for payment practices of contractors-subcontractors, the following colloquy ensued:

> Q: Let's talk about the time period to pay a subcontractor. Remembering, that we're talking about subcontractors who worked on multimillion-dollar private industrial and commercial construction projects such as hospitals and related medical facilities in the Los Angeles metropolitan area in 2004.
> ...
> Q: Do you know how long it took the general contractor to pay subcontractors for the work they did after the general contractor received payment for that work from the owner?
> ...
> A: Again, it's averages because it varied. If there's -- if there was a complete billing with all the correct paperwork in place, you know, less than 20 days, on an average, I would say.

Upon further examination of Andrews's testimony that "less than 20 days" was the industry standard for payment, the following inquiry occurred:

> Q: Using the definition I just gave you of "ordinary business terms," [the broad range of business terms employed by similarly situated debtors and creditors, including those in financial distress, during 2004 in Los Angeles] in your opinion, it would not be out of the ordinary course of business for a general to pay a sub longer than 20 days after the general got paid by the owner; is that correct?
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> A: That's correct.

In response to counsel's question about whether it would be an "aberration" for a financially distressed contractor to pay a subcontractor 60 days after receiving payment from the owner, even when all documents for payment were in order, Andrews responded, "I don't believe it would be an aberration, no." Upon being asked whether 90 days would be an "aberration," Andrews responded, "I've seen chains of events that would take it to

90 days." When asked to elaborate on his testimony that it could take up to 90 days for payment, Andrews clarified that such circumstances involved only cases where the subcontractor had filed stop notices or mechanics liens, which the general had to remove before it could get paid by the owner, and such cases were very rare.

Disputes about Andrews ensued. The parties argued, inter alia, over the scope of his testimony and questioned his qualifications. At a June 4, 2009 hearing, the bankruptcy court stated, "the only thing I want the expert to testify about is what is the objective standard as applied through the industry, period." (Hr'g Tr. at 2244:4-6, June 4, 2009). The court further ordered that all direct expert testimony be submitted by deposition transcript. At a September 3, 2009 hearing on the parties' Joint Stipulation Re Dispute Over Testimony of Court Appointed Expert, the bankruptcy court reminded the parties that they, particularly Trustee, agreed to Andrews as the court-appointed expert witness, and thus his objections as to Andrews's qualifications were overruled. The court also expounded on its reasoning as to why it preferred a court-appointed expert to the exclusion of all other experts in this proceeding:

> I devolved to all of you, Defendants and Plaintiff, the selection of an expert witness because I told you I would be appointing a court-appointed expert witness, not have each of you bring your own witnesses. Because in my experience, party-selected and paid expert witnesses are, for the most part --- not always, for most part unhelpful to the finder of fact in determining issues which are --- factual issues that are contested because they testify as paid to testify. That's why the rule exists, that's why I employ it often.

(Hr'g Tr. at 2314:21-2315:5, Sept. 3, 2009). Most importantly, the court warned the parties about the type of question to Andrews that would be improper for evidentiary purposes:

> So just having, like you said, asked the question, saying is this an aberration, trying to catch a magic word from Health Central [sic] or from Kaypro, that's not going to work. You've got to show me facts and you show me what his knowledge and his opinion is of what would work in the industry.

(Id. at 2316:21-2317:1).

The bankruptcy court held a trial on the preference action on October 21, 2009. Since the parties had stipulated to all of the elements of a preference under section 547(b), and had further stipulated that D&M satisfied section 547(c)(2)(A), D&M had to prove only that the subject progress payment satisfied sections 547(c)(2)(B) and (C) in order to prevail on its ordinary course of business defense.

D&M called the only witness, Michael Atia ("Atia"), the president of D&M for the past 26 years. Atia testified that D&M expected to receive progress payments from Peck/Jones approximately 60-90 days from the invoice date. The parties stipulated that all other progress payments made outside the preference period under this scheme (from invoice date) ranged from 49-86 days.

Atia also reviewed two documents concerning payment terms between D&M and Peck/Jones: Plaintiff's Exhibit #260, a similar subcontract agreement, and Defense Exhibit Y, a blank copy of "General Terms" utilized in D&M's contracts. The General Terms provide that the general contractor is not obligated to pay the subcontractor progress payments until the general receives

payment from the owner - the "pay when paid" provision - and that the general contractor shall pay the subcontractor within 30 days of when the general is paid by the owner. Atia testified that usually the General Terms were included with every D&M contract, but he could not recall if Exhibit Y was the actual General Terms from the Subcontract Agreement with Peck/Jones. Accordingly, the bankruptcy court denied D&M's motion to admit Exhibit Y into evidence. As for the copy of a similar subcontract agreement, which also contains the same payment provisions, Trustee stipulated that it was silent as to the time period when payment was to be made from Peck/Jones to D&M.[8]

The bankruptcy court ruled from the bench. It found that the subject progress payment did not meet section 547(c)(2)(C), the "objective" prong:

> My reading of Mr. Andrews' testimony ... and what is the ordinary course of business is that you look at the contract, you look at the statute [Cal. Bus. & Prof. Code § 7108.5] which calls for [payment in] 10 days -- I think that rarely occurs -- you look to the contract in which parties, it seems, routinely expand that period to at least 30 days for payment to come. But that in the industry at large, that it is common and in the ordinary course of business for payments to be made by a general contractor in this industry to a subcontractor such as the Defendant within 60 days of payment by the owner to the general.
>
> This transfer takes place 66 days. ... When I look at the expert's testimony again ... the expert testified that he had seen it once, maybe twice, where it would be beyond 60 days and up to 90 days. ...[T]aking that

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[8] Although Trustee asserts in his appellate brief that the Subcontract Agreement between Peck/Jones and D&M contained the "pay when paid" provision, as well as the provision that Peck/Jones was to pay D&M within 30 days of receiving payment from Hotel Dieu, he admitted at oral argument that the Subcontract Agreement was never part of the record.

> testimony in its plain meaning, clearly that's not in the ordinary course of the industry.
>
> So ... when ... I look at the other progress payments, they're within 60 days and many days within 60 days. So I find that the transfer is not within the meaning of the ordinary course of business for the progress payment. So it doesn't meet the objective prong.[9]

(Trial Tr. at 2054:2-2055:10, Oct. 21, 2009).

The bankruptcy court found in favor of D&M on section 547(c)(2)(B) - that the transfer was made in the ordinary course of business or financial affairs of Peck/Jones and D&M.

On December 17, 2009, the bankruptcy court entered a judgment in favor of Trustee for the progress payment of $94,808.20, plus pre- and post-judgment interest. D&M timely appealed.

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[9] D&M contended that the calculation for preference payments should be the time it took between the day D&M invoiced Peck/Jones to the day the payment to D&M cleared Peck/Jones's account. The 49-86 day range cited above is based on D&M's method.

Trustee contended that the calculation should be the time it took between the day Peck/Jones received payment from Hotel Dieu to the day the payment to D&M cleared Peck/Jones's account. Andrews also testified that a general contractor's obligation to pay a subcontractor does not flow from the date the subcontractor invoiced the general. Therefore, under Trustee's method, the time frame for payments to D&M would be fewer days since the clock does not start to run until Peck/Jones received payment from Hotel Dieu, as opposed to starting on D&M's invoice date.

The bankruptcy court adopted Trustee's calculation method. This likely explains why the court said many of the progress payments were made within 60 days and, in some instances, many days within 60 days, despite D&M's contention that the court must have confused D&M's case with the other defendants in the related adversary proceedings.

D&M does not challenge the bankruptcy court's calculation method as erroneous, but nonetheless asserts date ranges in both its opening and reply brief that adopt its "from invoice date" method of calculation.

II. JURISDICTION

The bankruptcy court had jurisdiction under 28 U.S.C. §§ 157(b)(2)(F) and 1334. We have jurisdiction under 28 U.S.C. § 158.

III. ISSUES

1. Did the bankruptcy court clearly err when it concluded that the progress payment did not fall within ordinary business terms?

2. Did the bankruptcy court abuse its discretion in striking D&M's expert witness?

IV. STANDARD OF REVIEW

We review the bankruptcy court's findings of fact for clear error and its conclusions of law de novo. Rule 8013; Educ. Credit Mgmt. Corp. v. Coleman (In re Coleman), 500 F.3d 1000, 1003 (9th Cir. 2009).

Evidentiary rulings are reviewed for an abuse of discretion and should not be reversed absent some prejudice. Defenders of Wildlife v. Bernal, 204 F.3d 920, 927-28 (9th Cir. 2000). We follow a two-part test to determine whether the bankruptcy court abused its discretion. U.S. v. Hinkson, 585 F.3d 1247, 1262 (9th Cir. 2009). First, we determine de novo whether it identified the correct legal rule to apply to the relief requested. Id. If it did, we next determine whether the bankruptcy court's application of the correct legal standard to the evidence presented was "(1) 'illogical,' (2)'implausible,' or (3) without 'support in inferences that may be drawn from the facts in the record.'" Id. If any of these three apply, we may

conclude that the court abused its discretion by making a clearly erroneous finding of fact. Id.

V. DISCUSSION

A. The Bankruptcy Court Did Not Err When It Determined That The Progress Payment Did Not Fall Within Ordinary Business Terms.

Trustee does not appeal the bankruptcy court's ruling in favor of D&M on section 547(c)(2)(B) - the "subjective" prong. Thus, the only issue before us with respect to the preference payment is the court's ruling under section 547(c)(2)(C) - the "objective" prong.

D&M contends that the bankruptcy court clearly erred when it determined that the progress payment made on the 66th day did not fall within ordinary business terms, given an industry standard of 60 days. More specifically, D&M contends that a six-day variance from the industry standard cannot be considered, as a matter of law, "so idiosyncratic as to fall outside the broad range" of business terms.

1. Governing Law

"To satisfy § 547(c)(2)(C) the creditor must demonstrate that the relevant payments were ordinary in relation to prevailing business terms." Sigma Micro Corp. v. Healthcentral.com (In re Healthcentral.com), 504 F.3d 775, 791 (9th Cir. 2007)(applying pre-BAPCPA law). This breaks down into two components. First, the creditor must establish the "broad range" of business terms employed by similarly situated debtors and creditors, including those in financial distress, during the relevant period. Id. Second, the creditor must show that the

relevant payments were "ordinary in relation to these prevailing business terms." Id.

"If the terms in question are ordinary for industry participants under financial distress, then that is ordinary for the industry." Arrow Elecs., Inc. v. Justus (In re Kaypro), 218 F.3d 1070, 1074 (9th Cir. 2000).

Section 547(c)(2)(C) should not pose a particularly high burden for creditors, and only those payments that are so unusual as to be an "aberration" in the relevant industry fall outside the meaning of "ordinary business terms." Ganis Credit Corp. v. Anderson (In re Jan Weilert RV., Inc.), 315 F.3d 1192, 1198 (9th Cir. 2003).

A determination of whether a transaction falls outside the ordinary course of business is a question of fact that depends on the nature of industry practice. Id. at 1196, citing Kaypro, 218 F.3d at 1073.

2. Analysis

The bankruptcy court found that the industry standard for payments by general contractors to subcontractors, including the payment practices of those parties in financial distress, with similar projects in Los Angeles in 2004, is within 60 days - 60 days being the outer limit. Accordingly, it found that the progress payment on the 66th day did not fall within ordinary business terms under section 547(c)(2)(C). We must accept the bankruptcy court's findings of fact unless upon review we are left with the definite and firm conviction that a mistake has

been committed. Latman v. Burdette, 366 F.3d 774, 781 (9th Cir. 2004).

D&M contends the evidence established that the industry standard for payment terms of contractors-subcontractors with similar commercial projects in 2004 in Los Angeles was 60-90 days and that the bankruptcy court erred in establishing a "bright-line" 60-day payment date, as opposed to determining a "range" of payment dates. Trustee contends that, without contract provisions to the contrary, California law provides for payment to subcontractors within 10 days. Further, Andrews's testimony established that the industry standard for payment terms is "less than 20 days." Therefore, Trustee argues that the bankruptcy court was being generous with its finding of 60 days as the outer limit for payment.[10]

D&M is incorrect. To support its contention, it cites to a page in its opening brief, which cites to a portion of Andrews's deposition testimony. Nowhere within that cited passage did Andrews ever assert such an opinion, nor did he assert as much anywhere else in the record. Moreover, the bankruptcy court did not establish a "bright-line" rule that the industry standard for payment was 60 days. The court found that, in the ordinary course of business in this industry, payments made by a general contractor like Peck/Jones to a subcontractor like D&M are "within 60 days of payment by the owner to the general." Thus,

[10] Trustee contends that his expert, DACM Project Management, was prepared to testify that the industry standard for payment was 30 days. Trustee cited, erroneously, to D&M's expert's report to support this statement. We see no report from Trustee's expert witness in the record.

the court found the "range" for payment to be up to 60 days, with 60 days being the outer limit of that range.

However, Trustee is also incorrect. In counsel's question to Andrews about how long it took general contractors to pay subcontractors in similar projects in Los Angeles in 2004, he did not preface it to include the payment practices of financially distressed general contractors like Peck/Jones, as required by our circuit. See Healthcentral.com, 504 F.3d at 791; Kaypro, 218 F.3d at 1074. Hence, Andrews did not factor such parties into his calculation of "less than 20 days," particularly since Andrews later stated that it was not out of the ordinary course of business for payment to be more than 20 days when considering financially distressed parties.

Unfortunately, considering that Andrews was the only witness to testify about the "objective" prong, the parties never posed the ultimate question at deposition, "Mr. Andrews, in your expert opinion, what was the range of payment dates for similarly situated general contractors and subcontractors, including those general contractors in financial distress, in Los Angeles in 2004?" The only question even close to this failed to include consideration of financially distressed general contractors. All other pertinent questions to Andrews were posed merely as whether it would be an "aberration" for payment to be more than 60 days or 90 days, which is exactly the type of question the bankruptcy court said was "not going to work" as evidence for section 547(c)(2)(C). While Andrews agreed that a 60-day payment would not be an aberration, he did not say that 60 days was in the

ordinary course of business for the industry. Further, Andrews later clarified his "90-day" testimony explaining that such cases occurred only when subcontractors had filed stop notices or mechanics liens, and such cases were "very rare." We see no evidence that D&M took either of these actions. As the bankruptcy court noted, Andrews's testimony here established only that payment of 90 days would not be in the ordinary course of business for the industry.

At best, the evidence established that the industry standard for payment terms between general contractors and subcontractors, including those parties in financial distress, with similar projects in Los Angeles in 2004, was a range of 10-60 days, but probably something narrower. Based on this record, we are not convinced that the bankruptcy court made a mistake in finding that the industry standard for payment was within 60 days, and that the progress payment on the 66th day did not fall within ordinary business terms. While some may agree that a payment on the 66th day is not "so idiosyncratic as to fall outside the broad range" of business terms, the bankruptcy court's view of the evidence is supported by the record and cannot be clearly erroneous. Anderson v. Bessemer City, 470 U.S. 564, 573-75 (1985).

B. The Bankruptcy Court May Have Abused Its Discretion In Striking Keeton's Testimony Under FRE 706(d) But D&M Did Not Sufficiently Preserve This Issue For Appeal.

D&M concedes that FRE 706(a)[11] authorized the bankruptcy court to appoint its own expert, but contends that the court violated D&M's right to its own expert under FRE 706(d) when it excluded Keeton. D&M further contends that the bankruptcy court abused its discretion when it preemptively concluded that Keeton's testimony, which satisfied FRCP 26(a)(2) and FRE 702, would not have assisted the trier of fact. D&M asserts that the court's ruling went to the testimony's probative value and not its admissibility, which is contrary to the principles of Daubert.

Courts rarely invoke FRE 706(a). Such appointments of experts are generally restricted to cases in which the court requires assistance deciphering complex scientific questions. See In re Joint E. & S. Dists. Asbestos Litig., 830 F.Supp. 686, 693 (E.D. N.Y. 1993)(recognizing that use of FRE 706 should be reserved for exceptional cases in which the ordinary adversary process does not suffice). No complex scientific questions were at issue in this case, and undoubtedly the adversary process would have sufficed. Turning now to FRE 706(d), it provides:

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[11] FRE 706(a) provides, in relevant part:

> Appointment. The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection ....

> "Parties' experts of own selection. Nothing in this rule limits the parties in calling expert witnesses of their own selection."

We could not find any decisions, published or unpublished, addressing this exact issue, and D&M did not cite any. More importantly, we are unable to locate in the record where D&M raised this issue before the bankruptcy court. When the court decided to strike all experts and appoint an expert witness at the December 11, 2008 hearing, D&M did not lodge any objections but, in fact, agreed with the process. D&M conceded as much before us at oral argument. We generally will not consider arguments not properly raised before the bankruptcy court. Franchise Tax Bd. v. Roberts (In re Roberts), 175 B.R. 339, 345 (9th Cir. BAP 1994). We note also that D&M did not address this issue in its opening brief, but rather in its reply. Generally, arguments not specifically and distinctly made in an appellant's opening brief are waived. Golden v. Chicago Title Ins. Co. (In re Choo), 273 B.R. 608, 613 (9th Cir. BAP 2002).[12] Even if we considered the issue, D&M has not demonstrated that excluding Keeton's testimony prejudiced and affected the outcome of its

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[12] Even though we may exercise our discretion to consider pure questions of law that are central to the case and important to the public (Consol. Mktg., Inc. v. Marvin Props., Inc. (In re Marvin Props., Inc.), 854 F.2d 1183, 1187 (9th Cir. 1988), we decline to do so because D&M did not demonstrate prejudice by the court's ruling, as noted above, so a different decision here would not change the outcome of the case.

Nonetheless, we question the bankruptcy court's practice of appointing expert witnesses to the exclusion of all other experts, and believe it violates the plain language of FRE 706(d). The bankruptcy court's interpretation of FRE 706 renders the parties' right to select their own expert meaningless and creates a potential for prejudice.

case. Defenders of Wildlife, 204 F.3d at 927-28. See 12 Moore's Federal Practice § 61.06[6] (3d. ed. 2010)(improper exclusion of evidence will be harmless error unless a substantial right of party is affected and the excluded evidence would have affected the outcome of the case); Rule 9005 (incorporating FRCP 61, which describes "harmless error"). D&M presents neither an outline of Keeton's probable testimony in relation to the "objective" prong nor an argument suggesting that such testimony could have led the bankruptcy court to reach a different conclusion on this issue.

Finally, we disagree with D&M's argument that the bankruptcy court erred by preemptively determining that Keeton's testimony, which satisfied FRCP 26(a)(2), FRE 702, and Daubert, would not have assisted the trier of fact. In our review of the record, the bankruptcy court never expressed any concerns over Keeton's qualifications or indicated that his report did not comply with Daubert and Kumho Tire. It struck all experts because it believed multiple experts "would have led to a cacophony of testimony from the Plaintiff and the various Defendants telling [the court] essentially what their clients paid them to tell [the court] with regards to what the ordinary course of business would be in the industry at large," which the court considered unhelpful to its finding of fact. (Trial Tr. at 2053:13-17, Oct. 21, 2009).

In summary, even if we were to disagree with the bankruptcy court's decision to strike all expert witnesses, a practice it admittedly employs often, D&M did not raise this issue before the bankruptcy court in order to preserve it for appeal. Moreover,

even if we considered the issue, D&M has not shown that it suffered prejudice when the court struck Keeton's testimony. Therefore, any possible error here by the bankruptcy court was harmless.

VI. CONCLUSION

For the foregoing reasons, we AFFIRM.