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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

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In re:)	BAP Nos. EW-11-1524-DHPa
)	EW-11-1550-DHPa
LLS AMERICA, LLC,)	(Related Appeals)
)	
Debtor.)	Bk. No. 09-06194-PCW11
_____)	
TEAM SPIRIT AMERICA, LLC,)	
)	
Appellant,)	
)	
v.)	M E M O R A N D U M¹
)	
BRUCE PETER KRIEGMAN, Chapter 11)	
Trustee,)	
)	
Appellee.)	
_____)	
D&D AND ASSOCIATES,)	
)	
Appellant,)	
)	
v.)	
)	
BRUCE PETER KRIEGMAN, Chapter 11)	
Trustee,)	
)	
Appellee.)	
_____)	

Argued and Submitted on May 16, 2012
at Pasadena, California

Filed - June 5, 2012

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.

1 Appeal from the United States Bankruptcy Court
2 for the Eastern District of Washington

3 Honorable Patricia C. Williams, Bankruptcy Judge, Presiding

4 Appearances:

5 BAP Case No. EW-11-1524: Conrad C. Lysiak, Esq. argued for the
6 Appellant, Team Spirit America, LLC.
7 Daniel J. Gibbons, Esq., of Witherspoon
8 Kelley argued for the Appellee, Bruce Peter
9 Kriegman, Chapter 11 Trustee.

10 BAP Case No. EW-11-1550: Michael Joseph Beyer, Esq. argued for the
11 Appellant, D&D and Associates; Daniel J.
12 Gibbons, Esq., of Witherspoon Kelley argued
13 for the Appellee, Bruce Peter Kriegman,
14 Chapter 11 Trustee.

15 Before: DUNN, HOLLOWELL, and PAPPAS, Bankruptcy Judges.

16 Without an evidentiary hearing, the bankruptcy court, applying
17 the standards set forth in In re Bonham, 229 F.3d 750 (9th Cir.
18 2000), ordered the substantive consolidation of chapter 11² debtor,
19 **LLS America, LLC ("LLS America")** (1) with chapter 11 debtor **D&D and**
20 **Associates, LLC ("D&D")**, and (2) with numerous non-debtor entities,³

21 ² Unless otherwise specified, all chapter and section
22 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
23 all "Rule" references are to the Federal Rules of Bankruptcy
24 Procedure, Rules 1001-9037. The Federal Rules of Civil Procedure
25 are referred to as "Civil Rules."

26 ³ The order granting substantive consolidation applies to
the following entities: TSA; LLS Canada, LLC; Little Loan Shoppe
America, LLC; Little Loan Shoppe Ltd.; 639504BC Ltd.; Little Loan
Shoppe Canada, LLC; 0738106BC, Ltd.; 0738116BC, Ltd.; 0738126BC,
Ltd.; 360 Northwest Networks, LLC; and LLS North America, LLC
(collectively referred to as the "Non-Debtor Companies"). It also
applies to D&D. We bold the references to the entities that are

(continued...)

1 including **Team Spirit America, LLC** ("TSA"). TSA and D&D filed
2 separate appeals.⁴ We AFFIRM.

3 I. FACTS

4 The "Little Loan Shoppe" Consumer Loan Business

5 In September 1997, Doris Nelson ("Doris") opened a payday loan
6 store, **Little Loan Shoppe, Ltd.**, in Abbotsford, British Columbia,
7 Canada. By 1999, Doris had opened three other stores in the Fraser
8 Valley of British Columbia.

9 Although Doris moved to Spokane, Washington in 2001, she
10 continued to operate three payday loan stores in Canada. In 2002,
11 Doris opened a new business, **639504BC Ltd.**, dba Little Loan Shoppe,
12 to take telephone loan applications in Canada for Canadian
13 customers. Doris thereafter closed the payday loan stores in
14 Canada. In 2005, Doris registered **Little Loan Shoppe Canada, LLC** in
15 Nevada for the purpose of conducting the Canadian telephone loan
16 business. After the Canadian loan business expanded to the internet
17 in 2006, **LLS Canada, LLC** was registered in Nevada to conduct the
18 telephone and internet loan business in Canada. The Canadian

19
20 _____
21 ³(...continued)

22 subject to the substantive consolidation order in an effort to aid
23 the reader in separating them from other entities that are not.

24 The other entities not subject to substantive consolidation are
25 numerous. Four are identified by name in the record. In addition,
26 there are 42 Nevada companies and 25 Utah companies formed in 2008
for future business needs that never have been "activated."

27 ⁴ Mr. Beyer's employment as bankruptcy counsel for
chapter 11 debtor **D&D** never was approved by the bankruptcy court.
28 Nevertheless he filed and argued this appeal on behalf of **D&D**.

1 consumer loan business ended in June 2009.⁵

2 In late 2001, Doris opened the first of three payday loan
3 stores she would eventually operate in Spokane under the name **Little**
4 **Loan Shoppe America, LLC**. In November 2005, Doris registered **LLS**
5 **America, LLC**, to conduct telephone and internet lending in the
6 United States.

7 **Team Spirit America, LLC** ("TSA") was formed in June 2006. It
8 is a Washington limited liability company solely owned by Doris.
9 **TSA** began operations in August 2006 to perform all administrative
10 and call center functions for the consumer loan business in the
11 United States (**LLS America**) and in Canada (**LLS Canada**). **TSA**
12 provided the following operating services: employing and paying all
13 employees who perform the work of the consumer loan business;
14 purchasing and paying for all supplies, utilities, and services;
15 performing the accounting function; owning the business equipment;
16 and holding unspecified software licenses.⁶ **TSA** charged **LLS America**
17 and **LLS Canada** for all services, allocated between them based on the
18 relative number of loans each generated. However, **LLS Canada** did

19 _____
20 ⁵ It appears that both the Canadian business and the U.S.
21 business maintained their banking relationships with Wells Fargo
22 Bank. After Wells Fargo Bank changed the way it processed ACH
23 debits to collect payments from consumer borrowers, the banking
24 transactions with Wells Fargo Bank terminated. The U.S.
25 business(es) moved all accounts to U.S. Bank. Because U.S. Bank was
26 not able to process ACH debits in bank accounts in Canada, the
Canadian consumer loan business ceased.

⁶ **TSA** performed the same services for the Canadian
business until the Canadian business terminated in 2009.

1 not pay for its share of the **TSA** operating costs. Instead, **LLS**
2 **America** paid all **TSA** costs, either by paying vendors directly or
3 otherwise transferring sufficient cash to **TSA** to pay the operating
4 costs for both **LLS America** and **LLS Canada**.

5 In October 2009, **TSA** and **LLS America** entered into a Service
6 Agreement, the validity of which is in dispute. See infra.

7 The store front businesses were expensive to operate. In 1999,
8 Doris began funding **Little Loan Shoppe, Ltd.** with small loans from
9 individuals. By 2005, Doris began financing both the Canadian
10 telephone loan business and the Spokane payday loan business through
11 significant loans from a large number of individuals, referred to by
12 the parties as the "Lenders."

13 For each Lenders loan, Doris executed a promissory note
14 ("Notes") as the managing member for the limited liability company
15 ("LLCs") to which the loan was extended. The record reflects a
16 sampling of the various LLCs to which funds were advanced, including
17 **0738126BC Ltd.**; **LLS America**; **0738106BC Ltd.**; **Atlantic LLS, LLC**;
18 **Pacific LLS, LLC**; **LLS-A, LLC**; and **Little Loan Shoppe America, LLC**.
19 Significantly, each Note contained language authorizing the use of
20 funds by "any associated company." The quid pro quo for the broad
21 authority for the use of funds was broad liability:

22 Parties agree that this money may be used by **Little Loan**
23 **Shoppe America, LLC** in [**LLS America**] or in any other
24 company that may be established from time to time and that
25 all of such companies including those that are not herein
26 listed are automatically included in the liability for
such note.

In the case of some Notes, there was no express concession of

1 liability, merely a disclosure that the funds were at Doris'
2 disposal in the operation of her business: "The undersigned hereby
3 warrants that this money is being borrowed for business purposes for
4 LLS-A, LLC and any associated company controlled by Doris Elizabeth
5 Nelson."

6 The Primary Bankruptcy Case

7 The proceedings at issue in these appeals commenced on July 10,
8 2009, when some of the Lenders filed a chapter 11 involuntary
9 petition in the Eastern District of Washington against one of Doris'
10 companies, LLS-A, LLC ("LLS-A"). In response to the LLS-A
11 involuntary petition, **LLS America** filed a voluntary chapter 11
12 petition in the District of Nevada on July 21, 2009.⁷ The **LLS**
13 **America** case is the primary bankruptcy case in the appeals before
14 the Panel.

15
16 ⁷ The voluntary petition filed to initiate the **LLS America**
17 case reflects that the involuntary petition had been filed against
18 LLS-A, an affiliate of **LLS America**, in the Eastern District of
19 Washington, on July 10, 2009 (09-03910-PCW). An order for relief
20 was entered in the LLS-A chapter 11 case on August 12, 2009.
21 Nothing substantive has occurred in the LLS-A case. Various minute
22 entries on the docket reflect that LLS-A was not operating, and that
23 the parties were waiting to see what developed in the **LLS America**
24 case before proceeding in the LLS-A case. Because of the lack of
25 progress in the LLS-A case, the LLS-A chapter 11 case was dismissed
26 May 15 2012 on the motion of the United States Trustee ("U.S.
Trustee"). Little of this background is in the Excerpts of Record
provided by the parties to these appeals. We therefore reviewed the
bankruptcy court's dockets as we are authorized to do in order to
sort out the interrelationships of the proceedings. See O'Rourke v.
Seaboard Sur. Co. (In re E.R. Fegert, Inc.), 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 2003).

1 **LLS America's** Schedule F - Creditors Holding Unsecured
2 Nonpriority Claims, filed with the petition, consisted of 277 pages
3 listing creditors. The claim for each creditor was scheduled as
4 "disputed" and, except for approximately twenty of those scheduled
5 creditors, the amount for each claim was scheduled as "unknown."
6 The dollar amount for the remaining twenty unsecured claims
7 aggregated to \$24,013,837.29. With the exception of a substantial
8 disputed claim owed to Wells Fargo Bank, the unsecured claims arise
9 from the Notes for loans nominally made to **LLS America**, LLS-A,
10 and/or other related entities. Central to this appeal is the
11 language of the Notes which raises substantial issues as to the
12 identity of the borrower(s).

13 On October 22, 2009, the **LLS America** case was transferred to
14 the Eastern District of Washington on the motion of some of the
15 LLS-A petitioning creditors, who also were creditors in the **LLS**
16 **America** case. The LLS-A petitioning creditors then sought the
17 appointment of a chapter 11 trustee in the **LLS America** case. Their
18 motion was resolved by the appointment of an examiner ("Examiner")
19 in the **LLS America** case on the joint motion of **LLS America** and the
20 Official Committee of Unsecured Creditors ("Creditors' Committee").⁸

21 The Examiner's charge was

22
23 ⁸ While the **LLS America** case still was pending in the
24 District of Nevada, the U.S. Trustee appointed the Creditors'
25 Committee, which included two of the LLS-A petitioning creditors.
26 The attorneys for the LLS-A petitioning creditors later were
appointed as attorneys for the Creditors' Committee in the **LLS**
America case.

1 5. ... to investigate the acts, conduct, assets,
2 liabilities, and financial condition of [**LLS America**],
including but not limited to:

3 a. sales or transfers of assets and any related
4 transactions between [**LLS America**] and any affiliate or
insider as those terms are defined in 11 U.S.C. § 101(2)
and (31);

5 b. any transfer or transaction involving [**LLS**
6 **America**] and any insider, affiliate, or member of
management of [**LLS America**] which was improper or a
misappropriation of funds of [**LLS America**]; and

7 c. [**LLS America's**] present financial operations and
8 business model to determine if the business model is
profitable and to analyze the profitability of the
business on a go-forward basis.

9 6. ... to investigate the current management of [**LLS**
10 **America**] and whether such management can be relied upon to
maintain business operations, act as a fiduciary to the
11 creditors, and formulate, propose, and implement a plan of
reorganization which will include taking appropriate legal
12 action against appropriate parties for the benefit of the
estate;

13 7. ... to investigate and report on any transactions
14 involving [**LLS America**] and any companies affiliated with
[**LLS America**], including, but not limited to [**Team Spirit**]
and Global Edge Marketing;

15 8. ... to investigate and report on transactions
16 involving [**LLS America**] and any insider as defined in
§ 101(31). . . .

17
18 The Examiner issued his preliminary report ("Preliminary
19 Report") on May 17, 2010,⁹ after which the U.S. Trustee filed its
20 own motion for the appointment of a chapter 11 trustee. Ultimately,
21 on April 7, 2011, the bankruptcy court, with the agreement of **LLS**
22 **America**, the Creditors' Committee, and the U.S. Trustee, directed
23

24 ⁹ In addition to the Preliminary Report, the Examiner filed
25 his first interim report ("First Interim Report") on August 12, 2010
26 and his second interim report ("Second Interim Report") on
February 9, 2011.

1 the U.S. Trustee to appoint a chapter 11 trustee in the **LLS America**
2 case. Bruce Kriegman was appointed as the chapter 11 trustee
3 ("Trustee") on April 18, 2011, and the bankruptcy court approved the
4 Trustee's appointment on April 21, 2011.

5 In his reports, the Examiner determined that during the six-
6 month period prior to the commencement of the **LLS America** bankruptcy
7 case:

8 [M]ost of the operating cash generated by **LLS America** was
9 transferred to **TSA** without regard to the monthly cost of
10 services provided to **LLS America** by **TSA**. Additionally,
11 cash was transferred monthly from **LLS America** to **LLS**
12 **Canada** to cover any cash shortfall arising out of the
13 operation of **LLS Canada**. Cash transfers were made
14 frequently and in varying amounts and, in most cases,
15 without regard to any particular transaction.

16 First Interim Report at p. 11. Based on this reality, the Examiner
17 reported that "[f]rom a cash utilization point of view, these three
18 entities [**LLS America**, **TSA**, and **LLS Canada**] were treated as a single
19 entity during the period." Id. In addition, **LLS America**
20 transferred cash to **LLS Canada** "as necessary to cover the amounts
21 paid to Lenders by **LLS Canada**." Id. at p. 12.

22 Relying upon the Examiner's reports, on June 30, 2011, the
23 Trustee filed a motion to consolidate ("Substantive Consolidation
24 Motion") the **LLS America** case with (1) the chapter 11 case of **D&D**,
25 and (2) numerous Non-Debtor Companies, including **TSA**. The
26 Substantive Consolidation Motion was premised on the assertions that
27 **LLS America**, **D&D**, and the Non-Debtor Companies were operating a
28 single enterprise, i.e., a consumer loan business, the Little Loan
29 Shoppe, and that most of the claims in the **LLS America** case were

1 loans made to facilitate that consumer loan business.

2 The Consolidated Entities

3 D&D and the Office Building

4 **LLS America** and **TSA** conducted their business operations from a
5 building ("Office Building") located on W. Broadway Street in
6 Spokane. **D&D** purchased the Office Building in August 2006 for the
7 purchase price of \$650,000. **D&D** is solely owned by Doris' husband,
8 Dennis Nelson.

9 To facilitate **D&D's** purchase of the Office Building, Doris
10 withdrew funds from **LLS America** and **TSA**, and loaned the funds to
11 **D&D**. When the building later was renovated, **LLS America** paid the
12 \$500,462 renovation costs. Between August 2006 and June 2009, rent
13 to **D&D** was overpaid by \$408,764.

14 Notwithstanding **D&D's** ostensible ownership of the Office
15 Building, on December 20, 2006, Doris informed the Lenders of the
16 Little Loan Shoppe's purchase and proposed renovation of the Office
17 Building:

18 "Little Loan Shoppe" recently bought the building we were
19 renting in Spokane, Washington. We are currently in the
20 middle of an extensive remodeling project. Once this is
21 complete we intend to schedule a grand opening. I want to
22 invite all of you to come for this event! I would like to
23 be able to thank you personally for the support and trust
24 you have displayed both in me and the company while we
25 were going through our growing stages. I will keep you
26 posted on the dates of the opening so you can plan
accordingly.

24 In 2009, Michael Schneider and certain other Lenders who had
25 extended loans to Doris' business in the approximate aggregate of
26 \$885,000 (collectively "Schneider Creditors"), sued **D&D** in state

1 court, asserting that **D&D** had benefitted from the money loaned
2 either as a partner of the Little Loan Shoppe business or as its
3 affiliate. On November 16, 2010, the state court issued an opinion
4 finding that (1) Doris had used the Lenders' funds both to purchase
5 and to renovate the Office Building, and (2) rental funds generated
6 by the Office Building were at times deposited into the joint
7 personal checking account of Doris and Dennis rather than into **D&D's**
8 account. In light of the language in the Notes authorizing Doris to
9 use the funds loaned in any associated company she controlled, the
10 state court held that **D&D** was in effect an agent or partner of Doris
11 and therefore responsible for repayment of the Notes.

12 **D&D** filed its voluntary chapter 11 petition in the Eastern
13 District of Washington (Case No. 11-00785-FLK11) on February 21,
14 2011, to prevent entry of a judgment on the state court's opinion,
15 which the Schneider Creditors could then have used to execute
16 against the Office Building. The Schneider Creditors filed a motion
17 for relief from the automatic stay in the **D&D** bankruptcy case
18 ("Schneider RFS Motion") to allow them to seek entry of a judgment
19 on **D&D's** liability on their Notes and to pursue a judgment for
20 damages. The Trustee objected to the Schneider RFS Motion. No
21 hearing ever was scheduled on the Schneider RFS Motion.¹⁰

22

23

24 ¹⁰ The order granting substantive consolidation was entered
25 on the docket in the **D&D** case on September 8, 2011. Thereafter,
26 other than **D&D's** request for entry of an order authorizing
employment of its attorney, and the Trustee's objection thereto,
nothing further is on the **D&D** docket.

1 The Non-Debtor Companies and Peripheral Services

2 In addition to **TSA**, which provided operating services to **LLS**
3 **America**, the following Non-Debtor Companies provided peripheral
4 services or support to the Little Loan Shoppe business.

5 Business Leads

6 Until 2006, **LLS America** generated business primarily through
7 advertising on Google. In 2006, **LLS America** began purchasing loan
8 leads from other providers. In May 2008, Doris formed Global Edge
9 Marketing, LLC dba Adworkz ("GEM"), which was used to generate
10 additional consumer loan leads through an advertising strategy that
11 created fictitious store fronts on Google maps. Start-up funding
12 for GEM came from **TSA** in the form of equipment and services. None
13 of those funds had been repaid as of May 19, 2010. GEM is owned by
14 D&C Lead Marketing, LLC, which is owned 59% by Dennis, 35% by Doris'
15 son, Alex Foster, and 6% by Evan Ernst. GEM charges **LLS America**
16 \$85.00 for each lead; approximately 60% of those leads translate
17 into loans. GEM provides services to other businesses as well. In
18 2010, less than 34% of GEM's gross revenue came from providing leads
19 to **LLS America**.

20 License and Copyright

21 Doris is the sole owner of **LLS North America LLC**, formed in
22 2005. Its assets are limited to (1) the software license for the
23 TRAN system (the software which enabled full consumer loan
24 processing to be conducted on the internet), and (2) the copyright
25 for the name "Little Loan Shoppe."
26

1 Internet Service Provider

2 **360 NW Networks, LLC** is owned by Dennis. Its sole function is
3 to act as the internet service provider that hosts the network
4 address for **LLS America**. Although it at one time had its own bank
5 account, at the time of the Examiner's investigation prior to the
6 issuance of the Preliminary Report, the account had been closed.

7 **0738106BC, Ltd., 0738116BC, Ltd., and 0738126BC, Ltd.**

8 Three companies were licensed in Canada in the fall of 2005 for
9 the purpose of making payments to the Lenders, and to pay certain
10 expenses of the consumer loan business in Canada: **0738106BC, Ltd.,**
11 **0738116BC, Ltd.,** and **0738126BC, Ltd.**

12 Proceedings on the Substantive Consolidation Motion

13 The Schneider Creditors objected to the consolidation of the
14 **D&D** bankruptcy case with that of **LLS America**. The Schneider
15 Creditors also requested ("Continuance Motion") that the hearing on
16 the Substantive Consolidation Motion be continued for a period of
17 45 days to permit discovery and the scheduling of an evidentiary
18 hearing on the Substantive Consolidation Motion. **D&D** filed its own
19 objection to the substantive consolidation of its case with the **LLS**
20 **America** case, but did not request a continuance or an evidentiary
21 hearing with respect to the Substantive Consolidation Motion. **TSA**
22 filed (1) an objection¹¹ to the Substantive Consolidation Motion,

23
24 ¹¹ The same attorney who filed the **TSA** Objection also filed
25 objections on behalf of the following related entities: **LLS Canada,**
26 **Little Loan Shoppe America, LLC, Little Loan Shoppe, Ltd., 639504BC**
Ltd., Little Loan Shoppe Canada, LLC fka LLS Ltd., 0738106BC Ltd.,

(continued...)

1 and (2) a "joinder" to the Continuance Motion.

2 The bankruptcy court denied the Continuance Motion at the
3 hearing held August 9, 2011 ("August 9 Hearing"), and proceeded to
4 hear argument on the Substantive Consolidation Motion at that time.
5 At the conclusion of the August 9 Hearing, the bankruptcy court
6 orally granted the Substantive Consolidation Motion. Hearings on
7 the form of orders were held August 26, 2011 ("August 26 Hearing")
8 and August 29, 2011 ("August 29 Hearing"). The bankruptcy court
9 thereafter entered its order denying the Continuance Motion
10 ("Continuance Order") on September 1, 2011, and its order granting
11 the Substantive Consolidation Motion ("Substantive Consolidation
12 Order") on September 8, 2011.

13 **TSA** filed a timely notice of appeal on September 21, 2011
14 (#835). **D&D** also filed a notice of appeal on September 30, 2011
15 (#918).¹² The Schneider Creditors did not appeal the bankruptcy
16 court's orders at issue before us.

17 II. JURISDICTION

18 The bankruptcy court had jurisdiction under 28 U.S.C.

19
20 ¹¹(...continued)
21 **0738126BC Ltd., LLS North America, LLC, 0738116BC Ltd.** Because the
22 objections of these related entities were not addressed at the
23 hearing on the Substantive Consolidation Motion and because no
24 appeal has been taken by any of the related entities, we deem these
25 objections to have been waived.

26 ¹² The **D&D** appeal is timely pursuant to Rule 8002(a): "If a
timely notice of appeal is filed by a party, any other party may
file a notice of appeal within 14 days of the date on which the
first notice of appeal was filed, or within the time otherwise
prescribed by this rule, whichever period last expires."

1 §§ 157(b)(1) and (b)(2)(A) and (O). We have jurisdiction under
2 28 U.S.C. § 158.

3 III. ISSUES

4 Whether the bankruptcy court abused its discretion when it
5 denied the Continuance Motion.

6 Whether the bankruptcy court abused its discretion when it
7 failed to conduct an evidentiary hearing on the Substantive
8 Consolidation Motion.

9 Whether the bankruptcy court erred when it ordered the
10 substantive consolidation of **D&D** with **LLS America**. Whether the
11 bankruptcy court erred when it ordered the substantive consolidation
12 of the Non-Debtor Companies with **LLS America**.

13 IV. STANDARDS OF REVIEW

14 A decision to deny a request for continuance is reviewed for
15 abuse of discretion. Orr v. Bank of Am., 285 F.3d 764, 783 (9th
16 Cir. 2002). A bankruptcy court's decision whether to hold an
17 evidentiary hearing also is reviewed for an abuse of discretion.
18 Zurich Am. Ins. Co. v. Int'l Fibercom, Inc. (In re Int'l Fibercom,
19 Inc.), 503 F.3d 933, 939 (9th Cir. 2007).

20 We apply a two-part test to determine whether the bankruptcy
21 court abused its discretion. United States v. Hinkson, 585 F.3d
22 1247, 1261-62 (9th Cir. 2009)(en banc). First, we consider de novo
23 whether the bankruptcy court applied the correct legal standard to
24 the relief requested. Id. Then, we review the bankruptcy court's
25 fact findings for clear error. Id. at 1262 & n.20. We must affirm
26 the bankruptcy court's fact findings unless we conclude that they

1 are "(1) 'illogical,' (2) 'implausible,' or (3) without 'support in
2 inferences that may be drawn from the facts in the record.'" Id. at
3 1262.

4 Under the abuse of discretion standard, we must have a definite
5 and firm conviction that the bankruptcy court committed a clear
6 error of judgment in the conclusion it reached before reversal is
7 appropriate. Hopkins v. Cerchione (In re Cerchione), 414 B.R. 540,
8 545 (9th Cir. BAP 2009).

9 A mixed question exists when the facts are established, the
10 rule of law is undisputed, and the issue is whether the facts
11 satisfy the legal rule. Murray v. Bammer (In re Bammer), 131 F.3d
12 788, 792 (9th Cir. 1997). Mixed questions require consideration of
13 legal concepts and the exercise of judgment about the values that
14 animate legal principles. Id. We review mixed questions of law and
15 fact de novo. Wechsler v. Macke Int'l Trade, Inc. (In re Macke
16 Int'l Trade, Inc.), 370 B.R. 236, 245 (9th Cir. BAP 2007).

17 De novo means review is independent, with no deference given to
18 the trial court's conclusion. See First Ave. W. Bldg., LLC v. James
19 (In re Onecast Media, Inc.), 439 F.3d 558, 561 (9th Cir. 2006).

20 In this case, the "rule of law" is articulated by the Ninth
21 Circuit's decision in Alexander v. Compton (In re Bonham), 229 F.3d
22 750 (9th Cir. 2000). We therefore must determine whether the facts
23 support substantive consolidation as ordered by the bankruptcy
24 court. We may affirm the bankruptcy court on any ground supported
25 by the record. Olsen v. Idaho State Bd. of Med., 363 F.3d 916, 922
26 (9th Cir. 2004).

1 V. DISCUSSION

2 I. The Bankruptcy Court Did Not Abuse Its Discretion When It Did
3 Not Continue the Hearing On the Substantive Consolidation
4 Motion.

5 A. The Continuance Motion

6 The Schneider Creditors, as creditors of **D&D** who opposed
7 substantively consolidating the **D&D** bankruptcy case with that of **LLS**
8 **America**, filed the Continuance Motion asserting that they needed an
9 additional forty-five days to conduct discovery for an evidentiary
10 hearing on the Substantive Consolidation Motion. The bankruptcy
11 court ruled that the Schneider Creditors were judicially estopped
12 from opposing the Substantive Consolidation Motion based upon their
13 contrary position, upon which they prevailed, taken before the state
14 court, i.e., that **D&D** was liable on the Notes issued by **LLS America**
15 and other related entities. Because the Schneider Creditors were
16 estopped from opposing the Substantive Consolidation Motion, the
17 bankruptcy court ruled that no additional discovery was necessary
18 and denied the Continuance Motion.

19 The Schneider Creditors have not appealed the Continuance Order
20 (or the Substantive Consolidation Order). Instead, **D&D** filed the
21 appeal. In its opening brief, **D&D** states "**D&D** also requested a
22 continuance [sic] hearing or trial so that discovery could be
23 conducted with respect to the proposed consolidation." **D&D** Opening
24 Brief on Appeal at 8:12-14. This is patently untrue. **D&D** cites to
25 its excerpts of record in support of this statement. However, the
26 pleading to which it cites is not a pleading filed by **D&D** but rather
the Continuance Motion filed by the Schneider Creditors, on their

1 own behalf. Having not sought a continuance from the bankruptcy
2 court, **D&D** cannot complain on appeal that one was not granted to it.

3 B. **TSA's Joinder in the Continuance Motion**

4 **TSA** did not file an independent motion for a continuance of the
5 hearing on the Substantive Consolidation Motion. Instead, it filed
6 a "joinder," which stated in its entirety: "[**TSA**], a party in
7 interest herein, hereby joins the motion for continuance filed . . .
8 on behalf of [the Schneider Creditors]. This joinder is based upon
9 the records and files herein and upon the Affidavit of Conrad C.
10 Lysiak filed herewith." The Affidavit of Conrad C. Lysiak stated
11 only that **TSA** believed that it should be given forty-five days to
12 conduct reasonable discovery in order to determine the factual and
13 legal basis for the Substantive Consolidation Motion.

14 In denying the Continuance Motion as to **TSA**, the bankruptcy
15 court determined that the only discovery sought by **TSA** appeared to
16 be evidence of transfers between **LLS America** and **TSA**. The
17 bankruptcy court was unpersuaded that **TSA** required additional
18 discovery with respect to those transfers where (1) the Examiner's
19 reports, submitted as evidence in support of the Substantive
20 Consolidation Motion, contained specifics about those transfers, and
21 (2) **TSA** had taken no steps to take the deposition of the Examiner in
22 an effort to dispute the Examiner's findings during the year in
23 which the Examiner was investigating the relationship between **TSA**
24 and **LLS America**.

25 On the record before us, we cannot say that the bankruptcy
26 court abused its discretion when it denied the Continuance Motion as

1 to **TSA**, based upon those factual determinations. No clear error has
2 been demonstrated.

3 II. The Bankruptcy Court Did Not Abuse Its Discretion When It Did
4 Not Conduct an Evidentiary Hearing On the Substantive
5 Consolidation Motion.

6 **D&D** asserts on appeal that the bankruptcy court abused its
7 discretion when it failed to conduct an evidentiary hearing on the
8 Substantive Consolidation Motion. In its opening brief, **D&D** states
9 that in the Continuance Order, the bankruptcy court determined that
10 there was no need for an evidentiary hearing as requested by **D&D**.

11 **D&D** Opening Brief at 9:1-3. However, nowhere in the order does the
12 bankruptcy court refer to an evidentiary hearing having been
13 requested by **D&D**, and as we discussed above, **D&D** did not request an
14 evidentiary hearing.

15 Further, it is disingenuous of **D&D** to represent to the Panel
16 that it somehow was harmed by the bankruptcy court's failure to
17 conduct an evidentiary hearing. **D&D's** objection to the Substantive
18 Consolidation Motion was "based on the fact, but not limited to
19 [sic], that [**D&D**] is not an affiliate of [**LLS America**] as defined by
20 11 USC § 101(2), its members are not the same, nor are it's [sic]
21 assets or liabilities the same as [**LLS America**]." Counsel for **D&D**
22 appeared at the August 9 Hearing and was provided an opportunity to
23 argue. The full presentation of **D&D's** case on the Substantive
24 Consolidation Motion was as follows:

25 Okay. My objection is the fact that, first of all, I
26 represent the **D&D** estate. **D&D** filed [its] chapter 11 to
prevent the possible entry of an order, which would then
cause execution against the sole asset of **D&D**, which is in
fact a building on West Broadway. Although, I would agree

1 that the state court found that there might be liability
2 of **D&D** on the notes, I don't think the court at the state
3 court level, and this is my argument, nor under the
Bankruptcy Code, under section 101(2), that **D&D** is in fact
an affiliate as defined.

4 If you look at that the - the entity, LLS, Little Loan
5 Shop doesn't directly own or control any power to vote on
D&D. **D&D** is solely owned by Dennis Nelson, not by Ms.
6 Nelson.

7 **LLS America** doesn't own any stock or any securities. It's
8 - there's no fiduciary or agency. There's no debt secured
9 by **D&D** to LL- LLS. And, in fact as Mr. Lysiak pointed
10 out, **D&D** never produced any notes, **D&D** never executed any
11 notes, **D&D** never collected on any notes. The only purpose
12 that **D&D** was that it operated as a building to provide
13 office space for Team America [sic].

14 I don't believe it is considered an entity, and in fact,
15 the trustee had an emergency motion not too long ago in
16 front of Judge Kurtz, who **D&D** actually was assigned, so
17 that they could file a complaint, a fairly substantial
18 complaint alleging a number of things, such as
19 preferences, fraudulent conveyances, unjust [enrichment],
20 et cetera.

21 And it would be my argument that, not only are not we an
22 affiliate, but if this motion to consolidate is allowed to
23 occur, then **D&D** is brought into the fold and ipso facto
24 they have no ability to defend itself, and the trustee's
25 adversary case is already done and over with, because they
26 now have **D&D**. So, that's why I'm opposing the motion,
Your Honor.

Tr. of August 9 Hearing at 38:24-40:7.

Neither in its objection nor at the hearing on the Substantive
Consolidation Motion did **D&D** assert that it had evidence to present
or that it wanted the bankruptcy court to conduct an evidentiary
hearing. By not making a request for an evidentiary hearing on the
Substantive Consolidation Motion, as other parties had done, **D&D**
waived its right to complain about the lack of an evidentiary
hearing. It cannot now step into the shoes of the Schneider

1 Creditors and complain that the bankruptcy court abused its
2 discretion in not granting them an evidentiary hearing.

3 Unlike **D&D**, **TSA** did request an evidentiary hearing. On appeal,
4 **TSA** asserts that it was precluded from cross-examining the Examiner
5 with respect to his reports. It now asserts that the reports are
6 "replete with conflicting . . . statements that actually support the
7 legal separateness of [**TSA**] and [**LLS America**]." However, **TSA** never
8 advised the bankruptcy court that it wanted an opportunity to cross-
9 examine the Examiner. In fact, it was the bankruptcy court that
10 pointed out to **TSA's** counsel that **TSA** never had undertaken to
11 challenge the Examiner or his reports, despite having had plenty of
12 opportunity to do so. Moreover, in its objection to the Substantive
13 Consolidation Motion, **TSA** relied nearly exclusively on the findings
14 of the Examiner in his reports.

15 For the first time on appeal, **TSA** asserts that because
16 substantive consolidation is "tantamount to an involuntary
17 petition," **TSA** was entitled to the same protection offered by the
18 provisions of § 303, which includes an evidentiary hearing. **TSA** did
19 not raise this issue before the bankruptcy court, either in its
20 objection to the Substantive Consolidation Motion, or in its joinder
21 to the Continuance Motion. In its argument on the Substantive
22 Consolidation Motion, **TSA** addressed only the legal standard for
23 substantive consolidation set forth in Bonham. Moreover, at the
24 subsequent hearings on the form of the order granting the
25 Substantive Consolidation Motion, in response to the bankruptcy
26 court's direct invitation for additional comment or argument on

1 substantive consolidation, **TSA**'s counsel declined:

2 I have nothing to add, Your Honor. You were patient last
3 week when I made my arguments and there's nothing else to
add. Thank you.

4 Tr. of August 26 Hearing at 83:11-13.

5 THE COURT: Mr. Lysiak, I haven't heard from you. Did you
6 want to add anything to this?

7 MR. LYSIAK: No, I don't, Your Honor. Thank You.

8 Tr. of August 29 Hearing at 115:5-7.

9 **TSA** did not inform the bankruptcy court that it claimed that it
10 was entitled to an evidentiary hearing because substantive
11 consolidation "is tantamount to an involuntary bankruptcy," thereby
12 entitling **TSA** to the due process opportunities afforded through
13 § 303. Significantly, nothing in its presentation to the bankruptcy
14 court on the merits of substantive consolidation suggests **TSA** ever
15 informed the bankruptcy court that **TSA** believed the bankruptcy court
16 was applying an incorrect rule of law, i.e., application of Bonham
17 to determine whether substantive consolidation was appropriate
18 versus application of § 303 standards to determine whether **TSA** was
19 subject to an involuntary bankruptcy proceeding. The failure to
20 assert § 303 as a defense on the merits of the Substantive
21 Consolidation Motion is a clear reflection that **TSA** never intended
22 to prepare for an evidentiary hearing on § 303 issues. **TSA** cannot
23 now assert that the bankruptcy court abused its discretion in not
24 holding an evidentiary hearing on that basis.¹³

25

26

¹³ The record reflects that the issue was raised by Doris'
(continued...)

1 In connection with the need for an evidentiary hearing, the
2 bankruptcy court made the following finding:

3 There is ample evidence in the record, including but not
4 limited to, the evidence identified [previously in the
5 order] for the Court to determine the [Substantive
6 Consolidation Motion] without holding an evidentiary
7 hearing. No party submitted any evidence or identified
8 any evidence that controverted the factual or legal basis
relied upon by the moving party in the [Substantive
Consolidation Motion]. No party established existence of
any additional evidence which would have controverted the
factual or legal basis of the [Substantive Consolidation
Motion].

9 Substantive Consolidation Order at 5:25-6:7.

10 Federal judges have discretion as to the method by which
11 evidence is taken, including wholly by affidavit. See Civil
12 Rule 43. Civil Rule 43 is applicable in bankruptcy cases pursuant
13 to Rule 9017. In the Eastern District of Washington, LBR 9073-1
14 contemplates that parties will provide evidence by affidavit prior
15 to the scheduled hearing. The version of LBR 9073-1 in effect at
16 the time of the August 9 Hearing provides:

17 (d) Filing of Documents to be Considered at Hearings

18 (1) Except as provided in LBR 4001-2, an application or
19 motion, supporting affidavits or statements under penalty
20 of perjury shall be served and filed no later than seven
21 (7) days prior to the hearing on an application or motion.
22 An opposing party shall serve and file any objections,
23 counter-affidavits or statements under penalty of perjury
24 or other responding documents not later than three (3)
25 days prior to the hearing on the application or motion.

26 _____
¹³(...continued)

attorney at the August 9 Hearing. However, the issue was not
preserved for our review because Doris did not file an appeal in her
own name. **TSA** cannot adopt on appeal a position asserted by another
party to the proceedings, which that party has abandoned.

1 (2) A document intended to be considered by the Court in
2 connection with a scheduled hearing shall be served and
filed in accordance with subparagraph (1) above.

3 Under these circumstances, we cannot say that the bankruptcy court
4 abused its discretion when it determined it had an adequate record
5 upon which to rule without an evidentiary hearing.

6 III. The Bankruptcy Court Did Not Err When It Granted the
7 Substantive Consolidation Motion.

8 "The primary purpose of substantive consolidation 'is to ensure
9 the equitable treatment of all creditors.'" Bonham, 229 F.3d at 764
10 (internal citation omitted). It is well-settled under Ninth Circuit
11 law that bankruptcy courts have the equitable authority to order the
12 substantive consolidation (1) of a debtor's case with non-debtor
13 entities, (2) nunc pro tunc. See generally In re Bonham. Our role
14 is limited to a determination of whether, on the record before us,
15 substantive consolidation is consistent with the rule of law set
16 forth in Bonham.

17 Bonham authorizes a bankruptcy court to order the substantive
18 consolidation of entities if "(1) [] creditors dealt with the
19 entities as a single economic unit and did not rely on their
20 separate identity in extending credit; or (2) [] the affairs of the
21 debtor are so entangled that consolidation will benefit all
22 creditors." Bonham, 229 F.3d at 766 (citation omitted, emphasis
23 added). These factors are considered in the disjunctive: only one
24 needs to be present to support substantive consolidation. In this
25 case, both factors are satisfied.

26 **D&D** contends that to satisfy the first factor, the bankruptcy

1 court was required to find that under Washington law, **D&D** was not a
2 separate legal entity. It further contends that the record before
3 the bankruptcy court was not sufficient to do so. We disagree as to
4 **D&D's** premise. The first Bonham factor does not address an issue of
5 law. Rather, it looks to the intent of the Lenders when the loans
6 were made.

7 The record before us demonstrates that the Lenders,
8 overwhelmingly the largest creditor body both in number and in
9 dollar amount, "dealt with the entities as a single economic unit,"
10 the Little Loan Shoppe. Clear evidence in support of this factual
11 determination is contained in the language of the Notes Doris signed
12 when the loans were made. That language gave Doris unfettered use
13 of the funds loaned with respect to any of her companies. In
14 addition to the Notes, the state court's findings and the Examiner's
15 reports all evidence the reality of the broad discretion Doris had
16 in using the loaned funds.

17 As to the second Bonham factor, the state court findings
18 establish preclusively that the affairs of **D&D** were entangled with
19 **LLS America**, and with Dennis and Doris. Despite **D&D's** protestations
20 to the contrary, its entanglement with the affairs of **LLS America**
21 was pervasive. **LLS America**, **TSA**, and Doris provided the funds for
22 **D&D** to purchase the Office Building. The monies flowing between and
23 among the entities have no relationship either to the purported
24 ownership of the Office Building by **D&D** or to any lease of the
25 premises to **LLS America** and/or **TSA**.

26 **TSA** attempts to establish that its affairs are separate from

1 those of **LLS America** through the Service Agreement it entered into
2 with **LLS America** dated October 23, 2009. Doris signed that Service
3 Agreement wearing two hats, i.e., on behalf of each of the parties.
4 Further, as the Trustee has pointed out, at the time Doris executed
5 the agreement on behalf of **LLS America**, **LLS America** was a debtor-in-
6 possession, incapable of entering into an agreement that was outside
7 the ordinary course of its business, unless the agreement was
8 subject to scrutiny by its creditors and approval by the bankruptcy
9 court. See §§ 1108, 363(b). For purposes of this appeal, whether
10 the Service Agreement is valid is not important. What is important
11 is that Doris took steps to identify and define the financial
12 relationship between **LLS America** and **TSA** only after the **LLS America**
13 bankruptcy had been filed. Up to that point, the records available
14 to the Examiner established that Doris treated **LLS America** and **TSA**
15 (and **LLS Canada**) as a single entity from a cash utilization point of
16 view.

17 We observe again that substantive consolidation is an equitable
18 remedy available for the benefit of creditors. Notably, it is only
19 Doris (through her solely-owned company, **TSA**) and Dennis (through
20 his solely-owned company, **D&D**) who have appealed the Substantive
21 Consolidation Order. No creditor has appealed.¹⁴

22 The record reflects both that the Lenders extended credit
23

24 ¹⁴ While the Schneider Creditors opposed the Substantive
25 Consolidation Motion in the first instance, their motivation was to
26 keep other Lenders from reaching the Office Building as an asset
from which their claims might be satisfied.

1 generally to Doris and to the Little Loan Shoppe business,
2 irrespective of the legal entity she created to conduct such
3 business. The record also reflects that the financial affairs
4 between and among Doris, Dennis, **LLS America, D&D**, and the Non-
5 Debtor Companies were so entangled that all creditors are benefitted
6 by the Substantive Consolidation Order.

7
8 VI. CONCLUSION

9 On the facts before us, the bankruptcy court did not abuse its
10 discretion when it denied the Continuance Motion or when it failed
11 to conduct an evidentiary hearing on the Substantive Consolidation
12 Motion. Under the Bonham factors, the bankruptcy court did not err
13 when it entered the Substantive Consolidation Order. Accordingly,
14 we AFFIRM.

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