

2/26/2014

NOT FOR PUBLICATION

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

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:) BAP Nos. NV-13-1188-TaJuKi
STEPHEN FLANAGAN and) NV-13-1189-TaJuKi
CHARLOTTE FLANAGAN,)
) Bk. No. 11-52228-BTB
))
Debtors.) Adv. No. 11-05091-BTB
))
))
ROBERT KEETON,))
))
Appellant/Cross-Appellee,)
))
v.) **MEMORANDUM***
))
STEPHEN FLANAGAN,))
))
Appellee/Cross-Appellant.))
))

Argued and Submitted on January 24, 2014
at Las Vegas, Nevada

Filed - February 26, 2014

Appeal from the United States Bankruptcy Court
for the District of Nevada

Honorable Bruce T. Beesley, Bankruptcy Judge, Presiding

Appearances: Jeffrey J. Jarvi of Law Offices of Jeffrey J. Jarvi argued for appellant/cross-appellee Robert Keeton; Kevin Darby of The Darby Law Practice argued for appellee/cross-appellant Stephen Flanagan.

Before: TAYLOR, JURY, and KIRSCHER, Bankruptcy Judges.

* 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 Appellant/Cross-Appellee Robert Keeton ("Keeton") commenced
2 an adversary proceeding against Debtor and Appellee/Cross-
3 Appellant Stephen Flanagan¹ ("Flanagan"), seeking a
4 nondischargeability determination under § 523(a)(2)(A), (a)(4),
5 (a)(6), and (a)(19).² The claims, in part, were based on
6 Flanagan's alleged violations of the Alaska Unfair Trade
7 Practices and Consumer Protection Act ("UTPA") and the Alaska
8 Securities Act ("Securities Act").

9 After a two day trial, the bankruptcy court granted judgment
10 ("Judgment") in Keeton's favor based on false pretenses under
11 § 523(a)(2)(A) and embezzlement under § 523(a)(4). It
12 determined, however, that Keeton failed to prove Flanagan's
13 violation of the UTPA or the Securities Act, and thus it denied
14 the § 523(a)(6) and (a)(19) claims.

15 Keeton appeals from the bankruptcy court's determination
16 that Flanagan did not violate the UTPA or Securities Act; its
17 denial of stay relief to proceed in an existing Alaska state
18 court action; and its denial of his post-trial motion for
19 prejudgment interest and attorney's fees and costs under Alaska
20 law.

21
22 ¹ Flanagan filed a joint bankruptcy petition with his wife.
23 Mrs. Flanagan, however, was not a named party in the adversary
24 proceeding and is not a party to this appeal.

25 ² Unless otherwise indicated, all chapter and section
26 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532.
27 "Rule" references are to the Federal Rules of Bankruptcy
28 Procedure, and "Civil Rule" references are to the Federal Rules
of Civil Procedure. References to "LBR" are to the Local Rules
of Bankruptcy Practice of the United States District Court for
the District of Nevada.

1 Flanagan cross-appeals from the bankruptcy court's
2 nondischargeability determinations under § 523(a)(2)(A) and
3 (a)(4). He also contends that the bankruptcy court committed
4 reversible error when it ordered him, mid-trial, to turn over all
5 documents that he reviewed in preparation for trial to opposing
6 counsel.

7 For the reasons explained below, we AFFIRM the bankruptcy
8 court, except as to its § 523(a)(4) determination and its denial
9 of attorney's fees and costs under Alaska law. We REVERSE the
10 Judgment as to the § 523(a)(4) claim. Further, we REVERSE that
11 portion of the bankruptcy court's order denying fees and costs
12 and REMAND solely on that issue for further proceedings
13 consistent with this decision.

14 **FACTS**

15 Keeton and Flanagan are former military and either currently
16 or intermittently served as pilots for the same major airline.

17 In 2005, Flanagan - through his company GPS Development, LLC
18 - began plans to develop a mixed-use residential and commercial
19 redevelopment project ("Redevelopment Project") in a suburb of
20 Minneapolis, Minnesota. Keeton dabbled in real estate and, in
21 2006, became acquainted with another airline pilot, Michael Hill
22 ("Hill"), who represented himself as a loan broker and eventually
23 mentioned the Redevelopment Project.

24 Hill informed Keeton that he secured approval for a
25 \$20 million loan ("\$20M Loan"), but that the loan was contingent
26 on the procurement of bank guarantees; the guarantees, in turn,
27 were predicated on an advanced origination fee of 1% or \$200,000.
28 As Keeton later learned, the "lender" was joint venture partners

1 Ultima Group II, LLC and Florida Institute of Applied Technology
2 (jointly hereafter, "FIAT"). Hill then asked Keeton if he could
3 provide Flanagan with the \$200,000 origination fee.

4 Whether driven by altruism or financial motives, Keeton
5 agreed to provide Flanagan with \$200,000 (the "Funds"). The
6 transaction was memorialized in a letter ("Agreement") dated
7 June 25, 2007, addressed to Keeton, and signed by Flanagan. The
8 Agreement, which identified FIAT as the lender, provided that
9 Keeton would supply the Funds and that the Funds would be held in
10 escrow until Flanagan obtained the bank guarantees (and,
11 presumably, the \$20M Loan) or returned to Keeton if the bank
12 guarantees were not obtained. Other terms included: repayment
13 of the "loan" from a first or second draw of financing, estimated
14 to occur after approximately six or seven weeks; a 5% monthly
15 return; and a guaranteed minimum return of \$20,000 for the first
16 60 days, until repayment of the principal.

17 Keeton attempted to take some protective measures. He
18 sought and obtained an assignment of a second mortgage held by
19 Flanagan and his wife; the second mortgage encumbered real
20 property located at or near the site of the Redevelopment
21 Project. Prior to the assignment, he verified the value of the
22 real property with an appraiser retained by Flanagan. At
23 Keeton's insistence, the parties also entered into an escrow
24 agreement with a Minneapolis title company; the latter acted as
25 the escrow agent and handled the exchange of the Funds and
26 recordation of the second mortgage assignment.

27 Things ultimately did not go as planned. Upon confirmation
28 that the second mortgage assignment was recorded, the title

1 company wired the Funds to Flanagan, who, in turn, wired the
2 Funds to FIAT. Once the Funds were transferred to FIAT, they
3 were placed into a risky investment platform that offered
4 incredible (even outlandish) payouts tied to the investment
5 contribution, such as an 80-to-1 leveraged payout. The
6 investment, unsurprisingly, did not pay out and Flanagan lost the
7 Funds. He then failed to repay Keeton the \$200,000.

8 In 2008, a senior secured lender foreclosed on Keeton's real
9 property collateral; the foreclosure yielded nothing for Keeton.³
10 Several months later, Keeton sued Flanagan in Alaska state court
11 and asserted claims based on alleged violations of the UTPA and
12 the Securities Act. The case proceeded over three years and was
13 scheduled for a bench trial on August 1, 2011. But just three
14 weeks before trial, Flanagan filed his bankruptcy. Keeton's
15 adversary proceeding followed shortly thereafter; the amended
16 adversary complaint sought a nondischargeability determination of
17 the \$200,000 based on: false pretenses and false representation
18 under § 523(a)(2)(A); embezzlement under § 523(a)(4); conversion
19 under § 523(a)(6); violation of the UTPA under § 523(a)(6); and
20 violation of the Securities Act under § 523(a)(19).

21 Keeton also moved for stay relief to allow trial to proceed
22 in the Alaska state court action. The bankruptcy court denied
23 this motion.

24
25 ³ We exercise our discretion to take judicial notice of
26 documents electronically filed in the underlying bankruptcy case
27 and adversary proceeding. See O'Rourke v. Seaboard Sur. Co.
28 (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 On January 17 and 18, 2013, the bankruptcy court held a
2 two-day trial in the nondischargeability action; both Keeton and
3 Flanagan testified. The bankruptcy court subsequently entered
4 the Judgment and its findings of fact and conclusions of law. It
5 determined that Keeton's claim was nondischargeable based on
6 false pretenses under § 523(a)(2)(A) and embezzlement under
7 § 523(a)(4); it denied all of Keeton's other claims.

8 Keeton appeals from the Judgment and Flanagan cross-appeals.
9 Keeton also appeals from the denial of his post-trial motion for
10 prejudgment interest and attorney's fees and costs under Alaska
11 law.

12 JURISDICTION

13 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
14 §§ 1334 and 157(b)(2)(I). We have jurisdiction under 28 U.S.C.
15 § 158.

16 ISSUES

17 Keeton contends that the bankruptcy court committed
18 reversible error as follows: (A) not awarding treble damages
19 under the UTPA after determining that Flanagan engaged in false
20 pretenses and embezzlement; (B) denying relief under the
21 Securities Act; (C) not "remanding" the Securities Act claim to
22 the Alaska state court for adjudication of that claim; and
23 (D) denying his post-trial motion for add-ons of prejudgment
24 interest and attorney's fees and costs under Alaska law.

25 Flanagan, in turn, asserts that the bankruptcy court
26 committed reversible error as to the following: (A) determining
27 that Keeton's claim was excepted from discharge based on false
28 pretenses under § 523(a)(2)(A); (B) determining that Keeton's

1 claim was excepted from discharge based on embezzlement under
2 § 523(a)(4); and (C) ordering him to turn over to Keeton's
3 counsel, during trial, all materials that he reviewed in
4 preparation for trial.

5 **STANDARDS OF REVIEW**

6 Whether a claim is excepted from discharge presents mixed
7 issues of law and fact, which we review de novo. Oney v.
8 Weinberg (In re Weinberg), 410 B.R. 19, 28 (9th Cir. BAP 2009),
9 aff'd, 407 F. App'x 176 (9th Cir. 2010). We also review de novo
10 issues of statutory construction. B-Real, LLC v. Chaussee
11 (In re Chaussee), 399 B.R. 225, 229 (9th Cir. BAP 2008). Under
12 de novo review, we consider a matter anew, as if it had not been
13 heard before, and as if no decision had been previously rendered.
14 Id.

15 Pure questions of fact and the bankruptcy court's underlying
16 factual findings are reviewed for clear error. Deitz v. Ford
17 (In re Deitz), 469 B.R. 11, 24-25 (9th Cir. BAP 2012);
18 de la Salle v. U.S. Bank, N.A. (In re de la Salle), 461 B.R. 593,
19 601 (9th Cir. BAP 2011); In re Weinberg, 410 B.R. at 28.

20 We review the following determinations for an abuse of
21 discretion: denial of stay relief, an award of prejudgment
22 interest, and a determination on attorney's fees. See Gruntz v.
23 Cnty of L.A. (In re Gruntz), 202 F.3d 1074, 1084 n.9 (9th Cir.
24 2000) (denial of stay relief); In re Weinberg, 410 B.R. at 37
25 (prejudgment interest award); Bertola v. N. Wisc. Produce Co.
26 (In re Bertola), 317 B.R. 95, 99 (9th Cir. BAP 2004) (attorney's
27 fees).

28 Review of an abuse of discretion determination involves a

1 two-pronged test; first, we determine de novo whether the
2 bankruptcy court identified the correct legal rule for
3 application. See United States v. Hinkson, 585 F.3d 1247,
4 1261-62 (9th Cir. 2009) (en banc). If not, then the bankruptcy
5 court necessarily abused its discretion. See id. at 1262.
6 Otherwise, we next review whether the bankruptcy court's
7 application of the correct legal rule was clearly erroneous; we
8 will affirm unless its findings were illogical, implausible, or
9 without support in inferences that may be drawn from the facts in
10 the record. See id. (internal quotation marks omitted).

11 We may affirm on any basis in the record. Caviata Attached
12 Homes, LLC v. U.S. Bank, N.A. (In re Caviata Attached Homes,
13 LLC), 481 B.R. 34, 44 (9th Cir. BAP 2012).

14 DISCUSSION

15 I.

16 We first address Keeton's issues on appeal.

17 **A. The bankruptcy court did not err by declining to award** 18 **treble damages under the UTPA.**

19 Keeton argues that the bankruptcy court erred by not
20 trebling damages and awarding full attorney's fees under the UTPA
21 after finding that Flanagan engaged in false pretenses and
22 embezzlement. He advances two arguments in support of his
23 position: first, that the bankruptcy court erred by entering the
24 Judgment for an amount less than \$600,000 when, on the first day
25 of trial, it established that the amount of Keeton's claim was
26 \$600,000 and was not at issue; and second, that the bankruptcy
27 court's determinations as to false pretenses and embezzlement are
28 both a per se and a general violation of the UTPA and, thus, that

1 the bankruptcy court erred by not awarding relief under the UTPA.
2 We construe the second argument as an appeal of bankruptcy
3 court's denial of the § 523(a)(6)⁴ claim. We first address the
4 latter argument.

5 1. Violation of the Alaska UTPA

6 The Alaska UTPA⁵ provides that "[u]nfair methods of
7 competition and unfair or deceptive acts or practices in the
8 conduct of trade or commerce are . . . unlawful." Alaska Stat.
9 § 45.50.471(a). Once a UTPA violation is established, the
10 injured party may recover \$500 or treble damages, whichever is
11 greater. Alaska Stat. § 45.50.531(a). Such damages are awarded
12 as a matter of course and do not constitute punitive damages.
13 Kenai Chrysler Ctr., Inc. v. Denison, 167 P.3d 1240, 1259 (Alaska
14 2007).

15 To establish a prima facie case of unfair or deceptive acts
16 or practices, the plaintiff must prove: (1) that the defendant
17 was engaged in trade or commerce; and (2) that in the conduct of
18 trade or commerce, an unfair act or practice occurred. Alaska
19 Interstate Const., LLC v. Pac. Diversified Invs., Inc., 279 P.3d
20 1156, 1163 (Alaska 2012).

21 Keeton contends that false pretenses and embezzlement are
22

23
24 ⁴ Section 523(a)(6) excepts a debt from discharge "for
25 willful and malicious injury by the debtor to another entity or
26 to the property of another entity." See also Black v. Bonnie
Springs Family Ltd. P'ship (In re Black), 487 B.R. 202, 211 (9th
27 Cir. 2013) (elements of a § 523(a)(6) claim).

28 ⁵ The UTPA is codified at Alaska Stat. §§ 45.50.471 -
45.50.561.

1 per se violations of Alaska Stat. § 45.50.471(b)(14).⁶ He also
2 contends that these determinations establish a general violation
3 of the UTPA.

4 Alaska courts have generally construed the "engaged in trade
5 or commerce" prong "to encompass **purchases of goods and services**
6 in business-to-business commercial transactions as well as in
7 individual consumer transactions." Alaska Interstate Const.,
8 LLC, 279 P.3d at 1169 (emphasis added); cf. W. Star Trucks, Inc.
9 v. Big Iron Equip. Serv., Inc., 101 P.3d 1047, 1051-52 (Alaska
10 2004) (application of ejusdem generis to Alaska Stat.
11 § 45.50.471(b) did "not serve to distinguish between transactions
12 based on commercial and consumer **products or services.**")
13 (emphasis added); Alaska Stat. § 45.50.561(4) (defining
14 "consumer" as "a person who seeks or acquires **goods or services**
15 by lease or purchase.") (emphasis added); Alaska Stat.
16 § 45.50.561(9) ("'goods or services' includes goods or services
17 provided in connection with a consumer credit transaction or with
18 a transaction involving an indebtedness secured by the borrower's
19 residence.").

20 In a broader context, "goods" is defined as "[t]angible or
21 movable personal property **other than money**; esp., articles of
22 trade or items of merchandise <goods and services>." Black's Law
23 Dictionary (9th ed. 2009) (emphasis added). As relevant here,
24 this description is buttressed by the definitions of "commerce":

25
26 ⁶ Alaska Stat. § 45.50.471(b)(14) provides that an act or
27 practice is unfair or deceptive if it "represent[s] that an
28 agreement confers or involves rights, remedies, or obligations
which it does not confer or involve, or which are prohibited by
law."

1 "[t]he exchange of goods and services, esp. on a large scale
2 involving transportation between cities, states, and nations,"
3 and of "trade": "[t]he business of buying and selling or
4 bartering goods or services; COMMERCE." Id.

5 Furthermore, it is well-established that, under Alaska law,
6 real estate transactions do not fall within the scope of the
7 UTPA.⁷ State v. First Nat. Bank of Anchorage, 660 P.2d 406, 414
8 (Alaska 1982); see also Aloha Lumber Corp. v. Univ. of Alaska,
9 994 P.2d 991, 1002 (Alaska 1999) (standing timber was not a
10 "good" for the purposes of the UTPA); Roberson v. Southwood Manor
11 Assocs., LLC, 249 P.3d 1059, 1061 (Alaska 2011) (distinction
12 between real property transactions and non-real property
13 transactions is particularly relevant where consumer goods are
14 involved).

15 Against this backdrop, Flanagan was not "engaged in trade or
16 commerce" for the purposes of the UTPA. There is nothing in the
17 record to suggest that the transaction between Keeton and
18 Flanagan involved the purchase, sale, or exchange of a good or
19 service, as contemplated by the UTPA. Nor does the record
20 suggest that Flanagan was a broker or otherwise involved in the
21 loan services industry. The bankruptcy court found that Flanagan
22 was not in the loan services business and Keeton does not
23 challenge this finding on appeal.

24 On this record, the bankruptcy court did not err in
25 determining that Keeton failed to meet the first prong for a
26

27 ⁷ But see Alaska Stat. § 45.50.471(52) (scope of UTPA
28 encompasses mortgage lending regulation).

1 prima facie UTPA violation. As a result, it did not err when it
2 declined to award treble damages under the UPTA.

3 2. Amount of Judgment

4 Keeton also asserts that the bankruptcy court erred in
5 entering the Judgment for less than \$600,000 when it expressly
6 ruled that the amount of the debt was undisputed and established
7 at trial.

8 It is true that, on the first morning of the two-day trial,
9 the bankruptcy court stated that the amount of Keeton's claim was
10 "presumptively resolved" in the amount of \$600,000, as scheduled
11 by Flanagan and his co-debtor spouse. Trial Tr. (Jan. 17, 2013),
12 Vol. 1 at 8:3-4. But, to the extent that Keeton argues that the
13 bankruptcy court was somehow estopped from entering a different
14 (and reduced) judgment amount, we reject his argument. Keeton
15 advances absolutely no case authority or reasoning in support of
16 such an argument.

17 Moreover, just a few minutes after announcing that the
18 claim amount was presumptively resolved, the bankruptcy court
19 further stated to Keeton: "you would be entitled to **whatever**
20 **you're entitled to under a 523 action**" Id. at 10:10-11
21 (emphasis added). The bankruptcy court's statement as to the
22 \$600,000 amount was, at best, an interim ruling based on the
23 facts known to it prior to trial. Once the bankruptcy court
24 conducted the trial, it was well within its discretion to adjust
25 the judgment based on the evidence presented and relief granted
26 to Keeton. Here, the \$600,000 amount was based on trebled
27 damages under a presumptive UTPA violation. As the bankruptcy
28 court determined that Flanagan did not violate the UTPA, there

1 was no statutory basis to treble the \$200,000 judgment. In this
2 regard, neither Flanagan's scheduled claim nor the bankruptcy
3 court's statements at trial were dispositive as to the final
4 judgment amount.

5 Based on the foregoing, the bankruptcy court did not err in
6 entering the Judgment for less than \$600,000.

7 **B. The bankruptcy court did not err in denying the § 523(a)(19)**
8 **claim.**

9 Section 523(a)(19) excepts from discharge certain debts
10 arising from violation of state or federal securities laws or for
11 common law fraud, deceit, or manipulation in connection with the
12 purchase or sale of a security.

13 Keeton next assigns error to the bankruptcy court's
14 determination that the Agreement was not an "investment contract"
15 and, thus, not a "security" as defined by the Securities Act. In
16 support of his argument, he contends that: (1) the Agreement
17 contained the terms "investment," "investor," and "return on
18 investment"; (2) in written discovery Flanagan admitted that the
19 Agreement referred to an "investment" and denied any
20 characterization as a loan; (3) Flanagan was a licensed sales
21 representative in Nevada for a financial services company; and
22 (4) as the sole member and manager of GPS Development, Flanagan's
23 managerial efforts were essential to the success or failure of
24 the Redevelopment Project.

25 We review de novo the bankruptcy court's determination as to
26 whether a transaction was a security. See Warfield v. Alaniz,
27 569 F.3d 1015, 1019 (9th Cir. 2009) (observing that "[a]lthough
28 characterization of a transaction raises questions of both law

1 and fact, the ultimate issue of whether or not a particular set
2 of facts, as resolved by the factfinder, constitutes an
3 investment contract is a question of law.").

4 Section 45.55.010(a) of the Securities Act⁸ provides that
5 "[a] person may not, in connection with the offer, sale, or
6 purchase of a **security**" employ fraud; make an untrue statement of
7 or omit a material fact; or engage in conduct that would operate
8 as fraud or deceit. (Emphasis added). Section 45.55.930(a)(2)
9 provides for civil liability for the offer or sale of a **security**
10 by means of an untrue statement of or an omission of material
11 fact. Both statutory provisions, hence, are predicated on a
12 transaction involving a "security."

13 Under Alaska law, a "security" encompasses, among other
14 things, an "investment contract." Alaska Stat. § 45.55.990(32).
15 While this term is not statutorily defined, Alaska has adopted
16 the test for an "investment contract" as set forth in Sec. &
17 Exch. Comm'n v. W.J. Howey Co., 328 U.S. 293 (1944), and refined
18 by Sec. & Exch. Comm'n v. Glenn W. Turner Enters., Inc., 474 F.2d
19 476 (9th Cir. 1973). See Am. Gold & Diamond Corp. v.
20 Kirkpatrick, 678 P.2d 1343, 1345 (Alaska 1984). As a result, for
21 the purposes of the Alaska Securities Act, an "investment
22 contract" refers to a contract, transaction or scheme where a
23 person (1) invests money; (2) in a common enterprise; and
24 (3) expects profits to be produced by the essential managerial
25 efforts (which affect the failure or success of the enterprise)

26
27 ⁸ The Securities Act is codified at Alaska Stat.
28 §§ 45.55-010 - 45.55.995.

1 of others. Id. (citing W.J. Howey Co., 328 U.S. at 298-99; Glenn
2 W. Turner Enters., Inc., 474 F.2d at 482-43)); see also United
3 Hous. Found., Inc. v. Forman, 421 U.S. 837, 852 (1975).

4 The first "money investment" prong "requires that the
5 investor commit his assets to the enterprise in such a manner as
6 to subject himself to financial loss." See Warfield, 569 F.3d at
7 1021 (quotation marks omitted). Actual loss is immaterial;
8 instead, the inquiry is focused on the existence of risk of loss
9 to the investor. Id.

10 Keeton's transfer of the Funds to Flanagan subjected him to
11 financial loss. Indeed, an actual loss occurred. Even so, all
12 loans entail some risk of loss. Here, the character of loss
13 could be consistent with both a loan and an investment. Also,
14 generally speaking, the contribution of money must be exchanged
15 for the prospect of financial gain. See id. (contribution of
16 money in exchange for promise of annuity payments and payment of
17 remaining funds at end of annuitant's life to designated
18 charities); Sec. & Exch. Comm'n v. Rubera, 350 F.3d 1084, 1091
19 (9th Cir. 2003) (contribution of money in exchange for financial
20 gains). Arguably, Keeton's anticipated receipt of interest could
21 constitute the requisite financial gain.

22 For the purposes of the second prong, "common enterprise"
23 means "that the investor's financial interests must be
24 'inextricably interwoven' with those" other than the investor.
25 Hentzner v. State, 613 P.2d 821, 824 (Alaska 1980). Here, the
26 record shows that Keeton's financial interest in the transaction
27 was the repayment of the Funds by Flanagan. There is nothing in
28 the record to suggest that Keeton stood to gain anything from the

1 FIAT transaction or the Redevelopment Project - other than
2 repayment of the Funds and interest thereon. Thus, it mattered
3 not, from Keeton's viewpoint, whether Flanagan was successful in
4 his venture, as Keeton was to be repaid whether or not Flanagan
5 obtained the bank guarantees or \$20M Loan or realized a profit
6 from the Redevelopment Project. In other words, the repayment
7 obligation was not tied to the success of an investment.

8 The third "expectation of profits" prong requires that the
9 investor be led to expect profits from essential managerial
10 efforts, those which affect the failure or success of the
11 enterprise, of those other than the investor. See Rubera,
12 350 F.3d at 1091-92. Applied to the facts here, there again is a
13 critical missing component: an expectation of profit by Keeton.

14 The Agreement admittedly contains various references to
15 "returns." The bankruptcy court found, however, that Flanagan
16 drafted the Agreement without the assistance of an attorney.
17 That finding was not challenged on appeal. Thus, the plain
18 meaning of the terms used in the Agreement is not dispositive as
19 to the issue here. These references, instead, appear to relate
20 to an interest rate on the principal balance of a loan rather
21 than traditional investment terms. Again, there is nothing in
22 the Agreement - or in the record - to suggest that Keeton's
23 repayment was tied to the success of the FIAT "financing" or the
24 Redevelopment Project; nor is there anything to suggest that
25 Keeton would receive any revenue, income, or other type of
26 profit. Once Flanagan repaid the Funds, Keeton was not entitled
27 to further remuneration. Fatally, Keeton cannot satisfy the
28 "expectation of profits" prong.

1 The short term nature of the loan, the fact that it was
2 collateralized by real property, and the fact that it allegedly
3 was intended to finance a discrete need of the Redevelopment
4 Project also support a determination that this transaction
5 involved a loan. See Caucus Distribs., Inc. v. State, 793 P.2d
6 1048, 1054-1055 (Alaska 1990).

7 As such, the bankruptcy court did not err in determining
8 that the Agreement was not an "investment contract" for the
9 purposes of the Securities Act. Therefore, it did not err in
10 denying the nondischargeability claim under § 523(a)(19).

11 **C. The bankruptcy court did not err in denying Keeton's**
12 **"renewed" motion for stay relief.**

13 Next, Keeton asserts that the bankruptcy court erred in
14 failing to remand the Securities Act claim for determination by
15 the Alaska state court. He maintains that the bankruptcy court
16 denied his multiple stay relief motions and that these denials
17 constitute reversible error.

18 As a preliminary matter, the term "remand," as used by
19 Keeton here, is inapt. The record reflects that Keeton never
20 removed the Alaska state court action (or any claim thereunder)
21 to the bankruptcy court. As a result, there was no existing
22 claim or action that the bankruptcy court could "remand" to the
23 Alaska state court.

24 More importantly, however, none of the denials for stay
25 relief are properly before this Panel. And, other than inclusion
26 of the transcript where Keeton's counsel orally "renewed" his
27 stay relief motion, Keeton did not include in the record on
28 appeal the other denials of stay relief.

1 Taking judicial notice of the bankruptcy case docket,⁹ we
2 observe that the bankruptcy court entered an order denying stay
3 relief on July 2, 2012. Keeton did not appeal from the denial
4 order and that order is now final and not subject to further
5 review by this Panel. See Kamai v. Long Beach Mortg. Co.
6 (In re Kamai), 316 B.R. 544, 547 (9th Cir. BAP 2004) (order
7 denying a stay relief motion is a final, appealable order).

8 It, thus, appears that Keeton correctly only appeals from
9 the bankruptcy court's denial of the stay relief motion that he
10 orally "renewed" at trial.

11 Generally speaking, a party may not orally move for stay
12 relief, let alone orally "renew" a stay relief motion. See
13 Fed. R. Bankr. P. 4001(a)(1) (stay relief motion governed by
14 Rule 9014); Fed. R. Bankr. P. 9014(a) (requiring reasonable
15 notice and opportunity for a hearing); LBR 4001; LBR 9014.¹⁰ As
16 a result, the orally renewed stay relief motion - and denial
17 thereof - are not properly before us for review.

18 And even if we review the merits, the bankruptcy court did
19 not abuse its discretion in denying the requested relief.
20 Keeton's oral motion was based on the revelation on the second
21 morning of trial that Flanagan's brother was a Nevada state court

23 ⁹ See supra note 3.

24 ¹⁰ Moreover, a party seeking stay relief must pay a
25 statutorily prescribed filing fee. See Judicial Conference
26 Schedule of Fees, Bankruptcy Court Miscellaneous Fee Schedule at
27 No. 19 (effective May 1, 2013), issued in accordance with
28 28 U.S.C. § 1930. By orally renewing the stay relief motion
during trial, Keeton could not have paid the requisite filing
fee.

1 judge and friend of the bankruptcy judge. Keeton pointed out
2 that he did not know any judges in Alaska or family members of
3 judges in Alaska and reiterated that the Alaska state court was
4 in a better position to not only determine the Securities Act
5 claim but also to determine whether it was nondischargeable under
6 § 523(a)(19).

7 The bankruptcy court denied the motion, reasoning that the
8 parties were halfway through trial and that, in any event, it
9 could render a fair judgment notwithstanding the acquaintance
10 with Flanagan's brother. Upon Flanagan's allegedly inadvertent
11 disclosure of the relationship, the bankruptcy court took a brief
12 recess to consider the matter and then made a full disclosure on
13 the record.¹¹

14 Even if the bankruptcy court determined that this situation
15 constituted an appropriate basis for recusal, such a motion and
16 determination is made under 28 U.S.C. § 455 - not § 362(d). This
17 situation does not lend itself to establishing a basis for
18 "cause" under § 362(d)(1).

19 The orally "renewed" stay relief motion was procedurally and
20 substantively improper but, in any event, the bankruptcy court
21 did not err in denying the stay relief motion.
22
23
24

25
26 ¹¹ This included that he and Flanagan's brother served
27 together for a couple of years in the Washoe County Public
28 Defender's Office a little over 30 years ago, previously served
on a board together for the State Bar of Nevada, and had lunch a
few times a year.

1 D. The bankruptcy court did not err in denying Keeton's
2 post-trial motion for prejudgment interest; it erred,
3 however, in denying the motion for fees and costs.

4 Finally, Keeton contends that the bankruptcy court erred in
5 denying his post-trial motion ("Post-Judgment Motion") for
6 prejudgement interest and attorney's fees and costs under Alaska
7 law. Based on Cohen v. de la Cruz, 523 U.S. 213 (1998), he
8 argues that he is entitled to: (1) prejudgment interest on the
9 principal amount of \$200,000 under Alaska Stat. § 09.30.070;
10 (2) partial attorney's fees under Alaska Civil Rule 82(b)(1); and
11 (3) partial costs under Alaska Civil Rule 79(f).

12 1. Jurisdiction

13 Flanagan argues that once Keeton filed his notice of appeal
14 of the Judgment, the bankruptcy court was divested of
15 jurisdiction to adjudicate the Post-Judgment Motion and, thus, it
16 did not err in denying the motion. In response, Keeton asserts,
17 as he did below, that the Post-Judgment Motion falls under
18 Rule 8002(b)(4) and, thus, that Flanagan's argument is incorrect
19 as a matter of law. Flanagan is incorrect and Keeton confuses
20 the issue.

21 A bankruptcy court has ancillary jurisdiction despite an
22 appeal to dispose of factually interdependent claims and to
23 vindicate its authority and effectuate its decrees. See Battle
24 Ground Plaza, LLC v. Ray (In re Ray), 624 F.3d 1124, 1135 (9th
25 Cir. 2010). The scope of this type of jurisdiction necessarily
26 includes an award of fees and costs related to the underlying
27 proceeding. See Tsafaroff v. Taylor (In re Taylor), 884 F.2d
28 478, 481 (9th Cir. 1989) (application for an award of fees

1 incurred in connection with the underlying proceeding is an
2 ancillary matter).

3 The bankruptcy court here awarded Keeton "reasonable
4 attorney's fees and costs" in the Judgment. In the Post-Judgment
5 Motion, Keeton simply sought to liquidate the award that the
6 bankruptcy court already granted. The request was not one for
7 new relief independent of the Judgment. See Aheong v. Mellon
8 Mortg. Co. (In re Aheong), 276 B.R. 233, 240 (9th Cir. BAP 2002)
9 (ancillary jurisdiction does not extend to new relief independent
10 of the bankruptcy court's prior rulings). As a result, the
11 bankruptcy court appropriately possessed ancillary jurisdiction
12 over the Post-Judgment Motion.

13 2. Prejudgment interest

14 If a nondischargeable debt arose under state law,
15 prejudgment interest is also governed by state law.
16 In re Weinberg, 410 B.R. at 37. Here, the bankruptcy court
17 resolved that nondischargeability actions under § 523(a) were
18 purely matters of federal law and, thus, subject to an interest
19 rate governed by federal law. As Keeton prevailed on federal
20 claims, it concluded that he was entitled to prejudgment interest
21 at the federal interest rate.

22 The bankruptcy court did not err in identifying the correct
23 rule of law. The nondischargeability determination was made
24 under § 523(a)(2)(A) and (a)(4), both of which constitute claims
25 under the federal Bankruptcy Code. The bankruptcy court applied
26 the standards developed under federal bankruptcy law in order to
27 adjudicate the claims; there was no implication of Alaska state
28 law as to either the § 523(a)(2)(A) or (a)(4) claims. The

1 adversary complaint shows that Keeton did not plead either claim
2 under Alaska common law. In sum, neither determination - under
3 § 523(a)(2)(A) or (a)(4) - was animated in any manner by Alaska
4 state law. Therefore, the bankruptcy court did not abuse its
5 discretion in determining that Keeton was entitled to prejudgment
6 interest at the federal interest rate, rather than under Alaska
7 law.

8 3. Attorney's fees and costs

9 Keeton also argues that the bankruptcy court erred in
10 denying his request for attorney's fees and costs under Alaska
11 law. We agree.

12 Generally, under the American Rule, a prevailing party is
13 not entitled to recovery of attorney's fees except as provided by
14 contract or statute. Travelers Cas. & Sur. Co. of Am. v. Pac.
15 Gas & Elec., Co., 549 U.S. 443, 448 (2007). In turn, there is no
16 general right to fee recovery under the Bankruptcy Code. Fry v.
17 Dinan (In re Dinan), 448 B.R. 775, 784 (9th Cir. BAP 2011).

18 Still, an exception exists with respect to fraud¹²
19 nondischargeability claims. See In re Bertola, 317 B.R. at
20 99-100. As to a § 523(a)(2) claim, the relevant inquiry is
21 whether the plaintiff would be entitled to attorney's fees in
22 state court for establishing those elements of the claim that the
23 bankruptcy court determines support nondischargeability. See id.

24 Here, the bankruptcy court determined that Keeton was
25 entitled to fees under Alaska Civil Rule 82. Noting that the
26

27 ¹² See 11 U.S.C. § 523(c)(1) (bankruptcy court has exclusive
28 jurisdiction over § 523(a)(2), (a)(4), or (a)(6) claims).

1 **A. The bankruptcy court did not err in determining that**
2 **Keeton's claim was nondischargeable based on false pretenses**
3 **under § 523 (a)(2)(A).**

4 A debt is excepted from discharge for "money, property,
5 services, or an extension, renewal, or refinancing of credit, to
6 the extent obtained by . . . false pretenses, a false
7 representation, or actual fraud, other than a statement
8 respecting the debtor's or an insider's financial condition
9" 11 U.S.C. § 523(a)(2)(A).

10 The creditor must demonstrate the following five elements by
11 a preponderance of the evidence: (1) misrepresentation,
12 fraudulent omission or deceptive conduct by the debtor;
13 (2) knowledge of the falsity or deceptiveness of his statement or
14 conduct; (3) an intent to deceive the creditor; (4) that the
15 creditor justifiably relied on such representation or conduct;
16 and (5) damage to the creditor proximately caused by its reliance
17 on the debtor's statement or conduct. Turtle Rock Meadows
18 Homeowners Ass'n v. Slyman (In re Slyman), 234 F.3d 1081, 1085
19 (9th Cir. 2000); see also Ghomeshi v. Sabban (In re Sabban),
20 600 F.3d 1219, 1222 (9th Cir. 2010).

21 Flanagan does not specifically address the second element in
22 his opening brief - knowledge of the falsity or deceptiveness of
23 his statement or conduct - and, thus, we do not address that
24 element on appeal. See Tracht Gut, LLC v. Cnty. of L.A.
25 Treasurer & Tax Collector (In re Tracht Gut, LLC), 503 B.R. 804,
26 811 (9th Cir. BAP 2014) (BAP does not ordinarily address matters
27 not argued in the opening brief).

1 1. Misrepresentation

2 Flanagan first contends that the bankruptcy court erred in
3 finding that he made a false representation regarding the use of
4 the Funds because any representation as to the Funds and escrow
5 were not material to Keeton.

6 Here, the bankruptcy court found that, as evidenced by the
7 Agreement, Flanagan represented that the Funds would be held in
8 an escrow account and that the funds would be promptly returned
9 to Keeton if Flanagan did not obtain the \$20M Loan. It found
10 that the FIAT account was not an escrow account, but a leveraged
11 investment platform and, thus, Flanagan's transfer of the Funds
12 into the investment platform constituted a misrepresentation that
13 the Funds would be deposited into an escrow account.

14 Flanagan does not challenge the finding that the FIAT
15 account was an investment platform. Instead, he argues that the
16 escrow of funds was not a central part of the Agreement or
17 Keeton's understanding of the transaction. The bankruptcy court
18 did not err in concluding that this is incorrect.

19 Contrary to Flanagan's argument, the Agreement provides that
20 the \$200,000 "will be held in escrow **until** the Bank Guarantees
21 (BG) used for funding are obtained." Emphasis added. Keeton
22 testified that, but for the escrow provision, he would not have
23 provided the Funds to Flanagan. That Keeton was aware that the
24 Funds were transferred to FIAT is inconsequential; there is
25 nothing in the record to suggest that Keeton was explicitly aware
26 that the Funds would be transferred into a leveraged investment
27 platform rather than a traditional escrow account by or through
28 FIAT.

1 On this record, the bankruptcy court did not err in finding
2 that Flanagan misrepresented the nature of the transfer of the
3 Funds.

4 2. Intent

5 Flanagan next contends that there was no evidence presented
6 that he intended to deceive Keeton and, thus, that the bankruptcy
7 court erred in finding that he did. He again argues that he
8 expressly informed Keeton that the Funds would be wired to FIAT
9 and that Keeton signed escrow instructions that permitted the
10 Funds to be released from escrow to FIAT.

11 Here, the bankruptcy court found that emails exchanged
12 between Flanagan and James Culp of FIAT showed that Flanagan
13 intended to deceive Keeton as to the nature of the account into
14 which the Funds were deposited.

15 Our review of these emails, dated at or near the time that
16 Keeton provided the Funds to Flanagan, shows that Flanagan
17 instructed Culp to wire a portion of the funds into his personal
18 bank account and to "roll" the other funds into "lines."
19 Flanagan also asked questions regarding "draws"; in particular,
20 in an email dated June 25, 2007, the day before the Agreement is
21 dated, Culp advised Flanagan that the second platform was an
22 "80 to 1 leveraged payout" and, thus, that Flanagan's \$200,000
23 would yield \$16 million dollars.

24 Contrary to his assertion, the emails evidence Flanagan's
25 express intent at the relevant time to transfer the Funds into a
26 leveraged investment platform. Once again, while Keeton was
27 aware of the imminent transfer of the Funds to FIAT, nothing in
28 the record suggests that Keeton was aware of the nature of the

1 transfer; that is, that the Funds would be put into an investment
2 platform rather than an escrow account at FIAT. Nor was Keeton
3 copied on the emails between Flanagan and Culp. In short, there
4 is nothing to show that Keeton was aware of or had reason to know
5 what the Funds would be used for.

6 The bankruptcy court's finding of intent to deceive was not
7 illogical, implausible, or without support from the record.
8 Therefore, it did not err in finding that Flanagan intended to
9 deceive Keeton.

10 3. Reliance

11 Flanagan next argues that Keeton's reliance on his
12 representation, if any, was not justifiable. He contends that
13 the bankruptcy court erred in finding reliance given Keeton's
14 lack of due diligence and failure to ensure the existence of
15 escrow.

16 Here, the bankruptcy court determined that Keeton's reliance
17 was justifiable based on the common background shared by the
18 parties (military service and pilots at the same major airline),
19 the implicit trust underscoring the relationship based on that
20 background, and the steps taken by Keeton to minimize his risk.
21 In particular, it noted that Keeton ensured there was an
22 agreement in place and that he insisted (and obtained) a second
23 mortgage against Flanagan's property. It found that, based on
24 the common background and assurances against risk, Keeton
25 approached the transaction with a "heightened degree of trust,"
26 which justified his reliance on Flanagan's representations.
27 Finally, it found that Keeton's lack of sophistication explained
28 his failure to "seriously question" the terms of the Agreement.

1 Flanagan does not explicitly challenge the finding that
2 Keeton placed a heightened degree of trust on their relationship.
3 Nor does he challenge the finding that the parties were
4 unsophisticated business people with little, if any, finance
5 experience. These findings, in turn, underscore the bankruptcy
6 court's ultimate finding that, notwithstanding Keeton's failure
7 to do certain things, his reliance was justifiable. This
8 consideration was appropriate. See Romesh Japra, M.D., F.A.C.C.,
9 Inc. v. Apte (In re Apte), 180 B.R. 223, 229-30 (9th Cir. BAP
10 1995) ("In considering whether reliance is justifiable, the court
11 must take into account the knowledge and relationship of the
12 parties.") (citation and quotation marks omitted).

13 Again, the bankruptcy court's findings were not illogical,
14 implausible, or without support in the record. Thus, the
15 bankruptcy court did not err in finding justifiable reliance.

16 4. Damages

17 Flanagan summarily argues that Keeton failed to prove that
18 his damages, if any, were proximately caused by
19 misrepresentation. He does not actually address proximate cause;
20 instead, he contends that because the representation with respect
21 to escrow was immaterial and Keeton did not justifiably rely on
22 any such representation, any damages incurred by Keeton were not
23 caused by a misrepresentation.

24 The bankruptcy court determined that Keeton lost \$200,000 as
25 a result of Flanagan's transfer of the Funds. This determination
26 is supported by the record, which shows that Keeton provided the
27 Funds to Flanagan, that Flanagan caused the transfer of the Funds
28 into the investment platform at FIAT, and that, as a result,

1 Keeton never received his \$200,000 back. Thus, the bankruptcy
2 court did not err in determining that Keeton's \$200,000 loss was
3 caused by his reliance on Flanagan's representation.

4 Based on the foregoing, the bankruptcy court did not err in
5 determining that Keeton's claim for \$200,000 was nondischargeable
6 for false pretenses under § 523(a)(2)(A).

7 **B. The bankruptcy court erred in determining that Keeton's**
8 **claim was nondischargeable based on embezzlement under**
9 **§ 523(a)(4).**

10 Section 523(a)(4) excepts a debt from discharge "for fraud
11 or defalcation while acting in a fiduciary capacity,
12 embezzlement, or larceny." In the context of
13 nondischargeability, embezzlement refers to "the fraudulent
14 appropriation of property by a person to whom such property has
15 been entrusted or into whose hands it has lawfully come." Moore
16 v. United States, 160 U.S. 268, 269 (1885). There are three
17 elements required to except a debt from discharge under
18 § 523(a)(4): (1) property that was rightfully in the possession
19 of a nonowner; (2) that the nonowner appropriated the property to
20 a use other than which it was entrusted; and (3) circumstances
21 indicating fraud. Transamerica Commercial Fin. Corp. v.
22 Littleton (In re Littleton), 942 F.2d 551, 555 (9th Cir. 1991)
23 (citation and quotation marks omitted); see also First Del. Life
24 Ins. Co. v. Wada (In re Wada), 210 B.R. 572, 576 (9th Cir. BAP
25 1997). "[E]mbezzlement requires a showing of wrongful intent."
26 Bullock v. BankChampaign, N.A., 133 S. Ct. 1754, 1760 (2013).

27 Flanagan argues that the transaction at issue was a loan and
28 that once the title company closed escrow, ownership of the Funds

1 vested in Flanagan. In any event, he argues that the Funds were
2 used exactly as he promised at the time that the Funds were in
3 his control. Keeton does not reply on this point.

4 As to the first element, the bankruptcy court determined
5 that Flanagan possessed custody but not title to the Funds based
6 on the short-term nature of the Agreement and that the Funds
7 would be repaid imminently. It erred in doing so. Despite the
8 parties' vacillations as to the character of the subject
9 transaction, the bankruptcy court found that the transaction was
10 a loan and so referred to it in its decision. On this record,
11 that decision was not erroneous.

12 The inquiry then shifts to whether, after receiving the
13 Funds, Flanagan possessed an ownership interest in the money.
14 Broadly speaking (and notwithstanding arrangements or disclaimers
15 to the contrary), upon disbursement, loan proceeds generally
16 belong to the borrower. See Belfry v. Cardozo (In re Belfry),
17 862 F.2d 661, 662 (8th Cir. 1988) ("Payment of a contract price
18 in exchange for the recipient to undertake an obligation of
19 future performance transfers ownership of the money to the
20 recipient."). Consequently, when a borrower uses properly
21 acquired loan proceeds in an unauthorized manner, in addition to
22 remaining liable on the obligation, there may exist a basis for
23 fraud, as there was here, or breach of contract; but, this
24 situation would not constitute embezzlement in as much as the
25 borrower owns the proceeds. See also Teamsters Local 533 v.
26 Schultz (In re Schultz), 46 B.R. 880, 889-90 (Bankr. D. Nev.
27 1985) ("One cannot embezzle, steal, or convert one's own
28 property."). Under these circumstances, then, Flanagan could not

1 have been a "nonowner" in possession of the Funds.

2 The bankruptcy court erred in determining that Keeton's
3 claim for \$200,000 was nondischargeable based on embezzlement
4 under § 523(a)(4). We, thus, reverse the Judgment as to the
5 § 523(a)(4) determination.

6 **C. The bankruptcy court's order to turn over any documents used**
7 **by Flanagan in preparing for trial was harmless error.**

8 Finally, Flanagan contends that the bankruptcy court erred
9 in ordering him to turn over all materials that he used in
10 preparation for trial to Keeton's counsel during trial. He also
11 alleges error in the bankruptcy court's determination that he
12 waived his attorney-client privilege or attorney work product
13 privilege by reviewing documents or communications from his
14 attorney in preparation for trial. Flanagan argues that these
15 errors prejudiced his ability to participate and prepare for
16 trial and requests that we vacate the Judgment and remand the
17 matter for trial before a new bankruptcy judge.

18 In his reply, Keeton points out that Flanagan fails to
19 mention that the bankruptcy court immediately stayed enforcement
20 of its order and subsequently "reversed" itself during trial.
21 Thus, he argues that Flanagan was never harmed by the bankruptcy
22 court's "short-lived order."

23 Our review of the record confirms that Flanagan's argument
24 extols form over substance. At the end of the first day of
25 trial, it became apparent that Flanagan reviewed documents in
26 preparation of testimony that were not produced to Keeton; in
27 particular, this consisted of a document from the title company
28 with respect to a third-party loan or investment and a copy of

1 the third-party check. The following exchange then occurred:

2 THE COURT: Okay. You are directed to produce tomorrow
3 morning to opposing counsel the printout from the title
4 company and the copy of the check.

5 FLANAGAN: Yes, sir.

6 THE COURT: And if there's anything else you looked at that
7 you see you are also directed to produce that.

8 FLANAGAN: Yes, sir.

9 COUNSEL: Your Honor, he may be looking at memos that I
10 prepared to him that are attorney --

11 THE COURT: That's too bad.

12 COUNSEL: So anything -- I mean, do you want to pry the case
13 law that he said he reviewed in preparation for today?

14 THE COURT: If he looked at something in preparation for his
15 testimony, opposing counsel is entitled to see it.

16 COUNSEL: Even if it's a communication from me to him.

17 THE COURT: Yes. You shouldn't let him do that.

18 Trial Tr. (Jan. 17, 2013), Vol. 2 at 168:6-8.

19 First thing the following morning, however, the bankruptcy
20 court stated that it was staying enforcement of its order until
21 further review. Apparently, Flanagan moved for reconsideration
22 of the bankruptcy court's order immediately after the first day
23 of trial concluded. It appears that the stay referred to the
24 blanket turnover order, as three documents¹³ were then reviewed
25 by Keeton's counsel on the record. Later that afternoon, the

26
27 ¹³ Ostensibly, these documents related to the title company
28 document and copy of the check at issue during the first day of
trial, but this is not entirely clear from the record.

1 bankruptcy court stated that it was not going to order the
2 production of Flanagan's other documents.

3 Based on our review of the record, the bankruptcy court's
4 order was of short duration and did not result in the production
5 of any privileged material. To the extent that it initially
6 ordered Flanagan to produce any materials reviewed in preparation
7 for trial, it did so at the end of the first day of trial and
8 then immediately stayed enforcement of its order the following
9 morning. The bankruptcy court then determined that no further
10 production of documents was necessary.

11 Flanagan does not specifically articulate any harm or damage
12 incurred as a result of the bankruptcy court's order, other than
13 he was precluded from participating in or preparing for trial.
14 As to the former, it is unclear what Flanagan is referring to as
15 the record shows that he continued to testify - under oath - at
16 trial. As to the latter, as stated, the initial order was made
17 at the end of the day of the first day of trial; we assume that
18 most trial preparation occurred prior to the start of trial.

19 Instead, here, Flanagan produced only three documents to
20 Keeton's counsel for review, seemingly based on Federal Rule of
21 Evidence 612(a)(2). Flanagan, however, does not identify any
22 privileged document that he was forced to produce. In fact, the
23 record shows that Flanagan's counsel stated at trial that he did
24 not review any materials with Flanagan and that Flanagan had not
25 reviewed any communication from him. As a result, to the extent
26 the bankruptcy court initially ordered production of all
27 documents reviewed, it vacated its order when it determined that
28 Flanagan was not required to produce any additional documents.

1 Any error was, thus, harmless. See Fed. R. Civ. P. 61
2 (incorporated into bankruptcy proceedings by Rule 9005).

3 **CONCLUSION**

4 We AFFIRM the bankruptcy court as to its determinations on
5 the § 523(a)(2)(A), (a)(6), and (a)(19) claims. We REVERSE its
6 determination as to the § 523(a)(4) claim. We AFFIRM its award
7 of prejudgment interest at the federal interest rate; but we
8 REVERSE its denial of attorney's fees and costs under Alaska law
9 and REMAND to it the sole issue of fees and costs for further
10 proceedings consistent with this decision.

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