

OCT 01 2014

NOT FOR PUBLICATION

SUSAN M. SPRAUL, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:)	BAP No.	CC-13-1311-KuDaKi
)		
FLASHCOM, INC.,)	Bk. No.	12-16351
)		
Debtor.)	Adv. No.	12-01339
)		
_____)		
CAROLYN A. DYE, Liquidating)		
Trustee,)		
)		
Appellant,)		
)		
v.)	MEMORANDUM*	
)		
ANDRA SACHS; ASHBY ENTERPRISES,)		
INC.; MAX-SINGER PARTNERSHIP,)		
)		
Appellees.)		
_____)		

Argued and Submitted on September 18, 2014
at Pasadena, California

Filed - October 1, 2014

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

Honorable Robert N. Kwan, Bankruptcy Judge, Presiding

Appearances: David R. Weinstein of Weinstein Law Firm APC
argued for appellant Carolyn A. Dye, Liquidating
Trustee; Gerald M. Serlin of Benedon & Serlin LLP
argued for appellees Myles Sachs,** Ashby

*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.

**On February 10 2014, after this appeal was fully briefed,
Counsel for the appellees filed a notice of suggestion of death
continue...

1 Enterprises, Inc. and Max-Singer Partnership.

2 _____

3 Before: KURTZ, DAVIS*** and KIRSCHER, Bankruptcy Judges.

4 **INTRODUCTION**

5 Flashcom Inc.'s chapter 11¹ liquidating trustee Carolyn A.
6 Dye appeals from an order denying in part her motion for entry of
7 a \$9 million stipulated judgment. Dye asserted that she was
8 entitled to entry of the judgment against Andra Sachs and the
9 other appellees in accordance with a "buyout option" in the
10 parties' settlement agreement. Dye claimed that, under the
11 buyout option, Sachs was granted the option of either paying
12 \$62,500 or having entered against her and the other appellees the
13 \$9 million stipulated judgment. Because Sachs did not timely pay
14 the \$62,500 buyout option amount, Dye contended that she was

15 _____

16 **...continue
17 of Andra Sachs. On September 15, 2014, the Orange County
18 Superior court appointed Myles Sachs as the Special Administrator
19 for purposes of representing the decedent's estate at oral
20 argument in this appeal. Based on the Superior Court
21 appointment, Myles Sachs filed a motion seeking to substitute
22 into this appeal as a party in place of Andra Sachs. Because the
23 Superior Court appointment expired by its own terms as of the
24 close of business on the date of oral argument, Myles Sachs'
25 motion is ORDER DENIED, except to the extent of permitting him to
26 represent the decedent's estate at the September 18, 2014 oral
27 argument.

28 ***The Honorable Laurel E. Davis, Bankruptcy Judge for the
District of Nevada, sitting by designation.

¹Unless specified otherwise, all chapter and section
references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
all "Rule" references are to the Federal Rules of Bankruptcy
Procedure, Rules 1001-9037. All "Civil Rule" references are to
the Federal Rules of Civil Procedure, and all "Evidence Rule"
references are to the Federal Rules of Evidence.

1 entitled to enter and enforce the \$9 million stipulated judgment.

2 The bankruptcy court determined that, under California law,
3 the buyout option constituted an unenforceable penalty. We agree
4 with that determination. We further hold that the bankruptcy
5 court had inherent authority to modify the court-approved
6 settlement agreement to limit the amount of the stipulated
7 judgment to the amount of damages Dye actually suffered as a
8 result of Sachs' nonpayment of the \$62,500. On this record, the
9 bankruptcy court correctly exercised that authority.

10 However, the bankruptcy court misconstrued California law
11 when it excluded from the \$62,500 judgment prejudgment interest
12 on and after April 1, 2012. This limited aspect of the court's
13 decision must be vacated, and the matter must be remanded so that
14 the court can amend the judgment to provide for prejudgment
15 interest up to the date of entry of the judgment.

16 Accordingly, we AFFIRM IN PART, VACATE IN PART, AND REMAND
17 WITH INSTRUCTIONS.

18 **FACTS**

19 Andra and her husband Brad² founded Flashcom, an internet
20 service provider, in 1998. Initially, the Sachses were Flashcom's
21 only shareholders. However, in June 1999, the Sachses
22 relinquished their sole ownership and control of Flashcom when
23 they agreed to sell shares of Flashcom preferred stock to certain
24 venture capital companies.

25 In February 2000, Andra and Flashcom reached an agreement
26

27 ²We refer to the Sachses by their first names for ease of
28 reference. No disrespect is intended.

1 pursuant to which Flashcom redeemed a substantial portion of
2 Andra's Flashcom shares in exchange for \$9 million. Flashcom
3 paid the \$9 million to Andra by wire transfer on February 23,
4 2000.

5 Later that same year, in December 2000, Flashcom commenced a
6 chapter 11 bankruptcy case in the Central District of California
7 and, roughly a year later, confirmed a chapter 11 liquidating
8 plan. Under the plan, Dye was appointed to serve as liquidating
9 trustee.

10 In July 2002, Dye filed a complaint against Brad, Andra, the
11 venture capital companies holding Flashcom shares, and others.
12 The complaint stated several different claims for relief. Some
13 of them were resolved by summary judgment motions, while others
14 were resolved after trial. And yet others were resolved, at
15 least in part, by means of the settlement from which this appeal
16 arose. The two claims relevant to the settlement and this appeal
17 are Dye's third and fourth claims for relief seeking to avoid and
18 recover as a preference the \$9 million stock redemption in favor
19 of Andra.

20 Meanwhile, also in July 2002, Brad filed a personal
21 chapter 7 bankruptcy case in the Southern District of Florida,
22 and Robert Furr was appointed to serve as the chapter 7 trustee
23 in that case. Furr initiated his own litigation against Andra
24 and her affiliated companies (collectively, "Andra Parties").

25 On November 1, 2005, the California bankruptcy court entered
26 an order pursuant to Rule 9019(a) approving the settlement
27 between Furr, Dye and the Andra Parties. On June 14, 2006, the
28 Florida bankruptcy court entered a similar settlement approval

1 order.

2 The settlement, referred to as the "Global Settlement
3 Agreement," was global in the sense that it addressed and
4 resolved the litigation then pending between Furr, Dye, and the
5 Andra Parties. On the other hand, the settlement was not global
6 as it did not fully dispose of all of the claims as against all
7 of the defendants in Dye's adversary proceeding.

8 The settlement provided for Andra to pay Furr \$500,000 on
9 the "Approval Date" (as defined in the agreement) and another
10 \$250,000 within six months of the Approval Date.³

11 In addition to these payments, Andra agreed to sign two
12 stipulated judgments, one known as the "Dye Avoidance Judgment"
13 and the other known as the "Dye Liability Judgment." The Dye
14 Avoidance Judgment declared that the \$9 million wire transfer
15 paid to Andra was avoided as a preferential transfer under
16 § 547(b). The Dye Liability Judgment provided pursuant to
17 § 550(a) for the joint and several liability of the Andra Parties
18 for the \$9 million preferential transfer.

19 The settlement provided for the immediate entry of the Dye
20 Avoidance Judgment but did not permit Dye to immediately record
21 the Dye Avoidance Judgment or to take any immediate action with
22 respect to the Dye Liability Judgment. Rather, both stipulated
23 judgments were subject to Andra's right to exercise what was

24

25 ³While these payments were directly payable to Furr, they
26 also stood to benefit Flashcom's creditors. Post-settlement, Dye
27 expected to be by far the largest creditor of Brad's bankruptcy
28 estate, so the lion's share of any distribution from Brad's
bankruptcy estate ultimately was expected to end up in Dye's
hands for the benefit of Flashcom's creditors.

1 known as the "Dye Buyout Option" as described in paragraphs 9 and
2 10 of the settlement. In essence, if Andra timely paid the
3 amount specified in the Dye Buyout Option, such payment would
4 satisfy any and all liability of the Andra Parties to Dye and the
5 Flashcom bankruptcy estate. If Andra did not timely pay the Dye
6 Buyout Option amount, then Dye was entitled to record the Dye
7 Avoidance Judgment and to take all action necessary to enforce
8 the Dye Liability Judgment.

9 The timing and amount of the payment due under the Dye
10 Buyout Option were governed by two complex paragraphs, which
11 stated as follows:

12 10. Dye Buyout Option.

13 a. The payment due under the Dye Buyout Option
14 shall be \$50,000 if, within 36 months of the Approval
15 Date, Dye receives at least \$2,000,000 from the [non-
16 settling] defendants in the in the [sic] Dye v. Andra
17 Adversary Proceeding . . . (collectively, "Other
Defendants"). Such \$50,000 payment shall be due within
60 days after Dye receives, and notifies Andra that she
has received, at least \$2,000,000 from the Other
Defendants.

18 b. The payment due under the Dye Buyout Option
19 shall be \$62,500 if Dye's recovery against the Other
20 Defendants in the Dye v. Andra Adversary Proceeding
21 within 36 months of the Approval Date is less than
22 \$2,000,000 (including if there is no such recovery at
23 all). Such \$62,500 payment shall be due within the
earlier of (i) the end of the 37th month after the
Approval Date or (ii) such time as there is a final
resolution of the Dye v. Andra Adversary Proceeding by
entry of a judgment or an order approving a settlement
agreement.

24 Global Settlement Agreement at ¶ 10.

25 As for the Approval Date, the settlement agreement defines
26 it as:

27 [T]he first business day following the tenth day after
28 the entry of the later of the two orders of the
respective Bankruptcy Courts approving this Agreement,

1 so long as no stay of either of those orders has been
2 entered prior to that date, provided that an
3 irrevocable escrow of \$500,000 has been made with
4 Shulman Hodges & Bastian LLP (the "Escrow Agent") prior
5 to the hearing on the settlement by Andra. . . . If
6 such a stay is entered, the Approval Date will be the
7 first business day after the stay is dissolved or
8 otherwise becomes ineffective, as long as the Agreement
9 has not been materially changed by a court in the
10 interim. If such a change has occurred, proceedings
11 upon this Agreement will be determined in accordance
12 with that ruling.

13 Id. at ¶ 2.

14 In a vacuum, and without the benefit of knowing (as we do)
15 what actually transpired, these paragraphs were nebulous at best
16 and nonsensical at worst. Nonetheless, the critical dates for
17 the Dye Buyout Option were not overwhelmingly difficult to
18 calculate in light of the events that actually transpired -
19 events that all could have been ascertained by monitoring the
20 dockets in the relevant bankruptcy cases and adversary
21 proceeding. The following is a summary of the key events and the
22 critical dates they generated.

- 23 • First, the Approval Date was June 26, 2006 (the first
24 business day following ten days after the Florida bankruptcy
25 court's June 14, 2006 approval of the settlement).
- 26 • Second, the deadline for fixing the amount of the Dye Buyout
27 Option payment was June 26, 2009 (36 months following the
28 Approval date).
- Third, by June 26, 2009, Dye had not obtained either any
settlement with or any judgment against the non-settling
defendants; such a settlement or judgment would have been a
prerequisite to any recovery along the lines contemplated in
subparagraph 10(a) of the settlement agreement.

- 1 • Fourth, given the absence of the requisite recovery of at
2 least \$2 million by June 26, 2009, the timing and amount of
3 the Dye Buyout Option payment were controlled by
4 subparagraph 10(b) of the settlement agreement.
- 5 • And fifth, under the events as they transpired, subparagraph
6 10(b) required payment of \$62,500 by no later than July 31,
7 2009 (the end of the 37th month following the approval
8 date).

9 See Stipulation of Facts (June 21, 2012) at ¶¶ 5, 9-10.

10 In 2006, Andra timely paid \$750,000 to Furr in accordance
11 with the terms of the settlement agreement. However, Andra did
12 not timely make the Dye Buyout Option payment.

13 Dye did not demand payment, serve any notice, or otherwise
14 communicate with any of the Andra Parties in July 2009 or
15 thereafter, until January 2012, when Dye's counsel, David
16 Weinstein, contacted the Andra Parties' former counsel, James
17 Bastian, and informed him of Dye's contention that the Andra
18 Parties were liable for the full \$9 million in accordance with
19 the settlement agreement and the stipulated judgments. In
20 response, Bastian advised Weinstein that he no longer represented
21 the Andra Parties.

22 In March 2012, Dye filed a motion requesting that the
23 California bankruptcy court enter the Dye Liability Judgment
24 against the Andra Parties based on Andra's failure to make the
25 Dye Buyout Option payment. After receiving her service copy of
26 the motion, Andra more than once offered to pay \$62,500 in
27 satisfaction of her obligations under the settlement agreement,
28 but Dye declined these offers based on her contention that the

1 Andra Parties were liable for the full \$9 million.

2 For the next year, the parties litigated the issue of
3 whether Dye was entitled to entry of the \$9 million judgment.
4 The parties filed numerous briefs, declarations, exhibits and
5 evidentiary objections. Among other things, Andra argued that
6 the \$9 million stipulated judgment constituted an unenforceable
7 penalty under California law. Andra also argued that she was
8 entitled to equitable relief from the court-approved settlement
9 and the stipulated judgments. To paraphrase Andra, the following
10 facts and circumstances justified equitable relief:

- 11 • Andra timely paid \$750,000 of the approximately \$800,000 in
12 agreed-upon settlement payments.
- 13 • Andra was ready, willing and able to pay the final remaining
14 \$50,000 or \$62,500 settlement installment on the
15 settlement's Approval Date, but Dye insisted on a deferred
16 final payment at some future date to be determined in
17 accordance with the complex formula set forth in the
18 settlement; Dye refused to permit Andra to make the final
19 payment on or around the Approval Date.
- 20 • Weinstein told Bastian during settlement negotiations that
21 Dye did not intend/expect⁴ to enforce a \$9 million judgment

22
23 ⁴This was one of the few factual disputes between the
24 parties. Dye insisted that Weinstein never used the word
25 "intend" but rather merely said that Dye did not "expect" that
26 she ever would be in a position to enforce the \$9 million
27 judgment because she expected Andra to exercise the Dye Buyout
28 Option. Regardless, it is plain from the record that no one -
not the bankruptcy court and certainly neither of the parties -
thought at the time of settlement that the \$9 million judgment
ever would be entered or enforced. The implications of this lack
continue...

1 against the Andra Parties but instead sought to use the
2 settlement agreement and the stipulated judgments as a means
3 of advancing Dye's claims against the non-settling
4 defendants.

5 • Once the settlement had been approved, Dye filed a series of
6 motions against the non-settling defendants predicated upon
7 the Andra Parties' admissions set forth in the settlement
8 agreement and the stipulated judgments.

9 • The Dye Buyout Option provisions in the settlement
10 agreement, which governed the payment of the final \$50,000
11 or \$62,500 settlement installment were confusing and did not
12 identify a specific future date for payment, but rather
13 required the Andra Parties to calculate the future payment
14 date by ascertaining and considering a number of different
15 factors and variables.

16 • Dye never apprised the Andra Parties of the status of the
17 remainder of her adversary proceeding against the non-
18 settling parties, which was one of the variables for
19 determining the amount and timing of the Dye Buyout Option
20 payment.

21 • Dye never demanded payment of the \$62,500 at the time when
22 Dye claims it was due, nor at any point for two and a half
23 years thereafter.

24 • In March 2012 and thereafter, Dye refused Andra's repeated
25 offer to pay the final \$62,500.

26
27 ⁴...continue
28 of expectation and reliance regarding the \$9 million judgment is
discussed infra.

1 • Dye admitted that, when the settlement agreement was entered
2 into, she had no expectation of entering or enforcing the
3 Dye Liability Judgment.

4 The bankruptcy court advised the Andra parties at one of the
5 hearings that, if they wanted the court to consider granting
6 equitable relief from the court-approved settlements, they would
7 need to file a formal motion seeking that relief under Civil
8 Rule 60(b). The Andra Parties thereafter filed a motion framing
9 their pre-existing request for equitable relief within the rubric
10 of Civil Rule 60(b)(6).

11 The court held a number of hearings and ultimately issued
12 two separate memorandum decisions, the latter of which it
13 subsequently amended.

14 In the first memorandum decision, the bankruptcy court
15 determined that, although California law was not binding, the
16 court could consider California law on liquidated damages in
17 addressing the Andra Parties' request for equitable relief. The
18 court also determined that the Dye Buyout Option was an
19 unenforceable penalty under Cal. Civ. Code § 1671(b). The court
20 further determined that, based on all of the circumstances
21 presented, Civil Rule 60(b) was a timely and appropriate means
22 for addressing the Andra Parties' request for equitable relief.
23 Based on these determinations, and on all of the circumstances,
24 the bankruptcy court held that the Andra Parties were entitled to
25 equitable relief and that Dye only was entitled to entry of a
26 stipulated judgment in the amount of \$62,500 plus interest.

27 In its supplemental memorandum decision, as amended, the
28 bankruptcy court elaborated on the particular circumstances that

1 led it to conclude that it would be inequitable to permit Dye to
2 enter and enforce the \$9 million judgment. The key facts and
3 circumstances posited by the Andra Parties were largely
4 uncontroverted, and the court essentially adopted virtually all
5 of those facts and circumstances as part of its own findings.

6 But the bankruptcy court's findings went even further than
7 the Andra Parties' factual recitations. The court inferred from
8 the contents of the settlement agreement and from both parties'
9 accounts of what they said, did and thought during the
10 negotiation of the settlement agreement that Dye and Weinstein
11 intentionally structured the settlement, the Dye Buyout Option
12 and the stipulated judgments to set up the Andra Parties for
13 failure. The court explained that Weinstein knew from his
14 settlement discussions with Bastian that Bastian planned to
15 discontinue his representation of Andra soon after the settlement
16 agreement was approved and that Andra likely would be
17 unrepresented after that point and likely would be left trying to
18 figure out for herself the complex provisions of the Dye Buyout
19 Option.

20 The following comments of the court are representative of
21 the court's findings:

22 These perverse circumstances at best represented a
23 "perfect storm" that [the Andra Parties] are liable for
24 a judgment 10 times more than what they settled for (or
25 144 times what remained due), which was in violation of
26 applicable state contract law as an unreasonable and
27 unenforceable penalty, or at worst, a "trap for the
28 unwary" set by [Dye] and her counsel, who intentionally
insisted that the settlement agreement provide for no
notice to [the Andra Parties] of the last settlement
payment when it became due and who expected that [the
Andra Parties were] not likely to [be] represented by
counsel . . . after the settlement was approved. The
court can discern no rational basis for the complicated

1 settlement payment structure of the Dye Buyout Option
2 of the Global Settlement Agreement, inconsistent notice
3 provisions, and Trustee's failure to give any notice of
4 the amount due [once] the amount was fixed other than
5 to trap the unwary [Andra Parties] into paying the full
6 judgment amount. There is no other legitimate
7 collection purpose for the so-called Dye Buyout Option
8 because [the Andra Parties] wanted to make an early
9 payment of the full settlement amount as evidenced by
10 their payment of \$750,000 of the either \$800,000 or
11 \$812,500, over 90% of the settlement amount due, and
12 based on Andra Sachs' uncontroverted statements in her
13 declarations [that she was] ready, willing and able to
14 pay the balance when [she] entered into the settlement
15 in 2005.

16 Amd. Supp. Mem. Dec. (June 24, 2013) at 22:14-23:3.

17 Based on the bankruptcy court's two memorandum decisions, it
18 entered an order which partially granted Dye's motion, but only
19 to the extent of providing for the entry of the Dye Liability
20 Judgment in the amount of \$62,500 plus interest. The court
21 thereafter entered the \$62,500 judgment. In that judgment, the
22 court cut off the accrual of prejudgment interest as of April 1,
23 2012. According to the court, Andra's offer to pay \$62,500 as of
24 that date was sufficient to relieve the Andra Parties of any
25 further liability for prejudgment interest.

26 Dye timely appealed.

27 **JURISDICTION**

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

29 **ISSUES**

30 1. Did the bankruptcy court commit reversible error when it
31 granted equitable relief to the Andra Parties and modified the
32 terms of the parties' court-approved settlement agreement to
33 limit Dye to a stipulated judgment in the amount of \$62,500 plus

1 interest?

2 2. Did the bankruptcy court commit reversible error when it
3 cut off the accrual of prejudgment interest on the \$62,500 as of
4 April 1, 2012?

5 **STANDARDS OF REVIEW**

6 We review the bankruptcy court's grant of equitable relief
7 for an abuse of discretion. See Zurich Am. Ins. Co. v. Int'l
8 Fibercom, Inc. (In re Int'l Fibercom, Inc.), 503 F.3d 933, 939,
9 945 (9th Cir. 2007).

10 A bankruptcy court abuses its discretion when it applies an
11 incorrect legal rule, or when the factual findings supporting its
12 decision are illogical, implausible or without support in
13 inferences that may be drawn from facts in the record. United
14 States v. Hinkson, 585 F.3d 1247, 1261-62 & n. 21 (9th Cir. 2009)
15 (en banc).

16 The issue concerning the accrual of prejudgment interest
17 turns upon the effectiveness of Andra's tender of the \$62,500.
18 This question, in turn, required the bankruptcy court to construe
19 state law, which construction we review de novo. See Trishan
20 Air, Inc. v. Fed. Ins. Co., 635 F.3d 422, 426-27 (9th Cir. 2011).

21 We can affirm on any ground supported by the record.
22 Thompson v. Paul, 547 F.3d 1055, 1058-59 (9th Cir. 2008).

23 **DISCUSSION**

24 Dye contends on appeal that the bankruptcy court's decision
25 contravened binding Ninth Circuit authority. Relying on
26 Twentieth Century-Fox Film Corp. v. Dunnahoo, 637 F.2d 1338 (9th
27 Cir. 1981), Dye argues that the bankruptcy court erred in two
28 distinct ways. According to Dye, the court should not have

1 considered state contract law principles in the process of
2 granting relief to the Andra Parties and also should not have
3 permitted the Andra Parties to request that relief roughly seven
4 years after the court entered an order approving the parties'
5 settlement agreement.

6 Dunnahoo is inapposite. Dunnahoo involved an entered
7 consent judgment and the efforts of one of the parties to the
8 consent judgment to enforce it as entered. Here, Dye was seeking
9 to enforce a court-approved settlement agreement and to cause the
10 bankruptcy court, in accordance with the settlement agreement, to
11 enter a stipulated judgment signed by the adverse party (Andra)
12 but not previously entered. Because the stipulated judgment at
13 issue - the Dye Liability Judgment - was not previously entered,
14 it was not final, and hence neither Dunnahoo nor Civil Rule 60(b)
15 were applicable to the Dye Liability Judgment. See Civil
16 Rule 60(b) (stating that this Civil Rule applies to "final"
17 judgments, orders and proceedings).

18 A different Ninth Circuit case, one that neither of the
19 parties cited, is more helpful to us in resolving this appeal.
20 See A & A Sign Co. v. Maughan, 419 F.2d 1152 (9th Cir. 1969),
21 cited with approval in Meyer v. Lenox (In re Lenox), 902 F.2d
22 737, 740 (9th Cir. 1990).

23 In Maughan, A & A Sign Co. performed some construction work
24 for the debtor prior to the debtor's bankruptcy filing and
25 claimed a materialmen's lien under Arizona law after the debtor
26 filed bankruptcy. Subsequent settlement negotiations between the
27 bankruptcy trustee and A & A resulted in them entering into a
28 compromise stipulation pursuant to section 27 of the Bankruptcy

1 Act (11 U.S.C. § 50),⁵ which stipulation was approved by the
2 district court. 419 F.2d at 1154.

3 The stipulation effectively provided: (1) that A & A held a
4 duly-perfected materialmen's lien under Arizona law; (2) that the
5 lien secured the reasonable value of the services and materials
6 furnished by A & A, less a specified sum paid in exchange for
7 A & A's release of its lien against one of three parcels of real
8 property; and (3) that A & A continued to hold a valid and
9 enforceable materialmen's lien against the other two parcels of
10 real property in the approximate amount of \$14,000. Id.

11 Several months after the compromise stipulation was approved
12 by the district court, the bankruptcy trustee filed a motion
13 seeking to modify the compromise stipulation. According to the
14 trustee, he had not intended in entering into the stipulation to
15 permit A & A to retain its lien as against both parcels of real
16 property and the language in the stipulation permitting A & A to
17 retain its lien as against both parcels was inadvertent on the
18 part of the trustee. A & A opposed the motion and presented
19 contrary evidence indicating that its retention of the lien as
20 against both parcels was a critical term of the stipulation that
21 it bargained for. Id. at 1154-55.

22 The district court granted the trustee's motion, but the
23 Ninth Circuit reversed because, on the record presented, there
24 was no evidence or legal basis that would permit the bankruptcy

25
26 ⁵11 U.S.C. § 50 was similar to current Rule 9019 and
27 provided in relevant part that a bankruptcy trustee "may, with
28 the approval of the court, compromise any controversy arising in
the administration of the estate upon such terms as he may deem
for the best interest of the estate."

1 court to excise one term of the compromise stipulation over the
2 objection of one of the parties but leave the remainder of the
3 compromise stipulation in tact. Id. at 1155-56. Even though the
4 Ninth Circuit reversed, the Ninth Circuit held in relevant part
5 that bankruptcy courts have the inherent equitable power to
6 modify their prior orders, including orders approving compromise
7 stipulations. Id. at 1155. The Ninth Circuit further opined
8 that the district court's modification of the compromise
9 stipulation could have been sustained over A & A's objection "had
10 there been findings supported by substantial evidence warranting
11 reformation of the stipulation." Id. at 1156.

12 In short, Maughan stands for the proposition that bankruptcy
13 courts have inherent equitable authority to modify or vacate
14 compromise stipulations if circumstances so justify. Maughan
15 further stands for the proposition that basic contract law
16 principles - like contract reformation - are relevant and can be
17 considered.

18 Maughan is binding Ninth Circuit law. It has not been
19 overruled or superseded by statute. Moreover, In re Lenox, cited
20 above, indicates that Maughan's teachings continue to be vital,
21 relevant and valid today. Given the similarity between the
22 compromise provision contained in section 27 of the Bankruptcy
23 Act and Rule 9019, which currently governs compromises in
24 bankruptcy cases, we know of no reason why we are not bound to
25 follow Maughan.

26 Only one small aspect of Maughan appears outdated. Maughan
27 indicated that orders approving compromises are interlocutory
28 orders, whereas under the "pragmatic approach" to the finality of

1 bankruptcy court orders, orders approving compromises are now
2 treated as final orders for appeal purposes. See Expeditors
3 Int'l v. Citicorp N. Am. (In re Colortran), 218 B.R. 507, 510
4 (9th Cir. BAP 1997). Nonetheless, decisions following Maughan
5 and In re Lenox have established that the bankruptcy court's
6 inherent authority to modify and vacate its prior orders exists
7 even when such orders are final. See, e.g., In re Int'l
8 Fibercom, Inc., 503 F.3d at 945; Heritage Pac. Fin., LLC v.
9 Montano (In re Montano), 501 B.R. 96, 114 n.15 (9th Cir. BAP
10 2013); see also In re Lenox, 902 F.2d at 740 ("although [Civil
11 Rule] 60(b) refers to relief from final orders, it does not
12 restrict the bankruptcy court's power to reconsider any of its
13 previous orders when equity so requires.").

14 The Ninth Circuit only has identified one general limitation
15 on the bankruptcy court's inherent authority to modify, vacate or
16 reconsider its prior orders. The bankruptcy court only may do so
17 to the extent that no intervening rights have vested in reliance
18 thereon. See In re Lenox, 902 F.2d at 739-40 (citing Chinichian
19 v. Campolongo (In re Chinichian), 784 F.2d 1440, 1443 (9th Cir.
20 1986)). In In re Int'l Fibercom, Inc., the Ninth Circuit refined
21 this vested rights limitation. 503 F.3d at 944-45. The Ninth
22 Circuit there ruled that, so long as the objecting party has not
23 detrimentally relied on the aspect of the order that is being
24 subjected to clarification or modification, the bankruptcy court
25 can exercise its equitable powers. Id.

26 Here, we have found no evidence in the record that Dye
27 detrimentally relied on the Dye Buyout Option provisions
28 purporting to entitle her to enter the \$9 million judgment. In

1 fact, Dye admitted that, at the time she entered into the
2 settlement agreement, she never expected to be able to enter or
3 enforce the \$9 million judgment. Moreover, the only action that
4 Dye apparently has taken in furtherance of her purported
5 entitlement to the \$9 million judgment is the litigation she has
6 initiated seeking to enter the judgment. However, assuming a
7 particular litigation position based on the provision in question
8 does not constitute the type of reliance or "vested rights" that
9 would preclude the bankruptcy court from exercising its inherent
10 authority. See, e.g., In re Lenox, 902 F.2d at 739 (no
11 preclusive reliance where creditor opposed plan confirmation and
12 appealed therefrom based on terms of prior court-approved
13 stipulation); In re Int'l Fibercom, Inc., 503 F.3d at 937-38 (no
14 preclusive reliance where creditor initiated relief from stay,
15 administrative claim, summary judgment and appeal proceedings all
16 based on agreed-upon terms set forth in the debtor's contract
17 assumption motion, which the court previously granted by entered
18 order).

19 There is one other limitation that the Ninth Circuit
20 sometimes has recognized regarding the bankruptcy court's
21 inherent authority to modify one of its prior orders.
22 Ordinarily, the court cannot exercise its modification authority
23 over the objection of the adverse party by excising one provision
24 of the parties' stipulation but leaving the rest of the parties'
25 stipulation in tact. Maughan, 419 F.2d at 1155; see also
26 Stephens Institute v. N.L.R.B., 620 F.2d 720, 725-26 (9th Cir
27 1980) (recognizing the same rule and the same limitation in a non-
28 bankruptcy civil case).

1 Even so, this anti-modification limitation is itself
2 equitable in nature, and the Ninth Circuit has refused to apply
3 it when the proponent's own inequitable conduct instigated the
4 dispute. Stephens Institute, 620 F.2d at 725-26. On this
5 record, and in light of the bankruptcy court's uncontested
6 findings that Dye refused Andra's offers to pay the \$50,000 or
7 62,500 on the Approval Date, insisted on the complex payment
8 provisions set forth in the Dye Buyout Option, and intentionally
9 structured these provisions in the hopes of setting up the Andra
10 Parties for failure, Dye is in no position to invoke this anti-
11 modification limitation. See id.

12 There is a separate and independent reason why the anti-
13 modification limitation does not apply here. As indicated in
14 Maughan, 419 F.2d at 1156, this limitation does not apply where
15 the application of contract law principles support the
16 modification. Here, the bankruptcy court determined under
17 California contract law that the Dye Buyout Option was an
18 unenforceable penalty provision. We agree. As stated by the
19 California Supreme Court:

20 A liquidated damages clause will generally be
21 considered unreasonable, and hence unenforceable under
22 [Cal. Civil Code] section 1671(b), if it bears no
23 reasonable relationship to the range of actual damages
24 that the parties could have anticipated would flow from
25 a breach. The amount set as liquidated damages must
26 represent the result of a reasonable endeavor by the
27 parties to estimate a fair average compensation for any
28 loss that may be sustained. In the absence of such
relationship, a contractual clause purporting to
predetermine damages must be construed as a penalty. A
penalty provision operates to compel performance of an
act and usually becomes effective only in the event of
default upon which a forfeiture is compelled without
regard to the damages sustained by the party aggrieved
by the breach. The characteristic feature of a penalty
is its lack of proportional relation to the damages

1 which may actually flow from failure to perform under a
2 contract.

3 Ridgley v. Topa Thrift & Loan Ass'n, 17 Cal.4th 970, 977 (1998)
4 (citations and internal quotation marks omitted).⁶

5 Here, there was no rational relationship between the \$62,500
6 Dye Buyout Option payment and the \$9 million judgment. When
7 evaluating the validity of a liquidated damages clause in a
8 settlement agreement, the appropriate measure of damages for
9 nonpayment of the settlement amount ordinarily is tied to the
10 amount due under the settlement agreement and not to the amount
11 originally sought by the plaintiff in its complaint. See
12 Greentree Fin. Grp., Inc. v. Execute Sports, Inc.,
13 163 Cal.App.4th 495, 499-500 (2008).

14 There is no evidence in the record here to support Dye's
15 implicit assertion on appeal that her original preference claim
16 of \$9 million is an appropriate measure of her damages resulting
17 from the non-payment of the \$62,500 Dye Buyout Option amount. To
18 the contrary, Dye's compromise motion effectively represented
19 that the payments provided for in the settlement agreement
20 constituted a fair and reasonable recovery for Flashcom's

21 _____
22 ⁶While Dye has argued on appeal that the bankruptcy court
23 should not have considered state contract law principles in the
24 process of granting the Andra Parties' request for equitable
25 relief, both parties seem to agree with the bankruptcy court's
26 assessment that, to the extent state law does apply to this
27 matter, California law governs. Because Dye has not argued that
28 any other state's law should govern, she has waived this
argument. See Christian Legal Soc'y v. Wu, 626 F.3d 483, 487-88
(9th Cir. 2010) ("We review only issues [that] are argued
specifically and distinctly in a party's opening brief.");
Brownfield v. City of Yakima, 612 F.3d 1140, 1149 n.4 (9th Cir.
2010) (same).

1 creditors on account of the \$9 million preference claim.
2 Moreover, Dye made this representation with the admitted
3 expectation that she never would be in a position to enter or
4 enforce the \$9 million judgment.

5 Dye argues that the Dye Buyout Option was not a liquidated
6 damages provision at all, but rather was a true option. In other
7 words, according to Dye, the Dye Buyout Option presented the
8 Andra Parties with two bona fide alternatives: (a) either pay
9 \$62,500, or (b) be subject to liability for a \$9 million
10 judgment. This argument lacks merit. The California Supreme
11 Court has made it clear that, when considering whether a
12 provision constitutes an unenforceable liquidated damages
13 provision or a valid alternate means of performance, substance
14 should prevail over both the form and the wording of the
15 agreement. See Ridgley, 17 Cal.4th at 979-80. As Ridgley
16 stated:

17 We have consistently ignored form and sought out the
18 substance of arrangements which purport to legitimate
19 penalties and forfeitures. Looking to the substance
20 rather than the form of the disputed provision, we
21 agree with the superior court and the Court of Appeal
22 dissenter that it was invalid because it was intended
to, and did, operate as a penalty for late payment.
However one describes its form, the intent and effect
of the disputed provision here was that any late
payment or other default by plaintiffs would result in
a severe penalty

23 Id. (citations and internal quotation marks omitted).

24 Here, what Dye phrased as an option was nothing more than a
25 penalty. No rational person would willingly choose the so-called
26 "alternate performance" of liability under the \$9 million
27 judgment especially when, as here, it is undisputed that the
28 adverse party was ready, willing and able to pay the \$62,500 Dye

1 Buyout Option amount. Furthermore, it is telling that Dye sought
2 to enforce the Dye Buyout Option precisely as a penalty - as a
3 consequence of Andra's failure to timely pay the Dye Buyout
4 Option amount.

5 Nor can Dye escape this result by referencing the fact that
6 the parties eschewed terminology like "breach" and "damages".
7 Dye's argument is wholly at odds with Ridgley's mandate that
8 substance should control over the form and wording used by the
9 parties.

10 Relying on Schneider v. Verizon Internet Servs., Inc.,
11 400 F. App'x 136, 138 (9th Cir. 2010), Dye contends that the
12 relative benefits and burdens of the alternatives must be weighed
13 at the time the agreement is entered into. But Schneider is an
14 unpublished decision and its facts are distinguishable.
15 Schneider dealt with the issue of whether an early termination
16 fee constituted a penalty or a bona fide alternative to
17 performance. No one here has attempted to characterize the Dye
18 Buyout Option as the equivalent of an early termination fee, nor
19 would the record support such a characterization.

20 Also relying upon Schneider, Dye asserts that the only way
21 to properly measure whether the Dye Buyout Option constitutes an
22 unenforceable penalty is to measure the \$9 million judgment
23 against Dye's original preference claim and Andra's risk of
24 liability thereunder. This assertion runs afoul of Greentree
25 Fin. Grp., Inc. and our discussion of that case above, in which
26 we concluded that there was no rational basis here for tying the
27 consequences for non-payment of the Dye Buyout Option amount to
28 the stated amount of Dye's preference claim.

1 Dye further points out that the Andra Parties knew and fully
2 understood the potential risks associated with the Dye Buyout
3 Option and that the settlement agreement was a commercial
4 transaction entered into by sophisticated parties who at the time
5 were both represented by counsel. This much is true.
6 Nonetheless, the California courts have made it clear that
7 sophisticated parties engaged in commercial transactions are not
8 exempt from the protections afforded under Cal. Civil
9 Code § 1671(b). See Ridgley, 17 Cal.4th at 981 n.5; Harbor
10 Island Holdings v. Kim, 107 Cal.App.4th 790, 799 (2003).

11 Our decision upholding the bankruptcy court's ruling
12 limiting Dye to a \$62,500 judgment is consistent with contract
13 reformation principles - the exact same principles referenced in
14 Maughan, 419 F.2d at 1156. As discussed in the facts section
15 above, at the time the settlement was entered into and approved,
16 the parties did not expect that the Dye Liability Judgment ever
17 would be enforced. Indeed, at that time, the express purpose and
18 motivation underlying the Dye Liability Judgment was to use it
19 against the non-settling defendants and not against the Andra
20 Parties. After Dye lost her litigation against the non-settling
21 defendants, Dye's motivation regarding how she wanted to use the
22 Dye Liability Judgment obviously changed, and the explicit terms
23 of the Dye Buyout Option facilitated Dye's change in motivation.

24 But application of contract reformation principles here
25 would prevent Dye from successfully acting upon her changed
26 motivation. As explained in Maughan: "[r]eformation is an
27 appropriate remedy to correct a written instrument when the words
28 it contains do not express the meaning the parties agreed upon

1” Id. at 1556. See also Restatement (Second) Contracts
2 § 155 (1981). In short, at the time of settlement, the parties
3 never really meant for the Dye Liability Judgment ever to be
4 enforced against the Andra Parties. Even though the settlement
5 agreement as written appears to permit such enforcement, contract
6 reformation principles could be invoked to conform the written
7 instrument to the parties’ actual expectations at the time of
8 contract formation.

9 We acknowledge that contract reformation was not put at
10 issue by the parties. Even so, we find the above contract
11 reformation analysis instructive because of its role in Maughan
12 and because it would lead to the same result as that reached by
13 declaring the \$9 million judgment an unenforceable penalty.

14 We also acknowledge that, at oral argument, Dye’s counsel
15 indicated that the bankruptcy court excluded some of the parties’
16 evidence pursuant to Evidence Rule 408. But it is difficult to
17 reconcile any such exclusion with the bankruptcy court’s findings
18 and factual statements, many of which appear to hinge on events
19 that transpired during settlement negotiations. Regardless,
20 Evidence Rule 408 does not impede our analysis. Dye did not
21 address Evidence Rule 408 or the court’s evidentiary exclusion
22 rulings in her appeal briefs, so she has forfeited any issue
23 relating thereto. See Christian Legal Soc’y, 626 F.3d at 487-88;
24 Brownfield, 612 F.3d at 1149 n.4. More importantly, it is well
25 established that Evidence Rule 408 does not exclude evidence
26 related to a settlement when it is offered for the purposes of
27 interpreting or enforcing the settlement. See Advisory Committee
28 Notes accompanying 2006 amendments to Evidence Rule 408 (citing

1 Coakley & Williams v. Structural Concrete Equip., 973 F.2d 349,
2 353-54 (4th Cir. 1992)); see also Cates v. Morgan Portable Bldg.
3 Corp., 780 F.2d 683, 691 (7th Cir. 1985) ("Obviously a settlement
4 agreement is admissible to prove the parties' undertakings in the
5 agreement, should it be argued that a party broke the
6 agreement.").

7 Most of Dye's other arguments on appeal concern whether the
8 bankruptcy court correctly relied upon Civil Rule 60(b) to grant
9 the Andra Parties relief from the terms of the court-approved
10 settlement agreement. In light of our analysis and holding that
11 the bankruptcy court's decision can be affirmed as an appropriate
12 exercise of the court's inherent authority under § 105(a), we
13 need not reach Dye's Civil Rule 60(b) issues, and we decline to
14 address them.

15 Somewhat unrelated to her Civil Rule 60(b) issues, Dye
16 argues that the bankruptcy court abused its discretion by
17 suggesting to the Andra Parties that they should file a motion
18 pursuant to Civil Rule 60(b) seeking equitable relief from the
19 court-approved settlement agreement. This so-called suggestion
20 was made at a hearing on Dye's motion held on October 31, 2012.
21 However, rather than providing legal advice to the Andra Parties
22 regarding what they needed to do to prevail, the entirety of the
23 hearing transcript reflects that the court and the Andra Parties'
24 counsel were engaged in a lengthy colloquy during which one of
25 the concerns the court raised was whether it could grant
26 equitable relief - relief that the Andra Parties already had
27 informally requested in their briefs in opposition to Dye's
28 motion - in the absence of a formal motion.

1 Rather than attempting to give legal advice, the bankruptcy
2 court appears to have been merely expressing its concern that the
3 Andra Parties needed to present their pre-existing request for
4 equitable relief in a procedurally proper format. In any event,
5 even if there were some sort of error or abuse of discretion
6 associated with the court's so-called suggestion that the Andra
7 Parties needed to file a formal Civil Rule 60(b) motion, any such
8 error was harmless, and we must ignore harmless error. Van Zandt
9 v. Mbunda (In re Mbunda), 484 B.R. 344, 355 (9th Cir. BAP 2012).
10 The bankruptcy court did not need a formal motion from the Andra
11 Parties in order to grant them equitable relief from the court-
12 approved settlement. Rather, under the court's inherent
13 authority, the court sua sponte could grant such relief. See
14 § 105(a); see also In re Lenox, 902 F.2d at 740 ("Although
15 FRCP 60(b) provides that a court may relieve a party from a final
16 order upon motion, it does not prohibit a bankruptcy judge from
17 reviewing, sua sponte, a previous order.").

18 There is one final issue we must address. The court
19 determined that Dye was not entitled to prejudgment interest on
20 the \$62,500 on and after April 1, 2012. According to the court,
21 on or about that date, Andra's belated offer to make the \$62,500
22 payment and Dye's refusal thereof cut off Dye's entitlement to
23 prejudgment interest, per Cal. Civ. Code § 1504, which provides:

24 [a]n offer of payment or other performance, duly made,
25 though the title to the thing offered be not
26 transferred to the creditor, stops the running of
interest on the obligation, and has the same effect
upon all its incidents as a performance thereof.

27 The bankruptcy court acknowledged that the following
28 requirements ordinarily apply before an offer of payment can cut

1 off the accrual of interest:

2 (1) full performance; (2) at a proper time and place;
3 (3) made by the debtor or someone on her behalf; (4) to
4 the creditor or some authorized person; (5) at a place
appointed by the creditor; (6) timely;
(7) unconditional; and (8) offer made in good faith.

5 Amd. Supp. Mem. Dec. (June 24, 2013) at 34:20-23 (citing
6 1 Witkin, Summary of California Law, Contracts, § 771, at
7 pp. 861-862 (10th ed. 2005 and 2013 Supp.)).

8 The court further acknowledged that Andra's tender did not
9 fully comply with these requirements. Nonetheless, the court
10 concluded that Andra's tender was sufficient to cut off
11 prejudgment interest because of Dye's failure to give Andra
12 notice of when the Dye Buyout Option payment was due. The court
13 reasoned that, under Cal. Civ. Code § 1511,⁷ Dye's failure to

14 _____
15 ⁷Cal. Civ. Code § 1511 provides:

16 The want of performance of an obligation, or of an
17 offer of performance, in whole or in part, or any delay
18 therein, is excused by the following causes, to the
extent to which they operate:

19 1. When such performance or offer is prevented or
20 delayed by the act of the creditor, or by the operation
21 of law, even though there may have been a stipulation
22 that this shall not be an excuse; however, the parties
23 may expressly require in a contract that the party
24 relying on the provisions of this paragraph give
25 written notice to the other party or parties, within a
reasonable time after the occurrence of the event
excusing performance, of an intention to claim an
extension of time or of an intention to bring suit or
of any other similar or related intent, provided the
requirement of such notice is reasonable and just;

26 2. When it is prevented or delayed by an irresistible,
27 superhuman cause, or by the act of public enemies of
28 this state or of the United States, unless the parties

continue...

1 give notice excused Andra from full compliance with the tender
2 requirements.

3 On appeal, Dye in essence argues that the bankruptcy court
4 incorrectly invoked Cal. Civ. Code § 1511 to excuse Andra's full
5 compliance with the tender requirements. We agree with Dye on
6 this point. Dye had no duty, contractual or otherwise, to give
7 Andra notice of the timing or amount of the Dye Buyout Option
8 payment. California cases excusing an improper or delayed tender
9 of performance based on the adverse party's conduct are
10 predicated on the adverse party having some sort of unmet duty
11 under the parties' agreement or, in the alternative, on the
12 adverse party affirmatively acting in some way, after the
13 agreement was entered into, to effectively prevent timely and
14 proper tender in accordance with parties' agreement. See, e.g.,
15 Pierce v. Lukens, 144 Cal. 397, 401-02 (1904); Ninety Nine Invs.,
16 Ltd. v. Overseas Courier Serv. (Singapore) Private, Ltd.,
17 113 Cal.App.4th 1118, 1135-36 (2003); Connolly v. Lake Cnty.
18 Canning Co., 95 Cal.App. 768, 771-72 (1928).

19 Here, in contrast, it is undisputed that Dye had no duty
20 under the settlement agreement to give Andra any notice unless
21 Dye recovered more than \$2 million from the non-settling
22 defendants (which she did not). Nor is there anything in the
23

24 ⁷...continue
25 have expressly agreed to the contrary; or,

26 3. When the debtor is induced not to make it, by any
27 act of the creditor intended or naturally tending to
28 have that effect, done at or before the time at which
such performance or offer may be made, and not
rescinded before that time.

1 record indicating that Dye ever led Andra to believe that she
2 would give Andra notice of the timing or amount of the Dye Buyout
3 Option payment.

4 The bankruptcy court's ruling suggests that it believed that
5 the same law, circumstances and equities that permitted it to
6 limit the consequences arising from Andra's failure to timely pay
7 the Dye Buyout Option amount somehow also permitted the court to
8 cut off prejudgment interest. We disagree. Dye's entitlement to
9 prejudgment interest was governed not by the settlement agreement
10 but instead by Cal. Civ. Code §§ 1504 and 1511, and the
11 bankruptcy court's ability to limit this entitlement was
12 restricted by the terms of those statutes as construed by the
13 California courts.

14 Accordingly, the bankruptcy court erred when it cut off the
15 accrual of prejudgment interest on and after April 1, 2012. We
16 thus will vacate this limited aspect of the court's ruling and
17 will remand with the instruction that the bankruptcy court on
18 remand should amend its judgment to include prejudgment interest
19 up to the date of entry of the judgment, June 24, 2013.

20 **CONCLUSION**

21 For the reasons set forth above, we AFFIRM the bankruptcy
22 court's decision, except for the court's ruling on prejudgment
23 interest. This limited aspect of the court's decision is VACATED
24 AND REMANDED WITH INSTRUCTIONS, as set forth above.