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NOT FOR PUBLICATION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-13-1607-TaSpD
JENNIFER CHAN,	)	Bk. No.	09-24636-BR
Debtor.	)	Adv. No.	09-02187-BR
_____	)		
JENNIFER CHAN,	)		
Appellant,	)		
v.	)	<b>MEMORANDUM*</b>	
DRM ENTERPRISES, LLC,	)		
Appellee.	)		
_____	)		

Submitted Without Argument\*\*  
on September 18, 2014

Filed - October 8, 2014

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

Honorable Barry Russell, Bankruptcy Judge, Presiding

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Appearances: David Brian Lally on brief for appellant Jennifer Chan; Raymond H. Aver on brief for appellee DRM Enterprises, LLC.

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\* 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 June 17, 2014, this Panel entered an order deeming this appeal suitable for submission on the briefs.

1 Before: TAYLOR, DUNN, and SPRAKER,\*\*\* Bankruptcy Judges.  
2

3 Debtor Jennifer Chan appeals from the bankruptcy court's  
4 judgment in favor of creditor DRM Enterprises, LLC ("DRM") for  
5 false representations that her corporation, CA Price Depot, Inc.  
6 ("Price Depot"), had the ability to repay certain advances made  
7 by DRM in December 2008, and that such debt was nondischargeable  
8 under § 523(a)(2)(A).<sup>1</sup> We AFFIRM.

9 **FACTS**

10 The Debtor was an officer, director, and sole shareholder of  
11 Price Depot, a regional restaurant distributor, and two related  
12 corporations. Price Depot began doing business with DRM, a  
13 poultry products broker, sometime between 1998 and 2000. The  
14 Debtor and Ronald Richter, Jr., eventually chief executive  
15 officer of DRM, were acquainted as a result of DRM's prior  
16 business relationship with the Debtor's family. They eventually  
17 became close friends.

18 Beginning in 2000, Price Depot, through Debtor, and DRM,  
19 through Richter, entered into an arrangement where, at the  
20 Debtor's request, DRM advanced money to Price Depot by wire  
21 transfer to its bank account; in effect, the advances were  
22 extremely short-term non-interest bearing loans. Price Depot  
23 repaid DRM by issuing post-dated checks.

24 In July 2008, DRM, through Richter, and at Debtor's request,  
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26 \*\*\* The Honorable Gary A. Spraker, Chief Bankruptcy Judge for  
the District of Alaska, sitting by designation.

27 <sup>1</sup> Unless otherwise indicated, all chapter and section  
28 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532.

1 agreed to further financially assist Price Depot. To help Price  
2 Depot with accounts payable issues, DRM agreed to purchase non-  
3 poultry products from other brokers on Price Depot's behalf or to  
4 advance payment on some of the Price Depot accounts payable. In  
5 return, Price Depot agreed to repay DRM the amount paid or  
6 advanced, plus a two percent fee. DRM also continued to broker  
7 poultry products to Price Depot and to make short term loan  
8 advances to Price Depot at the Debtor's request.

9 Starting in September 2008, the Debtor began requesting  
10 incrementally larger and more frequent short term loan advances  
11 for Price Depot. DRM provided the requested advances, apparently  
12 with few questions asked. As the Debtor's requests increased,  
13 however, the Debtor also caused Price Depot to provide DRM with a  
14 series of blank checks already signed by the Debtor, so that  
15 Richter could deposit repayment checks with greater ease.

16 The first weeks of December 2008, however, proved to be a  
17 pivotal point in the relationship. The Debtor requested - and  
18 obtained - even more substantial advances for Price Depot within  
19 the first four days of the month. DRM simultaneously deposited a  
20 number of Price Depot checks for advances then owing. And, the  
21 Debtor caused Price Depot to make three consecutive wire  
22 transfers to DRM in the total amount of \$250,000 during the four  
23 day period. Upon receipt, however, and based on the Debtor's  
24 request, DRM immediately wired the \$250,000 back to Price Depot  
25 as part of the advanced funds.

26 On December 9, 2008, DRM received notices of insufficient  
27 funds as to all of the repayment checks deposited the week  
28 before. The Debtor offered repayment to DRM of \$20,000 a day to

1 resolve the insufficient funds issue. She, in fact, caused  
2 repayment to DRM of \$70,000 over the course of the next month.  
3 But, these payments eventually stopped, and the Debtor stopped  
4 payment on the rest of the blank Price Depot checks in DRM's  
5 possession.

6 The Debtor filed a chapter 11 bankruptcy case in June 2009.  
7 Three months later, DRM commenced the nondischargeability action  
8 against the Debtor, seeking to except its claim from discharge  
9 under § 523(a)(2)(A).

10 At trial, the bankruptcy court received testimony from the  
11 Debtor, Richter, and DRM expert witness, Michael Borenstein. The  
12 Debtor testified that Richter and DRM were aware of Price Depot's  
13 rocky financial situation. According to the Debtor, she told  
14 Richter to hold off on deposit of the returned checks because  
15 Price Depot continued to experience financial problems and she  
16 simply needed time "to make good on those checks."

17 Richter's testimony was the complete opposite; he attested  
18 that he was never made aware of Price Depot's dire financial  
19 issues, that the Debtor constantly reassured him that DRM would  
20 be repaid, and that, until the checks were returned for  
21 insufficient funds, there were never repayment issues. He  
22 further testified that the Debtor never told him to hold deposit  
23 of the checks. Instead, it was his testimony that he deposited  
24 checks only after he spoke to the Debtor and she verbally  
25 authorized it.

26 Borenstein's testimony was brief: he stated that he was a  
27 certified public accountant who examined Price Depot's ability,  
28 at the end of 2008, to repay the DRM advances then owing. He

1 concluded after examining bank accounts and balance sheets that  
2 the Debtor's three businesses were collectively overdrawn  
3 \$81,567.36 at the beginning of October 2008, which increased to  
4 \$373,290.28 just two months later, even after DRM's significant  
5 cash advances. Borenstein, thus, opined that during the final  
6 months of 2008, Price Depot lacked the ability to repay DRM.

7 On cross-examination, Borenstein conceded that he was  
8 unaware of certain facts in conducting his analysis, i.e., the  
9 returned Price Depot checks and the Debtor's \$250,000 wire  
10 transfer to DRM. The Debtor, thus, moved to strike Borenstein's  
11 testimony and evidence; the bankruptcy court denied the motion.

12 At the conclusion of trial and after post-trial briefing,  
13 the bankruptcy court orally ruled on the record in favor of DRM.  
14 It determined that DRM established, by a preponderance of the  
15 evidence, each element of § 523(a)(2)(A). The bankruptcy court  
16 subsequently entered a judgment in DRM's favor and deemed the  
17 judgment nondischargeable. The Debtor timely appealed.

18 **JURISDICTION**

19 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.  
20 §§ 1334 and 157(b)(2)(I). We have jurisdiction under 28 U.S.C.  
21 § 158.

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1 **ISSUES<sup>2</sup>**

- 2 1. Did the bankruptcy court err in determining that the debt  
3 was nondischargeable under § 523(a)(2)(A)?  
4 2. Did the bankruptcy court abuse its discretion by admitting  
5 Borenstein's testimony and evidence?

6 **STANDARDS OF REVIEW**

7 We review de novo whether a debt is excepted from discharge  
8 under § 523(a)(2)(A). Wank v. Gordon (In re Wank), 505 B.R. 878,  
9 886 (9th Cir. BAP 2014). Whether there has been proof of an  
10 essential element of § 523(a)(2)(A) is a factual determination  
11 reviewed for clear error. Am. Express Travel Related Servs. Co.,  
12 Inc. v. Vinhnee (In re Vee Vinhnee), 336 B.R. 437, 442-43 (9th  
13 Cir. BAP 2005).

14 We review evidentiary rulings for an abuse of discretion  
15 and, even then, only reverse if any error would have been  
16 prejudicial to the appellant. Van Zandt v. Mbunda  
17 (In re Mbunda), 484 B.R. 344, 351 (9th Cir. BAP 2012). A

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19  
20 <sup>2</sup> The Debtor also identified the following issues on appeal:  
21 whether the bankruptcy court abused its discretion by "forcing"  
22 her to testify at trial when DRM failed to provide an  
23 interpreter; whether the bankruptcy court clearly erred in  
24 finding DRM's witness more credible than the Debtor when she has  
limited English proficiency; and whether the bankruptcy court  
considered the Debtor's \$70,000 payment to DRM in determining the  
amount of damages.

25 None of these issues were specifically and distinctly  
26 addressed in the Debtor's brief and, thus, we do not consider  
27 these issues on appeal. See Padgett v. Wright, 587 F.3d 983, 986  
28 n.2 (9th Cir. 2009) (appellate court "will not consider matters  
on appeal that are not specifically and distinctly raised and  
argued in appellant's opening brief.") (internal citation  
omitted).

1 bankruptcy court abuses its discretion if it applies the wrong  
2 legal standard, misapplies the correct legal standard, or if its  
3 factual findings are illogical, implausible or without support in  
4 inferences that may be drawn from the facts in the record. See  
5 TrafficSchool.com, Inc. v. Edriver Inc., 653 F.3d 820, 832 (9th  
6 Cir. 2011) (citing United States v. Hinkson, 585 F.3d 1247, 1262  
7 (9th Cir. 2009) (en banc)).

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

## 11 DISCUSSION

### 12 A. Exception to discharge under § 523(a)(2)(A).

13 A debtor is not discharged in bankruptcy from any debt  
14 obtained by "false pretenses, a false representation, or actual  
15 fraud." 11 U.S.C. § 523(a)(2)(A). The creditor bears the burden  
16 of demonstrating, by a preponderance of the evidence, each of the  
17 following five elements: (1) misrepresentation, fraudulent  
18 omission or deceptive conduct by the debtor; (2) knowledge of the  
19 falsity or deceptiveness of the representation or omission;  
20 (3) an intent to deceive; (4) the creditor's justifiable reliance  
21 on the representation or conduct; and (5) damage to the creditor  
22 proximately caused by reliance on the debtor's representations or  
23 conduct.<sup>3</sup> Ghomeshi v. Sabban (In re Sabban), 600 F.3d 1219, 1222

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25 <sup>3</sup> In her statement of issues in the opening brief, the  
26 Debtor challenges whether there was sufficient, admissible  
27 evidence supporting each element of § 523(a)(2)(A). She does  
28 not, however, specifically and distinctly address the fifth  
element of damages in her brief and, thus, we do not consider it  
on appeal. See Padgett, 587 F.3d at 986 n.2.

1 (9th Cir. 2010).

2 **1. Misrepresentation.**

3 The bankruptcy court first found that the Debtor  
4 misrepresented that Price Depot had the ability to repay DRM on  
5 account of the advances made in the final months of 2008. In so  
6 determining, the bankruptcy court found Richter's testimony more  
7 credible than the Debtor's on two points: (1) whether the Debtor  
8 adequately disclosed her businesses' financial problems during  
9 that time period; and (2) whether the Debtor told Richter to hold  
10 his deposit of the checks. It reasoned that the Debtor's version  
11 of events made "absolutely no sense." Hr'g Tr. (Nov. 27, 2013)  
12 at 33:20. Noting that DRM had possession of the \$250,000 wire  
13 transfers during the first week of December, it questioned why  
14 DRM would relinquish this money and then continue the advances if  
15 the Debtor actually told Richter to hold the checks for deposit  
16 and disclosed the full extent of Price Depot's precarious  
17 financial situation.

18 Viewed through the deferential lens required on appellate  
19 review, these findings are not clearly erroneous. The bankruptcy  
20 court's skepticism of the Debtor's allegations of full disclosure  
21 was reasonable. Its finding that a misrepresentation occurred is  
22 bolstered by the expert testimony establishing the overdrawn  
23 condition of Price Depot and the Debtor's other businesses, and  
24 the lack of contrary evidence of the financial situation from the  
25 Debtor. The findings also were based heavily on the bankruptcy  
26 court's determinations of witness credibility to which we afford  
27 significant deference. See Hussain v. Malik (In re Hussain),  
28 508 B.R. 417, 425 (9th Cir. BAP 2014) (the bankruptcy court is in

1 the best position to evaluate the documentary and testimonial  
2 evidence).

3 **2. Knowledge.**

4 Next, the bankruptcy court found that, at a minimum, at the  
5 time the Debtor told Richter to deposit the last set of checks,  
6 she knew that DRM would not be repaid. In its estimation, it was  
7 likely that the Debtor was aware of the inability to pay in late  
8 October 2008; but, giving her the benefit of the doubt, the  
9 bankruptcy court determined that the Debtor had the requisite  
10 knowledge in early December.

11 Again, the bankruptcy court's finding is not clearly  
12 erroneous. The evidence before the bankruptcy court showed that  
13 the bank accounts for Price Depot and the Debtor's other two  
14 businesses were collectively overdrawn in late October and were  
15 increasingly overdrawn through the end of December 2008. And,  
16 the Debtor herself testified that, although Price Depot was  
17 struggling financially and she needed more time to "make good on  
18 the checks," she continuously requested greater and more frequent  
19 advances from DRM.

20 **3. Intent to deceive.**

21 The bankruptcy court found that the Debtor intended to  
22 deceive DRM when she failed to inform it of the inability to  
23 repay the advances in December of 2008. Its finding is not  
24 clearly erroneous; it is neither illogical nor implausible to  
25 infer, as the bankruptcy court did here, that the Debtor's  
26 failure to disclose the full extent of Price Depot's financial  
27 troubles was purposely done in order to continue the available  
28 and critically required flow of cash from DRM. And, again, the

1 bankruptcy court's finding was heavily intertwined with its  
2 credibility determinations, to which we afford significant  
3 deference. See In re Hussain, 508 B.R. at 425. We, thus,  
4 decline to second guess the bankruptcy court's plausible view of  
5 the evidence. See id. (where there are two permissible views of  
6 the evidence, the bankruptcy court's choice between them cannot  
7 be clearly erroneous).

#### 8 **4. Justifiable reliance.**

9 In determining justifiable reliance, the bankruptcy court  
10 "must look to all of the circumstances surrounding the particular  
11 transaction, and must particularly consider the subjective effect  
12 of those circumstances upon the creditor." In re Wank, 505 B.R.  
13 at 894.

14 The bankruptcy court here found that Richter justifiably  
15 relied on the Debtor's representations. It noted that Richter  
16 was aware that the Debtor's business operation "was sort of a  
17 balancing act . . . [,] trying to get better credit . . . [,]  
18 better terms." Hr'g Tr. (Nov. 27, 2013) at 32:18-20. It also  
19 determined that Richter had simply tried to help a very close  
20 friend and, thus, he had not "stuck his head in the sand" as to  
21 the potential signs of financial distress. But, the bankruptcy  
22 court also found that Richter was a businessman who expected  
23 repayment and that had he known the extent of the Debtor's  
24 cumulative financial problems, he would not have caused DRM to  
25 advance additional money.

26 The record confirms that long-term personal and business  
27 relationship between the parties; a relationship grounded in  
28 friendship and trust. Unfortunately, a decade plus of friendship

1 and trust quickly cratered at the end of 2008. Had the long-term  
2 relationship not existed, the Debtor's requests for larger and  
3 more frequent advances may have raised some legitimate red flags.  
4 But given the relationship and history of repayment over a number  
5 of years, the bankruptcy court did not clearly err in finding  
6 that DRM (through Richter) developed, fairly, a trust in the  
7 Debtor that she would make good on the advances. Coupled with  
8 the evidentiary record and affording due deference to the  
9 bankruptcy court's credibility determinations, we determine that  
10 the bankruptcy court did not clearly err in finding justifiable  
11 reliance.

12 Based on the foregoing, the Debtor has not shown that the  
13 bankruptcy court's findings were clearly erroneous. We, thus,  
14 conclude that the bankruptcy court did not err in determining  
15 that the debt owed to DRM was excepted from discharge under  
16 § 523(a) (2) (A).

17 **B. Expert witness testimony and evidence.**

18 The Debtor also argues that DRM's expert witness lacked  
19 credibility because he was unaware of key facts: the Price Depot  
20 checks returned for insufficient funds and the Debtor's \$250,000  
21 wire transfer to DRM during the first week of December 2008. She  
22 contends that Borenstein lacked complete financial data in  
23 rendering his analysis and, thus, challenges his opinion that  
24 Price Depot could not repay DRM.

25 We will reverse a bankruptcy court's evidentiary ruling only  
26 if it abused its discretion and the error was prejudicial to the  
27 appellant. See In re Mbunda, 484 B.R. at 351. On this record,  
28 there is no indication that the bankruptcy court abused its

1 discretion. As it indicated at trial, the Debtor's motion to  
2 strike Borenstein's testimony related to credibility, not whether  
3 the testimony was admissible.

4 And, although Borenstein acknowledged at trial that he was  
5 unaware of certain facts when he conducted his analysis, he  
6 pointed out that his analysis was limited to "inflows, the wire  
7 transfers in and the intercompany transfers." As both the Debtor  
8 and Richter testified, the \$250,000 in wire transfers were not  
9 intended as repayment to DRM; DRM immediately returned the funds.  
10 In sum, the Debtor has not shown an abuse of discretion as to the  
11 evidentiary ruling in relation to the Borenstein testimony.

12 **CONCLUSION**

13 Based on the foregoing, we AFFIRM the bankruptcy court.  
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