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

ORDERED PUBLISHED

**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT**

In re:)	BAP No.	ID-15-1010-JuKiF
)		
JAY P. CLARK,)	Bk. No.	12-00649-TLM
)		
Debtor.)	Adv. No.	13-06016-TLM
)		
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CLARK'S CRYSTAL SPRINGS RANCH,)		
LLC; CLARK FARMS FAMILY TRUST,)		
)		
Appellants,)		
)		
v.)	O P I N I O N	
)		
JEREMY J. GUGINO, Chapter 7)		
Trustee,)		
)		
Appellee.)		
)		

Argued and Submitted on March 17, 2016
at Pasadena, California

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

Honorable Terry L. Myers, Chief Bankruptcy Judge, Presiding

Appearances: Nolan Sorensen of S&P Legal LLC argued for
appellants Clark's Crystal Springs Ranch, LLC and
Clark Farms Family Trust; Matthew Todd
Christensen of Angstman, Johnson & Associates,
PLLC argued for appellee Jeremy J. Gugino,
chapter 7 trustee.

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

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1 JURY, Bankruptcy Judge:
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3 Chapter 7¹ trustee, Jeremy J. Gugino (Trustee), filed an
4 adversary complaint against Clark's Crystal Springs Ranch, LLC
5 (LLC) and Clark Farms Family Trust (Trust) (collectively,
6 Defendants) seeking, among other things, a judgment
7 substantively consolidating the bankruptcy estate of Jay P.
8 Clark (Debtor) with the LLC and its sole member, the Trust.
9 After a trial, the bankruptcy court issued a decision finding
10 that the requirements for substantive consolidation articulated
11 in Alexander v. Compton (In re Bonham), 229 F.3d 750 (9th Cir.
12 2000), were met and entered judgment substantively consolidating
13 Debtor's estate with the LLC and the Trust nunc pro tunc. This
14 appeal followed. We AFFIRM.

15 **I. FACTS**

16 **A. The Trust**

17 Debtor, at one time a lawyer, formed the Trust in 2008 and
18 was the grantor and sole trustee. At that time, the trust
19 property was described as \$1.00 transferred by the grantor. The
20 agreement gave the grantor discretion to name the Trust as a
21 beneficiary of life insurance policies, deposit property with
22 the Trust or devise property to the Trust. In addition, the
23 trust agreement gave Debtor, as grantor, immediate benefits
24 while living: "the Trustee shall distribute to or for the
25

26 ¹ Unless otherwise indicated, all chapter and section
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532,
28 and "Rule" references are to the Federal Rules of Bankruptcy
Procedure.

1 benefit of the Grantor such sums from income and principal as
2 the Grantor may at any time request." The Trust did not provide
3 for Debtor's children during his lifetime nor did it
4 specifically identify them as beneficiaries. However, upon his
5 death, the trust agreement provided that the Trust's property
6 should be administered and distributed to his "issue" according
7 to the Trust's provisions.

8 Debtor was the initial trustee of the Trust. Under § 4.04
9 of the trust agreement, the trustee could resign on 30 days'
10 notice. That section further provided:

11 Upon the death, resignation, or disability of Jay P.
12 Clark, then Judith Constance (Clark) Appleby shall
13 serve as Trustee of this Clark Farms Family Trust.
14 Upon the resignation of any Trustee, if no successor
15 Trustee is designated, as permitted by this Clark
16 Farms Family Trust, a successor shall be appointed by
17 a court having jurisdiction over the trust with
18 respect to which such Trustee has resigned.

19 As described below, when Debtor resigned as trustee, this
20 provision was ignored. The trust agreement also contained a
21 spendthrift clause.

22 Finally, while one provision of the Trust stated that it
23 was irrevocable and not subject to amendment, another provision
24 authorized the Debtor, as grantor, to amend the Trust at any
25 time. Debtor exercised the authority to amend in May 2010.
26 This amendment changed several provisions. First, the trust
27 property was described as all the assets of the LLC which were
28 primarily farm machinery and vehicles owned by the LLC. The
value of the assets was asserted to be at least \$100,000, and
Debtor, as trustee, was required to maintain this "minimum
value." Second, it stated that so long as the Trust earned

1 income through the operation of the LLC, the Trust would pay for
2 certain expenses such as a cell phone, housing, and a vehicle,
3 on behalf of Debtor's children. Finally, the amendment made the
4 Trust irrevocable, but its language purporting to do so was
5 ambiguous at best.

6 **B. The LLC**

7 Two weeks after the Trust was created, articles of
8 organization of the LLC were filed with the Idaho Secretary of
9 State. Debtor signed the documents, which disclosed him as the
10 initial registered agent. The form indicates that the LLC is
11 "member-managed." The LLC's operating agreement stated that the
12 Trust was the sole member and manager of the LLC. Thus, Debtor
13 individually was neither a member nor manager of the LLC.

14 The record shows that Debtor exercised total and sole
15 control over the LLC's operations. Moreover, despite the fact
16 that he was neither a member nor manager, Debtor often
17 identified himself as one or the other. Further, although he
18 was not a member, Debtor's sole compensation for operating the
19 farm came through "draws" from the LLC. These "draws" were paid
20 directly from the LLC to third parties for Debtor's personal
21 expenses or those of his children.

22 In addition, one of the assets of the LLC was farm
23 equipment which was "leased" from Debtor's parents. The
24 January 14, 2008 lease was executed on the eve of Debtor's
25 chapter 12 filing in 2012. However, in response to discovery,
26 Defendants stated the LLC "owns" farm machinery and itemized
27 equipment with an auction value of \$364,600. The LLC's
28 Quickbooks report summarized "purchased" farming equipment from

1 John Clark valued at \$203,192.92 and "other" used equipment
2 valued at \$560,928.72. The record also shows that the LLC
3 asserted ownership rights in \$354,000 of crop insurance proceeds
4 and, due to Trustee's intervention, that check was currently
5 being held by the insurance company.² The LLC had liabilities
6 of \$676,796.98 and Debtor was personally liable for most of
7 those debts as shown by the proofs of claim filed by creditors
8 in Debtor's bankruptcy case.

9 Finally, the record shows that no tax returns were prepared
10 for the LLC. Rather, the income, profit and losses,
11 depreciation of assets, and other relevant information were on
12 Debtor's personal tax returns.

13 **C. Bankruptcy Events**

14 On March 27, 2012, Debtor filed a voluntary chapter 12
15 petition in his own name dba Crystal Springs Ranch. At this
16 time, Debtor was the trustee of the Trust and thus manager of
17 the LLC.

18 On May 31, 2013, the bankruptcy court granted a creditor's
19 motion to convert the case to chapter 7 under § 1208(d) which
20 allows for conversion "upon a showing that the debtor has
21 committed fraud in connection with the case." On the same date,
22 Trustee was appointed and Debtor resigned as trustee of the
23 Trust and manager of the LLC. As described below, Debtor then
24 found a successor trustee and manager for the LLC.

25
26 ² On June 10, 2013, the court issued an injunction freezing
27 the Trust's and LLC's assets. Accordingly, there were
28 essentially no farming "operations" thereafter, even though
Debtor attempted to procure the crop insurance proceeds for the
LLC.

1 On June 7, 2013, Trustee filed an adversary complaint
2 against the LLC and the Trust alleging various claims in an
3 effort to recover and bring into the estate the assets of the
4 LLC consisting of \$20,000 in a checking account, a crop
5 insurance check of \$354,000, and farming equipment with an
6 unknown value. In the complaint, Trustee sought (1) a
7 declaration that the LLC and the Trust are invalid entities
8 created as part of a scheme to hinder, defraud, or delay
9 Debtor's creditors (Sham Entities Claim); (2) a finding that the
10 LLC and the Trust are alter egos of Debtor and a determination
11 allowing Trustee to disregard the separate corporate existence
12 of those entities and treat the assets of the LLC and the Trust
13 as assets of the bankruptcy estate (Alter Ego Claim); (3) a
14 declaration that the Trust is a revocable trust with Debtor
15 retaining the right to revoke the Trust at any time (Revocable
16 Trust Claim); and (4) a judgment for the substantive
17 consolidation of the assets and liabilities of Debtor, the LLC,
18 and the Trust (Substantive Consolidation Claim).

19 After a two-day trial, the bankruptcy court took the matter
20 under submission. On December 30, 2014, the bankruptcy court
21 issued its memorandum decision. The court dismissed Trustee's
22 Sham Entities Claim after concluding that Trustee failed to
23 present sufficient evidence of Debtor's financial circumstances,
24 conduct, or creditor activity in 2008 that would shed light on
25 his motives when forming the Trust and the LLC. With respect to
26 the Alter Ego Claim, the court observed that "veil-piercing, or
27 reverse veil-piercing" is not an independent cause of action,
28 but a remedy and tantamount to a request for substantive

1 consolidation. Therefore, the bankruptcy court analyzed
2 Trustee's arguments and facts related to the Alter Ego Claim in
3 the context of the Substantive Consolidation Claim. The court
4 dismissed the Revocable Trust Claim as moot due to its finding
5 that substantive consolidation was appropriate.

6 The bankruptcy court applied the two-part disjunctive test
7 for substantive consolidation set forth in Bonham: whether
8 creditors dealt with the entities as a single economic unit and
9 did not rely on their separate identity in extending credit **or**
10 whether the affairs of the debtor are so entangled that
11 consolidation will benefit all creditors. In re Bonham,
12 229 F.3d at 766. As to the first factor, after noting Debtor's
13 financial and operational commingling of his personal affairs
14 with the Trust and the LLC, the court found the evidence
15 established that creditors generally dealt with Debtor and the
16 LLC as a single economic unit.

17 The bankruptcy court found the evidence showed there was a
18 unity of interest between Debtor and the LLC and its member
19 Trust and that there was no clear demarcation between Debtor's
20 affairs and those of the LLC and its member Trust. Debtor "drew
21 at his unfettered pleasure from the LLC," and all such
22 distributions were characterized as "Jay's Income (owner
23 draws)." However, there was no record keeping or accounting of
24 distributions by Debtor either as trustee of the Trust to
25 himself as grantor/beneficiary or to his children as
26 beneficiaries outside of the LLC's "owner draws" entries. As a
27 result, the court found "there was an exploitation of, and a
28 disregard for the economic and legal separateness of, the LLC

1 and the Trust.” The bankruptcy court did not find Debtor’s
2 testimony regarding the separateness of the LLC and the Trust
3 from his own personal affairs credible or trustworthy.

4 In considering the second factor under Bonham, the court
5 concluded that the evidence showed the financial affairs of
6 Debtor, the LLC, and the Trust were so entangled that unraveling
7 them would require significant time, effort, and expense, and
8 there was no realistic assurance that the result would be
9 accurate or without potential injury. Therefore, the bankruptcy
10 court concluded that substantive consolidation would benefit
11 creditors and far outweigh any potential harm.

12 On January 5, 2015, the bankruptcy court entered the
13 judgment substantively consolidating Debtor’s estate with the
14 Trust and the LLC effective nunc pro tunc as of the March 27,
15 2012 filing date. Under the judgment, Trustee retained all
16 avoidance powers for property that was transferred by the LLC or
17 the Trust after the date of the filing.

18 Defendants filed a timely notice of appeal from the
19 judgment. They then filed a motion for a stay pending appeal,
20 which the bankruptcy court denied on January 30, 2015.

21 Trustee filed a motion to sell the assets which were
22 divested from Defendants through the substantive consolidation.
23 The bankruptcy court granted this motion on February 5, 2015.
24 Defendants then sought a stay pending appeal from the Panel. On
25 February 10, 2015, a two-judge Panel denied the motion. Since
26 then, Trustee sold various farm machinery, equipment, motor
27 vehicles, tools and other personal property and has proceeded to
28 recover various machinery or monies through his avoidance

1 powers.

2 II. JURISDICTION

3 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
4 §§ 1334 and 157(b)(2)(A). We have jurisdiction under 28 U.S.C.
5 § 158.

6 III. ISSUE

7 Did the bankruptcy court err by entering a judgment to
8 substantively consolidate the estate of Debtor with the LLC and
9 its member Trust?

10 IV. STANDARDS OF REVIEW

11 In this case, the "rule of law" is articulated by the Ninth
12 Circuit's decision in In re Bonham, 229 F.3d 750. We therefore
13 must determine whether the facts support substantive
14 consolidation as ordered by the bankruptcy court. Factual
15 findings are reviewed under the clearly erroneous standard. A
16 factual finding is clearly erroneous if it is (1) illogical; (2)
17 implausible; or (3) without support in inferences that may be
18 drawn from the facts in the record. United States v. Hinkson,
19 585 F.3d 1247, 1262 (9th Cir. 2009) (en banc).

20 We may affirm the bankruptcy court on any ground supported
21 by the record. Olsen v. Idaho State Bd. of Med., 363 F.3d 916,
22 922 (9th Cir. 2004).

23 V. DISCUSSION

24 **A. The bankruptcy court has the authority to order substantive**
25 **consolidation of a nondebtor entity with a debtor under**
26 **In re Bonham.**

27 As a threshold issue and raised for the first time on
28 appeal, Defendants contend that the bankruptcy court lacks
equitable power to substantively consolidate nondebtor estates

1 with a debtor's estate under Law v. Siegel, 134 S. Ct. 1188
2 (2014). In general, we do not consider an issue raised for the
3 first time on appeal, although we have discretion to hear
4 previously unconsidered claims when the issue presented is
5 purely one of law and does not depend on the factual record
6 developed in the bankruptcy court. Cold Mountain v. Garber,
7 375 F.3d 884, 891 (9th Cir. 2004). Because the issue Defendants
8 raise meets this criteria, we exercise our discretion and
9 consider it.

10 We are not persuaded by Defendants' arguments. The Supreme
11 Court's ruling in Siegel is not applicable under these
12 circumstances – the facts are distinguishable,³ and the rule of
13 law that "whatever equitable powers remain in the bankruptcy
14 courts must and can only be exercised within the confines of the
15 Bankruptcy Code" was previously set forth in Norwest Bank
16 Worthington v. Ahlers, 485 U.S. 197, 206 (1988). The Ninth

17
18 ³ In Siegel, the debtor fabricated a lien against his home
19 in an attempt to keep equity in the home from his creditors and
20 also claimed a \$75,000 homestead exemption under California
21 Civil Procedure Code section 704.730(a)(1). The chapter 7
22 trustee successfully challenged the lien and obtained a
23 determination from the bankruptcy court that the debtor had
24 perpetrated a fraud. The court ruled that the trustee could
25 surcharge the debtor's homestead exemption to pay the trustee's
26 attorneys' fees. The debtor appealed, and this Panel and the
27 Ninth Circuit both affirmed. The Supreme Court reversed,
28 holding that the general equitable powers of § 105(a) did not
provide authority for judge-made exceptions to explicit mandates
of the Bankruptcy Code. Because § 522(k) explicitly prohibits
the use of exempt property to satisfy administrative expenses
such as attorney fees, the bankruptcy court was not authorized
to invoke a judge-made equitable exception to order otherwise.
134 S. Ct. at 1194 ("We have long held that 'whatever equitable
powers remain in the bankruptcy courts must and can only be
exercised within the confines of' the Bankruptcy Code.").

1 Circuit's decision in In re Bonham was rendered after Norwest,
2 and there is no Ninth Circuit case suggesting that bankruptcy
3 courts no longer have the authority to order substantive
4 consolidation. See Bank of Am., N.A. v. CD-04, Inc.
5 (In re Owner Mgmt. Serv., LLC Tr. Corps), 530 B.R. 711, 722
6 (Bankr. C.D. Cal. 2015). There is thus no basis to "read broad
7 new rules into Supreme Court rulings in order to specifically
8 ignore Ninth Circuit precedent." Id. at 723; see also In re
9 Bonham, 229 F.3d at 763, 765 (noting that the bankruptcy court's
10 power of substantive consolidation has been considered part of
11 the bankruptcy court's general equitable powers since the
12 passage of the Bankruptcy Act of 1898 and that this equitable
13 power "undoubtedly survived enactment of the Bankruptcy Code").

14 **B. Substantive consolidation is federal bankruptcy law.**

15 Next, Defendants argue that the bankruptcy court erred by
16 not considering property rights under Idaho law as directed by
17 Butner v. United States, 440 U.S. 48, 54-56 (1979). Defendants
18 contend that it is impossible to collapse an Idaho limited
19 liability company into its members because there is no unity of
20 interest. They further maintain that the Trust was valid under
21 Idaho law and contained a spendthrift provision which prohibits
22 distributions from the Trust to creditors.⁴

23 Defendants are mistaken about the role of state law in the
24 substantive consolidation analysis. Substantive consolidation
25 does not exist outside the context of a bankruptcy proceeding.

26
27 ⁴ The bankruptcy court did not decide that the spendthrift
28 clause was valid or invalid. We do not consider this issue for
the first time on appeal. Cold Mountain, 375 F.3d at 891.

1 It is available in bankruptcy courts as an alternative to remedy
2 the harms caused by debtors and entities they control who
3 disregard separateness. In short, the law of substantive
4 consolidation is federal bankruptcy law and is not dependent
5 upon state law concepts. In re Bonham, 226 B.R. 56, 77 (Bankr.
6 D. Alaska 1998).

7 To more thoroughly explain this concept, the Bonham
8 bankruptcy court observed:

9 The factors evaluated on a motion for substantive
10 consolidation appear similar to an analysis of
11 piercing the corporate veil. Like piercing the
12 corporate veil, substantive consolidation ignores
13 artificial structures legally defining the
14 consolidated entities. Ultimately, however, such an
15 analogy is misplaced because the corporate law
16 doctrine of limited liability is not involved.
17 Rather, substantive consolidation is more like the
18 corporate law notion of enterprise liability because
19 substantive consolidation does not seek to hold
20 shareholders liable for the acts of their incorporated
21 entity. Substantive consolidation more closely
22 resembles the bankruptcy rule of subordination because
23 competition for the consolidated assets is between
24 creditors alone. Thus, substantive consolidation
ignores artificial legal structures but looks only to
the combined assets of the consolidated entities for
satisfaction of all claims against the collective
group.

25

26 Piercing the corporate veil . . . is not a requisite
27 to the utilization of the bankruptcy law remedy of
28 substantive consolidation. The bankruptcy remedy of
substantive consolidation ensures the equitable
distribution of property to all creditors, while on
the other hand, piercing the corporate veil is a
limited merger for the benefit of a particular
creditor.

29 Id. at 77, 89. In sum, the bankruptcy court did not err by
30 failing to consider Idaho property rights in its substantive
31 consolidation analysis.

32 ///

1 **C. The bankruptcy court did not err when it granted the**
2 **substantive consolidation motion nunc pro tunc.**

3 Substantive consolidation is an uncodified, equitable
4 doctrine allowing the bankruptcy court, for purposes of the
5 bankruptcy, to "combine the assets and liabilities of separate
6 and distinct-but related-legal entities into a single pool and
7 treat them as though they belong to a single entity."
8 In re Bonham, 229 F.3d at 764. The doctrine "enables a
9 bankruptcy court to disregard separate corporate entities, to
10 pierce their corporate veils in the usual metaphor, in order to
11 reach assets for the satisfaction of debts of a related
12 corporation." Id. The essential purpose behind the doctrine is
13 one of fairness to all creditors, but it is a doctrine to be
14 used sparingly. Id. at 765, 767.

15 In Bonham, the Ninth Circuit adopted the analysis and
16 standards for substantive consolidation articulated by the
17 Second Circuit in Union Savings Bank v. Augie/Restivo Baking
18 Co., Ltd. (In re Augie/Restivo Baking Co., Ltd.), 860 F.2d 515
19 (2d Cir. 1988). In re Bonham, 229 F.3d at 766. The Bonham
20 court summarized those standards in a two-part disjunctive test
21 which requires bankruptcy courts to consider whether creditors
22 dealt with the entities as a single economic unit and did not
23 rely on their separate identity in extending credit or whether
24 the affairs of the debtor are so entangled that consolidation
25 will benefit all creditors. Id. at 766. "The presence of
26 either factor is a sufficient basis to order substantive
27 consolidation." Id. "In either case, the bankruptcy court must
28 in essence determine that the assets of all of the consolidated

1 parties are substantially the same.” Id. at 771. Ultimately,
2 the decision to apply the substantive consolidation doctrine
3 stems from a weighing of the equities and must be tailored to
4 meet the needs of each particular case. Id. at 771.

5 Trustee, as the moving party, has the initial burden of
6 showing either one of the Bonham factors are met. Luxury
7 Jewels, LLC v. Akers (In re Aroonsakool), 2014 WL 1273696, at *8
8 (9th Cir. BAP Mar. 28, 2014) (citing Reider v. Fed. Deposit Ins.
9 Corp. (In re Reider), 31 F.3d 1102, 1107 (11th Cir. 1994)).

10 Once the trustee establishes a close interrelationship between
11 the debtor and the non-debtor entities, there is a presumption
12 that creditors did not rely on their separate credit. The
13 burden of proof then shifts to the parties opposing substantive
14 consolidation to show otherwise. In re Bonham, 229 F.3d at 767.

15 In applying Augie/Restivo’s approach, the Bonham court
16 concluded that substantive consolidation was appropriate where:
17 (1) the target entities were “but instrumentalities of the
18 bankrupt with no separate existence of their own;” (2) there
19 “existed a unity of interest and ownership common to all
20 corporations” such that there was commingling of assets;
21 (3) there was “no clear demarcation” between the affairs of the
22 debtor and the target entities; and (4) adhering to the separate
23 corporate entities theory would result in an injustice to the
24 bankrupt’s creditors. In re Bonham, 229 F.3d at 766-67. Here,
25 these factors are demonstrated in the record by Debtor’s
26 financial and operational commingling of his personal affairs
27 with the Trust and the LLC.

28 As to the Trust, except for the written trust agreement and

1 amendment,⁵ there is nothing in the record which shows a
2 distinction between the Trust and Debtor's personal affairs. At
3 all times, until May 31, 2013, the record shows that Debtor had
4 the exclusive and complete dominion and control over all aspects
5 of the Trust. Under the trust agreement, Debtor had unfettered
6 authority as trustee to make distributions to himself. Acting
7 pursuant to this authority, he made distributions to himself for
8 his personal benefit and made lesser distributions to his
9 children. The record shows that all distributions came directly
10 from the LLC's funds.

11 As noted by the bankruptcy court, there was no record
12 keeping or accounting to establish any distributions to the
13 "member" of the LLC, i.e., the Trust - nor was there any
14 accounting of distributions by Debtor (as trustee of that Trust)
15 to himself (as grantor/beneficiary) or to his children as
16 beneficiaries outside of the LLC's Quickbook "owner draws"
17 entries. In short, no monies from the LLC were ever deposited
18 into a Trust bank account - there wasn't one - and there were no
19 records of activities concerning the Trust from 2008 to 2012.

20 Debtor's disregard of Trust provisions is also demonstrated
21 by his selection of a successor trustee after he resigned as
22 trustee. As noted above, § 4.04 of the trust agreement provided
23 that Judith Appleby (Debtor's sister) would be the successor

24
25 ⁵ As pointed out by the bankruptcy court, the trust
26 agreement was ambiguous and inconsistent. One provision stated
27 that it was irrevocable and not subject to amendment, while
28 another provision gave Debtor as grantor the authority to amend
any of the provisions in the Trust. Furthermore, when Debtor
attempted to amend the trust agreement to make it irrevocable
the relevant provisions were once again inconsistent.

1 trustee once Debtor resigned. If she did not serve, the trust
2 agreement provided that the court would appoint a trustee.
3 Notwithstanding these provisions, once Debtor resigned as
4 trustee he contacted Robert Jones⁶ who agreed to be the
5 successor trustee. After Trustee and other creditors pointed
6 out to the LLC and the Trust that Mr. Jones was not a proper
7 trustee pursuant to § 4.04 of the trust agreement, Ms. Appleby
8 was named as trustee. There is no resignation letter from
9 Mr. Jones in the record. He testified that at some point he was
10 removed as trustee but he could not recall when that was. He
11 also testified that even after he was appointed, it was his
12 impression that Debtor was the trustee of the Trust and manager
13 of the LLC stating: "I had no functionality."

14 Ms. Appleby testified that, when Debtor realized the trust
15 agreement specifically identified her as the successor trustee
16 if Debtor were to resign, it made sense for her to serve rather
17 than Mr. Jones, who lived outside the region. She did not sign
18 any documents to effect this change, but testified that she
19 became the trustee of the Trust and the "manager" of the LLC by
20 September 2013. The bankruptcy court observed that because
21 Ms. Appleby assumed her duties in the fall of 2013, she provided
22 little testimony as to financial transactions of the LLC or
23 Trust, all of which preceded her involvement as trustee.

24 The record also shows that from the LLC's inception in
25 February 2008 through May 31, 2013, Debtor exercised total and

26
27 ⁶ Robert Jones was involved in a relationship with Debtor's
28 ex-wife Stacy Thomas and was like a "step father" to Debtor's
children.

1 sole control over the LLC's operations. Again, the lack of
2 separateness between the LLC and Debtor's personal affairs is
3 demonstrated in the record. Payments reflected as "Jay's Income
4 owner draws" were used to pay for Debtor's personal expenses.
5 For example, the LLC paid Debtor's student loan payments, credit
6 card bills, child support payments, house payments for his
7 children, mortgage payments for rental property owned by Debtor,
8 and personal expenses for Debtor's then-girlfriend. From 2008
9 to May 2013, the LLC paid approximately \$6,500 on a monthly
10 basis for Debtor's personal expenses, and the vast majority of
11 these payments were made directly to other parties on his behalf
12 - not to Debtor himself.

13 With few exceptions, Debtor was also personally liable for
14 the LLC's liabilities. Therefore, many of the LLC's creditors
15 were also creditors in Debtor's bankruptcy case. One of the
16 creditors testified that he had no good understanding of the
17 difference between the LLC and Debtor. Other creditors did not
18 draw distinctions, as shown by various checks made out to
19 "Crystal Springs Ranch," "Jay Clark," "Clark's Crystal Springs,"
20 and "Clark's Crystal Springs Ranch."

21 Debtor also did not separate himself from the LLC.
22 According to the record, during the 2012 farm season, Debtor,
23 not the LLC, contracted with DeVries Family Farm and Van Boven
24 Calf Ranch to sell them hay. Further, no tax returns were filed
25 for the LLC, but instead the operations of the LLC merely passed
26 through to Debtor and were reported on his personal tax returns.

27 Debtor failed to draw distinctions between himself and the
28 LLC even in his bankruptcy filing. He filed his chapter 12

1 petition as "Jay P. Clark, DBA Crystal Springs Ranch." He
2 conflated the LLC's assets and his own in his bankruptcy
3 schedules. For example, he listed as "personal property of the
4 debtor" several LLC checking accounts. He also listed crops
5 consisting of 1,124 acres of wheat (worth \$451,848) and 1,150
6 acres of hay (\$832,140). He did not, however, indicate any
7 ownership of real property on which such crops could be grown.
8 His disclosure of leased ground was unclear as to which was the
9 LLC's and which was his. His statement of financial affairs
10 indicated Debtor had gross income from the operation of "his"
11 business of \$2.4 million in 2011 and almost \$1.3 million in
12 2010. These figures were not shown to be distributions from the
13 LLC, distributions from the Trust, or income from the crops he
14 allegedly personally grew, as distinguished from the gross
15 income of the LLC.

16 Besides the confusion caused by Debtor's schedules, the
17 record shows that the LLC's assets consisted mainly of farm
18 equipment which was leased from Debtor's parents. But the
19 "leased" equipment was depreciated on Debtor's tax returns and
20 not shown as an expense. In responding to discovery, Debtor
21 provided a list of farm machinery "owned" by the LLC. That list
22 shows an auction value of \$364,600. Ms. Appleby testified that
23 the LLC's assets consisted of farm equipment that she had not
24 inventoried. In the end, it was unclear what assets were the
25 LLC's as opposed to Debtor's.

26 In sum, the commingling of assets and the operation of the
27 Trust and the LLC without any formality demonstrates a close
28 interrelationship between Debtor and the Trust and the LLC.

1 Once Trustee established a close interrelationship between
2 Debtor and the LLC and its member Trust, there is a presumption
3 that creditors did not rely on their separate credit. The
4 burden of proof then shifts to the parties opposing substantive
5 consolidation to show otherwise. In re Bonham, 229 F.3d at 767.

6 Here, rather than pointing to any evidence in the record to
7 rebut this presumption, Defendants complain that Trustee's
8 evidence does not show that the creditors dealt with Debtor and
9 Defendants as a single economic unit and, therefore, he did not
10 meet his burden of proof. Defendants suggest, without citation
11 to any authority, that the Bonham test for substantive
12 consolidation requires Trustee to prove what the creditors
13 thought and actually did. Defendants are mistaken.

14 Defendants, as the parties opposing substantive
15 consolidation, had the burden to overcome the presumption that
16 creditors did not rely on the separate credit of the LLC. While
17 Defendants attempted to show the separateness of the LLC and its
18 member Trust, the bankruptcy court found Defendants' evidence
19 "conflicting and inconclusive" and Debtor's testimony not
20 credible or trustworthy. In essence, the bankruptcy court
21 concluded that Defendants did not meet their burden to overcome
22 the presumption once the burden shifted. Therefore, it
23 concluded that the first prong for substantive consolidation was
24 met.

25 Upon careful review of the record, we are satisfied that
26 the bankruptcy court considered all opposing evidence before
27 rejecting one view in favor of the other. The bankruptcy
28 court's account of the evidence is plausible in light of the

1 record cited above and when viewed in its entirety. We may not
2 reverse merely because we may have decided the issue
3 differently. Anderson v. City of Bessemer City, N.C., 470 U.S.
4 564, 573-74 (1985) ("Where there are two permissible views of
5 the evidence, the factfinder's choice between them cannot be
6 clearly erroneous."). Further, as the trier of fact, the
7 bankruptcy court is entitled to evaluate a witness's credibility
8 and to determine whether to believe the testimony or not.
9 Beauchamp v. Hoose (In re Beauchamp), 236 B.R. 727, 731 (9th
10 Cir. BAP 1999), aff'd mem. 5 F. App'x 743 (9th Cir. 2001).
11 "When the testimony of a witness is not believed, the trier of
12 fact may simply disregard it." Bose Corp. v. Consumers Union of
13 U.S., Inc., 466 U.S. 485, 512 (1984). The bankruptcy court's
14 determinations regarding credibility are given due regard on
15 appeal. Anderson, 470 U.S. at 573-74.

16 In the end, we conclude that the record supports the
17 bankruptcy court's conclusion that the first test in Bonham was
18 met and, therefore, consolidation was appropriate. Because we
19 affirm on this basis, it is unnecessary for us to consider
20 whether consolidation was appropriate under the second factor.

21 VI. CONCLUSION

22 For the reasons stated, we AFFIRM.
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