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

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UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

In re:	)	BAP No.	CC-15-1285-KiKuF
	)		
HENRY ISAAC BUSHKIN,	)	Bk. No.	2:11-bk-43502-DS
	)		
Debtor.	)	Adv. No.	2:13-ap-02172-DS
	)		
_____	)		
HENRY ISAAC BUSHKIN,	)		
	)		
Appellant,	)		
	)		
v.	)	<b>MEMORANDUM<sup>1</sup></b>	
	)		
BRUCE SINGER; SINGER	)		
FINANCIAL CORPORATION,	)		
	)		
Appellees.	)		
_____	)		

Argued and Submitted on June 23, 2016,  
at Pasadena, California

Filed - July 22, 2016

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

Honorable Deborah J. Saltzman, Bankruptcy Judge, Presiding

Appearances: \_\_\_\_\_  
Anthony J. Rothman argued for appellant Henry Isaac  
Bushkin; David I. Brownstein argued for appellees  
Bruce Singer and Singer Financial Corporation.

\_\_\_\_\_

Before: KIRSCHER, KURTZ and FARIS, Bankruptcy Judges.

\_\_\_\_\_

<sup>1</sup> This disposition is not appropriate for publication.  
Although it may be cited for whatever persuasive value it may  
have, it has no precedential value. See 9th Cir. BAP Rule 8024-1.

1 Appellant, chapter 7<sup>2</sup> debtor Henry Isaac Bushkin ("Debtor"),  
2 appeals an order denying his motion for attorney's fees and costs  
3 under § 523(d). The bankruptcy court determined that the debt to  
4 Bruce Singer and his wholly-owned entity Singer Financial  
5 Corporation ("SFC") (collectively, the "Singer Parties") was not a  
6 consumer debt and, alternatively, that the Singer Parties' claims  
7 under § 523(a)(2) were substantially justified. We AFFIRM.

## 8 I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

### 9 A. Prepetition events

10 Debtor is an attorney licensed in California and New York.  
11 In or about 2008, he began writing a book about his relationship  
12 with entertainer Johnny Carson, who was his client and friend. At  
13 this point in time, Debtor contends he was suffering financially  
14 due to the economic downturn. In 2008, before the book was  
15 completed, Debtor began marketing it to various publishers, film  
16 studios and agents. Some parties expressed great interest in the  
17 book and represented to Debtor that it had value.

18 To finish the book, Debtor approached Singer, a long-time  
19 friend, for money. Singer agreed to advance Debtor money –  
20 through SFC – in exchange for a share of the proceeds from the  
21 book Debtor was writing. On January 29, 2009, Debtor, Singer and  
22 SFC entered into an agreement (the "Agreement"), which provided  
23 that SFC would make advances to Debtor, who would "devote full  
24 time to the completion" of the manuscript. From the advanced  
25 funds, Debtor could receive living expenses for the months of

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26  
27 <sup>2</sup> Unless specified otherwise, all chapter, code and rule  
28 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and  
the Federal Rules of Bankruptcy Procedure, Rules 1001-9037. The  
Federal Rules of Civil Procedure are referred to as "Civil Rules."

1 February and March 2009, not to exceed \$25,000 per month. Singer  
2 was responsible for exploiting the book and film rights, but  
3 Singer and Debtor would have to mutually agree to the sale of any  
4 such rights.

5 If the manuscript sold, proceeds from the sale would be  
6 divided as follows: 10% would go to an agent; the entire amount  
7 of the advance would be repaid to SFC or Singer; and Singer and  
8 Debtor would split the remaining balance 25/75, respectively. The  
9 Agreement noted that the parties had agreed "to create a legal  
10 entity to own and control the book and film rights to a book  
11 written by Bushkin currently entitled 'The Carson Years,'" and  
12 that the "ownership of the entity to be created [would] be divided  
13 on an equal basis between Bushkin and Singer." If the manuscript  
14 did not sell within six months, Debtor agreed to execute a note to  
15 SFC for the entire amount paid to him or advanced on his behalf.

16 The manuscript did not sell within the agreed six months. On  
17 September 1, 2009, Debtor executed a 36-month promissory note,  
18 agreeing to pay SFC \$159,388.46, the amount advanced to Debtor, at  
19 an annual interest rate of 12%. Debtor defaulted on the note.  
20 Singer sent Debtor a notice of default, informing him that he was  
21 accelerating the note and would send it to collections if Debtor  
22 did not pay by November 15, 2009. Debtor did not pay.

23 **B. Postpetition events**

24 **1. Debtor's bankruptcy filing, Singer Parties' complaint**  
25 **and Debtor's pretrial motions**

26 In his chapter 7 bankruptcy case filed on August 5, 2011,  
27 Debtor listed Singer as an unsecured creditor with a claim of  
28 \$350,000, but did not identify SFC as a creditor. Debtor

1 identified and valued "six chapters of material for a book" at  
2 \$0.00. Singer's residence in California was listed on the  
3 creditors' mailing matrix, but the zip code listed was incorrect.

4 On August 10, 2011, the Bankruptcy Noticing Center ("BNC")  
5 sent the notice of the chapter 7 filing and deadlines to object to  
6 Debtor's discharge to all creditors on the mailing matrix. BNC  
7 apparently caught the zip code error for Singer and corrected it  
8 before mailing out the notice. The deadline for creditors to  
9 challenge the dischargeability of debts was November 21, 2011. No  
10 one filed any complaint for nondischargeability by the deadline.  
11 On June 20, 2012, Debtor received a discharge. BNC mailed the  
12 notice of discharge to creditors on June 22, 2012. Singer claimed  
13 he did not receive either of the notices and had no knowledge of  
14 Debtor's bankruptcy, despite their frequent contact before and  
15 after the filing and the discharge.

16 Meanwhile, Debtor continued writing and eventually published  
17 two books. One book, "Johnny Carson," achieved great success and  
18 was on the New York Times Best Seller list for several months.  
19 Debtor did not share any of the book proceeds with Singer or SFC  
20 and disputed that they owned any share of the book or film rights.

21 After Singer learned from a friend about Debtor's bankruptcy  
22 and discharge in October 2013, the Singer Parties filed an  
23 adversary complaint against Debtor on December 17, 2013. In their  
24 second amended complaint, the Singer Parties alleged claims under  
25 § 523(a)(2)(A), (a)(3)(B) and (a)(4), § 727(d)(2) and claims for  
26 declaratory relief and an accounting. Debtor moved to dismiss.  
27 He asserted that not only was Singer presumed to have received the  
28 mailed notices (which also provided notice to SFC because Singer

1 was SFC's registered agent for service of process at that same  
2 address), he had also actual notice. Because Debtor had met with  
3 Singer for breakfast to discuss the bankruptcy just days before it  
4 was filed, the Singer Parties had both presumed and actual  
5 knowledge of the bankruptcy so they could have filed a timely  
6 nondischargeability complaint.

7 The bankruptcy court dismissed the §§ 523(a)(4) and 727(d)(2)  
8 claims, but did not dismiss the § 523(a)(3)(B) claim because the  
9 Singer Parties' knowledge of the bankruptcy filing was a disputed  
10 factual issue. That left four claims: § 523(a)(2)(A), (a)(3)(B),  
11 declaratory relief and accounting.

12 Debtor then moved for summary judgment, contending that the  
13 remaining claims were time-barred because the Singer Parties  
14 failed to file their dischargeability complaint by the deadline  
15 and they had not provided clear and convincing evidence to rebut  
16 the presumption of receipt of the bankruptcy notice. Debtor  
17 alternatively argued that the Singer Parties' claims had been  
18 discharged; this debt arose from a breached loan/contract.

19 The bankruptcy court denied summary judgment, ruling that  
20 disputed issues of fact remained as to whether the Singer Parties  
21 had actual notice of the bankruptcy.

22 In opposition to the summary judgment motion, Singer had  
23 described his mail practices, stating that he had followed the  
24 same practice for the collection of mail at his home for more than  
25 seven years. His mailbox was located at the street in front of  
26 his residence. If he was home, he collected the mail daily at  
27 3:00 p.m., took it to his kitchen and reviewed it. If he was out  
28 of town, his housekeeper placed the mail in a basket in Singer's

1 kitchen for him to review when he returned. Singer recounted that  
2 he was home on August 10, 2011, but was out of town between  
3 August 11 and August 16, 2011. He stated he received no notices  
4 from the court on August 10 and no notices from the court were in  
5 his mail basket when he returned on August 16. He admitted that  
6 he was home on June 20, 2012, but stated that he had not received  
7 any notice of Debtor's discharge on that date or anytime  
8 thereafter.

9 Singer also stated that his wife is the sister of actress  
10 Sharon Stone, and both she and Ms. Stone have been the victims of  
11 stalkers. Such victimization included the periodic stealing of  
12 mail from Singer's mailbox. In addition, Singer's neighbor  
13 Dr. Jentsch, a UCLA neuroscientist unpopular with animal rights  
14 groups, had been the victim of a car bombing in his driveway, and  
15 persons thinking that Singer's mailbox was Jentsch's were caught  
16 on camera in 2010 taking Singer's mail. Singer knew of the mail  
17 theft because he had hired a private investigator, Paul Barresi,  
18 to look into the matter. He attached a copy of a 2010 article  
19 regarding the mail theft. Singer stated that despite reporting  
20 the mail theft to the Los Angeles Police Department, the problem  
21 had not been remedied and was still occurring with new stalkers of  
22 Ms. Singer, Ms. Stone and Dr. Jentsch.

23 In support of his claims for declaratory relief and  
24 accounting, Singer had presented evidence of emails from Debtor  
25 dated before and after the parties entered into the Agreement,  
26 wherein Debtor referred to the men as "partners," discussed the  
27 status of the book and stated that "everything would be split  
28 50/50" and that Singer would "always own half of the book." The

1 Singer Parties argued that these communications and conduct  
2 evidenced both an oral and written partnership agreement in which  
3 Singer acquired book and film rights to the Johnny Carson book.

4 **2. The trial and the bankruptcy court's ruling on the**  
5 **Singer Parties' claims**

6 Trial proceeded on the remaining four claims. By way of  
7 declaration, Debtor testified that when he spoke to Singer about  
8 writing the book, Singer thought it was a good idea and agreed to  
9 have SFC lend money to Debtor for his personal expenses while he  
10 wrote it. In return, Debtor agreed that he and Singer would be  
11 partners in the book Debtor was writing, if it were published  
12 within the agreed six months. Debtor testified that a partnership  
13 or other entity was to be formed only if the book sold within the  
14 six-month time frame. After the six months ran, Debtor said the  
15 funds advanced became a high interest loan.

16 The bankruptcy court decided to first hear live testimony on  
17 the question of whether the Singer Parties received notice of  
18 Debtor's bankruptcy filing, because if so, the § 523(a) claims  
19 necessarily failed. On cross-examination, Singer denied ever  
20 meeting Debtor for breakfast in California on August 14, 2011, to  
21 discuss the bankruptcy filing. Singer testified that he was in  
22 Montana between August 11 and 16, 2011, and had plane tickets and  
23 receipts to prove it. Singer's testimony at trial regarding his  
24 mail practices was consistent with what he stated in opposition to  
25 Debtor's earlier motion for summary judgment.

26 Following Singer's testimony and the parties' arguments  
27 regarding notice, the bankruptcy court announced its finding that  
28 Singer and SFC had received notice and awarded judgment on the

1 § 523 claims to Debtor. For Singer, the court found that while  
2 his additional evidence of stalkers and mail theft rebutted the  
3 presumption of receipt of the bankruptcy notices, it did not rise  
4 to the level of clear and convincing evidence sufficient to  
5 overcome the presumption. Because notice was proper for Singer,  
6 notice was also proper for SFC; Singer was SFC's only officer and  
7 its agent for service of process, and SFC's service address was  
8 Singer's residence. As a result, the court found that the  
9 § 523(a)(2) claims were untimely.

10 The bankruptcy court declined to take up the declaratory  
11 relief and accounting claims, finding that since the § 523 claims  
12 failed, it made no sense to adjudicate these claims, since any  
13 debt Debtor owed to Singer and SFC arising out the Agreement had  
14 been discharged. The court noted that even if it had found that a  
15 partnership existed and that Singer and SFC had some entitlement  
16 to book or film rights, it did not matter; any prepetition claims  
17 arising from the Agreement had been discharged.

18 The bankruptcy court entered a judgment in favor of Debtor on  
19 all claims on June 18, 2015 (the "Judgment").

20 **3. Singer Parties' motion for reconsideration of the**  
21 **Judgment and appeals**

22 The Singer Parties moved to alter or amend the Judgment under  
23 Civil Rule 59, which the bankruptcy court denied. The Singer  
24 Parties then appealed the Judgment to the district court, which  
25 entered its affirmance while this appeal was pending. The Singer  
26 Parties have appealed the district court's decision to the Ninth  
27 Circuit Court of Appeals.

28 / / /

1           **4. Debtor's motion for attorney's fees and costs**

2           Debtor moved for attorney's fees and costs of nearly \$300,000  
3 against the Singer Parties under § 523(d) ("Fee Motion"). Debtor  
4 contended that he met the requirements of § 523(d): a § 523(a)(2)  
5 judgment was entered in his favor; and the debt at issue was a  
6 consumer debt. Debtor maintained that his debt to Singer and SFC  
7 was a consumer debt, as he had incurred it for his personal,  
8 family and household living expenses. Additional evidence also  
9 established that the debt was consumer debt: (1) Singer told a  
10 friend that he lent Debtor money for living expenses; (2) Debtor's  
11 attached declaration explained that the advanced funds were used  
12 for personal and family expenses; (3) Singer testified in his  
13 deposition that the \$25,000 per month was an advance to Debtor to  
14 live while he wrote the book; and (4) paragraph 8 of the Agreement  
15 (that Debtor could receive up to \$25,000/month for the months of  
16 February and March 2009 for living expenses) established that the  
17 advanced funds were for living expenses. Debtor also claimed that  
18 the Singer Parties' § 523(a)(2) claims were not substantially  
19 justified.

20           The Singer Parties disputed Debtor's contention that the debt  
21 was consumer debt, arguing that the purpose for which the debt was  
22 incurred determines whether it is consumer debt and debts incurred  
23 with a profit motive are not consumer debts. In this case, Debtor  
24 was provided money as part of a business deal, wherein each of the  
25 parties anticipated and stood to gain substantial profit from the  
26 eventual sale of the Johnny Carson book. Those profits were to be  
27 divided within a partnership formed between Debtor and the Singer  
28 Parties. The Singer Parties contended that the purpose of the

1 transaction was a business transaction to create a profitable  
2 business partnership; no loan was given to Debtor merely to  
3 provide for personal, family or household purposes.

4 In reply, Debtor argued that in determining whether a debt is  
5 consumer debt for purposes of § 523(d), courts look to the **use** of  
6 the debt. Here, argued Debtor, the evidence showed that the  
7 \$159,388.46 loan to Debtor was incurred for his personal and  
8 family expenses; the funds were not used for any profit or  
9 business purpose. Debtor disputed the Singer Parties' position  
10 that because their § 523(a)(2) claims survived various procedural  
11 motions, this proved they were substantially justified. In all  
12 circumstances, argued Debtor, SFC had no evidence of any fraud  
13 claim under § 523(a)(2). All SFC had established was that it lent  
14 money and was a party to a prepetition agreement with Debtor.

15 **5. The bankruptcy court's ruling on the Fee Motion**

16 The bankruptcy court denied the Fee Motion at the hearing on  
17 August 11, 2015. It first determined that the advanced funds to  
18 Debtor were not consumer debt:

19 THE COURT: Now, while the case ultimately found that the  
20 debt was a consumer debt, the reasoning of In re Stein  
21 [sic] - and that's the BAP case, which was affirmed by  
22 the Ninth Circuit - leads me to conclude here that the  
23 Debtor has not established that this is a consumer debt.  
24 While funds may have been used for living expenses, it's  
25 quite clear that debts incurred by the Debtor with a  
26 profit motive are not consumer debt. That's the finding  
27 of the . . . Stein [sic] case. And my finding here is  
28 that these parties entered into some sort of commercial  
agreement. Whether it was a partnership or not is beside  
the point. The agreement was made to write and develop  
the book. There was always a profit motive among the  
parties with - in connection with the parties'  
arrangement, in connection with the note signed by the  
Debtor. This was an arrangement to write and market a  
book. This was a commercial relationship. This was not  
a consumer debt.

1 Hr'g Tr. (Aug. 11, 2015) 16:13-17:4. The court then determined  
2 that the Singer Parties' claims were substantially justified,  
3 finding that they had a reasonable factual and legal basis.

4 Debtor timely appealed the order denying the Fee Motion.

## 5 **II. JURISDICTION**

6 The bankruptcy court had jurisdiction under 28 U.S.C. §§ 1334  
7 and 157(b)(2)(I) and (O). We have jurisdiction under 28 U.S.C.  
8 § 158.

## 9 **III. ISSUES**

10 1. When denying the Fee Motion, did the bankruptcy court err in  
11 determining that the advanced funds were not a consumer debt?

12 2. Did the bankruptcy court abuse its discretion in denying the  
13 Fee Motion under § 523(d)?

## 14 **IV. STANDARDS OF REVIEW**

15 A bankruptcy court's denial of attorney's fees and costs  
16 under § 523(d) is reviewed for abuse of discretion. See First  
17 Card v. Hunt (In re Hunt), 238 F.3d 1098, 1101 (9th Cir. 2001)  
18 (citing First Card v. Carolan (In re Carolan), 204 B.R. 980, 984  
19 (9th Cir. BAP 1996)); Stine v. Flynn (In re Stine), 254 B.R. 244,  
20 248 (9th Cir. BAP 2000), aff'd, 19 F. App'x 626 (9th Cir. 2001).  
21 The court abuses its discretion if it applied the wrong legal  
22 standard or its findings were illogical, implausible or without  
23 support in the record. TrafficSchool.com, Inc. v. Edriver Inc.,  
24 653 F.3d 820, 832 (9th Cir. 2011).

25 Determining whether a debt is consumer or business is a  
26 factual question reviewed for clear error. See Aspen Skiing Co.  
27 v. Cherrett (In re Cherrett), 523 B.R. 660, 667 (9th Cir. BAP  
28 2014) (implying that a determination of whether a debt is

1 "consumer debt" for purposes of § 707(b)(1) is a factual finding  
2 reviewed for clear error). But see In re Booth, 858 F.2d 1051,  
3 1053 n.5 (5th Cir. 1988) (whether bankruptcy court correctly  
4 classified a debt as consumer or business for purposes of § 707(b)  
5 is a legal inquiry and subject to de novo review).

## 6 V. DISCUSSION

### 7 A. Section 523(d)

8 If a creditor prosecutes an action for an exception to  
9 discharge of a debt under § 523(a)(2) and that debt is then  
10 ordered discharged by the bankruptcy court, § 523(d) is  
11 implicated. That statute provides:

12 (d) If a creditor requests a determination of  
13 dischargeability of a consumer debt under subsection  
14 (a)(2) of this section, and such debt is discharged, the  
15 court shall grant judgment in favor of the debtor for the  
16 costs of, and a reasonable attorney's fee for, the  
proceeding if the court finds that the position of the  
creditor was not substantially justified, except that the  
court shall not award such costs and fees if special  
circumstances would make the award unjust.

17 Section 523(d) was enacted to "curb the abusive practices of  
18 consumer finance companies, who often filed bad faith  
19 dischargeability actions in the knowledge that the financially  
20 straitened debtor would be forced to settle the claim, rather than  
21 bearing the expense of a trial on the merits." All Am. of  
22 Ashburn, Inc. v. Fox (In re Fox), 725 F.2d 661, 663 (11th Cir.  
23 1984).

24 To recover attorney's fees under § 523(d), a debtor must  
25 prove: (1) the creditor requested a determination of the  
26 dischargeability of the debt under § 523(a)(2); (2) the debt is a  
27 consumer debt; and (3) the debt was discharged. In re Stine,  
28 254 B.R. at 249; Am. Sav. Bank v. Harvey (In re Harvey), 172 B.R.

1 314, 317 (9th Cir. BAP 1994) (citing Chevy Chase, F.S.B. v.  
2 Kullgren (In re Kullgren), 109 B.R. 949, 953 (Bankr. C.D. Cal.  
3 1990)). Once these three elements are satisfied, the burden  
4 shifts to the creditor to demonstrate that its position was  
5 substantially justified. In re Stine, 254 B.R. at 249;  
6 In re Harvey, 172 B.R. at 317. A creditor is "substantially  
7 justified" in bringing a § 523(a)(2) claim if the claim has a  
8 "reasonable basis both in law and in fact." In re Hunt, 238 F.3d  
9 at 1103.

10 **B. The bankruptcy court did not err in determining that the**  
11 **advanced funds were not consumer debt.**

12 "Consumer debt" is defined in § 101(8) as "debt incurred by  
13 an individual primarily for a personal, family or household  
14 purpose." This definition is adapted from the definition used in  
15 various consumer protection laws. In re Stine, 254 B.R. at 249.  
16 The term "consumer debt" is used throughout the Code. See  
17 § 524(c)(6)(B) (excepting consumer debts secured by real estate  
18 from reaffirmation requirements); § 707(b)(1) (providing for  
19 dismissal of chapter 7 cases filed by individual debtors "whose  
20 debts are primarily consumer debts" for substantial abuse);  
21 § 1301(a) (staying actions against a co-debtor to collect consumer  
22 debt). "[T]here is a natural presumption that identical words  
23 used in different parts of the same act are intended to have the  
24 same meaning." Atl. Cleaners & Dyers, Inc. v. United States,  
25 286 U.S. 427, 433 (1932). Thus, in addition to those cases  
26 construing the term "consumer debt" under § 523(d), we may  
27 consider cases construing other sections of the Code in which the  
28 term "consumer debt" is used. Cypher Chiropractic Ctr. v. Runski

1 (In re Runski), 102 F.3d 744, 746-47 (4th Cir. 1996).

2 "It is settled in this circuit that the purpose for which the  
3 debt was incurred affects whether it falls within the statutory  
4 definition of 'consumer debt' and that debt incurred for business  
5 ventures or other profit-seeking activities does not qualify."  
6 Meyer v. Hill (In re Hill), 268 B.R. 548, 552-53 (9th Cir. BAP  
7 2001) (discussing "consumer debt" in § 1322(b)(1)) (citing Zolg v.  
8 Kelly (In re Kelly), 841 F.2d 908, 913 (9th Cir. 1988) ("Debt  
9 incurred for business ventures or other profit-seeking activities  
10 is plainly not consumer debt for purposes of section 707(b).");  
11 In re Cherrett, 523 B.R. at 669 ("courts generally ascribe a  
12 **business** purpose, rather than a personal, family or household  
13 purpose to debts which are incurred 'with an eye toward profit'  
14 and which are 'motivated for ongoing business requirement'")  
15 (emphasis in original); In re Stine, 254 B.R. at 249 (a § 523(d)  
16 case citing In re Booth, 858 F.2d at 1055, a § 707(b) case, for  
17 the proposition that debts incurred by the debtor with a profit  
18 motive are not consumer debts).

19 Other circuits apply a similar "profit motive" or "business  
20 venture" test for the determination of consumer debt. See IRS v.  
21 Westberry (In re Westberry), 215 F.3d 589, 593 (6th Cir. 2000)  
22 (considering "profit motive" test in determining whether income  
23 tax debts should be considered consumer debts for purposes of  
24 applying the co-debtor stay under § 1301); Citizens Nat'l Bank v.  
25 Burns (In re Burns), 894 F.2d 361, 363 (10th Cir. 1990) (§ 523(d)  
26 case holding that a credit transaction is not a consumer debt when  
27 it is incurred with a profit motive); In re Booth, 858 F.2d at  
28 1055 (Fifth Circuit Court of Appeals discussing "consumer debt" in

1 § 707(b) and holding that a debt is a business debt, as compared  
2 to a debt acquired for a personal, family, or household purpose,  
3 when it is "incurred with an eye toward profit").

4 The determination of whether a debt relates to a personal,  
5 family, or household purpose or is motivated by profit-seeking is  
6 made at the time the debt is incurred. In re Nicolas, 2002 WL  
7 32332461, at \*2 (Bankr. D. Haw. Mar. 22, 2002) (citing  
8 In re Bertolami, 235 B.R. 493, 497 (Bankr. S.D. Fla. 1999)  
9 (holding that mortgage debt incurred for personal residence was a  
10 consumer debt notwithstanding its later conversion to commercial  
11 use)).

12 Debtor contends that the bankruptcy court applied an  
13 incorrect standard of law for determining whether the advanced  
14 funds were a consumer or business debt. Debtor contends that the  
15 court improperly relied on Stine – which he argues had nothing to  
16 do with defining a consumer or business debt and never defined  
17 profit motive – to conclude that the advanced funds were incurred  
18 by Debtor with a profit motive and therefore were not consumer  
19 debt. While it is true that Stine did not define "profit motive,"  
20 it did analyze whether the debts at issue were incurred by the  
21 debtor for personal, family or household purposes. The Panel  
22 concluded that because the debtor had borrowed funds for the  
23 purpose of improving her home and incurred further debt when the  
24 creditor made mortgage, insurance and tax payments for the home on  
25 the debtor's behalf, the debts were "consumer debts" as defined by  
26 § 101(8). 254 B.R. at 250.

27 In any event, we fail to see the point of Debtor's argument.  
28 Regardless of what Debtor claims is a "gratuitous statement of

1 law" in Stine, that "debts incurred by the debtor with a profit  
2 motive are not consumer debts," the rule in this circuit is clear:  
3 courts must look to the **purpose** of the debt in determining whether  
4 it is "consumer debt," and debt incurred for business ventures or  
5 other profit-seeking activities is **not** consumer debt. In re Kelly,  
6 841 F.2d at 913; In re Cherrett, 523 B.R. at 668-69; In re Hill),  
7 268 B.R. at 552-53. Thus, the bankruptcy court did not err when  
8 it applied that legal standard.

9       Nonetheless, despite this circuit's law, Debtor contends that  
10 the **use** of the funds is determinative for characterizing whether a  
11 debt is a consumer or business debt. Because Debtor "used" the  
12 advanced funds to pay his personal expenses, he maintains that the  
13 debt is consumer debt. We disagree.

14       In Cherrett, a recent case by this Panel, we examined the  
15 distinction between consumer and business debt in the context of  
16 incurring housing debt for a business purpose. The debtor was  
17 offered a job by Aspen Skiing Company for high compensation.  
18 523 B.R. at 663. As part of his employment package, he negotiated  
19 an interest-free loan of \$500,000 from Aspen to purchase a home.  
20 In 2007, the debtor borrowed the \$500,000 from Aspen to purchase a  
21 \$1 million home secured by a second trust deed. Id. at 664. The  
22 debtor hoped the home would appreciate in value so that when it  
23 was sold, he would realize a profit, as he did with his previous  
24 home. Id. Things did not turn out as planned. The real estate  
25 market greatly declined in 2008, and the debtor eventually left  
26 Aspen's employ in 2011. Id.

27       In moving to dismiss his chapter 7 case under § 707(b)(1),  
28 Aspen argued that the home loan was "consumer debt" because the

1 debtor had obtained the loan to purchase his personal residence.  
2 Id. at 668. Aspen argued that the home loan did not become a  
3 "business debt" simply because it was part of the debtor's  
4 compensation. Id. at 670. In affirming the bankruptcy court's  
5 determination that the home loan was business debt, the Panel  
6 ruled that "the key factor in determining whether a debt is  
7 consumer debt lies in the **debtor's purpose** in incurring the debt."  
8 Id. (emphasis in original). Thus, even though secured debt  
9 incurred to purchase or improve a debtor's personal residence is  
10 generally consumer debt, Price v. United States Tr. (In re Price),  
11 353 F.3d 1135, 1139 (9th Cir. 2004), the bankruptcy court had  
12 properly characterized the home loan as business debt, because the  
13 debtor's primary purpose in obtaining the loan was for business as  
14 it was an integral part of his employment. In re Cherrett,  
15 523 B.R. at 670-72.

16 Debtor's contention that "use" of the debt is determinative  
17 for characterizing whether a debt is consumer or business debt  
18 defies our controlling authority. Even though the debtor in  
19 Cherrett obtained the home loan to buy a personal residence, which  
20 is generally considered a consumer debt, and he did in fact use  
21 those funds to buy it, the **purpose** of the home loan had a business  
22 purpose; it was an integral part of the business arrangement  
23 between the parties and clearly had a profit motive for the  
24 debtor. Applying the standard of "use" Debtor suggests is  
25 unworkable. A debtor could convert the character of a debt from  
26 business to consumer (and vice versa) by simply using the funds  
27 for a purpose different than the original purpose. Plus, it  
28 eliminates the court's consideration of the debtor's motive, which

1 must be viewed at the time the debt was incurred. In re Nicolas,  
2 2002 WL 32332461, at \*2; In re Bertolami, 235 B.R. at 497.

3 Here, although Debtor testified that the advanced funds were  
4 used for his personal expenses and paragraph 8 of the Agreement  
5 provides that Debtor could receive up to \$50,000 total for living  
6 expenses for the months of February and March 2009, it is clear  
7 that the **purpose** of the advances to Debtor was for a business  
8 enterprise with an eye toward profit. Debtor approached Singer  
9 and obtained the loan from SFC for the sole purpose of funding the  
10 writing of his book. The parties agreed to split the proceeds if  
11 the book sold within six months. SFC advanced funds to Debtor so  
12 that he could focus his efforts on writing the book and not have  
13 to worry about the pressures of daily finances or about paying  
14 others who were involved in its completion (who Debtor did pay  
15 with some of the funds). Obviously, the faster Debtor could write  
16 the book, the faster the parties could make money, which clearly  
17 was the primary purpose of their arrangement. The funds here, not  
18 unlike those in Cherrett, functioned as Debtor's compensation  
19 during that six-month period.

20 Therefore, because the debt was incurred with a profit  
21 motive, it is not consumer debt. Accordingly, the bankruptcy  
22 court did not err in determining that Debtor failed to meet his  
23 burden in establishing that the advanced funds were consumer debt.  
24 As a result, Debtor was not entitled to attorney's fees and costs  
25 under § 523(d). Given this conclusion, we need not decide whether  
26 the bankruptcy court correctly concluded that the Singer Parties'  
27 § 523(a)(2) claims were substantially justified.

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**VI. CONCLUSION**

For the foregoing reasons, we AFFIRM.