UNITED STATES BANKRUPTCY COURT

EASTERN DISTRICT OF CALIFORNIA

MODESTO DIVISION

In re MANUEL L. MONIZ, III and TAMMI S. MONIZ, Debtor(s).	Case No. 09-90802-E-7
VAN DE POL ENTERPRISES, INC., Plaintiff(s), v. MANUEL L. MONIZ, III and TAMMI S. MONIZ, Defendant(s).	Adv. Pro. No. 09-9056

SUPPLEMENTAL FINDINGS OF FACT AND CONCLUSIONS OF LAW
February 16, 2011 Ruling on the Record

On February 16, 2011, the court announced its findings of fact and conclusions of law on the record in Adversary Proceeding 09-09056, *Van de Pol Enterprises, Inc. v. Tammy Moniz and Manuel Moniz*, pursuant to Rule 52, Federal Rules of Civil Procedure, and Rule 7052, Federal Rules of Bankruptcy Procedure. The court issues these Supplemental Findings of Fact and Conclusions of Law to provide a clear record for counsel in the post-judgment environment.

Determination of Insolvency

In the court's ruling, the determination has been made that Moniz, Inc. was insolvent as of July 30, 2008, and thereafter. The determination was made based on the testimony of Scott MacEwan and the balance sheets and financial statements of Moniz, Inc. (Exhibit 11), the testimony of Steven Becker, and the corporate records showing that Moniz, Inc. ceased operations on or about July 8, 2008 (Exhibit 10 and the testimony of Tammy Moniz). The court determined that the assets of the company were $1,128,325.91, while the liabilities were $1,547,717.26. These numbers are consistent with those argued by Tammy Moniz and Manuel Moniz at the trial and the testimony of both Scott MacEwan and Steven Becker, as well as the Moniz, Inc. balance sheet for August 2008 (Exhibit 11). The insolvency shown on the balance sheets increases dramatically to ($850,003.25) in September 2008 and ($1,204,570.72) in October 2008.

Steven Becker testified that the balance sheets did not reflect the true value for the assets of the business, in large part because the Moniz, Inc. customer list was not included in the assets. Mr. Becker assigned a value of $1,327,930.00 for the customer list. The court did not find Mr. Becker's testimony to be of assistance, as an expert, or persuasive. No methodology was given for this valuation. Further, no testimony was provided as to why, if a $1,327,930.00 asset existed post July 30, 2008, that asset was not liquidated for the benefit of creditors, Tammy Moniz, and Manuel Moniz. Testimony was given that other assets of Moniz, Inc. were sold, though no specifics of those sales were provided. Also, no testimony was provided as to what value was obtained for

these assets or the specific assets sold.

Mr. Becker also provided testimony that he used the standard valuation methods of the sales comparison, cost, and income capitalization. He opined that the income capitalization method was the most appropriate. The sales comparison was not used because he did not have comparable sales. Moniz, Inc. was a closely-held company, and closely-held companies do not make their financial information public. For the cost valuation method, Mr. Becker determined that Moniz, Inc. had a value of $808,000.00, but that this only took into place recreating the physical business. Since Moniz, Inc. was a distribution company with a relatively small infrastructure requirement, he believed that this did not reflect the value of the business.

Under the income capitalization method, Mr. Becker concluded that the company would have a value of $1,885,580.00. To this he added an additional $1,327,930.00 for the value of the customer list. In coming to this conclusion, Mr. Becker did not provide a persuasive explanation as to how a customer list, which was necessary to generate the income upon which he based his income approach, would have a separate value above the income it generated. The court determines that the value of the customer list in this case, if any, is included in the value of the business under an income capitalization approach.

Further, the court does not find persuasive Mr. Becker's testimony that the income capitalization approach is the proper method for valuing Moniz, Inc. after July 30, 2008, when operations had ceased. Tammy Moniz testified that she and Manuel Moniz had attempted to sell the business, including efforts to sell it to Van

de Pol Enterprises, Inc. Their efforts to sell the business had been rejected. By July 30, 2008, the company had ceased operations and was generating no income. It was being sued and Van de Pol Enterprises, Inc. had obtained a writ of attachment on the Moniz, Inc. accounts receivable. As Tammy Moniz testified, after July 30, 2008, the assets of Moniz, Inc. continued to decline because it was not operating and not generating any new accounts receivable. The court is not persuaded that using an income capitalization valuation method is the most appropriate, and would produce an accurate result, for valuing a company which ceased operations, was liquidating its assets, and could not be sold.

In addition to proposing separate values for the client list, Mr. Becker also believes that the value of fuel tanks which Moniz, Inc. owned and placed on customers' properties had a value greater than that stated on the balance sheets. His basis for coming to this conclusion was information provided to him by Manuel Moniz. Mr. Becker did not present any information concerning his investigation into the tanks, valuation of the tanks, or what the tanks actually were sold for by Moniz, Inc. in the Fall of 2008. Testimony was provided that not all of the tanks were sold by Moniz, Inc., and that the remaining tanks had not been sold by the Moniz, Inc. Chapter 7 trustee. The court cannot ascribe any additional value to the tanks above what Moniz, Inc. (presumably) correctly stated on its balance sheet. Merely because Mr. Becker is an expert witness, he cannot re-communicate hearsay information from Manuel Moniz and transform it into non-hearsay testimony. The court does not find persuasive the information and opinion by Mr. Becker that the value of the tanks should be increased.

Additionally, Mr. Becker's Forensic Business Fair Market Valuation, attached to his direct testimony statement is that the list/book of business valuation for Moniz, Inc. is between $1,300,000.00 to $1,350,000.00. If the court were inclined to just adopt his valuation opinion, which it is not, then Moniz, Inc. is still insolvent.

Computation of Van de Pol Enterprises, Inc.'s Interest as Beneficiary of Trust For Determining Judgment Amount

As announced on the record, the court determined that in the Summer and Fall of 2008, Moniz, Inc. was insolvent and the officers, directors, and shareholders, Tammy Moniz and Manuel Moniz, knew that the company was out of business and was being sued by Van de Pol Enterprises. With knowledge of the insolvency and pending litigation, Tammy Moniz and Manuel Moniz disbursed $352,887.22 to themselves after July 20, 2008, from the trust for creditors created by the insolvency of Moniz, Inc. The Defendants contend that the maximum monetary judgment for Van de Pol Enterprises, Inc. under an insolvent corporation trust fund doctrine for the monies improperly taken by the officers, directors, and shareholders of the corporation is limited to the percentage of the monies taken that is equal to the percentage of the Van de Pol Enterprises, Inc. claim of the total claims of creditors against Moniz, Inc.

As stated in its findings on the record, using the information from the Trustee's final report in the Moniz, Inc. bankruptcy case, Docket Entry No. 129 in Case No. 08-92125, Moniz, Inc. creditors have $1,300,088.69 in unsecured claims (priority and general unsecured claims), of which $734,978.22 is the Van de Pol

Enterprises, Inc. claim. The Defendants argue that any judgment for Van de Pol Enterprises, Inc. is limited to $199,487.16 (56.53% of $352,887.25). In support of this argument, the Defendants direct the court to *Oney v. Weinberg*, 410 B.R. 19 (9th Cir. BAP 2009). On page 34 and in footnote 11, the Bankruptcy Appellate Panel comments that the trial court allowed only the creditor's proportionate share of the funds transferred, not its entire claim up to the amount of the transferred funds under Arizona law.

The Bankruptcy Appellate Panel addressed the issue of the trust fund doctrine in *Nahman v. Jacks*, 266 B.R. 728 (9th Cir. BAP 2001), concluding that California courts have recognized that all assets of a corporation, immediately upon becoming insolvent, become a trust fund for the benefit of creditors, citing to *Saracco Tank & Welding Co. Ltd. v. Platz*, 65 Cal. App.2d 306 (1944). More recently, the District Court of Appeal reaffirmed the trust fund doctrine in California and that actions of the officers and directors that divert or dissipate assets that might otherwise be used to pay creditor claims may be avoided. *Berg & Berg Enterprises, LLC v. Boyle*, 178 Cal.App. 4th 1020, 1041 (2009). This precludes the officers and directors from diverting the assets to entities in which they have an interest or themselves. *Id.*, pg. 1040.

The Bankruptcy Appellate Panel in *Jacks* and the District Court of Appeal in *Berg* cite to the seminal United States Supreme Court case, *Pepper v. Litton*, 308 U.S. 295, 306-307 (1939). In *Pepper*, the Supreme Court stated that a claim of an officer, director, or stockholder in a bankruptcy proceeding could be subordinated to other creditor claims if the officer, director, or controlling

shareholder breached his or her fiduciary duty. The officer, director, or shareholder is not allowed to participate in the assets of the corporation, even for bona fide debt if there has been a breach of that person's fiduciary duty. This principle recognizes that a wrongdoing fiduciary is not allowed to partake in the assets of the trust.

Neither party has addressed for the court the proper method for computing the interests of beneficiaries in an insolvent corporation trust when the wrongdoer officers, directors, and shareholders file bankruptcy and obtain a discharge that alters the rights of some of the creditors holding beneficial interests in the trust. Upon considering the issue, the court does not concur with the Defendants that the discharge in bankruptcy works to effectively transfer the beneficial interests of creditors to the wrongdoer officers, directors, and shareholders and that such wrongdoers effectively share in the recovery of the monies which they improperly disbursed by retaining the percentage interests of the creditors' discharged claims.

Under the insolvent corporation trust fund doctrine, when a corporation is insolvent, the corporate assets are held in trust for the benefit of creditors. *Jacks, supra*, 266 B.R. at 737. The officers, directors, and shareholder (Tammy Moniz and Manuel Moniz in this case) are the trustees of the trust. Under California trust law, a trustee has a duty not to use or deal with trust property for the trustee's own profit or for any other purpose unconnected with the trust. 13 WITKIN SUMMARY CALIFORNIA LAW, 10TH EDITION, TRUSTS § 66. A trustee has a duty to administer the trust solely in the interests of the beneficiaries. 13 WITKIN SUMMARY CALIFORNIA LAW,

10TH EDITION, TRUSTS § 64. *See* California Probate Code § 16002. The beneficiary of a trust has the right to recover wrongfully disposed trust property, as well as suing the trustee personally. 13 WITKIN SUMMARY CALIFORNIA LAW, 10TH EDITION, TRUSTS § 129. The trustee does not have the right or power to take trust assets away from the beneficiaries.

Tammy Moniz and Manuel Moniz commenced a voluntary Chapter 13 case, which was converted to a Chapter 7 liquidation. In the Chapter 7 case, only one creditor asserted that it has rights as a trust beneficiary against Tammy Moniz and Manuel Moniz, that being Van de Pol Enterprises, Inc. Tammy Moniz and Manuel Moniz obtained their discharge in the Chapter 7 case on June 3, 2010. The effect of this discharge is that any of the other creditors who could have asserted claims against Tammy Moniz and Manuel Moniz are permanently enjoined by the statutory discharge injunction imposed by 11 U.S.C. § 524. For whatever reason, these other holders of beneficial interests in the trust have elected to allow their interests in the monies taken by Tammy Moniz and Manuel Moniz to lapse.

The court has considered the effect of holders of a beneficial interest in a trust waiving their interests, and upon such a waiver occurring, who has the right to the monies relating to those interests. The court concludes that it is only the beneficiaries who have enforceable rights and interests who are entitled to recover the diverted trust assets. The wrongdoing trustees do not acquire a right to retain the trust assets which were diverted. This is consistent with the purpose underlying the doctrine creating a trust for the benefit of creditors upon the insolvency

of a corporation – payment of the corporate assets to creditors and not have it diverted by the officers, directors, and shareholders to their own benefit. This is also consistent with the purpose underlying bankruptcy and the discharge granted to debtors, and the long standing principle stated in *Pepper v. Litton*, *supra*.

In *Cohen v. De La Cruz*, 523 U.S. 213, 222-223 (1998), Justice O'Conner writing for a unanimous Supreme Court addressing nondischargeability of a debt states the general policy for exceptions to discharge is that the creditor's interest in recovering full payment outweighs the debtor's interest in a fresh start. In its earlier decision, *Grogan v. Garner*, 498 U.S. 279, 286-287 (1991), the Supreme Court unambiguously stated the basic underpinning of the debtor's discharge and the Congressional purpose underlying creating exceptions to discharge.

> This Court has certainly acknowledged that a central purpose of the Code is to provide a procedure by which certain insolvent debtors can reorder their affairs, make peace with their creditors, and enjoy "a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt." *Local Loan Co. v. Hunt, 292 U.S. 234, 244, 78 L. Ed. 1230, 54 S. Ct. 695 (1934)*. But in the same breath that we have invoked this "fresh start" policy, we have been careful to explain that the Act limits the opportunity for a completely unencumbered new beginning to the "honest but unfortunate debtor." *Ibid.*
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> The statutory provisions governing nondischargeability reflect a congressional decision to exclude from the general policy of discharge certain categories of debts -- such as child support, alimony, and certain unpaid educational loans and taxes, as well as liabilities for fraud. Congress evidently concluded that the creditors' interest in recovering full payment of debts in these categories outweighed the debtors' interest in a complete fresh start. We think it unlikely that Congress, in fashioning the standard of proof that governs the applicability of these provisions, would have favored the interest in giving perpetrators of fraud a fresh start over the interest in protecting victims of fraud. Requiring the creditor to establish by a preponderance of

> the evidence that his claim is not dischargeable reflects a fair balance between these conflicting interests.

This general policy that a wrongdoer debtor is not to profit from his discharge was also addressed by the Ninth Circuit Court of Appeals in *Boyajian v. New Falls Corporation*, 564 F.3d 1088 (9th Cir. 2009). In *Boyajian* the plaintiff was the assignee of a state court judgment for breach of contract. The assignee asserted that the judgment was nondischargeable because the debtor had provided fraudulent financial statements to induce the original creditor to enter into the contract, and the debt arising from the contract was nondischargeable pursuant to 11 U.S.C. § 523(a)(2)(B). The debtor argued that the debt was dischargeable because the alleged fraud had not been made to the assignee plaintiff, and the debtor was insulated from nondischargeabilty of the debt.

> The Bankruptcy Code "limits the opportunity for a completely unencumbered new beginning to the honest but unfortunate debtor." *Grogan v. Garner, 498 U.S. 279, 286-87, 111 S. Ct. 654, 112 L. Ed. 2d 755 (1991)* (quotation marks omitted). While the bankruptcy court in this case held in favor of the Boyajians, it noted the perversity of permitting dishonest debtors to receive a discharge through the fortuity that their creditor chose to assign the debt. Moreover, if assignment of such a debt were to obviate a future non-dischargeability action in all cases where the assignee did not itself rely on misleading financial statements, the functioning of modern debt markets would be unnecessarily disrupted. There is no reason to construe *§ 523(a)(2)(B)(iii)* to require such an outcome.

Id., pg 1092-1093. The Ninth Circuit Court of Appeals ruled that the assignee of a claim could assert the nondischargeable basis of the claim, and the debtor would not receive a windfall by virtue of the decision by the original creditor to sell the judgment. The nondischargeable nature of the debt precludes the debtor from benefitting from the nondischargeable conduct if a creditor assets

its rights.

The same principles apply in this case. Tammy Moniz and Manuel Moniz diverted $352,887.22 to themselves when Moniz, Inc. was clearly insolvent, out of business, and being sued by Van de Pol Enterprises, Inc. There is no dispute that Van de Pol Enterprises, Inc.'s claim against Moniz, Inc. was $734,978.22 (this does not include any post-petition interest that has accrued on the obligation). As events have transpired, Van de Pol Enterprises, Inc. is the only beneficiary of the insolvent corporations trust that has the right to assert its beneficial interest to recover the $352,887.22 taken by Tammy Moniz and Manuel Moniz. This represents 100 percent of the valid, enforceable beneficial interests in the trust monies that can be recovered from Tammy Moniz and Manuel Moniz. The court rejects the debtors contention that Tammy Moniz and Manuel Moniz have the right to retain $153,400.06 (43.47% of $352,887.22) of the trust monies they improperly diverted to themselves.

Joint and Several Judgment For the Breach of Fiduciary Duty Damages

Tammy Moniz and Manuel Moniz have further argued that the court should not make them jointly and severally liable for the $352,887.22 which they jointly authorized to be disbursed to the two of them. Rather, then contend that the liability should be separate and limited to the amount disbursed to each of them individually on the checks which they issued to themselves. The court rejects this contention. First, Tammy Moniz and Manuel Moniz are married and no evidence was presented that any of the monies disbursed were the separate assets of either person. Family Code

§ 760 expressly provides that assets acquired during a marriage are community property and each member of the community, in this case Tammy Moniz and Manuel Moniz. The fact that Tammy Moniz and Manuel Moniz, as the officers of Moniz, Inc. chose to structure the transfers in checks issued to each of them does not defeat their respective interests in the monies they diverted from the trust.

Second, Tammy Moniz and Manuel Moniz jointly determined to authorize and make the payments to themselves. Exhibit 10. No evidence was presented that Tammy Moniz and Manuel Moniz received these community assets. The testimony of Tammy Moniz that they took $125,000.00 of these monies and paid down the mortgage on their home, which they list as a joint asset on their Schedules filed in the bankruptcy case. Docket Entry No. 10, case no. 09-90802.

Third, from the evidence presented, the court concludes that Tammy Moniz and Manuel Moniz jointly structured the diversion of the trust assets to the two of them. The court does not find plausible the contention that the payments to them are separate and independent events.

The correct judgment in this case is for each Defendant to be jointly and severally liable for the damages arising from the breach of fiduciary duty by these two trustees.

These findings of fact and conclusions of law supplement those made by the court on the record at the February 16, 2011 trial in this adversary proceeding.

Dated: March 8, 2011

/s/ Ronald H. Sargis
RONALD H. SARGIS, Judge
United States Bankruptcy Court