No. 15-56800
(Consolidated with No. 17-55530)

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHERI FU and THOMAS FU
Debtors, Defendants and Appellants,
v.
CITY NATIONAL BANK, N.A.
Creditor, Plaintiff and Appellee.

APPELLANTS' REPLY BRIEF

On Appeal From A Nondischargeable Money Judgment Entered by Hon. Theodor Albert, U.S. Bankruptcy Court, C.D. Cal., So. Div., in Adv. No. 8:13-ap-01255-TA arising in Case No. 8:09-bk-22699-TA (Jointly Administered with 8:09-bk-22695-TA)

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I. INTRODUCTION

In Appellee's Answering Brief ("AAB"), City National Bank, N.A. ("CNB") makes light of its due process and Rule violations that materially prejudiced the ability of appellants Cheri Fu and Thomas Fu to mount a fulsome defense to CNB's conclusory claims. In its "move on, nothing to see here" approach to the facts and evidence, CNB purports to justify the Bankruptcy Court's rush to judgment against the Fus and its facile excusal of CNB's prejudicial errors by citing the District Court's observation that "The Bankruptcy Court was correct that the Fus were not contesting the amount that they were loaned or any wrongdoing on the part of CNB." (AAB at 34.)

According to CNB, "[t]hat is the end of the story." (*Id.*).[1]

Not so; far from it. Half of that "story" is pure fiction, untethered to the facts.

While CNB loaned money it hasn't recovered yet, CNB also engaged in abuses of process and Rule violations to "railroad" the Fus into responding on drastically-shortened notice to an improperly-served motion for summary judgment (the "MSJ") seeking over $70 million in nondischargeable liability. *See Burlington Northern Santa Fe R. Co. v. The Assiniboine*, 323 F.3d 767, 774 (9th Cir. 2003). CNB's misconduct impeded the Fus' ability to timely retain counsel, prepare fully responsive pleadings, and marshal admissible, supporting evidence, while at the same time preventing discovery into CNB's nonwaivable failure to mitigate its alleged losses on its 100% collateralized loans.

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[1] *See also* AAB at 4 (CNB falsely claims that "In neither the Bankruptcy Court nor the District Court did the Fus charge CNB with misconduct[.]")

Among other misconduct, Appellants have charged that CNB:

(i) Failed to exercise commercially reasonable efforts to mitigate its damages with GUSA collateral, over which they retained constructive possession through the pre-bankruptcy GUSA Chief Reorganization Officer (John Pelton) and the later, pre-bankruptcy, bank-appointed Receiver (William Granger);

(ii) Failed to serve the requisite *Rand* notice on the *pro se* incarcerated Fus, in violation of *Rand v. Rowland*, 154 F.3d 952 (9th Cir. 1998);

(iii) Failed to serve on the Fus a notice with CNB's summons and complaint that compliance with Fed. R. Bankr. Proc. 7026 and Fed. R. Civ. Proc. 26 was required and thereafter failed to file a proof of service of such notice with the Bankruptcy Court, in violation of LBR 7026-1(a)(1) and (2);

(iv) Failed to make the requisite Rule 26(a)(1)(A) initial disclosures to the Fus and failed to initiate the Rule 26(f) early meeting and discovery conference, even though CNB's civil nondischargeability action against the Fus was *not* exempt from these obligations under Rule 26(a)(1)(B);

(vi) Failed to explain its noncompliance with Rule 26 in its Unilateral Status Reports, while falsely representing that it was "not able to contact the Fus directly" [Vol. XIX, Tab. 90, AER004700], and falsely representing that it was "not aware of a way to contact the Fus other than by mailings to the addresses that they used for their Answer" [Vol. XIX, Tab. 90, AER004703], even though the federally-incarcerated Fus at all relevant times were instantly locatable on the federal BOP inmate locator website (www.bop.gov/inmateloc);

(vii) Failed to timely effectuate service of its MSJ on the Fus, while again conveniently neglecting to check for the Fus' correct BOP mailing address;

(viii) Failed to grant a continuance or any reasonable extension of time to the Fus to prepare their response to CNB's tardily-served MSJ; and

(ix) Failed to support its premature and precipitous MSJ with admissible evidence, while instead relying on unauthenticated and unattached documents, and other hearsay and conclusory statements.

* * *

When a sophisticated international financial institution (i.e., CNB) represented by an international law firm makes a series of errors which all conveniently benefit it at the expense of the incarcerated, *pro se* defendant, the Court should take a dim view of such serial errors. They should not be deemed inadvertent mistakes or harmless error. *See* Fed. R. Evid. 61. Concatenated rule violations which impact an incarcerated *pro se* defendant's due process notice rights suggest calculated overreaching and piling on, and should not be countenanced.

The temptation to bend and break applicable rules and procedural safeguards, and to brush aside due process concerns as de minimus and immaterial, because a defendant has admitted to defrauding the civil plaintiff in a prior criminal proceeding, must be countermanded by this Court in clear and unambiguous language.

This case calls out for this Court to make the following rulings and holdings -- preferably with precedential force -- for the guidance of counsel and parties facing similar facts and circumstances in the future:

A. *That*, a sophisticated civil plaintiff suing a *pro se* incarcerated defendant in bankruptcy adversary proceedings must strictly abide by its obligations under *Rand v. Rowland*, 154 F.3d 952, under Rule 26, and under LBR 7026 and 7056.

B. *That*, the failure of a *pro se* incarcerated defendant to timely update the Bankruptcy Court of her current bureau of prison (BOP) address does not absolve a sophisticated civil plaintiff from its *Rand* notice, Rule 26 early meeting, initial disclosure, and discovery requirements, or its LBR 7056 minimum 42-day MSJ notice requirement when, as here, the plaintiff fails to check the BOD prison inmate locator website to confirm the defendant's actual mailing address.

C. *That*, under *Burlington*, 323 F.3d 767, and *Texas Partners v. Conrock Co.*, 685 F.2d 1116, 119 (9th Cir. 1982), it is unrealistic to expect an incarcerated, *pro so* civil defendant facing a summary judgment motion in a bankruptcy adversary proceeding to seek a court order permitting discovery before the Rule 26(f) conference has taken place when, as here, the civil plaintiff has violated its obligations under *Rand*, Rule 26, and LBR 7026 and 7056.

D. *That*, under Article 9 of the Uniform Commercial Code, a secured creditor plaintiff in a bankruptcy nondischargeability proceeding against a debtor defendant has a nonwaivable duty to mitigate its damages regarding collateral securing the debtor's guarantee obligation over which the creditor had pre-bankruptcy constructive possession.

E. *That*, as a matter of contract law, summary judgment law, and federal public policy, a defendant's criminal plea agreement must be construed in a subsequent civil summary judgment proceeding so as to resolve all reasonable inferences and ambiguities in favor of the defendant.

F. *That*, the 2010 amendments to Rule 56 do not absolve a civil plaintiff moving for summary judgment from its affirmative burdens of production and persuasion to support its summary judgment motion with admissible evidence, or its affirmative burden of showing "the material is admissible as presented or to explain the admissible form that is anticipated" in response to the non-moving party's timely objections. *See* Fed. R. Civ. Proc. 56 (2010 Advisory Committee comments).

G. *That*, under Rules 56(d), 14, and 15, the proper timeframe and procedural posture for determining whether undue delay, prejudice, complication of proceedings, or bad faith exists, sufficient to justify denial of motions brought under those Rules is the actual, practical procedural posture of the case under Rules 16 and 26, not simply the length of time the matter has been pending.

The Bankruptcy Court's findings and determinations under Rules 56, 14, and 15 were illogical, implausible, contrary to applicable law, and not sufficiently supported by the record. As shown in the Opening Brief and below, reversal in full is warranted.

II. ARGUMENT

A. THE 2010 AMENDMENTS TO RULE 56 DID NOT ABSOLVE APPELLANT CNB FROM ITS BURDEN TO SUPPORT ITS SUMMARY JUDGMENT MOTION WITH ADMISSIBLE EVIDENCE

According to CNB, in light of the 2010 amendments to Rule 56, unauthenticated or insufficiently authenticated reports and exhibits were properly admitted and considered by the Bankruptcy Court because they all somehow "could be introduced as evidence at trial." (AAB at 30 [citing 10B Charles Alan Wright et al., FEDERAL PRACTICE AND PROCEDURE § 2738 (2016)].)

This Court should hold that amended Rule 56 does not permit unauthenticated hearsay documents to support summary judgment in the face of the nonmoving party's timely objections. Neither Neilson nor any other CNB witness provided testimony or argument showing what "contents" they would be able to properly authenticate at trial, or how they would do it. "The burden is on the proponent to show that the material is admissible as presented or to explain the admissible form that is anticipated." Fed. R. Civ. Proc. 56 (2010 Advisory Committee comments). CNB did not meet that burden here.

Fed. R. Evid. 803(6) was not applicable. A writing is admissible under this exception only "if two foundational facts are proved: (1) the writing is made or transmitted by a person with knowledge at or near the time of the incident recorded, and (2) the record is kept in the course of regularly conducted business activity. These facts must be proved through the testimony of the custodian of the records or other qualified witness, though not necessarily the declarant." *United States v. Miller*, 771 F.2d 1219, 1237 (9th Cir. 1985) (citation omitted); Fed. R. Evid. 901(a). CNB never laid that foundation.

In addition, the Nielson Reply Declaration attached a new exhibit – Mr.

Nielson's Supplemental Direct Trial Testimony Declaration from the Fu involuntary bankruptcy case, Case No. 8:09-bk-22699-TA (ECF Doc. No. 315, filed on August 31, 2011). The Bankruptcy Court erred in overruling the Fus' objections to that evidence because Neilson Supplemental Declaration does not attach or properly authenticate the scores of bills of lading, packing lists, sales invoices, and other accounting and business records which supposedly form the evidentiary basis for its fraud conclusions.

The Trustee's conclusions were not based on business records "that came from the Fus or their representatives[.]" (AAB at 27.) The Fus were removed from GUSA and CRO Pelton and then Receiver Granger took over operations and custody of GUSA documents before Neilson was appointed as Trustee. (Vol. XIX, Tab 85, AER004655-4658; Vol. VI, Tab 81, AER001169; Vol. XIII, Tab 81, AER003168-3169)

The intervening, pre-bankruptcy chain-of-custody interventions by Mr. Pelton and Mr. Granger show that the documents relied upon by Mr. Neilson were not provided to him by any percipient GUSA witness with personal knowledge of their preparation and genuineness.

Decisions issued by this Court and the its Bankruptcy Appellate Panel after the 2010 Rule 56 amendments have consistently reiterated the requirement that documents supporting summary judgment be properly authenticated and that declarations be based on personal knowledge setting forth admissible facts under Fed. R. Civ. P. 56(c)(4).

So, for example, the court in *Narada v. United State (In re Narada)*, 2012 Bankr. LEXIS 1084, 22-24 (B.A.P. 9th Cir. Mar. 12, **2012**), stated as follows:

> In deciding a motion for summary judgment, a bankruptcy court only can consider admissible evidence. . . Authentication is a "condition precedent to admissibility," and this condition is satisfied by

> "evidence sufficient to support a finding that the matter in question is what its proponent claims." [FRE] 901(a). We have repeatedly held that unauthenticated documents cannot be considered in a motion for summary judgment. [Citations omitted].

(2012 Bankr. LEXIS 1084, 22-24.)

In *Las Vegas Sands LLC v Nehem*, 632 F3d 526 532-33 (9th Cir **2011**), this Court affirmed that "[t]he authentication of a document requires 'evidence sufficient to support a finding that the matter in question is what its proponent claims'".

This Court reaffirmed this law in **2013**. *See Jimena v. UBS AG Bank, Inc.*, 1:07-CV-00367 OWW, 2011 U.S. Dist. LEXIS 68560, 2011 WL 2551413 (E.D. Cal. June 27, 2011) *aff'd sub nom. Jimena v. Standish*, 504 Fed. Appx. 632, 2013 WL 223131 at *1 (9th Cir. **2013**) (citing an opinion from 2002, the court stated, "Unauthenticated documents cannot be considered in a motion for summary judgment.").

To the extent that a bankruptcy or district court may consider the admissibility of contents of a report or exhibit even if the form of the evidence is inadmissible (*see, e.g., Fraser v. Goodale*, 342 F.3d 1032, 1036 (9th Cir. 2003)), this Court should hold that this exception applies only to evidence submitted in *opposition* to summary judgment, not in s*upport* of it. *See, e.g., Ericson v. City of Phoenix*, 2016 U.S. Dist. LEXIS 152641, 23-25 (D. Ariz. Nov. 2, 2016) ("The Ninth Circuit has required, however, that evidence offered in support of a motion for summary judgment be admissible both in form and in content") (citations omitted).

The Nielson Reply Declaration, the attached Supp. Nielson Trial Declaration, the First Trustee Report, and the Nielson Declaration filed in support of CNB's MSJ are all inadmissible because they are based on unattached and

unauthenticated exhibits, no foundation was laid for the business record hearsay exception, and no one explained how the hearsay exhibits "would be admissible" at trial. *See* Fed. R. Evid. 801(d), 803-04 & 807 (hearsay exclusions and exceptions).

B. CNB'S VIOLATIONS OF RULE 26, LBR 7026 AND 7056, ITS MISLEADING UNILATERAL STATUS REPORTS, ITS FAILURE TO PROVIDE *RAND* NOTICE, AND ITS IMPROPER SERVICE OF ITS MSJ WERE NOT HARMLESS ERRORS

CNB, not the Fus, was required to initiate Rule 26 discovery under Local Bankruptcy Rule 7026-1(a). This action was never exempt from Rule 26's initial disclosure and discovery requirements. Cf. Fed. R. Civ. Proc. 26(a)(1)(B)(iv) (exempting actions brought by incarcerated plaintiffs). The failure to initiate the discovery process under Rules 26 and 56, and Local Bankruptcy Rule 7026-1(a), was CNB's exclusive fault, not the Debtors'.

CNB states that its Status Reports "warn[ed] of the summary judgment motion and the lack of any additional discovery needed to make it, which garnered no response either." (Opposition at 32.) That is false. CNB's Status Report stated its intention to seek discovery, "if necessary," to be completed by 06/30/2014. (*See* Vol. XIX, Tab 90 at AER004701.) The other Status Reports do not mention discovery at all. (*See* Vol. XIX, Tab 86 at AER04677-80; Vol. XIX, Tab 87 at AER004683-4685; Vol. XIX, Tab 88 at AER004689-91.)

CNB's Status Reports further indicate that CNB had not "met and conferred in compliance with LBR 7026-1" but CNB nonetheless failed to provide an explanation for its failure to do so, as required, except to note that the "Defendants are acting *pro se* and currently in Federal Prison." (*See id.* at AER004678, AER004690.) That does not excuse its failure to comply with LBR 7026-1.

CNB also disingenuously stated in its Unilateral Status Reports that it was "not aware of a way to contact the Fus other than by mailings to the addresses that they used for their Answer." (Vol. XIX, Tab 90, AER004703.)

That assertion defies credibility.

An international financial institution represented by an international law firm cannot honestly believe, as CNB represented in its Status Reports, that the only known way to contact a *pro se* incarcerated defendant they wish to serve with a motion seeking more than $70 million in nondishcargeable money judgments would be through an address the debtors put on the *pro se* jailhouse answers months earlier while incarcerated in separate correctional facilities.

A five second internet search for "find a federal prisoner" immediately provides links to the BOP online inmate locator which provides an inmate's mailing address and other contact information using the inmate's register number, DCDC number, FBI number, INS number, or by using the inmate's first and last name. *See* https://www.bop.gov/inmateloc/ It also indicates that one may call the national Inmate Locator number at 202-307-3126, 8:00 a.m. to 3:45 p.m. weekdays, EST.

Nothing in the Albert Declaration suggests that locating the Fus for purposes of proper service of process was difficult to determine. (Vol. X, Tab 78, AER002228, AER002136) Just the opposite: CNB simply needed to punch in their names on the BOP Inmate Locater website available 24/7, online.

CNB contends that the Fus were properly served through counsel because he "appeared" at a CNB/Fu status conference. (AAB at 6.). That is untrue. Counsel did not "generally appear" for the Fus at the CNB status conference; he informed the Bankruptcy Court that he had not yet been retained in that action. Counsel stated in his declaration that he was not officially retained in this action until early November, 2014 (Vol. X, Tab 78, AER002226). The Bankruptcy Court's finding

that service was on "soon to be counsel" (Vol. II, Tab No. 13, AER00304) was a refutation of any presumption that such service could be identical to service on the Fus as a matter of law.

This Court should hold that due process requires that civil plaintiffs seeking to impose ruinous nondischargeable money judgments on *pro se* incarcerated inmates cannot merely rely for service on the inmates' obligation to update their mailing addresses under Fed. R. Bankr. Proc. 4002(a)(5), but instead must check the BOP inmate locater website. This holding is particularly warranted given the leniency with which rule errors by *pro se* inmates should be treated, especially *pro se* defendants, whose lack of legal expertise can be exploited by sophisticated civil plaintiffs.

CNB's failure to serve the *Rand* notice on the Fus was not "harmless error" under Fed. R. Evid. 61 and *Labatad v. Corr. Corp. of Am.*, 714 F.3d 1155, 1159-60 (9th Cir. 2013) (per curiam).

CNB's failure to provide *Rand* notice to the incarcerated Fus forms part of a series of one-sided errors designed to railroad the Fus into a rushed summary judgment opposition in order to achieve a pre-ordained result at minimum cost to CNB, including, without limitation:

a) CNB's failure to provide the Rule 26 notice with its summons and complaint;
b) its failure to file them with the Bankruptcy Court;
c) its failure to make initial disclosures and conduct a discovery conference under Rule 26;
d) its failure to seek relief by court order from those obligations;
e) its misleading Unilateral Status reports in that regard; and
f) its subsequent refusal to allow a continuance to permit more time to respond to its improperly served MSJ.

That is not harmless error; it is an abuse of process resulting in a prejudicial rush to judgment; and this Court should so hold. If CNB had not violated all of these obligations, the incarcerated and bankrupt Fus would have had many more months of time to secure funding to hire counsel to mount a more effective response.

This Court also should hold that, in the case of a *pro* se, non-lawyer, incarcerated defendant, her "last known address" for service purposes under Fed. R. Civ. Proc. 5(B)(2)(C) should be her address listed on the BOP inmate locator website at the time of mailing. *See id.* ("A paper is served under this rule by: mailing it to the person's last known address — in which event service is complete upon mailing").

C. APPELLANTS' PROPOSED DISCOVERY WAS NOT FUTILE AND THE LIMITED DISCOVERY THAT WAS PERMITTED WAS "TOO LITTLE, TOO LATE"

It is illogical to conclude that discoverable evidence showing that the Fus are not responsible for 100% of CNB's claimed losses is irrelevant and futile. CNB's own Declarant, Barry Young, confirms that a comprehensive inspection and field audit of GUSA inventory completed in May 2008 showed that GUSA in fact had the amounts of inventory it claimed securing the loan at issue. (Vol. XIX, Tab 83, AER004605, ¶7.)

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The Fus never waived their failure-to-mitigate defense, under U.C.C. Article 9 or otherwise. The fundamental failure-to-mitigate defense, the Fus' related challenge to CNB's claimed 100% loss, their charge that CNB failed to properly locate and monetize the GUSA collateral securing its loans, and the Bankruptcy Court's denial of the Fus' requested discovery on those critical issues, were raised repeatedly in the proceedings below. (*See, e.g.*, AER Vol. X, Tab 79, at

AER002381, ll. 3-10; AER002380, ll.16-21; Tab 78 at AER002234, ll. 4-27; Vol. IX, Tab 69, AER001882, ll. 9-15; AER001887, ll. 3-8; Vol. IX, Tab 76, AER002040, ll.10-21; Vol. VIII, Tab 68, AER001807-1810, AER001820-1821, AER001849-1850.)

The Fus' repeated assertion that CNB should not be allowed to foist upon them 100% of GUSA's guaranteed losses under a 100% secured loan, as if not one penny of collateral ever existed, was more than sufficient to preserve the Fus' co-extensive U.C.C. Article 9 mitigation argument on appeal. *See Simkins v. NevadaCare, Inc.*, 229 F.3d 729, 736 (9th Cir. 2000) (cautioning against reading the waiver rule too broadly; it is sufficient if the record below shows that same issue was raised generally).

CNB's Answering Brief does not contest that U.C.C. Article 9's nonwaivable commercial reasonableness requirements apply when a secured creditor maintains "constructive possession" of the collateral. (AAB at 35.) Instead, CNB argues that "[t]here is no basis for the assertion that either Mr. Granger or Mr. Pelton were "agents" of CNB." (*Id.*)

But whether Messrs. Pelton and Grangere acted as pre-bankruptcy "agents" of CNB at the very least presents a material question of fact. It was error to deny discovery about that issue (i.e., what happened to the GUSA collateral pre-bankruptcy) under Rule 56(d).

The Bankruptcy Code "override" argument under 11 U.S.C. § 541(c)(1)(A) (*see* AAB at 37) is inapplicable to the critical timeframe before GUSA was placed into bankruptcy, which was the focus of the Fus' Rule 56(d) continuance/discovery request.

CNB's argument under Cal. Com. Code § 9401(a) -- stating that "whether a debtor's rights in collateral may be voluntarily or involuntarily transferred is governed by law other than this division" (AAB at 37 [citing *In re First Protection,*

Inc., 440 B.R. 821, 830 (B.A.P. 9th Cir. 2010)]) -- is a red herring because the Fus' failure-to-mitigate argument regarding GUSA collateral for the 100% secured loans turns on CNB's nonwaivable mitigation obligations, not the Fus' "rights in collateral."

Finally, the Bankruptcy Court's approval of the sale of the collateral that Trustee Neilson was able to locate (*see* AAB at 38-39) has no impact on the commercial reasonableness of CNB, CRO Pelton, and Receiver Granger before the bankruptcy case commenced. These were 100% secured loans and the Fus were not given credit for tens of millions of dollars' worth of collateral that apparently was lost, stolen, or otherwise mishandled.

D. THE BANKRUPTCY COURT ERRED BY DISREGARDING THE FU DECLARATION

CNB claims that the Fu Declaration fails because: (1) it is based on an immaterial issue of timing because the fraud admittedly impacted the ABL Facility; (2) it relies on information and belief to combat clear, direct evidence and logic; and (3) it is a sham declaration contradicting her earlier sworn testimony. (Opposition at 23.) These arguments fail.

1. The Fraud Timing Issue Is Not Immaterial

The timing of the commencement of the fraud is not immaterial. Citing 11 U.S.C. § 523(a)(2)(B) and *In re Juve*, 761 F.3d 847, 850, 852 (8th Cir. 2014), CNB argues that the continued extension of credit after October 2008 (the start-date for the fraud admitted in the Fus' Plea Agreement) is sufficient to charge the Fus' with the entirety of the Banks' losses going back to the inception of the loan in May 2008. (AAB at 10.) But CNB failed to argue, much less to demonstrate, that it funded the May 2008 BofA ABL facility after October 2008 based on any fraudulent borrowing base certificates, bills of lading, invoices, or other fabricated documents after that time.

2. Averments To The Truth Of Facts "To The Best Of My Knowledge" Under Penalty Of Perjury Satisfy 28 U.S.C. § 1746

The two qualifications in the Fu Declaration that her averments are to the "best of my knowledge and belief" (Vol. V, Tab 49, AER000898 at ll. 3-4; AER000912 at l. 13) are valid under 28 U.S.C. § 1746. A valid declaration under penalty of perjury made within the United States must be "in substantially the following form: . . . 'I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date).'" 28 U.S.C. § 1746(2). Ms. Fu's averments complied with Section 1746. Her two averments "to the best of my knowledge and belief" are not the same as averments merely "on information and belief," as CNB mistakenly asserts. *See Cobell v. Norton*, 391 F.3d 251, 260 (D.C. Cir. 2004) ("to the best of [my] knowledge, information or belief" averment sufficient under Section 1746); *Silva v. Gregoire*, No. C05-5731-RJB, 2007 WL 2034359, at *3 (W.D. Wash. July 3, 2007) (same); *Williams v. Nish*, 2015 U.S. Dist. LEXIS 1159, 2015 WL 106387, at *6 (M.D. Pa. Jan. 7, 2015), *aff'd*, 612 F. App'x 81 (3d Cir. 2015) (same); *Kersting v. United States*, 865 F. Supp. 669, 676-677 (D. Haw. 1994) (same; citing, *inter alia*, *Nissho Iwai American Corp. v. Kline*, 845 F.2d 1300, 1306 (5th Cir. 1988).

3. The Bankruptcy Court Did Not Make A "Sham" Declaration Finding And In All Events The Requirements For A "Sham" Declaration Were Not Met Here

The Bankruptcy Court never made a "sham" declaration finding, nor were the requirements for such a finding satisfied. As stated by the Bankruptcy Court:

> Ms. Fu seems to now claim that the fraud commenced exactly in October 2008, but the plea agreement clearly does not state this. *See Cleveland v. Policy Management Systems Corp.*, 526 U.S. 795, 806,

> 119 S.Ct. 1597 (1999)(a party cannot create a genuine issue of fact to survive summary judgment by contradicting a prior sworn statement). The plea agreement actually recites that the fraud began at an earlier date unknown but from at least October 2008. Obviously the implication is that the fraud began before October 2008.

(Vol. III, Tab 34, AER00585-586)

These statements do not constitute a finding that the Fu Declaration was a "sham." *Van Asdale v. Int'l Game Tech.*, 577 F.3d 989, 998-999 (9th Cir. Nev. 2009).

Furthermore, the purported inconsistency on the fraud timing issue must be "clear and unambiguous." *Id.* That requirement is not satisfied either.

On summary judgment, all reasonable constructions and inferences from the non-moving party's admissions must be resolved in her favor. *See Suntrust Bank v. Ruiz*, 648 Fed. Appx. 757, 760-761 (11th Cir. Fla. 2016) ("Provided that a reasonable construction of the admission is not contradicted by [the non-moving parties'] affidavit, the [non-moving parties] were entitled to such a construction for purposes of summary judgment"). The fraud commencement language in the Plea Agreement – *i.e.*, that the fraud commenced "[o]n a date unknown, but at least since October 2008" – supports the inference it started on a "date unknown" <u>in October</u> as much or more than it supports the contrary inference it started in May 2008 or earlier.

Any ambiguity in that regard should have been resolved in favor of Appellants, not against them. This error also requires reversal.

A plea agreement is a contract, and contract principles apply to its interpretation. "In [the] context of plea agreements, ... ambiguities are therefore construed in favor of the defendant." *United States v. Transfiguracion*, 442 F.3d 1222, 1228 (9th Cir. 2006) (internal quotation marks and citation omitted). Contra

proferentem requires that the defendant's interpretation of a plea agreement prevail when "each party's proffered interpretation is neither clearly supported by the language of the agreement nor necessarily inconsistent with it either." *United States v. De la Fuente*, 8 F.3d 1333, 1339 (9th Cir. 1993) (internal quotation marks omitted).

Given that "the government is usually the drafter [of the plea agreement]," it will "ordinarily bear the responsibility for any lack of clarity." *Transfiguracion*, 442 F.3d at 1228. Courts presume that a "responsible public servant who recognizes the desirability of clarity in agreements would avoid . . . use" of vague language in plea agreements. *United States v. Read*, 778 F.2d 1437, 1441 (9th Cir. 1985).

Contra proferentem applies in a civil nondischargeability lawsuit even though the private plaintiff neither drafted nor negotiated the plea agreement that the plaintiff seeks to use against the defendant debtor. Because the government wields enormous leverage over the criminal defendant and controls the plea drafting process, any ambiguity regarding the scope of unlawful conduct admitted in a plea agreement should be resolved in defendant's favor. This principle is particularly true when, as happened here, a more liberal construction significantly broadens carefully tailored admissions and forecloses a defendant from defending against ruinous monetary liability.

This latter point is demonstrated by the fixed and limited monetary amount of the loan over-advance. The $4.7 million fraud sum and related restitution order -- and the Fus' sentences -- would have been many times larger had the Plea Agreement encompassed supposed revenue falsification from May through the end of September, 2008.

CNB argues that the U.S. Attorney's office may have not included charges of prior period fraud just to save trial resources. (AAB at 13.) That argument lacks

support; it is rank speculation. There is zero evidence that such a resource-based trade-off was made here. If such a trade-off were made, the prosecutors would have been required to so inform the Court for sentencing purposes (which did not happen). *See United States v. Abbott*, 241 F.3d 29, 35 (1st Cir. 2001) ("[t]he prosecution must shoulder the burden of disclosing, in the first instance, all material information [concerning] plea agreements . . .).

This Court should rule that a federal prosecutor's undisclosed or hypothetical desire to save limited government prosecution resources does not override the express policy that federal plea agreements accurately reflect the facts showing the defendants' criminal conduct and liability. "Fact bargaining" that fails to disclose readily-provable, relevant facts related to sentencing enhancements is improper. *See* U.S. Attorneys' Manual, Sec. 9-16.300; *see also id*., Sec. 9-27.

Finally, at the Fus' sentencing hearing, the Fus' bank creditors presented their best evidence to the sentencing Judge, the Hon. Cormac Carney, seeking to hold the Fus' liable for alleged earlier-period fraud and (prior to October 2008) and for the full amount of the banks' alleged $230 million loss. But he rejected that proffer and those arguments:

> [MRS. FU] DID A BAD THING, BUT SHE IS A GOOD PERSON, AND SHE JUST HAD A MOMENT OF FAILURE, UNFORTUNATELY, OVER A SEVERAL-MONTH PERIOD AND, UNFORTUNATELY, A MULTI-MILLION DOLLAR FAILURE.

(Vol. 10, Tab 78, AER002349].)

> THIS WAS NOT A FRAUD FROM THE ONSET. IN MANY CASES, THE FRAUD CASES I SEE IS YOU HAVE VERY VULNERABLE VICTIMS THAT ARE SENIOR CITIZENS,

> PEOPLE WHO HAVE INVESTED THEIR LIFE SAVINGS AND IT'S A FRAUD AT THE INCEPTION. IT'S A PONZI SCHEME. YOU ARE JUST RIPPING THESE PEOPLE OFF. FROM WHAT I COULD GATHER, THIS WAS A VERY SUCCESSFUL BUSINESS FOR YEARS. IT CAME ON DIFFICULT FINANCIAL TIMES AND UNFORTUNATELY, AND TRAGICALLY, MS. FU GAVE IN TO THE ECONOMIC PRESSURE AND LIED.

(Vol. 10, Tab 78, AER002514.)

These observations by Judge Carney at the Fus' sentencing hearing completely undermine CNB's assertion that the ambiguity in Fus' Plea Agreements' fraud timing language supports the conclusion that the Fus committed fraud from the inception of the loan. Judge Carney's rejection of CNB's evidence and arguments that the Fus should be held liable for all of the banks' alleged losses at the very least creates a triable issue of fact regarding CNB's section 523(a)(2) non-dischargeability claim regarding the May 2008 BofA ABL Facility.

E. THIRD PARTY CORROBORATING DOCUMENTS SUPPORTED MS. FU'S TESTIMONY

It was error to disregard the corroborating certified audit opinions issued by Gaytan Baumbatt & Leevan LLP ("Gaytan CPAs") for GUSA's 2004 through 2008 fiscal year ending ("FYE") financial statements, and to disregard the certified tax returns prepared by PriceWaterhouseCoopers ("PWC") for GUSA for FYE 2004 through 2007.

In derogation of applicable summary judgment standards, the Bankruptcy Court made credibility determinations and factual conclusions that the Gaytan CPA audit opinions and PWC tax return certifications were unreliable and infected by alleged pre-October 2008 fraud committed by the Fus. The reliance by Gaytan CPAs and PWC on information provided by GUSA management does not mean

that their professional reports cannot be trusted. Discovery should have been permitted to test that contention and a trial held to resolve any conflicts.

CPAs are not permitted to blithely accept and rely upon information provided by their clients: they have to use due diligence through adequate testing procedures. The AICPA's AU Section 316 standard, entitled "Consideration of Fraud in a Financial Statement Audit," provides, in pertinent part, as follows:

> Section 110, Responsibilities and Functions of the Independent Auditor, paragraph .02, states, "The auditor has a responsibility to plan and perform the audit to obtain reasonable assurance about whether the financial statements are free of material misstatement, whether caused by error or fraud."

http://www.aicpa.org/research/standards/auditattest/downloadabledocuments/au-00316.pdf

Among other due diligence requirements, the Gaytan CPAs were required to:

> Obtain[] the information needed to identify risks of material misstatement due to fraud. This section requires the auditor to gather information necessary to identify risks of material misstatement due to fraud, by
>
> a. Inquiring of management and others within the entity about the risks of fraud. (See paragraphs .20 through .27.)
>
> b. Considering the results of the analytical procedures performed in planning the audit. (See paragraphs .28 through .30.)
>
> c. Considering fraud risk factors. (See paragraphs .31 through .33, and the Appendix, "Examples of Fraud Risk Factors" [paragraph .85].)

(*Id.*)

As to PWC and its verified GUSA tax returns, while tax return preparers may rely on information provided by management, they still must exercise due diligence to ensure the information is accurate:

> Tax return preparers must exercise due diligence in preparing or assisting in the preparation, approval, and filing of returns, documents, affidavits, or other papers relating to IRS matters. Tax return preparers also must exercise due diligence in determining (1) the correctness of oral and written representations made by the tax return preparer to the IRS, and (2) the correctness of representations made by the tax return preparer to the client with reference to any matter administered by the IRS.

https://www.irs.gov/tax-professionals/irs-letters-and-visits-to-return-preparers-faqs

It was error to disregard the Gaytan CPA audit opinions and PWC certified GUSA tax returns as unreliable and inconsequential on summary judgment, because they corroborated Ms. Fu's testimony; and it was error to preclude discovery regarding GUSA's financial statement audits and PWC's tax return due diligence. Appellants were wrongly denied their right to examine GUSA's tax accountants, financial statement CPA, and inventory auditors to provide support for their opinions and reports verifying the assets and income of GUSA prior to October 2008.

F. IT WAS ERROR TO PRECLUDE APPELLANTS FROM AMENDING THEIR *PRO SE* ANSWER TO ASSERT VALID DEFENSES AND TO CORRECT ERRONEOUS ADMISSIONS

The Debtors' *pro se* jailhouse answers failed to assert even a single affirmative defense. Denying them leave to assert any defenses once they were able to retain counsel was an abuse of discretion. The ruling was predicated on a misapplication of the pertinent standards. The Bankruptcy Court's findings undue

delay, bad faith, dilatory motive, undue prejudice, futility were illogical and not supported by the record. *See Moore v. Kayport Package Express*, 885 F.2d 531, 538 (9th Cir. 1989) (citing amendment factors listed *Foman v. Davis*, 371 U.S. 178, 182 (1962)).

Delay by itself is insufficient to justify denying a motion to amend. *Bowles v. Reade*, 198 F.3d 752, 758 (9th Cir. 1999).

The finding that the Fus' inadvertent admissions of complicated facts and legal conclusions were "freely made" is illogical: they are unschooled non-lawyers who prepared their own jailhouse *pro se* answers.

The finding that the amended answer would prejudice CNB by asserting new defenses and complicating the action was erroneous. Requiring a plaintiff to prove up its case and address viable defenses is what our system of civil justice requires.

The Fus' proposed Affirmative Defenses were not futile.

Regarding the mitigation-of-damages defense, the inventory (landed and in transit) and accounts receivable securing the 100% collateralized loans were subject to regular and comprehensive field audits and inspections. *See, e.g.*, Declaration of CNB Officer, Barry Young, ¶ 7 ("In addition, the inventory side of the asset base was important. As to inventory, in early 2008, CNB was informed that DBS, the Agent under the predecessor facility, had ordered a collateral audit of GUSA's inventory, and that the audit was underway. CNB insisted that the collateral audit be completed and the results reviewed before CNB would agree to enter into the ABL Facility. The collateral audit was completed as of April 30, 2008, and received by CNB shortly thereafter. The collateral audit raised no issues, concerns, or problems with respect to GUSA's inventory."). (Vol. XIX, Tab 83, AER004605.)

CNB's own testimony corroborates Ms. Fu's testimony in that regard. What happened to all of the collateral securing the May 2008 ABL Facility? It was and

is unfair to charge the Fus with 100% of CNB's claimed losses as if no collateral ever existed. Discover should have been allowed. As previously shown, as a secured creditor, CNB's mitigation obligation to use commercially reasonable efforts to locate, monetize, and give credit to the Debtors for all liquidated collateral was nonwaivable, and existed in full force before GUSA was placed into bankruptcy. Saddling the Debtors with 100% of fully secured loan as a nondischargeable liability as if not one penny of collateral ever existed is a grossly unfair.

Regarding the lack of standing defense, under the applicable Second Amended and Restated Loan and Security Agreement (CNB Compendium Ex. 2 (Vol. XIV, Tab 82, AER003250-3400), BofA, as the Agent, is solely responsible for enforcing the rights of the Lender Group when and if an "Event of Default" occurred. There is no provision authorizing CNB as one of the several participant members of the Lender Group to bring suit either on behalf the Lender Group or to sue individually for its pro rata injuries.

Regarding the arbitrability defense, this Court should reverse the Bankruptcy Court's erroneous Rule 15 ruling, and hold that a bankruptcy court should not reject an affirmative defense of arbitrability of disputed "core" claims absent an express finding by the bankruptcy court that arbitration would conflict with the underlying purposes of the Bankruptcy Code under *Continental Ins. Co. v. Thorpe Insulation Co. (In re Thorpe Insulation Co.*, 671 F.3d 1011, 1021, 2012 (9th Cir. 2012). .

G. THE DEBTORS' THIRD PARTY CLAIMS AGAINST RELATED CREDITOR BANKS SHOULD HAVE BEEN PERMITTED

There is no basis for CNB's bald assertion that Best Ascent is a "company controlled by the Fus . …" (AAB at 53.) There is no evidence for that assertion; it

is CNB's unsupported say-so. Nor is it true that the Fus can obtain the same relief in the state court Best Ascent lawsuit. The Fus have assigned all rights to recover affirmative money relief to Best Ascent, are not parties to that action, and, therefore, they cannot benefit from its outcome. Neither the doctrine of res judicata or collateral estoppel would apply.

In their Third Party Complaint, the Fus allege that BofA fraudulently induced them to enter into the May 2008 ABL Facility and related guaranty based on BofA's false promises for $100 million in timely funding for Galleria Hong Kong. (Vol. IX, Tab 76, AER002065-2066, AER002066-2067, AER002071.) That claim is neither futile nor irrelevant. If proven, it would directly impact CNB's breach of guaranty claim in this lawsuit.

III. CONCLUSION

For the foregoing reasons, Judgment No. 3 by Bankruptcy Court should be reversed, together with the reversal of Judgments Nos. 1 and 2.

DATED: September 8, 2017 MARK ANCHOR ALBERT & ASSOCIATES

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CERTIFICATE OF COMPLIANCE

Pursuant to FRAP 32(a)(7)(B)(i) and (C), I certify that the attached brief is proportionately spaced, has a typeface of 14 points or more, and contains 6,462 words.

DATED: September 8, 2017 MARK ANCHOR ALBERT & ASSOCIATES

By: ss//Mark Anchor Albert
Mark Anchor Albert
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9th Circuit Case Number(s) 15-56800

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