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.

PETITION FOR PANEL REHEARING AND REHEARING EN BANC

On Appeal From Nondischargeable Money Judgments 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)

MARK ANCHOR ALBERT & ASSOCIATES
Mark Anchor Albert, State Bar No. 137027
albert@LAlitigators.com
800 West 6th Street, Suite 1220
Los Angeles, California 90017
Telephone: (213) 699-3155
Facsimile: (213) 223-2154

Attorneys for Debtors, Defendants, and Appellants
CHERI FU and the ESTATE OF THOMAS FU, Deceased

TABLE OF CONTENTS

Page

I. INTRODUCTION AND STATEMENT UNDER FED. R. APP. P. 35(B) 1

II. REASONS WHY REHEARING SHOULD BE GRANTED 3

A. THE PANEL OVERLOOKED MATERIAL FACTS AND LAW 3

B. THE PANEL'S DECISION CONFLICTS WITH EXISTING LAW REGARDING RULES OF NATIONAL APPLICATION REQUIRING NATIONAL UNIFORMITY, AND WHICH INVOLVE ISSUES OF EXCEPTIONAL IMPORTANCE 5

III. CONCLUSION 10

CERTIFICATION 10

TABLE OF AUTHORITIES

Page

CASES

Anderson v. Liberty Lobby, Inc.
477 U.S. 242 (1986)....................6, 7

Burlington Northern Santa Fe R. Co. v. The Assiniboine
323 F.3d 767 (9th Cir. 2003), ...6

Burnside-Ott Aviation Training Ctr., Inc. v. United States
985 F.2d 1574 (Fed. Cir. 1993) 7

Celotex Corp. v. Catrett
477 U.S. 317 (1986)....................6

Cowan v. J.C. Penney Co., Inc.
790 F.2d 1529 (11th Cir. 1986) 7

Glen Eden Hosp., Inc. v. Blue Cross and Blue Shield of Mich., Inc.
740 F.2d 423(6th Cir. 1984) 8

Info. Handling Servs., Inc. v. Defense Automated Printing Servs.
338 F.3d 1024 (D.C. Cir. 2003)....................7

Jones v. Blanas
393 F.3d 918 (9th Cir. 2004) 5

Klingele v. Eikenberry
849 F.2d 409 (9th Cir. 1988), ...5

McKinzy v. Norfolk S. R.R.
354 Fed. Appx. 371 (10th Cir. Kan. 2009)....................7

Miller v. Beneficial Mgmt. Corp.
977 F.2d 834 (3d Cir. 1992) 7

Rand v. Rowland
154 F.3d 952 (9th Cir. 1998) 4

Texas Partners v. Conrock Co.
685 F.2d 1116 (9th Cir. 1982), ...6

Vance By and Through Hammons v. United States
90 F.3d 1145 (6th Cir. 1996) 7

Whittaker Corp. v. Execuair Corp.
953 F.2d 510 (9th Cir. 1992) 3

Wichita Falls Office Assocs. v. Banc One Corp.
978 F.2d 915 (5th Cir. 1992) 7

RULES

9th Cir. R. 35-1 ....1, 9

9th Cir. R. 40-1 ....1, 9

Fed. R. App. P. 35 ....1, 9

Fed. R. App. P. 35(b)(1) 1, 2

Fed. R. App. P. 40 1

Fed. R. Bankr. Proc. 7026 1

Fed. R. Civ. Proc. 26 1

LBR 7026-1 1

LBR 7026-1(a)(1) and (2) 1

Fed. R. Civ. Proc. 14 9

Fed. R. Civ. Proc. 15 9

Fed. R. Civ. Proc. 26 1

Fed. R. Civ. Proc. 26(a)(1)(A) 1

Fed. R. Civ. Proc. 26(f) 1, 7

Fed. R. Civ. Proc. 56 2

Fed. R. Civ. Proc. 56(d) 4, 8, 9

TREATISES

10B Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 2741, at 413-16 & n.2 (3d ed. 1998) 8

I. INTRODUCTION AND STATEMENT UNDER FED. R. APP. P. 35(B)

Debtors, Defendants, and Appellants Cheri Fu and the Estate of her late husband, Thomas Fu ("Appellants" or the "Fus"), hereby respectfully petition this Court for panel rehearing under Fed. R. App. P. 40 and 9th Cir. R. 40-1, and also petition for rehearing en banc under Fed. R. App. P. 35 and 9th Cir. R. 35-1 to -3, for the following reasons:

First, panel rehearing and rehearing en banc are warranted under Fed. R. App. P. 35(b)(1) because in its Memorandum Disposition (the "MemoDispo"), issued on August 16, 2018, the panel overlooked material points of fact and law.

A. The panel mistakenly upheld the Bankruptcy Court's finding that the incarcerated and *pro se* Fus unreasonably delayed commencing discovery to the prejudice of creditor/appellee City National Bank ("CNB"), even though there was no factual dispute in the record that the failure to commence the discovery process under Fed. R. Civ. Proc. 26 was CNB's exclusive fault due to CNB's failure to: (i) serve on the Fus the required Rule 26 notice in compliance with Fed. R. Bankr. Proc. 7026 and Fed. R. Civ. Proc. 26, (ii) file a proof of service to confirm service of such notice to the Fus with the Bankruptcy Court in violation of LBR 7026-1(a)(1) and (2), (iii) make the requisite Rule 26(a)(1)(A) initial disclosures to the Fus, and (iv) fulfill its non-exempted obligation to initiate the Rule 26(f) early meeting and discovery conference.

B. The panel overlooked CNB's materially false representation its Unilateral Status Reports to the Bankruptcy Court (in order to excuse its failure to comply with Rule 26 and LBR 7026-1, and to excuse its tardy service of its motion for summary judgment ("MSJ")) that "CNB is not able to contact the Fus directly." (AER Vol. XIX, Tabs 87-90.) These CNB representations to the Bankruptcy Court were indisputably false because CNB *at all times* could check the BOP prison inmate locator website, available 24/7, to locate the Fus, and it was perfectly able

to contact the Fus following BOP protocols; but CNB chose not to that, and instead mislead the Bankruptcy Court. (*See* required inmate communication and meeting procedures at https://www.bop.gov/inmates/communications.jsp and https://www.bop.gov/inmates/visiting.jsp).

C. In its MemoDispo, the panel overlooked the material fact that the Bankruptcy Court's Rule 56 ruling prohibited the Fus from conducting any discovery whatsoever regarding the amount of the civil damages that CNB claimed, despite CNB's non-waivable and affirmative duty to mitigate its damages as a secured creditor under Article 9 of the Uniform Commercial Code, and CNB's failure to produce any evidence of any effort whatever it undertook to mitigate its claimed losses before the Bankruptcy Court.

Second, rehearing en banc also is warranted under Fed. R. App. P. 35(b)(1) and (2) because the MemoDispo conflicts with existing opinions by other courts of appeals and the Supreme Court, substantially affects federal rules of national application in which there is an overriding need for national uniformity, and involves issues of exceptional importance.

A. Under Rule 56(d), Fed. R. Civ. Proc. (providing for continuances to conduct discovery to respond to a motion for summary judgment), Rule 14 (providing for impleader of third party indemnitors), and Rule 15 (providing for amendments to answers and other pleadings), 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 (and should be) the actual, practical procedural posture of the case under Rules 16 and 26, not simply the length of time the matter has been pending. *See, e.g., McKinzy v. Norfolk S. R.R.*, 354 Fed. Appx. 371, 375 (10th Cir. Kan. 2009) ("It goes without saying that a plaintiff cannot be permitted to thwart his opponent's ability to launch a defense by filing a summary judgment

motion before the Rule 26(f) conference[.]").

B. In a circumstance in which it is known that the incarcerated, *pro se* debtor's designated address is ineffective, because the MSJ papers had been returned to CNB as undeliverable because CNB failed to comply with the BOP with regard to delivery of papers to an inmate, an inmate's "failure to comply with a statutory obligation to keep up [his/her] address [does not forfeit] his right to constitutionally sufficient notice." *Jones v. Flowers*, 547 U.S. 220 (2006).

II. REASONS WHY REHEARING SHOULD BE GRANTED

Appellants understand the unpublished memorandum dispositions are not precedential. Here, however panel rehearing and rehearing en banc are warranted to issue rulings in a published opinion that have precedential force, because of the importance of the issues involved.

A. THE PANEL OVERLOOKED MATERIAL FACTS AND LAW

First, with respect to the Fus' argument that that the bankruptcy court erred in denying their Rule 56(d) motion because CNB failed to serve the required Rule 26 notice with its complaint, and breached its duty to commence Rule 26 discovery, the panel found that "the Fus failed to raise this argument before the bankruptcy court or district court and, as a result, the argument is waived. *Whittaker Corp. v. Execuair Corp*., 953 F.2d 510, 515 (9th Cir. 1992)." (*See* MemoDispo at pg. 3, fn. 4.). Rehearing is warranted because the panel overlooked the material fact that Appellants forcefully raised this very argument before the District Court, and therefore it was not waived:

> In this case, contrary to law, . . ."undue delay" supposedly occurred even though discovery had not even commenced because CNB failed to serve the requisite Rule 26 notice on Appellees or to initiate the Rule 26(f) conference with Appellees[.]

(*See* Appellants' Opening Brief to the U.S. District Court, ECF Doc. # 25, filed

6/22/2015, 8:15-cv-00676-CJC; Appellants' Appendix Vo. XVIII, at AA004515 [underlining added].)

Second, with respect to the Fus' argument that the bankruptcy court should have granted their Rule 56(d) motion because CNB failed to serve the Fus properly with CNB's summary judgment motion, the panel found that "it was the Fus' responsibility to update their addresses if they were changed and, as a result, CNB is not responsible for the fact that the Fus did not receive the summary judgment motion papers until later. *See* Fed. R. Bankr. P. 4002(a)(5)." (MemoDispo at pg. 3, fn. 4.) Rehearing is warranted because the panel overlooked the material fact that CNB repeatedly stated, falsely, in its Unilateral Status Reports to the Bankruptcy Court, "CNB is not able to contact the Fus directly." (AER Vol. XIX, Tabs 87-90.) In fact, CNB was perfectly able to contact the Fus directly by telephone, email and regular mail, and even in person, by complying with applicable BOP guidelines. (*See* required procedures at https://www.bop.gov/inmates/communications.jsp and https://www.bop.gov/inmates/visiting.jsp).

The Fus' failure to notify the Bankruptcy Court of changes to their BOP addresses when they were involuntarily transferred from one prison facility to another does not justify CNB's failures to locate the Fus through the BOP inmate locator website, to serve the requisite *Rand* notice under *Rand v. Rowland*, 154 F.3d 952 (9th Cir. 1998), to serve the requisite Rule 26 notice, or to initiate the Rule 26 conference. Absent CNB fulfilling its obligations as plaintiff under applicable rules, which it failed to do, discovery in the case never commenced, because it could not under Rule 26(f). (*See* Rule 26(a)(1)(B) (iv), exempting from Rule 26 meeting and discovery requirements actions brought by incarcerated, pro se plaintiffs, not actions brought against incarcerated, pro se defendants).The panel overlooked the material fact that CNB repeatedly stated, falsely, in its Unilateral

Status Reports to the Bankruptcy Court that it was "not aware of a way to contact the Fus other than by mailings to the addresses that they used in their Answer." (*See, e.g*., AER Vol. XIX, Tab 90, AER 004703.) These CNB statements are materially and indisputably false as a 15-second search on the federal inmate locator website would have located them. (*See* https://www.bop.gov/inmateloc/.)

Third, in light of these false representations to the Bankruptcy Court, which were not addressed by the panel, excusing the tardy service on the Fus of CNB's MSJ papers and its failure to serve the requisite Rule 26 notices while blocking the Fus from conducting any discovery simply because the Fus failed to update their prison addresses as *civil defendants* is contrary to at least the following decisions: *Jones v. Blanas*, 393 F.3d 918 (9th Cir. 2004), and *Klingele v. Eikenberry*, 849 F.2d 409 (9th Cir. 1988), which require liberal excusal of procedural errors of *pro se* incarcerated defendants (such as failing to update their mailing addresses); and *Jones v. Flowers*, 547 U.S. 220 (2006), which holds that a failure to update an address does not excuse the failure to provide constitutionally-sufficient notice.

B. THE PANEL'S DECISION CONFLICTS WITH EXISTING LAW REGARDING RULES OF NATIONAL APPLICATION REQUIRING NATIONAL UNIFORMITY, AND WHICH INVOLVE ISSUES OF EXCEPTIONAL IMPORTANCE

The panel upheld the Bankruptcy Court's determinations that the Fus unreasonably delayed the commencement of discovery, and that permitting discovery would delay the proceedings, complicate the issues, and prejudice Appellee CNB. (*See* MemoDispo §§ 1-3, at pgs. 3 -5.) But once the Court confronts the demonstrated and irrefutable fact, which the panel did not do, that the failure to commence discovery was due solely to the fault and rule violations of CNB, and is not properly attributable to the Fus either as a matter of fact, or law, or equity, then an entirely different result is warranted, justifying rehearing and the

issuance of a new and different opinion, preferably published.

So, for example, comprehensive research of published decisions in every Circuit Court of Appeals and District Court nationwide, and the Supreme Court, has failed to uncover any case in which "prejudice," "bad faith," or "undue delay" has been established when the case is in its most incipient procedural stage, when no pre-trial or trial dates had been set, and no Rule 26(f) meeting or discovery had occurred. Neither CNB, nor the Bankruptcy Court, nor the District Court, nor the panel, cited any such case either: because none exists. Yet the panel MemoDispo supports that untenable position.

Instead, and to the contrary, the Supreme Court has made clear that Rule 56(d)(2) expressly contemplates deferring summary judgment in order to "allow time" for the non-movant "to take discovery." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (Rule 56 allows for summary judgment "after adequate time for discovery and upon motion"). When, as here, the nonmoving party has not had the opportunity to discover information from a MSJ moving party that is essential to its opposition -- especially when the lack of discovery is due solely to the moving party's fault -- it is error to grant a precipitous summary judgment motion because a defendant must receive "a full opportunity to conduct discovery" to be able to successfully defeat the motion. *See Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 257 (1986).

Rehearing is warranted to reaffirm that, under *Burlington Northern Santa Fe R. Co. v. The Assiniboine*, 323 F.3d 767 (9th Cir. 2003), and *Texas Partners v. Conrock Co*., 685 F.2d 1116 (9th Cir. 1982), an incarcerated, *pro se* civil defendant in any proceeding (especially in a bankruptcy adversary proceeding) should not be railroaded into responding on shortened notice to a motion for summary judgment seeking ruinous nondischargeable money judgments before the Rule 26(f) conference has taken place, especially when, as here, the civil plaintiff has violated

its obligations under *Rand*, Rule 26, and LBR 7026 and 7056.

This fundamental error, in granting summary judgment against a *pro se*, incarcerated civil defendant when no discovery was permitted to commence, is contrary to the Supreme Court's controlling decisions in *Celotex* and *Anderson*. It also conflicts with opinions in other Circuits which hold that when no Rule 26(f) early meeting has occurred and no discovery has taken place, it is premature under Rule 56(d) to entertain a summary judgment motion. *See, e.g., McKinzy v. Norfolk S. R.R.*, 354 Fed. Appx. 371, 375 (10th Cir. Kan. 2009) ("It goes without saying that a plaintiff cannot be permitted to thwart his opponent's ability to launch a defense by filing a summary judgment motion before the Rule 26(f) conference[.]"); *Vance By and Through Hammons v. United States,* 90 F.3d 1145, 1149 (6th Cir. 1996) [reversing summary judgment because "no discovery was conducted before the motion for summary judgment was filed and decided"]) . *Miller v. Beneficial Mgmt. Corp*., 977 F.2d 834, 845 (3d Cir. 1992) (concluding that the "ncomplete state of discovery alone should have precluded summary judgment on the merits"); *Info. Handling Servs., Inc. v. Defense Automated Printing Servs*., 358 U.S. App. D.C. 37, 338 F.3d 1024, 1036 (D.C. Cir. 2003) ("[T]o the extent there is any doubt about the genuineness of those disputes, it cannot be resolved until IHS is given adequate time for discovery." (internal quotation marks omitted)); *Burnside-Ott Aviation Training Ctr., Inc. v. United States*, 985 F.2d 1574, 1582 (Fed. Cir. 1993) ("[S]ummary judgment should 'be refused where the nonmoving party has not had the opportunity to discover information that is essential to [its] opposition.'" (quoting *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 250 n.5 (1986))); *Wichita Falls Office Assocs. v. Banc One Corp*., 978 F.2d 915, 920 (5th Cir. 1992) ("[W]hen a party is seeking discovery that is germane to the pending summary judgment motion it is inequitable to pull out the rug from under them by denying such discovery.");

Cowan v. J.C. Penney Co., Inc., 790 F.2d 1529, 1532-33 (11th Cir. 1986) ("[G]enerally, summary judgment is premature when the moving party has not answered the opponent's interrogatories[,] . . . especially . . . where [the] . . . interrogatories [**17] . . . request information that is critical to the issues in dispute."); *Glen Eden Hosp., Inc. v. Blue Cross and Blue Shield of Mich., Inc*., 740 F.2d 423, 428 (6th Cir. 1984) (holding denial of rule 56(f) motion improper where party moving for summary judgment had not been "extremely forthcoming" with respect to document requests and interlocutory appeal had interrupted discovery); see also 10B Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 2741, at 413-16 & n.2 (3d ed. 1998) ("[T]he granting of summary judgment will be held to be error when discovery is not yet completed . . . .").

The panel's no-discovery ruling, on the erroneous ground that the Fus committed prejudicial delay (based on the misapprehension of the material fact that CNB was solely at fault for not commencing the Rule 26 discovery process), also is far from "harmless" error -- even as to Judgments Nos. 1 and 2, which were based on CNB's loans that were funded during the time-period in the Fus' plea agreements (October 2008 – June 2009). That is because the unfair denial of the Fus' Rule 56(d) motion prevented them from challenging the amount of the debt in relation to the amount that the creditor (Appellee CNB) actually did recover and should have recovered if it had exercised reasonably diligent efforts to mitigate its losses on these 100% secured loans. So even if the Bankruptcy Court were correct that Judgments Nos. 1 and 2 were properly deemed nondischargeable, it was incorrect, and committed reversible error, by accepting as undisputed, and disallowing any discovery to challenge, the full amount of CNB's claimed losses (on CNB's Sixth and Fifth Claims for Relief, in Judgment No. 1, in the amount of $35,000,000, and on CNB's Third and Fourth Claims for Relief, in Judgment No.

2, in the amount of $5,812,183.75, plus millions of dollars in interest).

The panel erred, and rehearing should be granted, so that this Court may make clear 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.

Rehearing also is warranted for this Court to make clear that 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 Rules 14 (impleader), Rule 15 (pleading amendments), and Rule 56(d) (summary judgment discovery), is the actual, practical procedural posture of the case under Rules 16 and 26. Supposedly "prejudicial delay" should not be based, as was done here, solely on the length of time the matter has been pending. When, as here, no pre-trial deadlines have been set, no trial date has been scheduled, no scheduling order has been entered under Rule 16, no early meeting counsel has occurred or disclosures made under Rule 26, and no discovery was even permitted to commence, the Court should rule that it is premature to grant summary judgment against any defendant, especially the Fus as *pro se* incarcerated civil defendants. This is even more true when these scheduling delays are caused entirely (and perhaps strategically) by the sophisticated creditor plaintiff.

Uniformity of the standard for determining Rule 56(d) undue delay, and undue delay for motions under Ruel 14 and 15, would be extremely beneficial, and this case provides the Court with an opportunity to do just that, for the benefit of parties and practitioners in this case and other cases in the future. That is another reason why a precedential ruling after rehearing is warranted.

III. CONCLUSION

For the foregoing reasons, panel rehearing and rehearing en banc are appropriate under Fed. R. App. P. 35 & 40 and 9th Cir. R. 35-1 to -3, and 40-1.

DATED: August 29, 2018

Respectfully submitted,

MARK ANCHOR ALBERT & ASSOCIATES

By: ss//Mark Anchor Albert

Mark Anchor Albert
Attorneys for Debtors, Defendants, and Appellants Cheri Fu and the Estate of Thomas Fu, deceased

CERTIFICATE OF COMPLIANCE PURSUANT TO 9TH CIRCUIT RULES 35-4 AND 40-1

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached petition for panel rhearing and rehearing en banc contains 3,526 words, is prepared in a format, type face, and type style that comply with Fed. R. App. P. 32(a)(4)-(6).

______ss//Mark Anchor Albert_____
Mark Anchor Albert

FILED

AUG 16 2018

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re: CHERI FU and THOMAS FU, Debtors, ____________________ CHERI FU and THOMAS FU, Appellants, v. CITY NATIONAL BANK, N.A., Appellee.	No. 15-56800 D.C. No. 8:15-cv-00676-CJC Bkr. Ct. No. 8:09-bk-22699-TA MEMORANDUM*

Appeal from the District Court
for the Central District of California
Cormac J. Carney, District Judge, Presiding

In re: CHERI FU and THOMAS FU, Debtors, ____________________ CHERI FU and THOMAS FU, Appellants, v.	No. 17-55530 D.C. No. 8:16-cv-01152-CJC Bkr. Ct. No. 8:09-bk-22699-TA

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

CITY NATIONAL BANK, N.A.,

Appellee.

Appeal from the Bankruptcy Court
for the Central District of California
Theodor Albert, Bankruptcy Judge, Presiding

Argued and Submitted December 4, 2018
Pasadena, California

Before: CALLAHAN and BEA, circuit judges, and WHALEY, [**] district judge.

Cheri Fu and Thomas Fu[1] appeal two money judgments entered by the bankruptcy court after summary judgment and affirmed by the district court and a third money judgment entered by the bankruptcy court after summary judgment and appealed directly to this court.[2] We affirm with respect to the money judgments entered by the bankruptcy court on April 20, 2015 and affirmed by the district court. We reverse and remand for further proceedings with respect to the money judgment

[**] The Honorable Robert H. Whaley, United States District Judge for the Eastern District of Washington, sitting by designation.

[1] Thomas Fu died during the pendency of this litigation. His estate is represented in this appeal.

[2] We have jurisdiction to hear the Fus' appeal from the district court's order under 28 U.S.C. § 158(d)(1) and 28 U.S.C. § 1291. We have jurisdiction to hear the Fus' direct appeal from the third money judgment entered by the bankruptcy court under 28 U.S.C. § 158(d)(2), because the order was certified for direct appeal and this court granted the Fus' petition for a direct appeal.

entered by the bankruptcy court on May 18, 2016 and appealed directly to this court (the “Third Money Judgment”).[3]

1. The Fus’ claim that the bankruptcy court erred when it denied, in substantial part, the Fus’ Rule 56(d) motion to postpone summary judgment in order to permit further discovery. We review a denial of a Rule 56(d) motion for an abuse of discretion. *Chance v. Pac-Tel Teletrac Inc.*, 242 F.3d 1151, 1161 (9th Cir. 2001). Here, the bankruptcy court did not abuse its discretion when it denied in substantial part the Fus’ Rule 56(d) motion because the Fus did not diligently pursue discovery. In fact, the Fus did not conduct any discovery in the 15 months between the time City National Bank (“CNB”) filed its complaint and the time CNB filed its motion for summary judgment.[4] It is not an abuse of discretion to deny a Rule 56(d) motion

---

[3] The Fus’ unopposed motion to take judicial notice (Dkt. No. 55) and City National Bank’s unopposed motions to take judicial notice (Dkt. Nos. 28 and 60) are GRANTED.

[4] The Fus argue that the bankruptcy court erred in denying their Rule 56(d) motion because CNB failed to serve the required Rule 26 notice with its complaint. But the Fus failed to raise this argument before the bankruptcy court or district court and, as a result, the argument is waived. *Whittaker Corp. v. Execuair Corp.*, 953 F.2d 510, 515 (9th Cir. 1992).

Additionally, we reject the Fus’ argument that the bankruptcy court should have granted their Rule 56(d) motion because CNB failed to serve the Fus properly with CNB’s summary judgment motion. CNB served the Fus at the addresses listed on the bankruptcy court’s docket. It was the Fus’ responsibility to update their addresses if they were changed and, as a result, CNB is not responsible for the fact that the Fus did not receive the summary judgment motion papers until later. *See* Fed. R. Bankr. P. 4002(a)(5).

Finally, assuming *arguendo* that the requirements of *Rand v. Rowland*, 154 F.3d 952, 953 (9th Cir. 1998) applied in this case, the Fus’ extensive response to

when the moving party failed to pursue discovery diligently earlier in the litigation. *See Brae Transp., Inc. v. Coopers & Lybrand*, 790 F.2d 1439, 1443 (9th Cir. 1986).

2. Next, the Fus argue that the bankruptcy court erred when it denied their Rule 15 motion to amend their *pro se* answers to change certain admissions to denials and assert 14 affirmative defenses. We review the denial of a Rule 15 motion for an abuse of discretion. *Jackson v. Bank of Hawaii*, 902 F.2d 1385, 1387 (9th Cir. 1990). Leave to amend should be freely given when justice so requires, *see* Fed. R. Civ. P. 15(a)(2), but "late amendments to assert new theories [at the time of summary judgment] are not reviewed favorably when the facts and the theory have been known to the party seeking amendment since the inception of the cause of action." *Acri v. Int'l Ass'n of Machinists & Aerospace Workers*, 781 F.2d 1393, 1398 (9th Cir. 1986). Here, the bankruptcy court did not abuse its discretion when it denied the Fus' motion because of undue delay and potential prejudice to CNB. *Cf. Howey v. United States*, 481 F.2d 1187, 1190 (9th Cir. 1973); *Jackson v. Bank of Hawaii*, 902 F.2d 1385, 1387–88 (9th Cir. 1990) (holding that an amendment prejudices the other party when the amendment would require additional discovery because it "advance[s] different legal theories and require[s] proof of different facts"); *AmerisourceBergen Corp. v. Dialysist W., Inc.*, 465 F.3d 946, 953 (9th Cir.

CNB's summary judgment motion demonstrates that any failure to serve a *Rand* notice on the Fus was harmless. *See Labatad v. Corr. Corp. of Am.*, 714 F.3d 1155, 1159 (9th Cir. 2013).

2006) (noting that we have considered delays of eight and 15 months to constitute "undue delay").

3. The Fus also contend that the bankruptcy court erred when it denied their Rule 14 motion to file a third-party complaint. We review a denial of a motion to file a third-party complaint for an abuse of discretion. *United States v. One 1977 Mercedes Benz, 450 SEL, VIN 11603302064538*, 708 F.2d 444, 452 (9th Cir. 1983). A trial court does not abuse its discretion when it denies a Rule 14 motion that would have "complicated and lengthened the trial, and would have introduced the extraneous question of remedies in the third-party action." *Sw. Administrators, Inc. v. Rozay's Transfer*, 791 F.2d 769, 777 (9th Cir. 1986). Here, the Fus' third-party complaint alleged bad faith on behalf of a number of financial institutions in relation to financing agreements to which CNB was not a party. The bankruptcy court did not abuse its discretion when it found that allowing the third-party complaint would have unnecessarily delayed and complicated the underlying litigation.

4. Finally, the Fus contend that the bankruptcy court erred when it granted CNB's summary judgment motion with respect to the Third Money Judgment. Summary judgment is proper when the moving party demonstrates that there is no genuine issue of material fact with respect to a cause of action and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). When considering a motion for summary judgment, the trial court must view the evidence in the light

most favorable to the nonmoving party. *Summers v. Teichert & Son, Inc.*, 127 F.3d 1150, 1152 (9th Cir. 1997). "The court must not weigh the evidence or determine the truth of the matters asserted but must only determine whether there is a genuine issue for trial." *Id*. An issue is "genuine" when there is sufficient evidence such that "a reasonable jury could reach a verdict in favor of the nonmoving party." *Id.* We review a grant of summary judgment de novo and may affirm if the trial court's decision is supported by any ground in the record, regardless whether the trial court relied on that ground. *Sicor Ltd. v. Cetus Corp.*, 51 F.3d 848, 853, 860 n.17 (9th Cir. 1995).

After reviewing the record in this case, we reverse the bankruptcy court's grant of summary judgment with respect to the Third Money Judgment. First, the bankruptcy court erred by striking Cheri Fu's declaration. The bankruptcy court disregarded the declaration because it allegedly contradicted Ms. Fu's prior sworn statements in her plea agreement in a related criminal case. But a finding that a statement in a declaration contradicts prior testimony is, without more, insufficient to invoke this court's rule concerning "sham affidavits." *Van Asdale v. Int'l Game Tech.*, 577 F.3d 989, 998 (9th Cir. 2009). Because the bankruptcy court failed to make a factual finding that Ms. Fu's affidavit was a "sham affidavit" within the meaning of this court's precedent, it was error to exclude the affidavit. *Yeager v. Bowlin*, 693 F.3d 1076, 1080 (9th Cir. 2012) ("In order to trigger the sham affidavit

rule, the district court must make a factual determination that the contradiction is a sham . . . .”).

Second, taking Ms. Fu’s affidavit into account, the Fus presented the bankruptcy court with a genuine issue of material fact for trial. Specifically, Ms. Fu’s declaration raised a genuine issue of fact as to when the Fus’ fraud began. Ms. Fu’s declaration stated that the fraud did not begin until October 2008, and that prior to October 2008, the Fus made no misrepresentations to CNB. The ABL financing agreement at issue in the Third Money Judgment was signed in May 2008. As a result, if the fraudulent statements did not occur until October 2008, months after the ABL agreement was consummated, a reasonable jury could find that CNB was not induced to enter into the ABL agreement by the Fus’ fraudulent representations.[5]

---

[5] CNB argues that whether the fraud began in May 2008 or October 2008 is immaterial because the fraud allowed the Fus to obtain an “extension [or] renewal . . . of credit,” thereby rendering the debt non-dischargeable. *See* 11 U.S.C. § 523(a)(2)(B). First, the bankruptcy court clearly rejected CNB’s argument that the date the fraud began was immaterial because it continued the summary judgment hearing to receive additional evidence and argument as to the date the fraud began. Although we can affirm on any ground supported by the record, we decline to affirm based on this argument, which was underdeveloped both before the bankruptcy court and here on appeal.

To the extent CNB claims that the Fus’ debt is non-dischargeable because the Fus fraudulently obtained an extension or renewal of credit, thereby causing CNB’s forbearance with respect to its collection remedies, CNB was required to prove that it possessed valuable collection remedies that lost value as a result of the fraud. *See In re Siriani*, 967 F.2d 302, 306 (9th Cir. 1992), *as amended* (June 29, 1992). The only evidence to which CNB directed this court regarding the value of its collateral and/or collection remedies are the borrowing base certificates that were admittedly fraudulent as of October 2008. This would have been CNB’s first opportunity to

In disregarding the possibility CNB was not induced to enter the May 2008 ABL financing agreement by fraudulent statements that were made in October 2008, the bankruptcy court drew impermissible inferences in favor of the moving party, CNB, rather than viewing the evidence in the light most favorable to the non-moving party, the Fus. For instance, the bankruptcy court stated that the March 2008 financial statements were likely fraudulent because they closely matched the October 2008 financial statements, which Ms. Fu admits were fraudulent. Of course, that is one possible inference a reasonable fact finder could draw from those facts, but it is not the only one. Viewing the evidence in the light most favorable to the Fus, as required at summary judgment, a reasonable fact finder could also conclude that the report from May 2008 was accurate, but that the Fus' business declined by October 2008, making a report of the same basic figures inaccurate. Similarly, the bankruptcy court erred by totally disregarding audit reports referenced by Ms. Fu's declaration because, in the bankruptcy court's view, all the reports proved was that the auditors were "fooled, incompetent and/or obviously relied far too much on the information supplied by the Fus." This factual finding exceeded the bankruptcy court's authority at summary judgment and resulted in the bankruptcy court's erroneous conclusion that there was no genuine issue of material fact for trial.

---

exercise its collection remedies. As a result, CNB has failed to show the amount of loss it suffered due to its forbearance after October 2008.

Because the bankruptcy court applied the wrong standard at summary judgment, we reverse the Third Money Judgment and remand for further proceedings.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED FOR FURTHER PROCEEDINGS.

9th Circuit Case Number(s) NO. 15-56800
15-56800 (consolidated with No. 17-55530)

NOTE: To secure your input, you should print the filled-in form to PDF (File > Print > *PDF Printer/Creator*).

****

CERTIFICATE OF SERVICE
When All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) August 29, 2018 .

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Signature (use "s/" format) s/Mark Anchor Albert (SBN 137027)

****

CERTIFICATE OF SERVICE
When Not All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) ______ .

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

Signature (use "s/" format)