In the

United States Court of Appeals

For the Seventh Circuit

No. 22-2500

IN RE: JELENA DORDEVIC,

Debtor,

GUS A. PALOIAN, as Trustee

Plaintiff-Appellee,

v.

JORGOVANKA DORDEVIC,

Defendant-Appellant.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 1:21-cv-05328 — **Gary Feinerman**, *Judge*.

ARGUED JANUARY 19, 2023 — DECIDED APRIL 27, 2023

Before BRENNAN, SCUDDER, and KIRSCH, *Circuit Judges*.

BRENNAN, *Circuit Judge*. Jelena Dordevic filed for Chapter 7 bankruptcy. The Trustee then sued her mother, Jorgovanka Dordevic, to recover a stake in a company registered in

Jorgovanka's name,[1] a procedure called a "turnover." The Trustee successfully argued before the bankruptcy court that Jorgovanka served as Jelena's nominee—a party who holds title for another's benefit. So, the court ruled that equitable ownership of the stake in the company belonged to Jelena, and thus that the property was subject to turnover to the bankruptcy estate.

Jorgovanka argues the bankruptcy court incorrectly applied a preponderance of the evidence standard of proof, rather than clear and convincing evidence, when making this decision. But a preponderance standard applies unless particularly important individual interests are involved or the estate's theory for property turnover imposes a higher standard of proof. Neither situation exists here, so the bankruptcy court applied the correct standard of proof. Under that standard, the bankruptcy court did not clearly err in finding that the Trustee had met his burden of establishing Jelena's equitable ownership, and the district court correctly affirmed the bankruptcy court's judgment for the Trustee.

The Trustee also argues that Jorgovanka's appeal is frivolous and requests sanctions. Because Jorgovanka presented a colorable legal argument on the standard of proof, we deny that request.

I. Background

This appeal concerns an adversarial proceeding arising out of the Chapter 7 bankruptcy of debtor Jelena Dordevic. Under 11 U.S.C. § 542, the Trustee of Jelena's estate sued Jelena's mother, Jorgovanka, for turnover of Jorgovanka's

[1] We refer to certain parties by their first names for ease of reference.

50% record interest in PHMX LLC, a Florida company organized to produce injectable pharmaceuticals.

Jorgovanka is the uncontested legal owner of the 50% interest in PHMX at issue. The other half of the company is owned by a third party, Shogher Zargaryan. The parties here dispute who has equitable ownership of the 50% PHMX interest registered in Jorgovanka's name. To obtain the PHMX stake for the sale and distribution of proceeds to Jelena's creditors, the Trustee had to prove that the PHMX stake is a part of Jelena's estate. 11 U.S.C. § 541. The Trustee sought to do so on a theory that Jorgovanka is Jelena's nominee—a "party who holds bare legal title for the benefit of others"[2]—thus vesting equitable ownership in Jelena. On appeal, Jorgovanka claims equitable ownership under various theories, as does Nikola Zaric, Jelena's former business and romantic partner.

The following facts were adduced at the bankruptcy trial. Zaric and Jelena cofounded a trucking company in 2009 called Arrow Freight, Inc. and were equal business partners. In 2015, Zaric sold Jelena his half for $800,000 under the Arrow Freight Stock Sale and Purchase Agreement. The two-page Agreement says nothing about the timing of payment or a debt, and though at trial Zaric referenced a note generated by the sale, that note is not in the record. Per Zaric, he did not need the money at the time and so did not demand payment immediately.

Separately, around 2015 and 2016, medical researcher Shogher Zargaryan designed specialized machinery to produce syringes with the intent to form a medical equipment manufacturer. This technology served as the foundation of

[2] *Nominee*, BLACK'S LAW DICTIONARY (11th ed. 2019).

PHMX LLC. Shogher and others later formed a separate company, Pharmix USA LLC, to serve as a general contractor to build the PHMX pharmaceutical factory. This entire project is called the PHMX Project. Shogher eventually brought her son and engineer, Nick Kazumian, and his now ex-wife, Kari Kazumian, into the Project. Together they sought an investor.

In late 2016 or early 2017, Zaric and Jelena, who at the time were in a romantic relationship, met then-couple Nick and Kari on a cruise. The couples became friendly, and Nick and Kari pitched the PHMX Project to Zaric and Jelena. Zaric recounted that Nick approached him about the Project and that they "decided to be 50/50 partners." Zaric further averred that Jelena was offered a role in the PHMX investment opportunity but turned it down.

But Nick, Kari, and Shogher testified to the contrary. Nick and Kari indicated the three of them intended to bring in Jelena—not Zaric—as the financial partner for the PHMX Project. And Shogher testified that she was looking for investors in 2016 and 2017, and was introduced to Jelena by Nick and Kari. Nick, Kari, and Shogher said it was understood that Jorgovanka was inserted as nominal owner on behalf of Jelena. Jelena attested this was done to avoid problems with immigration authorities because she had been charged with immigration fraud for trying to attain permanent residency in the United States through an alleged sham marriage. But Zaric said he—not Jelena—had requested Jorgovanka to be registered as the legal owner of the 50% stake in PHMX.

Eventually, the PHMX factory construction began in Florida. The costs for the PHMX Project were covered by a $1,000,000 construction loan and $773,250 of wire transfers from Jelena's personal bank account and the business

accounts of Arrow Freight, GTR, and Spirit Freight, which she controlled.[3] Relevant here is who has equitable ownership of the company stake paid for by the $773,250 in wire transfers. Jorgovanka and Zaric presented a variety of theories to show equitable ownership of the PHMX stake belonged to them. We briefly summarize their supporting evidence.

Recall that Jelena allegedly owed Zaric money from the Arrow Freight stock sale—money that Zaric said he had not immediately demanded. Jelena and Zaric testified that the wire transfers were made at Zaric's direction for repayment of that alleged debt. But Shogher, Kari, and Nick testified to the contrary. They all recalled conversations with Jelena that indicated she had initiated the wire transfers on her own, not on Zaric's instructions. And contemporaneous emails and text messages showed that Jelena was inquiring into and disbursing funds for Pharmix's mortgage, environmental expenses, construction expenses, and even porta potties for the construction site.

At trial, Jorgovanka produced a Nominee Agreement that by its terms suggested Jorgovanka held the PHMX stake for Zaric's benefit. She also proffered a Secured Promissory Note for $500,000 lent by Zaric to Jorgovanka for alleged investment into PHMX, which suggested that Jorgovanka was to be owner of the interest. Zaric testified inconsistently that he or Jorgovanka was to be the equitable owner of the 50% PHMX stake under these documents. Jorgovanka also claimed that she made a separate $112,000 contribution to the PHMX Project for her own interest. But Zaric testified that the $112,000 was for a purpose different from the Project. He said he

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[3] GTR and Spirit Freight were other trucking businesses Jelena owned.

transferred that amount to Jorgovanka with the understanding that Jorgovanka's son would simultaneously transfer the money in cash to Zaric's father in Serbia for house renovations. The positions of Zaric and Jorgovanka were convoluted, and the testimony of Jorgovanka's witnesses—Zaric, herself, and Jelena—often conflicted.

After a three-day trial, the bankruptcy court decided that the Trustee had established by a preponderance of the evidence that Jelena was the equitable owner of the PHMX interest. Jorgovanka appealed to the district court, which affirmed the bankruptcy court. Jorgovanka then appealed to this court. While awaiting oral argument, the Trustee moved for sanctions under Federal Rule of Appellate Procedure 38, arguing that this appeal is frivolous.

II. Standard of Proof

Jorgovanka first asserts that the correct standard of proof for turnover of property under 11 U.S.C. § 542 is the heightened clear and convincing evidence standard, rather than the preponderance standard that the bankruptcy court applied. We review legal questions de novo. *In re USA Gymnastics*, 40 F.4th 775, 777 (7th Cir. 2022). To evaluate Jorgovanka's assertion, we begin by discussing the turnover procedure under the Bankruptcy Code and its predecessor statute.

A. Section 542

Under Bankruptcy Code Section 542, a trustee assigned to administer a debtor's estate may recover property of the estate from third parties via a "turnover." 11 U.S.C. § 542. Property of the bankruptcy estate includes "all legal and equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1). What constitutes property of

the estate under Section 541 is a question of federal law, but state law often determines whether a debtor has an interest in property. *See Barnhill v. Johnson*, 503 U.S. 393, 398 (1992) (citations omitted) ("In the absence of any controlling federal law, 'property' and 'interests in property' are creatures of state law."); *Butner v. United States*, 440 U.S. 48, 54–55 (1979) ("Congress has generally left the determination of property rights in the assets of a bankrupt's estate to state law."); *In re Thorpe*, 881 F.3d 536, 539 (7th Cir. 2018) (citation omitted); *Fisher v. Apostolou*, 155 F.3d 876, 880 (7th Cir. 1998) (citation omitted). So, a variety of legal theories can support what constitutes property of an estate under Section 541, and thus what is subject to turnover under Section 542.

1. Bankruptcy Act of 1898

The federal bankruptcy statutory regime was revamped in 1978 by the Bankruptcy Reform Act (effective October 1, 1979), which replaced the prior Bankruptcy Act of 1898 with the Bankruptcy Code. Bankruptcy Reform Act, Pub. L. 95–598, 92 Stat. 2549 (November 6, 1978) (codified as amended at 11 U.S.C. ch. 1, *et seq.*). Since that reform, there has been some confusion about the proper standard for bankruptcy turnovers, a procedure that existed under the Bankruptcy Act framework. *In re Meyers*, 616 F.3d 626, 630 (7th Cir. 2010). Neither the Supreme Court nor this court has resolved this question.

This court adopted the preexisting burden-shifting scheme for turnover actions in *In re Meyers*: A trustee first "bears the burden of establishing a prima facie case for turnover," then "the debtor must provide a reason for going forward with the case." *Id.* at 629–30 (citations omitted). "[B]ut the ultimate burden of persuasion remains with the trustee at

all times." *Id.* In *Meyers*, this court also suggested—in dicta that the bankruptcy court relied upon—that "we think that the default preponderance standard that the Supreme Court applied to dischargeability in *Grogan* is probably the appropriate one also for turnover actions" *Id.* at 630 (citing *Grogan v. Garner*, 498 U.S. 279 (1991)). But that case did not resolve this question, because the result would have been the same under either standard. *Id.*

Jorgovanka criticizes the bankruptcy court's reliance on the *Meyers* dicta in applying a preponderance standard. She argues that the clear and convincing standard for summary turnovers under the Bankruptcy Act controls, based on *Maggio v. Zeitz*, 333 U.S. 56, 64 (1948) and *Oriel v. Russell*, 278 U.S. 358, 362–63 (1929). This court last applied the clear and convincing standard for a turnover in *Gorenz v. Ill. Dep't of Agric.*, 653 F.2d 1179, 1184 (7th Cir. 1981). True, these three cases all held that "[a]s part of his prima facie case, the trustee must demonstrate through clear and convincing evidence that the property or proceeds in question are a part of the bankrupt's estate." *Gorenz*, 653 F.2d at 1184 (citing *Maggio*, 333 U.S. at 64); *see Oriel*, 278 U.S. at 362–63. But each decision was based on the judicially created summary turnover procedure that existed under the now-defunct Bankruptcy Act.[4] *Maggio*, 333 U.S. at 61–64. The summary turnover procedure was created to effectuate the Bankruptcy Act, which imposed criminal sanctions—including "heavy penalties of fine or

[4] *Gorenz*, though decided by our court in 1981, involved a petition for bankruptcy filed January 23, 1978. 653 F.2d at 1181. So, the petition in that case was filed before the Bankruptcy Reform Act became effective on October 1, 1979. Contrary to Jorgovanka's suggestions, *Gorenz* still operated under the Bankruptcy Act.

imprisonment or both"—for a "comprehensive list of frauds, concealments, falsifications, mutilation of records and other acts that would defeat or obstruct collection of the assets of the estate." *Id.* at 61–62 (citing 11 U.S.C. §§ 11(a)(4), 52(b), 42(c) (1946)); *see* Bankruptcy Act, ch. 541, §§ 1(22), 2(4), (13)–(16), 29 (1898). Such offenses were subject to investigation and prosecution by the United States Attorney, in cooperation with the bankruptcy referee. *Maggio*, 333 U.S. at 62 (citing 11 U.S.C. § 52(e) (1946)); *see* Bankruptcy Act, ch. 541, § 29(d) (1898).

The courts fashioned the summary turnover procedure "to retrieve concealed and diverted assets … the withholding of which … would intolerably obstruct and delay administration." *Maggio*, 333 U.S. at 62–63. Given the background of criminal sanctions, the courts imposed a stringent clear and convincing evidence standard, like the one imposed in a case of fraud in a court of equity. *Id.* at 62–64; *Oriel*, 278 U.S. at 362-63.

2. Bankruptcy Code

Fast forward to the Bankruptcy Code, which no longer includes criminal sanctions. *See* 11 U.S.C. ch. 1, *et seq.* Granted, many criminal actions related to bankruptcy are codified in 18 U.S.C. ch. 9, including concealment of assets, embezzlement against the estate, and bankruptcy fraud. 18 U.S.C §§ 152, 153, 157. Still, the federal bankruptcy system changed after the Bankruptcy Code became effective in 1979, as recognized in *Grogan v. Garner*, 498 U.S. 279 (1991). Although *Grogan* concerned the non-dischargeability of debt for actual fraud under 11 U.S.C. § 523(a)(2)(A), 498 U.S. at 280–81, the Supreme Court's reasoning applies just as well to turnovers under Sections 542 and 541.

Grogan established that, in the absence of an express or implied standard of proof in the Bankruptcy Code, the presumptive standard of proof under its provisions is the preponderance standard governing civil actions generally. *Id.* ("[W]e presume that this standard is applicable in civil actions between private litigants."). This standard governs unless "particularly important individual interests or rights are at stake." *Id.* (quoting *Herman & MacLean v. Huddleston*, 459 U.S. 375, 389–90 (1983)). In holding that the preponderance standard governed, the Court thought it unlikely that Congress would have favored debtors' interest in having a fresh start following bankruptcy over the interests of victims of fraud. *Id.* at 286–87.

As in *Grogan*, Sections 541 and 542 do not prescribe a standard of proof. *See* 11 U.S.C. §§ 541, 542. The predecessor summary turnover procedure was a judicial creation, *Maggio*, 333 U.S. at 61–64, so at best it provides only guidance as to the new statutory framework. And the backdrop of criminal sanctions under the defunct Bankruptcy Act that undergirded the Supreme Court's imposition of a higher standard no longer exists in the Bankruptcy Code. As we see next, the relevant individual interests *Grogan* instructed us to consider lead us to a preponderance standard.

B. Individual Interests

Where Congress has not prescribed a standard of proof, the Supreme Court will assign one. *Huddleston*, 459 U.S. at 389. In establishing a standard of proof, the Court is "mindful that a standard of proof 'serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision.'" *Id.* (quoting *Addington v. Texas*, 441 U.S. 418, 423 (1979)). Thus, the Court has "required proof by

clear and convincing evidence where particularly important individual interests or rights," such as individual liberty, "are at stake." *Id.* (citing *Santosky v. Kramer*, 455 U.S. 745 (1982) (proceeding to terminate parental rights); *Addington*, 441 U.S. 418 (involuntary commitment proceeding); *Woodby v. INS*, 385 U.S. 276 (1966) (deportation proceeding)).

Here, no particularly important individual interests or rights are at stake. "This case is solely about money"—that is, who has equitable title to the PHMX stake and proceeds from its sale. *In re Briscoe Enters., Ltd., II*, 994 F.2d 1160, 1165 (5th Cir. 1993). "There are not … any quasi-liberty interests at stake." *Id.* In such cases, our sister circuits have held that a preponderance standard applies to different Bankruptcy Code provisions. *In re Johnson*, 501 F.3d 1163, 1169–70 (10th Cir. 2007) (willful violation of an automatic stay under 11 U.S.C. § 362(k)(1)); *In re Norris*, 1997 WL 256808, at *3–4 (5th Cir. Apr. 11, 1997) (question of debtor not paying debts as they become due unless such debts are the subject of a bona fide dispute under 11 U.S.C. § 303(b)(1), (h)(1)); *In re Briscoe Enters.*, 994 F.2d at 1163–65 (Chapter 11 reorganization plan confirmation under 11 U.S.C. § 1129(b)).

The conflict here is among third parties—the alleged nominee (Jorgovanka), Zaric, and creditors. There is no evident statutory preference for the creditors' or another third party's interests to trump that of the nominee titleholder or vice versa. Without statutory direction to favor one interest over another, the default preponderance of evidence standard governs for Section 542 turnovers unless the estate's theory for property turnover prescribes a heightened standard. We discuss this next.

C. *Kelley* and the Estate's Theory for Property Turnover

The Trustee cites *Kelley v. Stevanovich*, 40 F.4th 779 (7th Cir. 2022), as adopting a preponderance standard for Section 542 turnovers and rejecting the clear and convincing standard from *Maggio* and *Oriel*. That is not quite correct. In *Kelley*, we rejected the appellant's reliance on *Maggio* and *Oriel* as unpersuasive because the cases "considered an outdated procedure superseded by the Bankruptcy Code," but we did not address turnovers under Sections 542 and 541. *Id.* at 788–89. As Jorgovanka correctly notes, *Kelley* concerned a post-judgment district court proceeding in which the trustee sought turnover of property under an Illinois state law theory of embezzlement—not Sections 542 and 541. *Id.* at 783–84. So while in *Kelley* this court applied a preponderance standard for the turnover in question, we did so primarily "[b]ecause the Illinois statute does not provide a higher standard of proof for recovery." *Id.* at 789.

Under the rationale of *Grogan* and *Kelley*, courts should apply the preponderance standard to bankruptcy turnovers by default unless Congress indicates that "particularly important individual interests or rights are at stake" or the relevant law for the estate's theory for property turnover imposes a higher standard of proof. *Grogan*, 498 U.S. at 286 (quoting *Huddleston*, 459 U.S. at 389–90); *Kelley*, 40 F.4th at 788–89. Congress did not express a policy that a nominee titleholder's interest overcomes a creditor's or another third party's interest. With congressional silence on the issue, we presume the relevant interests are in parity. But a question remains as to whether the estate's nominee theory for turnover requires a higher standard of proof than preponderance.

Applying federal law,[5] courts have uniformly held—albeit in different contexts—that a preponderance standard applies in determining nomineeship.[6] Given this authority, we hold that a preponderance standard applies here. In recent cases, courts have applied a preponderance standard for turnovers under Section 542. *E.g.*, *In re Miller*, 741 F. App'x 859, 862 (3d Cir. 2018); *In re Jacobson*, 676 F.3d 1193, 1200–01 (9th Cir. 2012) (applying a preponderance standard but not deciding the issue conclusively); *In re Bruner*, 561 B.R. 397, 403 (B.A.P. 6th Cir. 2017); *In re Crowson*, 431 B.R. 484, 489 (B.A.P. 10th Cir. 2010); *see also* 5 COLLIER ON BANKRUPTCY ¶ 542.03 (Richard Levin & Henry J. Sommer eds., 16th ed. 2023). The same is true of recent bankruptcy court cases within and outside our circuit.[7]

All these cases are more recent than the Eighth Circuit and bankruptcy court cases Jorgovanka cites in support of a clear

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[5] The parties do not contest the bankruptcy court's decision that because PHMX, Inc. was organized in Florida, that state's law applies in determining the equitable ownership of the stake in that company. Because Florida law does not prescribe a test for determining equitable title under a nominee theory, the bankruptcy court applied a federal common law factor test to determine the issue. Neither party objected to this choice of law, and we do not diverge from it.

[6] *See, e.g.*, *United States v. One 1990 Beechcraft, 1900 C Twin Engine Turbo-Prop Aircraft, Venezuelan Registration No. YV219T, Serial UC118*, 619 F.3d 1275, 1277 (11th Cir. 2010); *LiButti v. United States*, 107 F.3d 110, 119-20 (2d Cir. 1997); *United States v. Reed*, 168 F. Supp. 2d 1266, 1268–69 n.1 (D. Ut. 2001); *United States v. Marsh*, 114 F. Supp. 2d 1036, 1045 (D. Haw. 2000).

[7] *E.g.*, *In re FDV Artfolio LLC*, 618 B.R. 29, 34 (Bankr. W.D. Okla. 2020); *In re Pac. Thomas Corp.*, 603 B.R. 455, 461 (Bankr. N.D. Cal. 2019); *In re Lee*, 508 B.R. 399, 407 (Bankr. S.D. Ind. 2014); *In re McCoy*, 464 B.R. 832, 835 (Bankr. W.D. Wis. 2011).

and convincing standard. The Eighth Circuit in *Evans* relied on Bankruptcy Act cases, *Maggio* and *Gorenz*, and was decided before the Supreme Court's 1991 clarification of the Bankruptcy Code's standard of proof in *Grogan*. *Evans v. Robbins*, 897 F.2d 966, 968 (8th Cir. 1990) (citing *Maggio*, 333 U.S. at 64 and *Gorenz*, 653 F.2d at 1184).

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All indications point one way: The default preponderance standard applies to the Trustee's nominee theory for turnover under Section 542. The bankruptcy court applied the correct standard, so next we review the bankruptcy court's finding under that standard of Jelena's equitable ownership.

III. Equitable Ownership

A bankruptcy court's factual findings are reviewed for clear error—"in other words, with a serious thumb on the scale for the bankruptcy court." *U.S. Bank Nat. Ass'n ex rel. CWCapital Asset Mgmt. LLC v. Vill. at Lakeridge, LLC*, 138 S. Ct. 960, 966 (2018) (citing FED. R. CIV. P. 52(a)(6)). Mixed questions of law and fact that are primarily factual are also reviewed for clear error. *Id.* at 966–69. As seen below, determining equitable ownership is a mixed question that depends heavily on factual findings. So, we review for clear error the bankruptcy court's determination that the Trustee established Jelena's equitable ownership of the PHMX stake.

Jorgovanka disputes this conclusion and asserts that despite the uncontested evidence that Jelena wired $773,250 to Pharmix, equitable ownership of PHMX belongs to her or to Zaric. To decide whether Jorgovanka was a nominee for Jelena, the bankruptcy court applied a five-factor test for nomineeship from an unpublished Seventh Circuit opinion,

United States v. Szaflarski, 614 F. App'x 836, 838–39 (7th Cir. 2015): "(1) there is a close personal relationship between the nominee and the transferor; (2) the nominee paid little or no consideration for the property; (3) the parties placed the property in the name of the nominee in anticipation of collection activity; (4) the parties did not record the conveyance; and, (5) the transferor continues to exercise dominion and control over the property." These factors generally accord with other federal caselaw. *See, e.g.*, *Oxford Capital Corp. v. United States*, 211 F.3d 280, 284 n.1 (5th Cir. 2000). We analyze the facts here under these factors.

On the first factor, Jorgovanka is both Jelena's mother and dependent, which weighs in favor of Jelena's equitable ownership. The bankruptcy court found the fourth factor—recording of conveyance—irrelevant without stating why. This was probably because Jorgovanka's status as record titleholder is uncontested. The relevant question is who had equitable title to Pharmix despite record title belonging to Jorgovanka. So, we need not address this fourth factor. We examine the remaining three factors next.

A. Jorgovanka's Consideration

On the second *Szaflarski* factor, we review Jorgovanka's contributions as well as whether she is the real party in interest.

1. Contributions by Jorgovanka

No evidence shows that Jorgovanka contributed financially to the PHMX Project. Jelena—not Jorgovanka—wired $773,250 to PHMX's general contractor, Pharmix. The Trustee asserts that these funds were consideration for Jelena's 50% equitable interest in PHMX. While legal title was in

Jorgovanka's name, there was no financial record of transfers by Jorgovanka for the PHMX Project. All the financing for the Project—apart from the $1 million construction loan—came from $773,250 in wire transfers from accounts controlled by Jelena.

Jorgovanka asserts that she independently contributed $112,000 to the PHMX Project for her own interest. In the alternative, she claims this contribution should be attributed to Zaric. As noted, no financial record shows that Jorgovanka contributed funds to the PHMX Project. Contradicting Jorgovanka's assertion, Zaric testified that because he wanted $112,000 sent to his father to renovate Zaric's house in Serbia, he transferred the amount to Jorgovanka with the understanding that Jorgovanka would then instruct her son, Igor, to take the money in cash to Zaric's father in Serbia. This suggests that the $112,000 had nothing to do with the Project. Moreover, there is no financial record of this sum being transferred from Zaric to Jorgovanka.

Jorgovanka highlights that bank records reveal transfers to Jelena from Zaric or companies he owned, totaling exactly $112,000. The records do show that Zaric transferred to Jelena $80,000, $10,000, and $22,000. But this misses the point. There is no evidence of transfers by Zaric or Jorgovanka specifically for the PHMX Project. And there is no documentation that the transfers to Jelena were for Jorgovanka's or Zaric's alleged interest in PHMX. The bankruptcy court thus did not clearly err in rejecting the claims of Jorgovanka and Zaric based on the $112,000.

The record also fails to support any non-financial contributions by Jorgovanka to the PHMX Project. The PHMX Project was the brainchild of Shogher Zargaryan as well as her

business partners Nick and Kari Kazumian—not Jorgovanka. The bankruptcy court emphasized that Jorgovanka cannot speak English and she has no expertise in pharmaceuticals, factory construction, engineering, or any other skill that would be useful in running an enterprise like PHMX. On appeal, Jorgovanka portrays herself as a businesswoman and a competent part-owner of a chain-restaurant in Serbia. Regardless of her abilities, Jorgovanka has not identified any specific acts of managerial or technical assistance by her for the benefit of the PHMX Project.

PHMX co-founder, Shogher, testified she met Jorgovanka only twice on social occasions. Shogher also said Jorgovanka lacked knowledge of the business. So, the evidence shows that Jorgovanka paid no consideration—financial or otherwise—for the 50% share of PHMX and that Jelena contributed all the $773,250 in funding. This supports the Trustee's theory of Jelena's equitable ownership.

2. Jorgovanka—Not the True Party in Interest

This second *Szaflarski* factor of whether "the nominee paid little or no consideration for the property," 614 F. App'x at 838–39, also assesses whether the nominee is not the true party in interest and thus that equitable title is held by someone else.

Jorgovanka advances three reasons for why she or Zaric is the equitable owner: (1) the payments from Jelena to the PHMX Project are repayments to Zaric for his sale of Arrow Freight stock to Jelena; (2) Zaric made Jorgovanka a loan pursuant to a Secured Promissory Note and Nominee Agreement, allegedly making Jorgovanka his nominee; and (3) Jorgovanka (or possibly Zaric) separately invested $112,000 into

the PHMX Project. We already discussed why the evidence does not support the third, so we discuss the first two.

(i) *Repayment for Arrow Freight Stock Sale*

Jorgovanka does not contest the bankruptcy court's finding that no written documentation showed that Jelena's wire transfers were in repayment for a debt to Zaric generated by the Arrow Freight stock sale. So, the question is whether the transaction generated a debt owed by Jelena to Zaric and whether that debt was partially repaid by Jelena via the $773,250 in wire transfers. Evidence of that is lacking.

For one, the Arrow Freight Stock Sale and Purchase Agreement says the buyer (Jelena) agreed to pay Zaric $800,000 for his interest in Arrow Freight. But the two-page Agreement says nothing about when or how that amount would be paid or whether a debt would be generated by the sale. At trial, Zaric referenced a "note" from the sale but that note is nowhere in the record. Even if we accepted that the Agreement was enough documentation for a debt, there is no documentary evidence that Zaric assigned any right to repayment to Pharmix and that such payments would be for his equitable interest in PHMX. All we have are post hoc testimonies from Zaric, Jelena, and Jorgovanka, all of whom the bankruptcy court found not credible for, among other reasons, their "financial motivation to shade the truth."

Jelena testified that she believed she still owed some of the $800,000 under the Arrow Freight Stock Sale and Purchase Agreement. But incredibly, she said she never paid any of the money directly to Zaric. Given that the plain language of the Agreement says the buyer (Jelena) would pay the seller (Zaric) $800,000 without qualification, one would assume that

there would be some financial record of payments and an accounting for debt still owed and interest, if any. Instead, Jelena testified she owed Zaric a debt for the sale, which the bankruptcy court found was severely impeached by the fact that Jelena deliberately omitted the alleged debt from her bankruptcy schedules, despite attesting that the schedules were correct and complete.

Jelena's credibility was further impugned by her testimony at a Bankruptcy Rule 2004 examination by her secured creditors. In her testimony, she could not account for the whereabouts of her fleet of over 100 trucks and trailers that constituted the collateral of her creditors. The bankruptcy court found that Jelena had "repeatedly demonstrated to the Court her propensity for prevarication and evasion, even when under oath, in an apparent attempt to place assets beyond the reach of her creditors." Similarly, the court found that Jorgovanka and Zaric's financial and personal ties to Jelena, as well as their own financial interests in the 50% stake of PHMX, impaired their credibility. It also found that Zaric's conflicting testimony regarding the Nominee Agreement and Secured Promissory Note (discussed below) and the inconsistency of his testimony with Jorgovanka's regarding the $112,000, among other things, further damaged Zaric's credibility. We review these credibility determinations with utmost deference to the trial court, which under Federal Rule of Civil Procedure 52(a) "demand[] even greater deference to the trial court's findings." *Anderson v. Bessemer City*, 470 U.S. 564, 575 (1985) (citation omitted) ("[O]nly the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said."); *Kadia v. Gonzales*, 501 F.3d 817, 819 (7th Cir. 2007). These credibility findings stand.

In the absence of documentation supporting the repayment theory, the bankruptcy court found that "[t]he simplest explanation for the wire transfers is that they were just what they appear to be: payments directly to Pharmix by Debtor, from Debtor, for Debtor." We see no clear error in this finding.

(ii) *Promissory Note & Nominee Agreement*

Jorgovanka alternately contends that the Nominee Agreement and Secured Promissory Note between her and Zaric showed she was a nominee for Zaric, not for Jelena. On its face, the document supports that Jorgovanka acted as nominee for Zaric as to "their combined interest in PHMX." Paragraph 2.a clarifies that the nominee will hold all the "*designated* portion of their right, title and interest in the PHMX Shares." And Paragraph 2.b says that the "Nominee otherwise has their [sic] pro rata legal and beneficial interest in the PHMX Shares." So, the Nominee Agreement appears to provide for both Jorgovanka's nomineeship in support of Zaric's equitable ownership of 50% of PHMX, as well as Jorgovanka's independent pro rata ownership in PHMX—perhaps for her alleged $112,000 contribution. Given that Shogher is the uncontested 50% owner of PHMX, it is unclear from the four corners of the Agreement what Jorgovanka's alleged share of the business is, separate from Shogher's and Zaric's alleged 50/50 shares of the business.

We agree with the bankruptcy court that the Nominee Agreement supports Zaric's testimony that he and Nick decided they (but actually, Shogher and Zaric) would be "50/50 partners." But Nick denied he had ever discussed being partners with Zaric. Nick's testimony that Jelena—not Zaric—was to be a partner was "clear, internally consistent, and supported by contemporaneous documents, particularly the

documents memorializing the wire transfers from Debtor to Pharmix." To the contrary, Zaric's testimony was internally inconsistent, especially when he deviated and began to testify that "Jorgovanka personally … took the money to invest as an owner," suggesting that she—not him—was both the legal and equitable owner. Still, Zaric said, somehow, he was to remain as a "silent investor."

Supporting this alternate theory was the $500,000 Secured Promissory Note. But Zaric admitted that he never took any steps to collect on the note, and there were no signs of money transfers between Zaric and Jorgovanka or between Jorgovanka and the PHMX Project. All the wire transfers for the Project came from Jelena—not Jorgovanka. For these reasons and the others mentioned above, the bankruptcy court found Nick's testimony more credible than Zaric's on the issue of any ownership by Zaric, a judgment call that demands great deference. *Anderson*, 470 U.S. at 575. The court thus rejected Zaric's assertion of equitable ownership. It made this credibility finding even though some of Zaric's inconsistencies could be explained by his shoddy cut-and-paste creation and misunderstanding of some terms in the Nominee Agreement and the Promissory Note. On this, we defer to the bankruptcy court's determination. Further, because there was no evidence of money transfers between Zaric and Jorgovanka, Zaric's alternate contention that Jorgovanka was to be sole owner of PHMX also fails.

The bankruptcy court considered yet another explanation on behalf of Zaric: that the Promissory Note evidenced a loan—albeit three years after the Arrow Freight sale—from Zaric to Jorgovanka (but really, Jelena) for the remainder of the alleged $800,000 Arrow Freight debt. The Note is dated

March 1, 2018. This third alternative was supported by the fact that, as of that date, Jelena had wired only $276,250 to Pharmix. The eventual total of wire transfers by Jelena to the PHMX Project was $773,250, and deducting $276,250 yields $497,000—suspiciously close to $500,000. Zaric therefore could have reasonably estimated that the remainder of the debt on the $800,000 Arrow Freight stock sale was about $500,000 as of March 2018—especially if approximately $26,750 of the debt was paid down earlier. This gives rise to the reasonable inference that Zaric tried to retroactively use the Promissory Note to document the 2015 Arrow Freight stock sale debt three years after the transaction. This would show that Jelena's transfers to Pharmix were consideration for the alleged Arrow Freight debt. At trial, though, Zaric changed positions and testified the Note showed that Jorgovanka was sole owner of the 50% stake in PHMX. Adding to the confusion, Zaric simultaneously claimed the Nominee Agreement showed that he was the equitable owner. It is no wonder that the bankruptcy court did not credit Zaric and said, "The Court is not buying it." We do not either.

In a last attempt to demonstrate that the PHMX interest belonged to Zaric, Jorgovanka cites Zaric's nonfinancial contributions to the PHMX Project as if they were consideration for his alleged 50% equitable ownership of PHMX. She points to testimony about how Zaric was intimately involved in the PHMX factory construction. But the bankruptcy court observed that testimony regarding Zaric's day-to-day involvement was hotly contested by Shogher, Nick, and Kari—despite contrary testimony by Jelena, Jorgovanka, and Zaric himself. More importantly, Zaric's alleged nonfinancial contributions are irrelevant unless he can show that they constituted consideration for the 50% PHMX stake. That link is

missing. Even more, Zaric's alleged day-to-day involvement in the PHMX Project is contrasted with his testimony that he was to remain a "silent investor."

In sum, the evidence showed that Jorgovanka paid no consideration for the 50% share of PHMX and that Jelena is the true party in interest. This second factor, whether evaluated by the lack of Jorgovanka's contributions or beneficial interest, weighs heavily in favor of Jelena's equitable ownership, not Jorgovanka's.

B. Intent to Avoid Collection Activity

As to the third *Szaflarski* factor, the evidence showed that Jelena placed the property in Jorgovanka's name to avoid collection activities by Jelena's creditors. We discussed above how Jelena—despite her $772,000 in transfers allegedly meant to repay the Arrow Freight debt—deliberately omitted that debt from her bankruptcy schedules. This was in spite of her attestation that the schedules were correct and complete. She also said in the Rule 2004 examination that she could not account for the whereabouts of her truck fleet, which was her creditors' collateral. This evidence gives rise to the inference that Jelena, despite funding the PHMX Project, placed legal ownership in Jorgovanka's name to avoid collection efforts by her creditors. The alternative theories of equitable ownership by Zaric or Jorgovanka can reasonably be understood as paths to keep the 50% stake in PHMX out of Jelena's creditors' reach.

Jorgovanka states that Jelena's immigration problems, based on a former alleged sham marriage, supply a different rationale to identify Jorgovanka as nominee. It does not follow why making Jorgovanka nominee would help Jelena with

alleged immigration issues, and the record does not clarify the motive. Perhaps for that reason, the bankruptcy court found more reasonable the explanation that "[Jelena's] significant omissions of her debts and assets in her bankruptcy schedules also support the conclusion that she placed Jorgovanka in the position of nominee in order to shield her 50% membership interest in PHMX from her creditors." We find no clear error in this determination. This, too, weighs in favor of Jelena's equitable ownership.

C. Dominion and Control

On the fifth *Szaflarski* factor, Jelena's involvement as an investor in PHMX demonstrates her dominion and control of the stake in the company. Jorgovanka pushes back, contending the evidence showed only that Jelena was a "payment station" for funding PHMX "in repayment of her debt to Zaric." But the bankruptcy court correctly rejected Jorgovanka's contention. And to the extent Jelena was not a manager of the PHMX Project, Jorgovanka misapprehends the bankruptcy court's findings.

The evidence showed that Shogher, Nick, and Kari were seeking a financial investor, rather than a technical or managerial expert, for the PHMX Project. Most, if not all, of the brainpower and managerial expertise for the Project came from Shogher, Nick, and Kari. The evidence that Jelena served as a "working capital account" to fund various transactions of PHMX is consistent with her being an active investor. The strongest evidence of Jelena's involvement in PHMX is her $773,250 in transfers. As the bankruptcy court observed, any additional involvement "is simply further evidence" of Jelena's position as an investor "as it evinces her interest in seeing the business she invested in succeed."

The record also demonstrates that Jelena was an active investor who was intimately involved with the progress of the PHMX Project. Shogher, Nick, and Kari all recounted conversations with Jelena consistent with their understanding that she initiated the wire transfers on her own—not on Zaric's instructions. Text messages and emails between Kari and Jelena confirmed that Jelena was involved in invoicing and disbursing funds for Pharmix's various needs. We see no clear error in the bankruptcy court's finding that Jelena exercised sufficient dominion and control in light of her position as an investor.

* * *

This evaluation under the *Szaflarski* factors supports the bankruptcy court's finding of Jelena's equitable ownership in the 50% stake in the PHMX project.

First, Jorgovanka is Jelena's mother, favoring Jelena's equitable ownership. Second, the record lacked evidence that Jorgovanka contributed financially or otherwise to the PHMX Project. The evidence also suggested that Jorgovanka was not the true party in interest as to Jelena's $773,250 in wire transfers to Pharmix. Even more, Jorgovanka's alternative explanations for why she or Zaric is the equitable owner were not credible and not supported by the evidence. Jelena's evasiveness and omissions from her bankruptcy schedule further tended to show that Jelena placed the PHMX stake in Jorgovanka's name in anticipation of collection activities—the third factor. As noted above, we agree with the bankruptcy court that the fourth factor, recording of conveyance, is irrelevant and can be bypassed. On the fifth factor, Jelena's PHMX funding activities supported her dominion and control over the company in line with her intended role as an investor.

We affirm the bankruptcy court's finding that the Trustee has met his burden of establishing Jelena's equitable ownership of the PHMX stake, which is therefore subject to turnover. Accordingly, the district court properly affirmed the bankruptcy court's factual findings.

IV. Sanctions

The Trustee seeks sanctions in our court, arguing that Jorgovanka's appeal is frivolous. Whether that standard is met depends on whether Jorgovanka had a colorable legal argument to challenge the standard of proof for the turnover. She did. And because the standard of proof necessarily impacts how the evidence is weighed for proof of equitable ownership, her factual challenge was not frivolous either.

A court of appeals may issue sanctions if it "determines that an appeal is frivolous." FED. R. APP. P. 38. "An appeal is frivolous if the appellant's claims are cursory, totally undeveloped, or reassert a previously rejected version of the facts." *McCurry v. Kenco Logistics Servs.*, LLC, 942 F.3d 783, 791 (7th Cir. 2019) (citation omitted). "An appeal is also frivolous if it presents arguments that are so insubstantial that they are guaranteed to lose." *Id.* Even after determining that an appeal is frivolous, the appellate court's decision to issue sanctions is a matter of discretion. *Burlington Northern R.R. Co. v. Woods*, 480 U.S. 1, 4 (1987); *Harris N.A. v. Hershey*, 711 F.3d 794, 802 (7th Cir. 2013) (citations omitted). "We do not invoke Rule 38 lightly. Reasonable lawyers and parties often disagree on the application of law in a particular case, and this court's doors are open to consider those disagreements brought to us in good faith." *Harris*, 711 F.3d at 801.

The Trustee makes three arguments for sanctions: (1) Jorgovanka's arguments simply reassert a previously rejected version of the facts by both the District Court and Bankruptcy Court; (2) there was virtually no possibility of reversing the Bankruptcy Court's credibility findings on appeal; and (3) *Kelley* foreclosed Jorgovanka's arguments. But the frivolity of this appeal—and thus the appropriateness of sanctions under Rule 38—depends on whether Jorgovanka had a colorable argument for a heightened standard of proof to be applied here. As shown above in Section II, the standard of proof for Section 542 turnovers was unsettled. In *Kelley*, we did not address turnovers under Sections 542 and 541. *Supra* Section II.C. And for the reasons stated above, Jorgovanka presented colorable "legal contentions" that "are warranted … by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law." FED. R. CIV. P. 11(b)(2). So, the Trustee's third argument fails, which also leads to the failure of the other two.

The Trustee asserts that Jorgovanka's reassertion of her version of the facts and challenges to credibility determinations are frivolous and sanctionable. He relies on *Jaworski v. Master Hand Contractors, Inc.*, 882 F.3d 686, 691 (7th Cir. 2018) to argue that an appeal is frivolous if the appellant simply reasserts a previously rejected argument. In that case, we mentioned that factor as one of many in assessing frivolity. *See Jaworski*, 882 F.3d at 691. We did not rule that repeating positions is a sufficient condition for sanctions under Rule 38. "What is sanctionable is not merely repeating a losing argument. That is necessary to avoid waiver. What is sanctionable is doing so while 'fail[ing] to present any arguable reason why the district court erred' in rejecting the argument the first time." *H.A.L. NY Holdings, LLC v. Guinan*, 958 F.3d 627, 636

(7th Cir. 2020) (alteration in original) (quoting *Bugg v. Int'l Union of Allied Indus. Workers of Am., Local 507*, 674 F.2d 595, 600 (7th Cir. 1982)).

Jorgovanka may have repeated her legal arguments at each court level. But she provided a colorable argument that—even if the facts were weighed the same—she should prevail on the higher standard of proof. That standard necessarily changes how the evidence and related credibility determinations weigh toward proof of Jelena's equitable ownership. Given that the standard of proof was unsettled, Jorgovanka's appeal is not frivolous, even if just to preserve her arguments for presentation to the Supreme Court. *Nisenbaum v. Milwaukee County*, 333 F.3d 804, 809 (7th Cir. 2003) ("[C]ourts do not penalize litigants who try to distinguish adverse precedents, argue for the modification of existing law, or preserve positions for presentation to the Supreme Court."). "'Frivolous,' we stress, is not a synonym for 'unsuccessful,' or 'unlikely to succeed.'" *Dolin v. GlaxoSmithKline LLC*, 951 F.3d 882, 887 (7th Cir. 2020) (citing *NLRB v. Lucy Ellen Candy Div.*, 517 F.2d 551, 555 (7th Cir. 1975)). Even if the standard of review for credibility and factual findings here is "extraordinarily deferential," it does not mean that Jorgovanka did not "have the right to try." *Id.*

V. Conclusion

For the reasons stated, we AFFIRM the district court's affirmance of the bankruptcy court's judgment for the Trustee, and we DENY the Trustee's motion for sanctions.