



The following constitutes
the order of the court. Signed January 22, 2014

A handwritten signature in black ink that reads "Charles Novack".

Charles Novack
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re:
MAX SYED MALIHI,
Debtor.

Case No. 11-56253 CN
Chapter 7

MAHMOOD KUCHAKI RAFSANJANI,
Plaintiff,

Adversary No. 11-5241

vs.

MEMORANDUM DECISION

MAX SYED MALIHI,
Defendant.

On August 15, 2011, plaintiff Mahmood Kuchaki Rafsanjani (“Kuchaki”) commenced this adversary proceeding against defendant Max Syed Malihi (“Malihi”) seeking a non-dischargeable judgment as well as the denial of his chapter 7 discharge under Bankruptcy Code §§ 523(a)(2)(A), 523(a)(4) and §727(a)(4), respectively. This court conducted a trial in this adversary proceeding on August 27 and 28, 2013. This memorandum decision constitutes this court’s findings of fact and conclusions of law under Fed. R. Bankr. P. 7052.

Malihi and Kuchaki met over 25 years ago as college students in their native Iran. They lost

1 touch after they immigrated to the United States in the mid-1980's, but they rekindled their
2 friendship in 1997. Although they initially lived in different states (Kuchaki in California and Malihi
3 in Florida and Arizona) they stayed in near constant contact, speaking regularly on the phone and
4 periodically visiting each other.

5 After immigrating to the United States, Malihi worked in construction and owned and
6 operated several home restoration and remodeling businesses. Kuchaki also became a small business
7 owner, at one point operating a limousine service and restaurant. As discussed below, their relative
8 success led to several financial transactions between them, which are the genesis of Kuchaki's non-
9 dischargeable claims for relief in this adversary proceeding.

10

11 ***Section 523 Claims For Relief***

12 **The South Carolina Transaction**

13 In August 2005, Malihi and Kuchaki discussed Kuchaki's possible participation in a South
14 Carolina real estate transaction that Malihi was considering. The terms of Kuchaki's investment
15 were scanty. The parties did agree, however, that Kuchaki would provide Malihi with \$100,000
16 which Malihi would use to purchase several parcels of South Carolina real property. Malihi, who
17 had already obtained buyers for some of these parcels, would then flip the property and return
18 Kuchaki's original investment with some profit. Malihi testified that at least two other individuals
19 invested in this deal.

20 Malihi and Kuchaki's agreement was strictly verbal, and they never discussed several critical
21 details, including the amount of "profits" that Kuchaki would receive and when Kuchaki would
22 receive these profits (plus the return of the original \$100,000 investment). Notwithstanding these
23 deficiencies, Kuchaki provided Malihi with a \$100,000 cashier's check on September 1, 2005, which
24 Malihi then used to purchase the South Carolina parcels. Approximately six months later, Malihi
25 sold the parcels and realized a \$48,000 profit. Malihi thereafter paid \$10,000 to Kuchaki as his share
26 of the profits.

27 After he received these funds, Kuchaki - who believed that Malihi was actively searching for
28 additional real estate investments - authorized Malihi to re-invest his \$100,000 principal in other real

1 estate deals.¹ This authorization, too, was not reduced to writing.

2 Malihi never returned Kuchaki's \$100,000 principal. Over the next few years, Malihi
3 regularly informed Kuchaki that his money was invested in Florida real property that Malihi was
4 rehabilitating. Malihi did not, however, invest Kuchaki's funds in Florida real estate. Instead,
5 Malihi used the money to support himself while he pursued unrelated business ventures. By late
6 2007, Malihi had spent all of Kuchaki's principal.

7 **The Business Loan**

8 Malihi moved from Arizona to San Jose, California at Kuchaki's suggestion in 2007. Malihi
9 lived with Kuchaki for several months while he considered his next business venture. In November
10 2007, Kuchaki agreed to loan \$50,000 to Malihi to help capitalize a home repair and remodeling
11 business (the "Business Loan"). Kuchaki transferred these funds to Malihi in three installments: (I)
12 \$10,000 on December 10, 2007; (ii) \$20,000 on January 2, 2008, and (iii) \$20,000 on March 27,
13 2008. Consistent with their prior business deals, the parties never documented the Business Loan
14 and did not discuss an interest rate or maturity date. Malihi never repaid the Business Loan.

15 **The Truck Sale**

16 In November 2007 Kuchaki's limousine business - Rainbow Limousine Services, Inc. -
17 agreed to sell a 2004 Toyota Tundra Truck (the "Truck") to Malihi for \$15,000. For reasons that
18 were inadequately explained during trial, the parties structured the sale in the following, convoluted
19 manner: First, Kuchaki transferred \$10,000 to Malihi for the explicit purpose of "purchasing" the
20 Truck from Rainbow. Rainbow then sold the Truck to Malihi for \$10,000, which Malihi paid with
21 the aforementioned \$10,000. The \$15,000 debt to Kuchaki arose only after Malihi took title to the
22 Truck in his own name. Again, the parties never discussed interest rate or repayment terms, and the
23 loan was left unwritten. Malihi did not make any payments other than the initial \$10,000 transfer.
24 Malihi sold the Truck in 2009, and he retained all of the proceeds.

25 **The Residential Lease**

26 In August 2008, Malihi began renting a single family residence owned by Kuchaki for \$2000

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28 ¹ Malihi did not have any other potential real estate investments at that time.

1 per month. The lease was a verbal agreement with no fixed term. While Malihi lived in the property
2 for approximately ten months, he stopped paying rent after five months.

3 **The State Court Litigation**

4 On July 16, 2009, Kuchaki sued Malihi in Santa Clara Superior Court to recover the unpaid
5 rent and all other funds he had invested with or loaned to Malihi. In January 2011, the parties signed
6 a stipulated judgment in which Malihi agreed to pay Kuchaki \$230,000, plus 6.5% interest, over a
7 five-year term. The \$230,000 amount included the \$100,000 real estate investment, the outstanding
8 Business Loan balance, \$10,000 in unpaid rent, the \$15,000 “debt” arising from the Truck sale, and
9 accrued interest.

10 ***Section 727 Claims For Relief***

11 Kuchaki also seeks to deny Malihi his Chapter 7 discharge. The facts behind these claims for
12 relief are discussed below.

13 **The MJ12 Business**

14 In 2008, Malihi was operating a home restoration business located in the same shopping
15 plaza as a coffee shop owned and operated by Jengshin Lee (“Lee”). Lee’s coffee shop suffered
16 significant water damage in 2008, and she hired Malihi for the repair work. The two became friends,
17 and they thereafter formed their own home restoration and remodeling business, “MJ12,” which Lee
18 incorporated in August 2009. Lee provided \$50,000 in start-up capital, and she managed the
19 accounting and administrative end of the business. She was the sole shareholder. Malihi, in turn,
20 performed the actual restoration and remodeling work. By mid- 2010, Lee had invested more than
21 \$200,000 into the business, and it became apparent that the business needed additional capital which
22 she could not supply. Malihi asked Fred Djahandideh (“Djahandideh”), his business partner in
23 another, unrelated venture, to invest in MJ12, and he agreed to invest \$250,000 for a 50% stake in
24 the company (the “Original Shareholder Agreement”). Not surprisingly, the Original Shareholder
25 Agreement was not reduced to writing.

26 Djahandideh funded the first \$150,000 in May/June 2010 without incident, but then balked at
27 providing the final \$100,000. Djahandideh informed Lee and Malihi that his final \$100,000 was
28 conditioned on amending the Original Shareholder Agreement. Djahandideh wanted to convert the

1 final \$100,000 infusion into a loan, demanded a 51% ownership stake in MJ12, insisted that Lee
2 reduce her equity interest to 10%, and required that Malihi - who previously had no equity interest
3 and had not made any capital investment - own 39% of the company. With the company desperate
4 for cash, Lee reluctantly agreed to Djahandideh's terms, and on June 15, 2010, Lee, Djahandideh and
5 Malihi executed a written shareholder agreement (the "First Amended Shareholder Agreement").

6 One month later, Lee realized that she could not abide by the First Amended Shareholder
7 Agreement. She so informed Djahandideh and demanded that he buyout her equity interest and
8 assume her managerial responsibilities. Djahandideh agreed to rescind the First Amended
9 Shareholder Agreement, and, in mid-August 2010, Lee and Djahandideh executed a revised
10 shareholder agreement (the "Second Amended Shareholder Agreement"). While Malihi also signed
11 the Second Amended Shareholder Agreement, he did so as a "witness" rather than as a shareholder.

12 Malihi filed his Chapter 7 bankruptcy on June 30, 2011. He did not list any past or present
13 equity interest in MJ12 in his Bankruptcy Schedule B or Statement of Financial Affairs.

14 The Omid and Pars Ventures

15 Malihi started two separate land development ventures in 2005, Omid, LLC ("Omid") and
16 Pars Group Design and Development, LLC ("Pars"). Omid, which was jointly owned by Malihi and
17 Ebrahim Mostoufi ("Mostoufi"), held South Carolina, Florida, and Arizona real property. Pars was
18 jointly owned by Malihi and Djahandideh, and it was created to own and develop Arizona land. For
19 reasons that were not made clear at trial, in late 2007, Mostoufi sued Malihi, Djahandideh, and Pars
20 (among others) in state courts in Florida, South Carolina, and Arizona (the "Mostoufi Claims").
21 Malihi did not respond to these complaints, and multiple default judgments were entered against
22 him. Malihi thereafter settled the Mostoufi Claims, and in so doing disclaimed any interest in Omid,
23 Pars, and the properties owned by these entities. Although Malihi listed the Mostoufi Claims on his
24 Bankruptcy Schedule F, his schedules did not, however, disclose any interest in Pars, Omid, or any
25 related properties.
26

27 Notwithstanding Malihi's assertions that he had settled the Mostoufi Claims, Mostoufi timely
28 filed an adversary proceeding against Malihi (A.P. # 11-05280) asserting claims under Bankruptcy

1 Code §§727(c), (d), (e) and 523(a)(2) and (a)(6). On August 17, 2012, Mostoufi filed an application
2 to compromise his adversary proceeding against Malihi. The settlement terms again required Malihi
3 (along with Pars and Omid) to transfer their purported real property interests to certain Mostoufi
4 controlled entities. In response to the proposed compromise, the Chapter 7 Trustee, on August 27,
5 2012, withdrew his no asset report which he had filed on November 19, 2011.

6 While this court initially denied the application to compromise Mostoufi's adversary
7 proceeding by order dated November 11, 2012, Mostoufi dismissed his adversary proceeding with
8 prejudice on March 28, 2013, with this court's consent. One month earlier, the Chapter 7 Trustee,
9 presumably after reviewing Mostoufi's allegations, filed a second, no asset report.

10 LEGAL DISCUSSION

11 I. The §727(a)(4) Claims

12 This court may deny a Chapter 7 debtor's discharge under Bankruptcy Code § 727(a)(4) if
13 (1) the debtor made a false oath in connection with the case; (2) the oath related to a material fact;
14 (3) the oath was made knowingly; and (4) the oath was made fraudulently. Kuchaki must establish
15 these elements by a preponderance of the evidence. *In re Retz*, 606 F.3d 1189, 1197 (9th Cir. 2010)
16 (*citing Roberts v. Erhard (In re Roberts)*, 331 B.R. 876, 882 (9th Cir. BAP 2005). Moreover,
17 "objections to discharge under 11 U.S.C. § 727 are to be literally and strictly construed against the
18 creditor and liberally in favor of the debtor." *In re Coombs*, 193 B.R. 557, 560 (Bankr. S.D. Cal.
19 1996) (*quoting In re Bodenstein*, 168 B.R. 23, 27 (Bankr. E.D.N.Y. 1994)).

20 Errors and omissions from a debtor's bankruptcy schedules and statements can constitute
21 false oaths under §727(a)(4). *Retz*, 606 F.3d at 1197; *Searles*, 317 B.R. at 377; *Roberts*, 331 B.R. at
22 882. *See also*, 28 U.S.C. § 1746; Fed. R. Bankr.P. 1008. Under Bankruptcy Code
23 § 727(a)(4)(A), a fact is material "if it bears a relationship to the debtor's business transactions or
24 estate, or concerns the discovery of assets, business dealings, or the existence and disposition of the
25 debtor's property." *In re Khalil*, 379 B.R. 163, 173 (9th Cir. BAP 2007) (citations omitted). An
26 omission or misstatement that "detrimentally affects administration of the estate" is material. *In re*
27 *Wills*, 243 B.R. at 63 (*citing* 6 Lawrence P. King et al., *Collier on Bankruptcy* ¶ 727.04[1][b] (15th
28 ed. rev.1998)). Additionally, a debtor must act "knowingly" when making a false oath. *In re*

1 *Roberts*, 331 B.R. at 882; *see also* 11 U.S.C. § 727(a)(4)(A). “A debtor acts knowingly if he or she
2 acts deliberately and consciously.” (*In re Retz*, 606 F.3d at 1198 (*quoting In re Khalil*, 379 B.R. at
3 173); Black’s Law Dictionary 888 (8th ed. 2004) (“A person acts knowingly if he or she acts
4 deliberately and consciously”).

5 To demonstrate the requisite fraudulent intent, Kuchaki must establish that Malihi made the
6 representations or omissions at issue, knew they were false when they made them, and made them
7 with the intention and purpose of deceiving the creditors. *In re Retz*, 606 F.3d at 1198-1999; *Khalil*,
8 379 B.R. at 173. Intent is usually proven by circumstantial evidence or by inferences drawn from the
9 debtor’s conduct. *Devers v. Bank of Sheridan, Mont. (In re Devers)*, 759 F.2d 751, 753-54 (9th
10 Cir.1985).

11 **A. Failure to Disclose Interest in MJ12**

12 At trial, Kuchaki emphasized that Malihi had been an officer of MJ12, and was listed as the
13 corporate secretary in certain filings with the California Secretary of State. A corporate officer does
14 not equate with being a shareholder, and this court assigns little weight to this fact. Kuchaki also
15 argues that Malihi’s extensive expertise in home restoration and construction and Lee’s relative lack
16 of experience in the field demonstrates that Malihi must have had an ownership interest in MJ12.
17 Malihi’s home repair experience also is not determinative of whether Malihi had an equity interest in
18 MJ12. Lee ran a successful coffee shop, and she invested more than \$210,000 in MJ12, while
19 Malihi’s capital contribution was zero. These facts carry far more weight than those pursued by
20 Kuchaki.

21 While the First Amended Shareholder Agreement did purportedly grant Malihi a significant
22 equity interest in MJ12, this court believes that the subsequent events that culminated in the Second
23 Amended Shareholder Agreement truthfully reflects the parties’ intent not to provide Malihi with an
24 equity interest in MJ12. While there are certain inconsistencies regarding when the parties signed or
25 witnessed the Second Amended Shareholder Agreement, this court does not question its authenticity
26 and accuracy (Lee and Malihi both authenticated the document and consistently testified regarding
27 the reason for its execution and its meaning). It is important to remember that these parties routinely
28 failed to document agreements, and it is understandable that some aspects of the Second Amended

1 Shareholder Agreement are not perfect. Moreover, Malihi did not invest any capital in MJ12, and it
2 therefore it is not surprising that he was solely a salaried employee. Simply, Kuchaki has not
3 demonstrated by a preponderance of the evidence that Malihi was an equity owner of MJ12 when he
4 filed his Chapter 7 on June 30, 2011.

5 There is also insufficient evidence for this court to conclude that the Second Amended
6 Shareholder Agreement was calculated to defraud Malihi's creditors. To the extent that the First
7 Amended Shareholder Agreement created an equity interest for Malihi, Malihi held it only for two
8 months, and the First Amended Shareholder Agreement was rescinded not to hinder, delay or
9 defraud any creditor but to address Lee's concerns and to prevent her from abandoning MJ12.
10 Accordingly, Kuchaki has not established each element of his §727(a)(4) claim that Malihi
11 knowingly failed to disclose an ownership interest in MJ12 on his Schedule B or Statement of
12 Financial Affairs.

13 **B. Failure to Disclose Interests in Omid and Pars**

14 Mostoufi's application to compromise his adversary proceeding is Kuchaki's sole evidence
15 that Malihi made a false oath by failing to disclose interests in Pars and Omid. This scant evidence
16 does not establish by a preponderance of the evidence that Malihi held any interest in Pars and/or
17 Omid, let alone prove the requisite level of intent.

18 First, the compromise application does not establish that Malihi had any remaining interests
19 in Pars, Omid, or any related properties. No corporate or title documents of any kind were
20 introduced into evidence to establish this allegation. Indeed, Malihi testified that he discarded any
21 interests when he settled the state court cases with Mostoufi. Kuchaki did not offer any testimony
22 from Mostoufi or anyone else to prove otherwise. Moreover, the Chapter 7 Trustee had every
23 opportunity to determine if the bankruptcy estate had an interest in these entities after he withdrew
24 his initial, no-asset report. Again, the court finds that Kuchaki has not demonstrated by a
25 preponderance of evidence that Malihi fraudulently failed to disclose interests in Pars and/or Omid
26 on his bankruptcy schedules.

27 **II. The §523(a)(2)(A) Claims**

28 Bankruptcy Code § 523(a)(2)(A) provides that "A discharge . . . does not discharge an

1 individual debtor from any debt . . . (2) for money, property, services, or an extension, renewal, or
2 refinancing of credit, to the extent obtained, by - (A) false pretenses, a false representation, or actual
3 fraud[.]” A creditor must establish five elements by a preponderance of the evidence to prevail on a §
4 523(a)(2)(A) claim: (1) misrepresentation, fraudulent omission or deceptive conduct by the debtor;
5 (2) knowledge of the falsity or deceptiveness of the statement or conduct; (3) an intent to deceive; (4)
6 justifiable reliance by the creditor on the debtor’s statement or conduct; and (5) damage to the
7 creditor proximately caused by its reliance on the debtor’s statement or conduct. *Turtle Rock*
8 *Meadows Homeowners Ass’n v. Slyman (In re Slyman)*, 234 F.3d 1081, 1085 (9th Cir. 2000). A
9 §523(a)(2)(A) claim may also arise from the concealment or intentional non-disclosure of material
10 facts. *In re Evans*, 181 B.R. 508, 515 n.6 (Bankr.S.D. Cal.1995). A debtor’s knowledge and intent to
11 deceive may be inferred by circumstantial evidence and from the debtor’s conduct. *Edelson v. CIR*,
12 829 F.2d 828, 832 (9th Cir. 1987); *Donaldson v. Hayes (In re Ortenzo Hayes)*, 315 B.R. 579, 587
13 (Bankr. C.D. Cal. 2004).

14 A § 523(a)(2)(A) claim requires that the “target misrepresentation must have existed at the
15 inception of the debt, and a creditor must prove that he or she relied on that misrepresentation.”
16 *Reingold v. Shaffer (In re Reingold)*, 2013 WL 1136546, at *5 (9th Cir. BAP Mar 19, 2013); *see*
17 *also, New Falls Corp. v. Boyajian (In re Boyajian)*, 367 B.R. 138, 147 (9th Cir. BAP 2007) (*citing*
18 *Bombardier Capital, Inc. v. Dobek (In re Dobek)*, 278 B.R. 496, 508 (Bankr. N.D. Ill.2002)).

19 **A. The South Carolina Transaction**

20 Malihi admitted that he did not return any of Kuchaki’s \$100,000 investment after his
21 successful real estate flip, and instead used those funds to support himself. There is ample evidence
22 that between 2006 and 2009 Malihi regularly told Kuchaki that his \$100,000 was invested in real
23 estate, when in fact, he had spent the funds on his personal expenses. Thus, there is little doubt that
24 Malihi made material misrepresentations to Kuchaki. Bankruptcy Code § 523(a)(2)(A) requires,
25 however, that Kuchaki establish that Malihi’s misrepresentations were contemporaneous with the
26 creation of Kuchaki’s claim, *i.e.*, that Malihi’s misrepresentations induced Kuchaki to advance him
27 the funds.

28 No such evidence was introduced. There is no evidence that in August 2005 - when Kuchaki

1 invested his \$100,000 with Malihi - Malihi made any material misrepresentation that induced
2 Kuchaki to invest his funds with Malihi. In fact, it appears that Malihi's initial actions were entirely
3 consistent with their arrangement: Malihi invested the \$100,000 in South Carolina real estate which
4 he sold for a profit. Malihi received \$10,000 as his share of the profits in February 2006, and
5 instructed Malihi to look for additional real estate in which to invest his \$100,000 principal. There is
6 also no evidence indicating that Malihi did not intend to re-invest the \$100,000 when he received
7 this further authorization from Kuchaki. Instead, it appears that Malihi's misrepresentations
8 occurred after Kuchaki made his initial investment and authorized Malihi to retain the funds for
9 further real estate deals.

10 Simply, Kuchaki did not offer any evidence suggesting that in February 2006, Malihi was
11 unable or unwilling to re-invest the \$100,000 as promised or that he intended to misappropriate the
12 funds to pay his personal expenses. While Malihi did misrepresent the status of Malihi's \$100,000
13 capital after February 2006, these misrepresentations did not induce Kuchaki into authorizing Malihi
14 to re-invest the funds. Kuchaki therefore cannot establish that he relied on Malihi's
15 misrepresentation at "the inception of the debt." *In re Boyajian* , 367 B.R. at 147. Accordingly, the
16 § 523(a)(2)(A) claim is denied with respect to Malihi's initial advancement of the \$100,000 on
17 September 1, 2005, and his authorization for Malihi to re-invest the funds in February 2006.

18 **B. The Truck Transaction**

19 At trial, Kuchaki failed to present any evidence, circumstantial or otherwise, that Malihi
20 defrauded Kuchaki when he agreed to purchase the Truck. Other than the fact that Malihi breached
21 his agreement to pay the \$15,000, no other evidence was introduced regarding Malihi's failure to pay
22 nor his intent when he purchased it. Accordingly, the court denies this § 523(a)(2)(A) claim for
23 relief.

24 **C. The Business Loan and the Rent Balance Claim**

25 At trial, Kuchaki failed to present evidence that Malihi knowingly misrepresented his intent
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1 to repay the Business Loan or his rent.² Again, other than the fact that he breached these agreements,
2 the evidence did not demonstrate that Malihi never intended to repay the Business Loan or his
3 monthly rent. Accordingly, the court denies these §523(a)(2)(A) claims for relief.

4 **II. The §523(a)(4) Embezzlement Claim**

5 Debts that arise from “embezzlement” are nondischargeable under § 523(a)(4) of the
6 Bankruptcy Code. Federal law defines the term embezzlement for purposes of § 523(a)(4). *In re*
7 *Wada*, 210 B.R. 572, 576 (9th Cir. BAP 1997). To prevail on a §523(a)(4) embezzlement claim, a
8 creditor must establish that (1) property owned by another is rightfully in the possession of a
9 bankruptcy debtor; (2) the bankruptcy debtor appropriated such property to a use other than the use
10 for which the property was entrusted to the bankruptcy debtor; and (3) there are circumstances
11 indicating fraud on the part of the debtor. *In re Mickens*, 312 B.R. 666, 680 (Bankr.N.D.Cal. 2004)
12 (citations omitted).

13 Malihi argues in his post-trial brief that Kuchaki loaned him the \$100,000, and that it was not
14 an investment. Malihi relies on the pre-petition Superior Court litigation between the parties, in
15 which Kuchaki alleged in his verified complaint that he loaned this amount to Malihi.
16 Notwithstanding this verified allegation, Malihi contended in the Superior Court litigation that
17 Kuchaki invested the \$100,000 in his real estate investments, and the Superior Court stipulated
18 judgment states that it was an investment. The evidence at trial supports this contention, and the
19 court finds that Kuchaki invested these funds with Malihi.

20 Given this finding, all of the remaining elements of an embezzlement fall into place. Malihi
21 held the \$100,000 for investment purposes and misused the funds when he spent them on his
22 personal expenses. When Kuchaki asked him about the status of his investment, Malihi routinely

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24 ² Malihi claims that he partially repaid the Business Loan with four payments of \$5,000 each
25 in February, March, April and May of 2008. Kuchaki, however, has argued that these payments
26 relate to a separate loan. Malihi offers no evidence, aside from his testimony, that these payments
27 relate to the Business Loan. Moreover, Malihi has acknowledged in the state court stipulated
28 judgment that he owed the full amount of the Business Loan without any mention of the \$20,000
partial payment. Considering the evidence offered at trial, the court finds that Malihi’s payments of
\$5,000 each in February, March, April and May of 2008 were unrelated to the Business Loan and did
not reduce the outstanding \$50,000 balance.

1 lied by telling him that they were tied-up in various real estate deals. Accordingly, this court finds
2 that Malihi embezzled the \$100,000.00 principal, and that Kuchaki is entitled to a \$100,000.00 non-
3 dischargeable judgment on this claim for relief.

4 **III. The 523(a)(4) Defalcation Claim**

5 Debts that arise due to “fraud or defalcation” when a debtor is acting in a “fiduciary capacity”
6 are nondischargeable under §523(a)(4) of the Bankruptcy Code. Whether a person is a fiduciary
7 under § 523(a)(4) is a question of federal law.” *Lewis v. Scott (In re Lewis)*, 97 F.3d 1182, 1185 (9th
8 Cir.1996) (citing *Ragsdale v. Haller (In re Haller)*, 780 F.2d 794, 795 (9th Cir.1986)). Persons who
9 are “partners” under California law “are fiduciaries within the meaning of § 523(a)(4)”. *Ragsdale*,
10 780 F.2d at 796-797; *see also*, Cal. Corp.Code § 16404(b)(1) (partner has a duty to hold as trustee
11 any “property, profit, or benefit derived” from partnership business or use of partnership property).
12 Kuchaki argues that Malihi and him formed an “investment partnership” funded with his \$100,000,
13 which created a fiduciary relationship between them.

14 Cal. Corp. Code § 16202(a) defines a partnership as an “association of two or more persons
15 to carry on as co-owners a business for profit . . .” Courts must also take into account whether the
16 putative partners “intended to share in the profits, losses and the management and control of the
17 enterprise.” *In re Shart*, 2013 WL 1397401, at *8 (9th Cir. BAP, April 02, 2013) (citing *Bank of Cal.*
18 *v. Connolly*, 36 Cal.App.3d 350, 364, 111 Cal.Rptr. 468 (Cal.Ct.App.1973)). The transactions
19 involving Malihi’s \$100,000 investment did not create a partnership between the parties. First, there
20 was no ongoing enterprise and no shared management. Malihi simply expected some return on his
21 investment, and he did not seek nor was given any control over what real estate transaction generated
22 the return. Nor did the parties agree to share any potential losses. Aside from asserting that the
23 parties were partners, Kuchaki does not posit any other grounds which would have created a
24 fiduciary relationship. Accordingly, the §523(a)(4) defalcation claim is denied.

25 **CONCLUSION**

26 Kuchaki shall submit a proposed judgment consistent with this court’s memorandum
27 decision.

28 * * **END OF ORDER** * * *

COURT SERVICE LIST

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Recipients are ECF participants