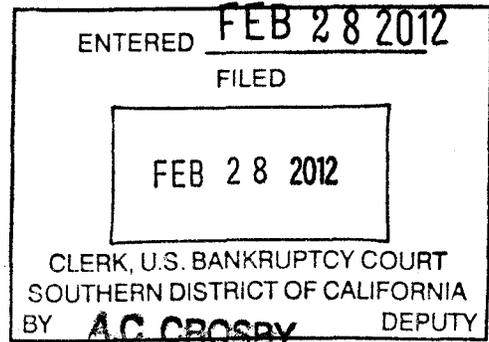


1 WRITTEN DECISION - NOT FOR PUBLICATION



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6 UNITED STATES BANKRUPTCY COURT  
7 SOUTHERN DISTRICT OF CALIFORNIA

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10  
11 In re ) Case No. 09-03587-PB7  
12 ) Adv. No. 09-90247  
13 )  
14 )  
15 )  
16 )  
17 )  
18 )  
19 )  
20 )

MARCOS DANIEL SANCHEZ,  
Debtor.

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CORY HUNT,  
Plaintiff,

v.

MARCOS DANIEL SANCHEZ,  
Defendant.

MEMORANDUM DECISION

21 This adversary proceeding came on for trial on plaintiff's  
22 complaint seeking a determination that Mr. Sanchez should be  
23 denied a discharge under 11 U.S.C. § 727(a), and that the debt  
24 allegedly owed to Mr. Hunt, specifically, should be determined  
25 to be nondischargeable under 11 U.S.C. § 523(a)(2) and (a)(4).

26 ///

1           The Court has subject matter jurisdiction over the  
2 proceeding pursuant to 28 U.S.C. § 1334 and General Order  
3 No. 312-D of the United States District Court for the Southern  
4 District of California. This is a core proceeding under  
5 28 U.S.C. § 157(b)(2)(I), (J).

6           The Court begins with Mr. Hunt's causes of action for denial  
7 of a discharge under § 727 because if Mr. Hunt prevails on any  
8 one of those claims, then any debt owed by Mr. Sanchez to  
9 Mr. Hunt is not discharged, and Mr. Hunt would be entitled to  
10 judgment, without further examination of his claims under § 523.

11           Mr. Hunt invokes three subparts of § 727(a) in objecting to  
12 a discharge for Mr. Sanchez. They are § 727(a)(2), (a)(4)(A),  
13 and (a)(5). The Court has had occasion to consider the first two  
14 in some depth in In re Coombs, 193 B.R. 557 (Bankr. S.D. CA  
15 1996). To review:

16 Subsection(a)(2) of § 727 provides:

17           (a) the court shall grant the debtor a discharge  
18 unless -

19                   (2) the debtor, with intent to hinder, delay, or  
20 defraud a creditor or an officer of the estate  
21 charged with custody of property under this title,  
has transferred, removed, destroyed, mutilated, or  
concealed, or has permitted to be transferred,  
removed, destroyed, mutilated, or concealed -

22                           (A) property of the debtor, within one  
23 year before the date of the filing of  
the petition; or

24                           (B) property of the estate, after  
25 the date of the filing of the petition  
26 . . . .

26 ///

1 Subsection (a)(4)(A) of the § 727 states:

2 (a) The court shall grant the debtor a discharge  
3 unless-

4 (4) the debtor knowingly and fraudulently,  
5 in connection with the case-

6 (A) made a false oath or account . . . .

7 It is now generally recognized that a plaintiff must  
8 establish the allegations in an action under § 727(a) by a  
9 preponderance of the evidence. In re Cox, 41 F.3d 1294, 1297  
10 (9<sup>th</sup> Cir. 1994). At the same time that courts utilize the  
11 preponderance standard for weighing the evidence in a § 727  
12 action, they also reiterate that:

13 [O]bjections to discharge under 11 U.S.C.  
14 § 727 are to be literally and strictly  
15 construed against the creditor and liberally  
16 in favor of the debtor.

17 In re Bodenstein, 168 B.R. 23, 27 (Bankr. E.D.N.Y. 1994).

18 In re Adeeb, 787 F.2d 1339 (9<sup>th</sup> Cir. 1986) discusses what, at  
19 least in part, that rule of construction means:

20 Accordingly, discharge of debts may be denied  
21 under section 727(a)(2)(A) only upon a  
22 finding of actual intent to hinder, delay, or  
23 defraud creditors. Constructive fraudulent  
24 intent cannot be the basis for denial of a  
25 discharge. (Citation omitted.) However,  
26 intent "may be established by circumstantial  
evidence, or by inferences drawn from a  
course of conduct." (Citation omitted.)

787 F.2d at 1342-43.

As to § 727(a)(4)(A), courts generally agree:

[T]he plaintiff must prove by a preponderance  
of evidence that: (1) debtors made a  
statement under oath; (2) the statement was

1 false; (3) debtor knew the statement was  
2 false; (4) debtor made the statement with  
3 fraudulent intent; and (5) the statement  
4 related materially to the bankruptcy case.

5 In re Bailey, 147 B.R. 157, 162 (Bankr. N.D. Ill. 1992)

6 As one court put it:

7 The purpose of these requirements is to  
8 insure that those interested in the case, in  
9 particular the trustee, have accurate  
10 information upon which they can rely without  
11 having to dig out the true facts or conduct  
12 examinations. (Citations omitted.) A debtor  
13 has an uncompromising duty to disclose  
14 whatever ownership interest he holds in  
15 property. It is the debtor's role to simply  
16 consider the question carefully and answer it  
17 completely and accurately. (Citation  
18 omitted.) Even if the debtor thinks the  
19 assets are worthless he must nonetheless make  
20 full disclosure. (Citation omitted.) In  
21 completing the schedules it is not for the  
22 debtor to pick and choose [sic] which  
23 questions to answer and which not to.  
24 Indeed, the debtor has no discretion - the  
25 schedules are to be complete, thorough and  
26 accurate in order that creditors may judge  
for themselves the nature of the debtor's  
estate. (Citation omitted.)

18 In re Lunday, 100 B.R. 502, 508 (Bankr. D.N.D. 1989);

19 In re Haverland, 150 B.R. 768, 770 (Bankr. S.D. Cal. 1993).

20 Two of the indispensable elements of a cause of action  
21 under § 727(a)(4)(A) are fraudulent intent and materiality.

22 It is generally recognized that:

23 A plaintiff can rarely produce direct  
24 evidence of fraudulent intent; the requisite  
25 actual intent to defraud may therefore be  
26 established through proof of sufficient "badges of  
fraud." (Citation omitted.) Such badges of fraud  
include reservation of rights in or the beneficial  
use of the transferred assets; inadequate

1 consideration; close friendship or relation to the  
2 transferee; the financial condition of the  
3 transferor both before and after the transfer; and  
4 "the existence of cumulative effect of a pattern  
5 or series of transactions or course of conduct  
6 after the incurring of debt, onset of financial  
7 difficulties, or pendency or threat of suits by  
8 creditors.'" "

9 [W]here there has been a "pattern of  
10 falsity", or a "cumulative effect" of  
11 falsehoods, a court may find that  
12 [fraudulent] intent has been  
13 established.

14 Likewise, a court may infer fraudulent  
15 intent under Code § 727(a)(4)(A) from a  
16 debtor's reckless indifference to or cavalier  
17 disregard of the truth.

18 In re Maletta, 159 B.R. 108, 112 (Bankr. D. Conn. 1993);

19 In re Gipe, 157 B.R. 171, 176-77 (Bankr. M.D. Fla. 1993).

20 However:

21 The denial of a discharge under  
22 11 U.S.C. § 727(a)(4)(A) cannot be imposed  
23 where the false statement was the result of  
24 a simple or honest mistake or inadvertence.  
25 (Citations omitted.) Rather, to sustain  
26 an objection to discharge under 11 U.S.C.  
§ 727(a)(4)(A), the debtor must have  
willfully made a false statement with intent  
to defraud his creditors. (Citations  
omitted.)

27 In re Bodenstein, 168 B.R. 23, 32 (Bankr. E.D.N.Y. 1994).

28 Similarly, "material misstatements, absent fraudulent intent, do  
29 not warrant denial of a discharge under § 727(a)(4)(A) . . . ."

30 In re Parsell, 172 B.R. 226, 231 (Bankr. N.D. 1994). It bears  
31 repeating that an essential element under § 727(a)(4)(A) is that  
32 debtor acted with an actual intent to defraud. To be sure, that  
33 intent may be proven by circumstantial evidence. In re Devers,

1 759 F.2d 751, 753-54 (9<sup>th</sup> Cir. 1985); In re Schroff, 156 B.R.  
2 250, 254 (Bankr. W.D. Mo. 1993). And it may be inferred from all  
3 the surrounding circumstances. Ibid. But there must be specific  
4 facts or circumstances which point toward fraud. The court, in  
5 In re Smith, 161 B.R. 989, 991 (Bankr. E.D. Ark. 1993) observed:

6 First, the debtor's actual intent must be  
7 found as a matter of fact from the evidence  
8 presented. Of course, the objecting party  
9 must generally rely on a combination of  
10 circumstances which suggest that the debtor  
11 harbored the necessary intent. The Court may  
12 then draw an inference from this evidence.  
(Emphasis added.)

13 Some courts have stated: "The fact that  
14 numerous major assets were omitted will alone  
15 satisfy the requirement that such omissions  
16 be knowing and fraudulent."

17 In re Schroff, 156 B.R. 250, 256 (Bankr. W.D. Mo. 1993);

18 In re Shah, 169 B.R. 17, 21 (Bankr. E.D.N.Y. 1994). More than  
19 one court has opined:

20 The Debtor's numerous omissions in his  
21 Statement of Financial Affairs and Schedules,  
22 taken together may constitute a pattern  
23 demonstrating a reckless disregard for the  
24 truth. (Citation omitted.) This reckless  
25 disregard for the truth is widely recognized  
26 as the equivalent to fraudulent intent.  
(Citation omitted.)

27 In re Metz, 150 B.R. 821, 824 (Bankr. M.D. Fla. 1993). Such  
28 conclusory statements are of little use to a court trying to  
29 determine whether the requisite fraudulent intent exists in a  
30 particular case. Competent facts placed in evidence must point  
31 toward that fraudulent intent. If no facts point toward  
32 fraudulent intent, it cannot be found simply by cumulating the

1 number of omissions. Neither sloppiness nor an absence of effort  
2 by the debtor supports, by itself, an inference of fraud. Courts  
3 which hold otherwise are simply devising a court-made  
4 prophylactic rule that the debtor must make substantial effort  
5 to provide accurate and complete schedules. Had the Congress  
6 intended to make such a rule, it could have done so easily, as  
7 it did with § 727(a)(3) (failure to keep adequate books and  
8 records), and (a)(5) (failure to adequately explain the loss  
9 of assets), neither of which have an express element of  
10 fraudulent intent. In re Bodenstein, 168 B.R. 23, 33  
11 (Bankr. E.D.N.Y. 1994).

12       The essential point is that there must be something about  
13 the adduced facts and circumstances which suggest that the debtor  
14 intended to defraud creditors or the estate. For instance,  
15 multiple omissions of material assets or information may well  
16 support an inference of fraud if the nature of the assets or  
17 transactions suggests that the debtor was aware of them at the  
18 time of preparing the schedules and that there was something  
19 about the assets or transactions which, because of their size or  
20 nature, a debtor might want to conceal. For instance, in In re  
21 Chalik, 748 F.2d 616, 168-19 (11<sup>th</sup> Cir. 1984), the debtor failed  
22 to disclose dealings with twelve corporations of which he was the  
23 sole or controlling shareholder and which had \$2.1 million in  
24 assets and \$250,000 per month in income. The court in In re  
25 Aboukhater, 165 B.R. 904, 910 (9<sup>th</sup> Cir. BAP 1994) looked to the  
26 substantiality of the omission to support an inference of an

1 intent to defraud. In other words, is there something about the  
2 omitted asset or transaction which a debtor might want to avoid  
3 disclosing. That is why the so-called badges of fraud are  
4 utilized to discern intent. In re Woodfield, 978 F.2d 516, 518  
5 (9<sup>th</sup> Cir. 1992); In re Gipe, 157 B.R. 171, 176-77 (Bankr. M.D.  
6 Fla. 1993). Another court has called them "factors to consider".  
7 In re Schroff, 156 B.R. 250, 254-55 (Bankr. W.D. Mo. 1993).

8 A number of courts have considered the concept of  
9 materiality. Most cited is In re Chalik, 748 F.2d 616, 618  
10 (11<sup>th</sup> Cir. 1984). There, the court concluded:

11 The subject matter of a false oath is  
12 "material," and thus sufficient to bar  
13 discharge, if it bears a relationship to the  
14 bankrupt's business transactions or estate,  
15 or concerns the discovery of assets, business  
16 dealings, or the existence and disposition of  
17 his property . . . . The recalcitrant debtor  
18 may not escape a section 727(a)(4)(A) denial  
19 of discharge by asserting that the admittedly  
20 omitted or falsely stated information  
21 concerned a worthless business relationship  
22 or holding; such a defense is specious.  
(Citation omitted.) It makes no difference  
23 that he does not intend to injure his  
24 creditors when he makes a false statement.  
25 Creditors are entitled to judge for  
26 themselves what will benefit, and what will  
prejudice, them. (Citations omitted.) The  
veracity of the bankrupt's statements is  
essential to the successful administration of  
the Bankruptcy Act. (Citation omitted.)

22 The court in In re Bailey, 147 B.R. 157, 162-63 (Bankr. N.D. Ill.  
23 1992), reiterated the foregoing, and added several observations.  
24 Quoting from Matter of Yonikus, 974 F.2d 901 (7<sup>th</sup> Cir. 1992), the  
25 Bailey court stated "'[d]ebtors have an absolute duty to report  
26 whatever interests they hold in property, even if they believe

1 their assets are worthless or unavailable to the bankruptcy  
2 estate.'" The Bailey court continued: "This is because '[t]he  
3 bankruptcy court, not the debtor, decides what property is exempt  
4 from the bankruptcy estate.'" "

5 The Bailey court then wrote at length:

6 10. Debtors in Chapter 7 proceedings have an  
7 affirmative duty to disclose on their schedules of  
8 assets whatever ownership interest they hold in  
9 any property, inclusive of all legal and equitable  
10 interest in said property, as of the commencement  
11 of a bankruptcy case. (Citations omitted.) The  
12 purpose behind 11 U.S.C. § 727(a)(4) is to enforce  
13 debtors' duty of disclosure and to ensure that the  
14 debtor provides reliable information to those who  
15 have an interest in the administration of the  
16 estate. (Citations omitted.) "Bankruptcy  
17 Trustees lack the time and resources to play  
18 detective and uncover all the assets and  
19 transactions of their debtors." Since § 727(a)(4)  
20 relates to the discovery of assets and enforces  
21 debtors' duty of disclosure, an omission can be  
22 material, even if the creditors were not  
23 prejudiced by the false statement. (Citations  
24 omitted.)

25 11. Allowing debtors the discretion to  
26 not report exempt or worthless property  
27 usurps the role of the trustee, creditors,  
28 and the court by denying them the opportunity  
29 to review the factual and legal basis of  
30 debtors' claims. It also permits dishonest  
31 debtors to shield questionable claims  
32 concerning an asset's value and status as an  
33 exemption from scrutiny. Therefore, the mere  
34 fact that unreported property is thought to  
35 be worthless or exempt is not a per se  
36 defense in a § 727(a)(4) action to bar  
37 discharge.

38 12. However, while the assertion that  
39 property is worthless or exempt is not a per  
40 se defense, it is a factor in determining  
41 materiality, and several courts have found  
42 minor omissions from debtors' schedules of  
43 assets to be immaterial.

1 See In re Cross, 156 B.R. 884, 889 (Bankr. D.R.I. 1993); In re  
2 Gipe, 157 B.R. 171, 178 (Bankr. M.D. Fla. 1993); In re Haverland,  
3 150 B.R. 768, 771-72 (Bankr. S.D. Cal. 1993).

4 Returning to the allegations under § 727(a)(2)(A), many of  
5 the elements are similar. Specifically:

6 To deny a discharge under this section,  
7 the court must find that the Debtors harbored  
8 actual intent to hinder, delay or defraud a  
9 creditor or officer of the estate. . . . We  
may infer the intent from the circumstances  
surrounding the transaction.

10 In re Woodfield, 978 F.2d 516, 518 (9<sup>th</sup> Cir. 1992); In re  
11 Davidson, 164 B.R. 782, 785 (Bankr. S.D. Fla. 1994), *modified on*  
12 *other grounds*, 178 B.R. 544 (Bankr. S.D. Fla. 1995); In re  
13 Schroff, 156 B.R. 250, 254-55 (Bankr. W.D. Mo. 1993); In re  
14 Smith, 161 B.R. 989, 991 (Bankr. E.D. Ark. 1993). Again, actual  
15 fraud is required. In re Devers, 759 F.2d 751, 753-54 (9<sup>th</sup> Cir.  
16 1985).

17 Finally, § 727(a)(5) provides for denial of a Chapter 7  
18 discharge where "the debtor has failed to explain satisfactorily,  
19 before determination of denial of discharge . . . any loss  
20 of assets or deficiency of assets to meet the debtor's  
21 liabilities . . . ."

22 During the course of the trial, Mr. Hunt established that  
23 Mr. Sanchez did not list Mr. Hunt as a creditor, even though  
24 Mr. Hunt had sued him for partition of the property; ouster; an  
25 accounting; breach of contract; specific performance; and fraud  
26 and misrepresentation. He also established that Mr. Sanchez had

1 failed to disclose the brief existence of two bank accounts at  
2 Washington Mutual. Both were opened on May 5, 2008. The first  
3 was in Mr. Sanchez's name, only, and involved a deposit of  
4 \$3,000. That account was closed on May 30, 2008 after withdrawal  
5 of all the funds. The second was an account in the joint names  
6 of Mr. Sanchez and Mr. Hunt, had an opening deposit of \$2,000,  
7 and was also closed on May 30, 2008 following withdrawal of the  
8 funds.

9 Mr. Hunt also established that Mr. Sanchez did not disclose  
10 his prior ownership of a home in Las Cruces, New Mexico. There  
11 was no mention of it in his Statement of Financial Affairs. At  
12 trial, Mr. Sanchez testified his former wife had occupied it, had  
13 trashed it, then he rented it out ostensibly for the debt service  
14 on it; and finally, he sold it to the tenants for the debt on it.  
15 He testified he had to pay almost \$10,000 out of his own pocket  
16 to close the escrow.

17 Further, Mr. Hunt established that in February and  
18 March 2009, Mr. Sanchez gave receipts to a tenant for rent  
19 payments for 3236 Menlo Avenue, which were not disclosed to the  
20 Court or the trustee in any of Mr. Sanchez's filings. The  
21 ostensible rent was \$560 in March and \$540 in February. Neither  
22 was paid in full, according to the receipts, and there is no  
23 evidence on whether there were any other months, or any other  
24 tenants also paying rent.

25 ///

26 ///

1           Lastly, Mr. Hunt asserted that Mr. Sanchez understated his  
2 income from both employment and from his Veteran's educational  
3 benefit.

4           As already noted, 11 U.S.C. § 727(a)(2)(A) requires proof  
5 of an actual intent to hinder, delay or defraud a creditor or  
6 officer of the estate. The Court finds and concludes that  
7 Mr. Hunt has failed to carry his burden of establishing the  
8 requisite intent. Accordingly, judgment should enter in favor  
9 of Mr. Sanchez on Mr. Hunt's claim for denial of discharge under  
10 11 U.S.C. § 727(a)(2)(A).

11           Mr. Hunt also seeks denial of a discharge under 11 U.S.C.  
12 § 727(a)(5), for failure to satisfactorily explain a loss of  
13 assets. A premise of that argument is the amount of money  
14 Mr. Sanchez is supposed to have had at a certain time, based on  
15 Mr. Hunt's claims of payments to Mr. Sanchez. As discussed,  
16 *infra*, the Court finds that Mr. Hunt has failed to establish one  
17 of the supposed \$10,000 payments, reducing the funds supposedly  
18 unaccounted for to a relatively small amount over a span of a  
19 number of months. The Court finds and concludes that Mr. Hunt  
20 has failed to carry his burden in establishing denial of a  
21 discharge under 11 U.S.C. § 727(a)(5).

22           The remaining claim of Mr. Hunt under 11 U.S.C. § 727 is  
23 under subpart (a)(4) for making a false oath. That oath is taken  
24 in signing the bankruptcy schedules and Statement of Financial  
25 Affairs under penalty of perjury, as well as the oath taken at  
26 the statutory meeting of creditors. As already discussed,

1 Mr. Hunt has established several items that were omitted by  
2 Mr. Sanchez in his bankruptcy filings. Moreover, Mr. Sanchez  
3 amended Schedules B and C to disclose, and claim as exempt, state  
4 and federal tax refunds. He did so within weeks of the  
5 bankruptcy filing. It was not until more than a year later that  
6 he amended his Statement of Financial Affairs to disclose the  
7 transfer of the New Mexico property, and the closing of the two  
8 Washington Mutual accounts. These amendments were filed long  
9 after this adversary proceeding was commenced. The Court is  
10 satisfied that the nondisclosures were "material", within the  
11 rubric of § 727(a)(4).

12 The challenge under § 727(a)(4) often is - as it is here -  
13 to ascertain whether the debtor had the requisite fraudulent  
14 intent. As noted, *supra*, to determine that, we are relegated to  
15 looking for "badges of fraud". As previously discussed:

16           Such badges of fraud include reservation of  
17           rights in or the beneficial use of the  
18           transferred assets; inadequate consideration;  
19           close friendship or relation to the  
              transferee; the financial condition of the  
              transfer on both before and after the  
              transfer . . . .

20 In re Maletta, 159 B.R. 108, 112 (Bankr. D. Conn. 1993).

21 Examining the evidence adduced at trial, the Court is unable to  
22 find sufficient "badges" to deny Mr. Sanchez a discharge under  
23 § 727(a)(4). At trial, he testified that he told his attorney  
24 about the New Mexico property, and reminded him of it when  
25 reviewing his petition before filing. His attorney repeated  
26 those assertions in the Defendant's Trial Brief filed in this

1 matter before trial, and they have gone unchallenged. On the  
2 record before the Court, the Court is unable to find by a  
3 preponderance of evidence that Mr. Sanchez had the intent to  
4 defraud or deceive when he failed to disclose the New Mexico  
5 property transfer, or the Washington Mutual accounts.

6 For all the foregoing reasons, the Court finds and concludes  
7 that Mr. Hunt has failed to carry his burden of proving a  
8 violation of § 727(a)(4) sufficient to warrant a denial of  
9 discharge under that subpart.

10 Having determined there is no basis for denial of a  
11 discharge under 11 U.S.C. § 727, the Court turns to examination  
12 of whether any debt owed by Mr. Sanchez to Mr. Hunt survives  
13 a general discharge because it is nondischargeable under  
14 11 U.S.C. § 523(a)(2)(A) or (a)(4).

15 Section 523(a)(2)(A) provides in relevant part that a  
16 discharge under section 727 "does not discharge an individual  
17 debtor from any debt - "

18 (2) for money, property, services . . .  
19 to the one extent obtained by -

20 (A) false pretenses, a false  
21 representation, or actual fraud  
22 . . . .

23 In the Ninth Circuit, a creditor must establish each of  
24 the following elements:

- 25 (1) That the debtor made the representations;
- 26 (2) That at the time they were made, debtor knew they were false;

26 ///

1 (3) That they were made with the intention and purpose  
2 of deceiving the creditor;

3 (4) That the creditor justifiably relied on the  
4 representations; and

5 (5) That the creditor sustained the alleged loss and  
6 damage as the proximate result of the representations  
7 having been made.

8 In re Britton, 950 F.2d 602, 604 (9<sup>th</sup> Cir. 1991). A false  
9 pretense involves an implied misrepresentation, or conduct  
10 which creates and fosters a false impression. A false  
11 representation is an express misrepresentation that induces  
12 conduct. In re Grant, 237 B.R. 97, 113 (Bankr. E.D. Va. 1999).

13 It is established that when a debtor has a duty to disclose,  
14 silence, or omission of a material fact can constitute a false  
15 representation actionable under § 523(a)(2)(A). In re Apte,  
16 96 F.3d 1319, 1323 (9<sup>th</sup> Cir. 1996).

17 Section 523(a)(4) is more brief. It states that a  
18 "discharge under section 727 . . . does not discharge an  
19 individual debtor from any debt -

20 . . .  
21 (4) for fraud or defalcation while acting in a  
22 fiduciary capacity, embezzlement, or larceny . . ."

23 For purposes of § 523(a)(4), the meaning of "fiduciary" is an  
24 issue of federal law, and is not controlled by a label state law  
25 might apply. Ragsdale v. Haller, 780 F.2d 794 (9<sup>th</sup> Cir. 1986) is  
26 a seminal case in this Circuit, and held that applying California  
law in ascertaining whether the requisite trust relationship  
exists yielded the conclusion that partners are fiduciaries of

1 each other. Particularly helpful in any § 523(a)(4) analysis  
2 is identification of an identifiable pre-existing trust res.  
3 As noted in Ragsdale, trusts arising *ex maleficio* or as a result  
4 of wrongdoing do not satisfy § 523(a)(4). "The trust giving rise  
5 to the fiduciary relationship must be imposed prior to any  
6 wrongdoing; the debtor must have been a 'trustee' before the  
7 wrong and without reference to it." 780 F.2d at 796. In In re  
8 Lewis, 97 F.3d 1182, 1185 (9<sup>th</sup> Cir. 1996), the court reiterated:

9 [T]he fiduciary relationship must be one  
10 arising from an express or technical trust  
11 that was imposed before and without reference  
12 to the wrongdoing that caused the debt.

12 The case begins with an apparent friendship between Cory  
13 Hunt and Marcus Sanchez, which evolved over a number of years.  
14 They did small projects together for friends, attended concerts,  
15 went kayaking.

16 Mr. Sanchez became interested in buying a house that could  
17 be fixed up and would generate revenue. He found the subject  
18 property in foreclosure. It had two homes on it, and he entered  
19 escrow on it. He testified he was having difficulty qualifying  
20 for the necessary loan because of his debt-to-income ratio.  
21 He testified that was when he approached Mr. Hunt about possibly  
22 participating in the project. Mr. Hunt testified that when he  
23 was contacted by Mr. Sanchez he got the address, did some  
24 research, consulted a realtor and hired a contract inspector.  
25 He visited the property, and orally agreed to become partners  
26 with Mr. Sanchez. Subsequently, a handwritten agreement was

1 drawn up and signed by both of them, but not dated. The document  
2 is Exhibit 3, and is captioned "50%/50% Partnership Agreement  
3 By and Between Marcos Sanchez and Cory Hunt on 3236 and 3238  
4 Menlo Ave San Diego, CA 92105 (two separate houses on one lot,  
5 front house 3 br 1.5 ba + 2 car garage back house 3 br 1.5 ba on  
6 back of property)" The document states:

7 Cory and Marcos agree Marcos will  
8 complete started escrow and get loan for  
9 approx. \$300,000 (\$312k with 12k coming back  
10 from seller approx) and complete purchase  
11 Cory will assist with money to get this  
12 completed and in listing work and repairs  
13 that must be done.

14 Marcos and Cory agree to not put any  
15 other loans or allow any liens or  
16 encumbrances on the property or to take on  
17 any other partners or investors.

18 Marcos and Cory agree not to do any work  
19 or have any work done over \$100.00 with out  
20 writing a request and agreeing in writing to  
21 the type of work repair/or replace who's  
22 doing how long it will take will it affect  
23 the rental date etc and signing an agreement)

24 Marcos and Cory agree to meet soon after  
25 signing all loan docts and go over cost  
26 estimates and closing costs and Marcos will  
give copies of all documents to Cory.

Marcos will give Cory keys and access to  
property as soon as possible. Marcos will  
make a list of all work that has to be done  
in order to get houses rented. Cory will go  
over it and make a list that Marcos can  
review and Cory and Marcos will sign and then  
make a buget for supplies needed and both  
sign Cory and Marcos will set a schedule for  
work to be done and make a flow chart and  
time estimate of the work and sign and agree  
to complete on time or make a list of penalty  
or consequence and sign and agree.

1 Cory and Marcos agree to do all the  
2 work themselves to avoid any additional  
3 costs or exspenses the only exception being  
4 possible \$200.00 for electrician or to get  
5 or meet city code requirements for anything  
6 additional we meet write up and sign an  
7 agreement between us and we get at least  
8 3 written estimates first each to present  
9 each other.

10 If Cory or Marcos want to end change or  
11 dissolve this partnership they must do so by  
12 writing the other and stating what the  
13 problems are and what they want to do to  
14 resolve them then Cory and Marcos will meet  
15 and try to resolve or fix these problems.  
16 Cory will have the option to buy the partner  
17 (Marco) out, at the purchase price plus work  
18 what work has been done or an agreed fair  
19 price. Marcos will have this option at this  
20 fair price also to buy out Cory if any  
21 partnership agreements cant be worked out.

22 In they event the property sells Marcos  
23 & Cory will split any profits 50/50 and we  
24 agree to give each other first right of  
25 purchase and work together to complete this.

26 Marcos will give copies of all papers  
escrow loan etc. to Cory as soon as he  
recieves them or any other notices city SDGE  
water etc.

Marcos will meet with Cory and they will  
set up a more defined/Partnership soon as  
possible after closing.

Cory & Marcos will meet and make a list  
of all work to be done and a time line  
schedule & cost for each item.

Marcos and Cory will set up a  
goods/supplies account for materials.

Both Mr. Hunt and Mr. Sanchez agree that on or about  
February 8, 2008 they entered into two loan agreements to deposit  
a total of \$7,000 into Mr. Marcos' account as reserve funds to  
aid in closing the escrow on the Menlo Avenue property. Those

1 funds were to be paid back to Mr. Hunt following the closing.  
2 Ultimately, those funds were not necessary to the closing, which  
3 Mr. Sanchez was able to accomplish without direct financial  
4 assistance from Mr. Hunt. Mr. Sanchez testified that he was  
5 able to improve his debt-income ratio by borrowing money through  
6 the same loan officer (who was a friend of his) to pay off the  
7 debt on his Jeep - a transaction which is troubling to the Court  
8 but not part of this proceeding.

9       According to plaintiff's trial brief, and not controverted  
10 by anyone, Mr. Sanchez received title to the property on  
11 April 8, 2008. Mr. Sanchez testified he moved onto the property  
12 immediately, and began working on the property nonstop.  
13 Apparently he had been laid off by his employer and had the time  
14 available. He said he repaired pipe, toilets, furnaces, tile.  
15 He also spackled and painted, and cleaned up the yard, putting  
16 most of the items on his credit cards. He said he worked 18-20  
17 hours a day, 7 days a week for about 30 days, and slept at the  
18 property. Mr. Sanchez testified Mr. Hunt was not there, but  
19 began coming around, asserting he was a 50% owner of the  
20 property.

21       Mr. Hunt testified to a different version of events. He  
22 said that he put up money during the initial escrow for  
23 materials, inspection and services, and that he paid those funds  
24 directly to Mr. Sanchez in cash, so has no records or receipts.  
25 Mr. Hunt said he moved onto the property after Mr. Sanchez gave  
26 him a key, and he began work to clean up the property. His

1 testimony was that Mr. Sanchez did one percent of the work,  
2 while Mr. Hunt did ninety-nine percent. He also claimed he  
3 spent \$1,500 - \$2,000 on materials in April, 2008.

4 Neither Mr. Hunt nor Mr. Sanchez testified about what  
5 soured their relationship so quickly. On May 1, 2008 Mr. Sanchez  
6 repaid the \$7,000 loaned by Mr. Hunt to act as an escrow reserve,  
7 and Mr. Hunt signed a receipt for it. Then, on or about  
8 May 5, 2008, two new accounts were opened at Washington Mutual.  
9 One was in Mr. Sanchez' name, alone, and had an opening deposit  
10 of \$3,000. The other was a joint account with both names, Hunt  
11 and Sanchez on it, with a \$2,000 opening deposit.

12 On or about May 5, 2008, both Hunt and Sanchez executed a  
13 form "Residential Lease Or Month-To-Month Rental Agreement."  
14 It identified Mr. Sanchez as the landlord, and Mr. Hunt as the  
15 tenant. The term commenced May 5 and was to terminate after  
16 the purchase was completed. It recited that the rent was \$1,500  
17 per month, payable on the first of the month to Mr. Sanchez. It  
18 referenced that there was to be a \$1,000 security deposit, which  
19 was the account set up at WAMU on May 5. Paragraph 15 had  
20 interlineated "Marcos and Cory are already making repairs", while  
21 paragraph 19 had written in: "Cory and Marcos are already  
22 partners on property so Cory will take care of sign".  
23 Handwritten in as paragraph 32A was "Tenant to get own renter's  
24 insurance", followed by Mr. Sanchez's initials.

25 According to both Mr. Hunt and Mr. Sanchez, it was  
26 agreed between them that Mr. Hunt would buy the property from

1 Mr. Sanchez. Mr. Sanchez provided an unsigned copy of purported  
2 escrow instructions (Exhibit E) from Simply Escrow, dated  
3 June 2, 2008. It recited that Mr. Hunt, as buyer, had deposited  
4 \$2,000 with seller, Mr. Sanchez, outside of escrow. From that  
5 point, the respective stories diverge. Mr. Hunt testified that  
6 he met at Hazard with Mr. Sanchez and Ms. Capri Lutes, who  
7 was with the escrow company. He testified he paid over to  
8 Mr. Sanchez \$10,000 in cash, on two different occasions, to be  
9 deposited in the escrow, approximately 25-30 days apart. He  
10 said when he learned neither payment was deposited in escrow he  
11 did not make any more payments.

12 Mr. Sanchez, on the other hand, testified he never received  
13 any \$10,000 payments from Mr. Hunt, although the two of them did  
14 meet with Ms. Lutes on one occasion. When Mr. Hunt never  
15 completed the escrow, he gave instructions to Simply Escrow on  
16 or about October 21, 2008 to cancel it.

17 Reconciling the conflicting testimony of Mr. Hunt and  
18 Mr. Sanchez is difficult because no paper trail was presented by  
19 either. Mr. Hunt testified the payments were in cash, and that  
20 he kept his monies in cash, gold or silver, real estate. He did  
21 not recall where the money came from, "maybe something he sold."  
22 Curiously, he testified that when he paid the \$10,000, he trusted  
23 Mr. Sanchez and considered him a good friend, even though their  
24 business relationship had collapsed and Mr. Hunt was going to  
25 take over the property.

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1           As for Mr. Sanchez, he testified he thought Mr. Hunt was  
2 going to be on the loan on the property "50/50", and when he was  
3 not, he considered the so-called partnership agreement "null and  
4 void". Nevertheless, he agreed to sell the property to Mr. Hunt,  
5 although the terms were never clear, and an escrow apparently was  
6 opened for the transaction. Moreover, the so-called residential  
7 lease was executed, giving Mr. Hunt possession of the property.  
8 In a letter from one of Mr. Sanchez's attorneys, the attorney  
9 stated: "Mr. Hunt paid a non refundable deposit of \$10,000.00  
10 but never performed when the property was in escrow." (Ex. 8).

11           Further confusing matters are the repayment to Mr. Hunt of  
12 \$7,000 on May 1, followed by Mr. Sanchez opening two new accounts  
13 on May 5, one in his own name, with \$3,000, and one in both  
14 names, with a \$2,000 deposit. The funds in both accounts were  
15 withdrawn on May 30, 2008, and the accounts were closed.  
16 Mr. Hunt testified he never accessed the joint account, and  
17 could not access Mr. Sanchez's individual account.

18           From the evidence adduced at trial, the court finds and  
19 concludes that Mr. Hunt and Mr. Sanchez entered into a  
20 partnership somewhere around February 8, 2008 to acquire the  
21 Menlo Avenue property. It appears the agreement contemplated  
22 that Mr. Sanchez would complete the escrow, while Mr. Hunt stood  
23 ready to help fund the closing. Thereafter, they were to improve  
24 the properties to make them rentable, and to thereafter share the  
25 profits, whether from rents earned or subsequent sale on an equal  
26 basis. Contrary Mr. Sanchez's testimony, the partnership was not

1 "null and void" from the inception. To the contrary, it  
2 persisted, despite Mr. Sanchez's period of unemployment, for the  
3 short time between closing and the agreement to sell the property  
4 to Mr. Hunt. The Court finds that it is more probable than not  
5 that Mr. Hunt made a \$2,000 payment outside of escrow, and one  
6 payment of \$10,000. The evidence is insufficient to persuade  
7 the Court that a second \$10,000 payment was made. In Ex. 8, the  
8 \$10,000 is referred to as a "non refundable deposit", but no  
9 documentation or testimony was proffered to support the assertion  
10 that it was nonrefundable, much less what any other terms of the  
11 proposed sale were.

12 Based on the foregoing, the Court finds and concludes that  
13 Mr. Hunt has met his burden of establishing that Mr. Sanchez,  
14 while in a fiduciary relationship with Mr. Hunt as partners,  
15 accepted a specified res, \$12,000, which he held as part of an  
16 escrow for sale of the Menlo Avenue property. He did not  
17 deposit any of the funds with the escrow company, and he did  
18 not return them to Mr. Hunt when Mr. Sanchez cancelled the  
19 escrow. Mr. Sanchez has failed to provide any competent evidence  
20 of authority to personally retain any of those funds upon the  
21 failure of the escrow. Accordingly, Mr. Hunt is entitled to a  
22 judgment that a debt of \$12,000 owed to him by Mr. Sanchez is  
23 nondischargeable under 11 U.S.C. § 523(a)(4), and to a judgment  
24 in that amount.

25 In addition, the evidence established that on May 5, 2008  
26 an account was opened at Washington Mutual in the names of both

1 Mr. Sanchez and Mr. Hunt, with a deposit of \$2,000. On or about  
2 May 30, 2008 Mr. Sanchez apparently withdrew the \$2,000 and  
3 closed the account. Absent evidence to the contrary, Mr. Hunt  
4 had a right to one-half those funds. There is no evidence he  
5 ever accessed that account. Accordingly, Mr. Hunt is also  
6 entitled to a judgment of nondischargeability under 11 U.S.C.  
7 § 523(a)(4), and an award of \$1,000.

8 Mr. Hunt has also asserted that the debt owed to him  
9 is nondischargeable under 11 U.S.C. § 523(a)(2)(A). However,  
10 Mr. Hunt has failed to meet his burden of establishing that  
11 Mr. Sanchez made knowingly false representations to Mr. Hunt that  
12 induced Mr. Hunt to part with any of the \$12,000 at the time he  
13 made the payments. Moreover, the Court is persuaded it would not  
14 be justifiable for Mr. Hunt to pay over \$10,000 without some  
15 receipt or requiring deposit in the escrow, given the decline  
16 in their relationship. Accordingly, judgment should enter in  
17 favor of Mr. Sanchez on Mr. Hunt's claim of nondischargeability  
18 under § 523(a)(2)(A).

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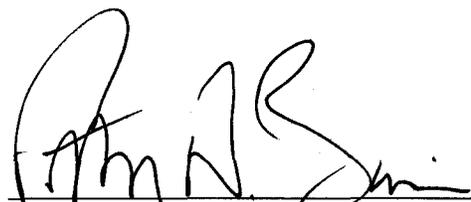
Conclusion

Based on the foregoing analysis, the Court finds and concludes that judgment should enter in favor of Mr. Hunt, in the amount of \$13,000, which judgment is nondischargeable under 11 U.S.C. § 523(a)(4) only. Judgment shall enter in favor of Mr. Sanchez and against Mr. Hunt on all other causes of action.

Counsel for Mr. Hunt shall prepare and lodge a separate form of judgment consistent with the foregoing within twenty-eight (28) days of the date of entry of this Memorandum Decision.

IT IS SO ORDERED.

DATED: FEB 28 2012

  
PETER W. BOWIE, Chief Judge  
United States Bankruptcy Court