

WRITTEN DECISION – NOT FOR PUBLICATION

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 CLERK, U.S. BANKRUPTCY COURT  
 SOUTHERN DISTRICT OF CALIFORNIA  
 BY \_\_\_\_\_ DEPUTY

UNITED STATES BANKRUPTCY COURT  
 SOUTHERN DISTRICT OF CALIFORNIA

12	In re:	)	Bankruptcy Case No. 10-12306-CL7
13	DAVID KAHN,	)	Adversary Proceeding No. 10-90636-CL
14	Debtor,	)	Chapter 7
15	_____	)	
16	CALIFORNIA BANK & TRUST,	)	MEMORANDUM DECISION AND ORDER
17	Plaintiff,	)	GRANTING DISCHARGE AND DENYING
18	v.	)	NONDISCHARGEABILITY
19	DAVID KAHN,	)	
20	Defendant.	)	Judge: Christopher B. Latham
21	_____	)	

198

1 **MEMORANDUM DECISION AND ORDER GRANTING DISCHARGE**  
2 **AND DENYING NONDISCHARGEABILITY**  
3

4 In August 2006, Vineyard Bank (“Vineyard”) extended a loan to Tres Hombres, LLC (“Tres  
5 Hombres”). Tres Hombres issued a \$5.2 million promissory note to repay Vineyard. Defendant-  
6 Debtor David J. Kahn (“Debtor” or “Kahn”) guaranteed the note. Tres Hombres was unable to pay off  
7 the note, and Vineyard extended its maturity date three times. Kahn provided Vineyard several  
8 financial statements in connection with the note, the guarantee, and the maturity date extensions. Tres  
9 Hombres eventually defaulted on the note, and Kahn did not cure the default under his guarantee.

10 In October 2009, Vineyard’s successor in interest, plaintiff California Bank & Trust (“Plaintiff”  
11 or “CBT”), sued Kahn in state court. And in July 2010, Kahn filed bankruptcy. Five months later, on  
12 December 30, 2010, CBT brought this adversary proceeding against Debtor seeking:  
13 (1) nondischargeability of its debt under 11 U.S.C. § 523(a)(2); and (2) denial of discharge under  
14 11 U.S.C. §§ 727(a)(2), 727(a)(4) and 727(a)(5). For the following reasons, the court grants Debtor’s  
15 discharge, and finds CBT’s debt dischargeable.

16  
17 **I. JURISDICTION, VENUE, STANDING & REQUIRED PARTIES**

18 The court has jurisdiction over this adversary proceeding under 28 U.S.C. §§ 1334(b),  
19 157(b)(2)(I), and 157(b)(2)(J). Venue is proper under 28 U.S.C. § 1409(a). And CBT has standing to  
20 bring this action. On July 17, 2009, the Office of the Comptroller of the Currency closed Vineyard and  
21 assigned its assets and liabilities to the Federal Deposit Insurance Corporation (the “FDIC”).<sup>1</sup> The  
22 FDIC entered into a Purchase and Assumption Agreement (the “Agreement”) whereby the FDIC  
23 assigned to CBT all right, title, and interest in the subject matter of this case.<sup>2</sup>

24 As a preliminary matter, Debtor states that Plaintiff failed to timely produce the Agreement  
25 between the FDIC and CBT.<sup>3</sup> He alleges that CBT did this to conceal language in the Agreement that  
26

27 <sup>1</sup> Mara Decl. ¶ 4 at ECF No. 155; Pl.’s Ex. 139.

28 <sup>2</sup> Mara Decl. ¶¶ 6 & 7; Pl.’s Ex. 139.

<sup>3</sup> Pretrial Order (ECF No. 156) at 28:14-16.

1 would require the FDIC to be a party to this action.<sup>4</sup> Debtor then argues that the court should:  
2 (1) strike CBT's operative complaint; and (2) designate the FDIC as a required party under Rule 19 of  
3 the Federal Rules of Civil Procedure.<sup>5</sup>

4 But Debtor's arguments are unpersuasive. CBT produced the Agreement. And indeed, the  
5 Agreement is a matter of public record: On July 17, 2009, the FDIC published a press release  
6 regarding Vineyard's failure that provides a copy of the Agreement. Debtor has not stated how CBT's  
7 untimely production prejudiced him. Moreover, even if Debtor were prejudiced, striking CBT's  
8 complaint would not be the appropriate remedy. The court therefore denies Debtor's request to strike  
9 CBT's complaint.

10 Further, Rule 19 provides that a required party is a person who must be joined if, in that  
11 person's absence, the court cannot accord complete relief among existing parties. *See* Fed. R. Bankr.  
12 P. 7019. Debtor fails to point to any particular provision of the Agreement that would render the FDIC  
13 a required party. And he did not present evidence on this argument at trial.<sup>6</sup> There is no reason that  
14 the court, in the FDIC's absence, cannot accord complete relief between CBT and Kahn. The court  
15 therefore finds that the FDIC is not a required party under Rule 7019.

## 16 17 **II. FACTUAL FINDINGS**

### 18 **A. The Structure and History of Kahn's Business Enterprises and Dealings with** 19 **Vineyard Bank**

20 During the period relevant to this case, Debtor's primary business was locating and purchasing  
21 underutilized real properties, obtaining entitlements, and then reselling the properties for profit to  
22

23  
24 <sup>4</sup> Pretrial Order at 28:17-29:27.

25 <sup>5</sup> Pretrial Order at 70:4-14. Rule 19 of the Federal Rules of Civil Procedure applies to bankruptcy proceedings  
through Rule 7019 of the Federal Rules of Bankruptcy Procedure.

26 <sup>6</sup> The parties' joint pretrial order makes only vague factual allegations that, *inter alia*: the FDIC's assignment  
27 was conditional; the FDIC could, at any time, reacquire assets it transferred to CBT; CBT has an ongoing  
contractual obligation to report on its collection efforts; etc. After reviewing the Agreement, it appears that the  
28 FDIC has the right to reacquire assets it deems "essential to [itself]." But such reacquired assets "shall be  
purchased at a price equal to the [asset's book value, plus certain adjustments]." This is no different from a  
plaintiff selling rights in a cause of action. And the absence of such purchaser has no bearing on the court's  
ability to accord relief between Plaintiff and Debtor here.

1 professional builders.<sup>7</sup> Plaintiff alleges that Kahn was involved in at least thirteen related business  
 2 entities relevant to its suit.<sup>8</sup> And Kahn, through these entities, repaid approximately \$98 million in  
 3 loans from 1999 through 2008.<sup>9</sup> Kahn is also the sole trustee and beneficiary of the David Kahn Trust  
 4 (the “DKT”).<sup>10</sup> It is a revocable trust that he uses for estate planning purposes.<sup>11</sup> On the advice of  
 5 counsel, Kahn settled the DKT in 1990.<sup>12</sup>

6 Sometime before 2006, David Martz, Timothy Sears, and David Zachary formed Tres Hombres  
 7 in order to purchase undeveloped real property for a construction project in Laughlin, Nevada (the  
 8 “Project”).<sup>13</sup> Tres Hombres applied for a construction loan with Vineyard.<sup>14</sup> But its owners believed  
 9 that, without Kahn, Vineyard would not approve the loan.<sup>15</sup> Accordingly, Mr. Martz solicited Kahn to  
 10 join Tres Hombres.<sup>16</sup> And Kahn eventually purchased a 51% ownership interest.<sup>17</sup>

11 In August 2006, Vineyard approved the loan; it entered into a construction loan agreement with  
 12 Tres Hombres to fund the Project.<sup>18</sup> In return, Tres Hombres executed a promissory note to pay  
 13 Vineyard approximately \$5.2 million plus interest.<sup>19</sup> The note’s original maturity date was August 10,  
 14 2007.<sup>20</sup> The note provided a “pre-approved” option to extend this maturity date by six months, for a  
 15 fee of 0.5% of the outstanding loan amount.<sup>21</sup> The Project secured the note.<sup>22</sup> And Kahn guaranteed  
 16 it.<sup>23</sup> In relation to this guarantee, Kahn provided Vineyard with a consolidated financial statement  
 17  
 18  
 19

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20 <sup>7</sup> Pretrial Order at 6:13-16.

21 <sup>8</sup> Pretrial Order at 28:18-29:21.

22 <sup>9</sup> Pretrial Order at 6:19-8:10.

23 <sup>10</sup> Pretrial Order at 2:20-21.

24 <sup>11</sup> Pretrial Order at 5:13.

25 <sup>12</sup> Pretrial Order at 5:5-6.

26 <sup>13</sup> Pretrial Order at 2:24-26.

27 <sup>14</sup> Pretrial Order at 3:9-10.

28 <sup>15</sup> Pretrial Order at 9:9-10, 25:26-28.

<sup>16</sup> Pretrial Order at 2:22-23; Trial Tr., Vol. 4 at 138:16-139:15.

<sup>17</sup> Trial Tr., Vol. 1 at 16:15-20.

<sup>18</sup> Pretrial Order at 3:11-15; Pl.’s Ex. 15.

<sup>19</sup> Pretrial Order at 3:16-17; Pl.’s Ex. 18.

<sup>20</sup> Kasner Decl. ¶ 10 at ECF No. 147; Pl.’s Ex. 18.

<sup>21</sup> Pl.’s Ex. 18; Trial Tr., Vol. 3 at 83:15-23; Trial Tr., Vol. 4 at 49:16-51:5.

<sup>22</sup> Kasner Decl. ¶ 4 at ECF No. 147; Pl.’s Ex. 19.

<sup>23</sup> Kasner Decl. ¶ 5 at ECF No. 147; Pl.’s Ex. 16-17.

1 dated June 2006 (the “June 2006 Statement”) that described his and his related entities’ total assets and  
2 liabilities.<sup>24</sup> Kahn maintains that he neither reviewed nor signed this Statement.<sup>25</sup>

3 Tres Hombres made no principal payments on the note, and instead sought to extend the  
4 maturity date.<sup>26</sup> In July 2007, Kahn provided Vineyard a second, consolidated financial statement (the  
5 “July 2007 Statement”) in connection with the note’s pre-approved six-month extension.<sup>27</sup> In turn,  
6 Vineyard entered into a Change in Terms Agreement with Tres Hombres, extending the maturity date  
7 to February 10, 2008.<sup>28</sup> In January 2008, Tres Hombres again sought to extend the note’s maturity  
8 date.<sup>29</sup> Kahn gave Vineyard a third consolidated financial statement (the “January 2008 Statement”).<sup>30</sup>  
9 And through another Change in Terms Agreement, Vineyard extended the note’s maturity date to May  
10 10, 2008.<sup>31</sup>

11 As May 10 approached, Tres Hombres and Vineyard agreed to extend the note’s maturity date  
12 again to August 10, 2008.<sup>32</sup> Finally, in August 2008, Tres Hombres requested another maturity date  
13 extension.<sup>33</sup> Kahn provided Vineyard a fourth consolidated financial statement dated July 2008 (the  
14 “July 2008 Statement”).<sup>34</sup> And Vineyard extended the note’s maturity date one last time, to February  
15 10, 2009.<sup>35</sup> Before each maturity date extension, an officer at Vineyard – Mr. Richard Kasner –  
16 reviewed Kahn’s financial statements and authored a creditor recommendation upon which Vineyard  
17 relied in making its decision.<sup>36</sup>

18 In November 2008, Tres Hombres defaulted on the note.<sup>37</sup> On December 31, 2008 Vineyard  
19 gave Kahn notice of this default, and Kahn failed to cure it.<sup>38</sup> Vineyard recorded its notice of default  
20

21 <sup>24</sup> Kasner Decl. ¶ 6 at ECF No. 147; Pl.’s Ex. 9

22 <sup>25</sup> Trial Tr., Vol. 2 at 255:8-256:1.

23 <sup>26</sup> Kasner Decl. ¶ 10; Pl.’s Ex. 50.

24 <sup>27</sup> Kasner Decl. ¶ 11 at ECF No. 147; Pretrial Order at 12:1-4; Pl.’s Ex. 24.

25 <sup>28</sup> Kasner Decl. ¶ 12 at ECF No. 147; Pl.’s Ex. 26.

26 <sup>29</sup> Kasner Decl. ¶ 13 at ECF No. 147; Pretrial Order at 12:10-13.

27 <sup>30</sup> Kasner Decl. ¶ 13 at ECF No. 147; Pretrial Order at 12:10-13; Pl.’s Ex. 35.

28 <sup>31</sup> Kasner Decl. ¶ 13 at ECF No. 147; Pretrial Order at 10:12-13; Pl.’s Ex. 36.

29 <sup>32</sup> Kasner Decl. ¶ 15 at ECF No. 147; Pl.’s Ex. 42.

30 <sup>33</sup> Kasner Decl. ¶ 16 at ECF No. 147; Pretrial Order at 12:20-23.

31 <sup>34</sup> Kasner Decl. ¶ 17 at ECF No. 147; Pl.’s Ex. 46.

32 <sup>35</sup> Kasner Decl. ¶ 18 at ECF No. 147; Pl.’s Ex. 45.

33 <sup>36</sup> Kasner Decl. ¶¶ 11-18 at ECF No. 147; Pl.’s Exs. 28, 40, 43 & 47.

34 <sup>37</sup> Chico Decl. ¶¶ 7 & 8 at ECF No. 146; Pl.’s Ex. 50.

35 <sup>38</sup> Chico Decl. ¶ 9 at ECF No. 146.

1 in Clark County, Nevada.<sup>39</sup> On June 26, 2009, it sold the Project at foreclosure for \$621,000.<sup>40</sup> On  
2 October 12, 2009, CBT brought suit against Kahn in San Diego Superior Court.<sup>41</sup> Then, on July 13,  
3 2010, Kahn filed a voluntary Chapter 7 petition.<sup>42</sup>

4 CBT commenced this adversary proceeding on December 30, 2010.<sup>43</sup> Following two motions  
5 to dismiss, CBT filed its second amended complaint on August 17, 2011.<sup>44</sup> And Debtor answered on  
6 September 19, 2011.<sup>45</sup> Again, CBT's operative complaint seeks: (1) nondischargeability of its debt  
7 under 11 U.S.C. § 523(a)(2); and (2) denial of Debtor's discharge under 11 U.S.C. §§ 727(a)(2),  
8 727(a)(4) and 727(a)(5).

### 9 **B. Kahn's Consolidated Holdings and How He Represented Them**

10 Plaintiff has alleged that Kahn is liable under § 523(a)(2) for misrepresenting – in his Financial  
11 Statements – the value of several of his numerous investments.<sup>46</sup> As to some of those investments,  
12 CBT either did not present evidence or else did not argue at trial how Kahn's representations about  
13 them are inaccurate. In the latter category are Kahn's holdings at Pohaku Loa Way, Maika Place,  
14 KCM LM LLC, Sunset Centers I and II, and various vehicles. The court concludes as to each of them  
15 that CBT has not proven liability under § 523. And the court treats in turn each of the Kahn holdings  
16 on which CBT presented evidence and argument, namely Media Cart, Fern Street LLC, KCM  
17 Lakeshore Crossing LLC, All Star Apparel, Inc., Midway Resources, Inc., and Kahn's wife's jewelry.

#### 18 **1. Media Cart**

19 Kahn held preferred and common stock in Media Cart Holdings, Inc. ("Media Cart") through  
20 his KCM MC and Bennelong USA LLCs.<sup>47</sup> The court concludes that Kahn did not knowingly  
21 misrepresent the value of his Media Cart investment and that his representations of Media Cart's value  
22 were not factually inaccurate.

24 <sup>39</sup> Chico Decl. ¶ 10 at ECF No. 146.

25 <sup>40</sup> Chico Decl. ¶ 10 at ECF No. 146; Pl.'s Ex. 63.

26 <sup>41</sup> Pretrial Order at 3:1-3.

27 <sup>42</sup> Pretrial Order at 3:4-5.

28 <sup>43</sup> Pretrial Order at 3:6-8.

<sup>44</sup> ECF No. 35.

<sup>45</sup> ECF No. 36.

<sup>46</sup> Pretrial Order at 69:6-7.

<sup>47</sup> Pl.'s Exs. 24, 35 & 46; Trial Tr., Vol. 1 at 33:1-35:4, 40:5-8 & 205:3-5.

1 Kahn's Media Cart holdings are included in his 2007 and 2008 Financial Statements.<sup>48</sup> The  
2 July 2007 Statement values Kahn's preferred and common stock at the prices Kahn purchased them:  
3 \$26.45 million and \$21.63 million, respectively.<sup>49</sup> The January 2008 Financial Statement valued the  
4 holdings at \$27 million.<sup>50</sup> But Kahn testified that Bank of America and Merrill Lynch independently  
5 valued Media Cart's market capitalization worth at \$100 million.<sup>51</sup> And he explained that the January  
6 2008 value is the product of his 27% ownership of Media Cart and the \$100 million market  
7 capitalization.<sup>52</sup> Moreover, Kahn had reason to be optimistic. Media Cart had received favorable  
8 attention from its product's pilot test with Shoprite.<sup>53</sup> And very large market players – Microsoft,  
9 Merrill Lynch, and Walmart – had expressed interest in perhaps doing business with Media Cart.<sup>54</sup>

10 In the July 2008 Financial Statement, by contrast, Kahn based the stocks' value on the recent  
11 sale of a 49% interest in KCM MC to one Ken Krebs for \$1.7 million.<sup>55</sup> Because KCM MC held  
12 90,000 preferred shares of Media Cart, each share had a value of \$18.30.<sup>56</sup> And, combined with  
13 Bennelong USA's holdings, Kahn valued his total Media Cart stock at just over \$19 million.<sup>57</sup> Kahn's  
14 shift in valuation method had a factual basis, and he disclosed it. Based on his testimony and  
15 demeanor at trial, the court concludes that Kahn did not think his valuations were false. It therefore  
16 cannot be said that Kahn's representations were inaccurate, although the court notes that he treated  
17 Media Cart's value as somewhat plastic.

18 CBT presented evidence from the months the Financial Statements covered, and beyond, in an  
19 attempt to show that Kahn must have known his reported values were inaccurate.<sup>58</sup> Thus, during a  
20 dispute with Media Cart's president in June 2007, Kahn said in an email that the company's valuation  
21 was "artificially high."<sup>59</sup> But the email does not specify what the objectionable valuation was.<sup>60</sup> Kahn

22 \_\_\_\_\_  
23 <sup>48</sup> Pl.'s Exs. 24, 35 & 46.

<sup>49</sup> Pl.'s Ex. 24; Trial Tr., Vol. 1 at 33:1-35:4, 204:8-205:12 & 206:18-207:13.

<sup>50</sup> Pl.'s Ex. 35.

<sup>51</sup> Trial Tr., Vol. 1 at 217:21-218:9.

<sup>52</sup> Pl.'s Ex. 35; Trial Tr., Vol. 1 at 217:21-218:9.

<sup>53</sup> Trial Tr., Vol. 1 at 213:9-25.

<sup>54</sup> Trial Tr., Vol. 1 at 214:9-217:16.

<sup>55</sup> Trial Tr., Vol. 1 at 218:12-220:12.

<sup>56</sup> Pl.'s Ex. 45; Trial Tr., Vol. 1 at 218:25-219:3.

<sup>57</sup> Pl.'s Ex. 45.

<sup>58</sup> Trial Tr., Vol. 1 at 35:5-38:9.

<sup>59</sup> Pl.'s Ex. 23; Trial Tr., Vol. 1 at 35:5-38:9.

1 did object to exchanging his 30% position in Media Cart for \$7.5 million – corresponding to \$25  
 2 million in total capitalization, and calling it a “low valuation.”<sup>61</sup> And he sought an option to purchase  
 3 5% of Media Cart for \$2 million.<sup>62</sup> But Kahn stated these figures in the context of negotiation, and  
 4 they do not contradict the \$48.08 million valuation asserted in his July 2007 Statement.

## 5                   2.       **Fern Street LLC**

6           Kahn owned an 80% interest a limited liability company – Fern Street, LLC – that held an  
 7 option to buy and develop real estate on Fern Street in San Diego, California.<sup>63</sup> The court likewise  
 8 finds that Kahn did not knowingly misrepresent the value or nature of his interest in Fern Street, LLC.  
 9 Nor were his representations of the Fern Street, LLC’s investment’s nature and worth inaccurate.

10           The Fern Street, LLC asset is included on the July 2007, January 2008 and July 2008 Financial  
 11 Statements.<sup>64</sup> In the first one, it is listed under “REAL ESTATE.”<sup>65</sup> In the last two, it is included in a  
 12 new category denominated “REAL ESTATE CONTRACTS.”<sup>66</sup> But this is not in itself misleading  
 13 since none of the Statements limit the “REAL ESTATE” category to fee ownerships; indeed, none of  
 14 the Statements describe the category at all.<sup>67</sup> Nor was there any evidence presented to suggest that:  
 15 (1) Kahn ever claimed Fern Street was a fee holding; or (2) that CBT asked him about it and was  
 16 misled by his response.

17           Additionally, the net value of the Fern Street LLC position steadily declined across the  
 18 Statements: from \$8 million to \$5 million in a January 3, 2008 financial statement to Torrey Pines  
 19 Bank, to \$1.5 million, and finally to \$995,000 following litigation.<sup>68</sup> That clear trend cuts against  
 20 CBT’s assertion that Kahn had knowingly exaggerated the value. Finally, Kahn gave detailed  
 21 testimony explaining how his valuations changed from report to report depending on how relevant  
 22 events impacted the Fern Street real estate development project.<sup>69</sup> Taking the circumstances in their  
 23

24 <sup>60</sup> Pl.’s Ex. 23.

<sup>61</sup> Pl.’s Ex. 23.

25 <sup>62</sup> Pl.’s Ex. 23.

<sup>63</sup> Trial Tr., Vol. 2 at 429:9-430:7, Vol. 3 at 69:1-20.

26 <sup>64</sup> Pl.’s Exs. 24, 35 & 46.

<sup>65</sup> Pl.’s Ex. 24.

27 <sup>66</sup> Pl.’s Ex. 35 & 46.

<sup>67</sup> Pl.’s Exs. 24, 35 & 46.

28 <sup>68</sup> Pl.’s Exs. 24, 34, 35 & 46.

<sup>69</sup> Trial Tr., Vol. 2 at 422:4-434:20.

1 totality – and giving weight to Kahn’s trial testimony on these points – the court concludes that the  
 2 Fern Street, LLC values were not misstated. The court also finds that Kahn did not believe the values  
 3 were false or inaccurate.

### 4 3. KCM Lakeshore Crossing LLC

5 Kahn held an interest in another company – KCM Lakeshore Crossing LLC (“KCM  
 6 Lakeshore”) – that owned a 90-acre, mixed-use property in Shreveport, Louisiana through another  
 7 entity, Lakeshore Crossing, LLC.<sup>70</sup> The court finds that Kahn’s representations of KCM Lakeshore’s  
 8 value were factually inaccurate and that he knowingly misrepresented that value.

9 According to Kahn, the KCM Lakeshore property sat atop a valuable natural gas deposit.<sup>71</sup> He  
 10 paid \$850,000 for a 50% stake in August 2006.<sup>72</sup> He sold half of his position, or 25% of the company,  
 11 for \$625,000 sometime between January and July 2008.<sup>73</sup> The Consolidated Financial Statements  
 12 declare Kahn’s KCM Lakeshore holdings and values to be the following:

- 13 • July 1, 2007 shows a 50% stake worth \$2.94 million (“pre entitlement”);<sup>74</sup>
- 14 • January 3, 2008 shows a 50% stake worth \$5.43 million (“pre entitlement”);<sup>75</sup>
- 15 • January 28, 2008 shows a 50% stake worth \$3.71 million (per offer at \$1.60/sq.  
 16 ft.);<sup>76</sup> and
- 17 • July 21, 2008 shows a 25% stake worth \$3.93 million (blended value of  
 18 \$4.25/sq. ft. for land, plus \$15,000/ac. surface rights and 25% royalties on  
 19 natural gas).<sup>77</sup>

20 The July 2008 Statement is internally inconsistent. Kahn listed the investment’s value there as  
 21 \$3.93 million.<sup>78</sup> But in Note 4 of the Real Estate Schedule portion of the July 2008 Statement, he  
 22 reports as to KCM Lakeshore that he “subsequently sold 25% interest for \$625k.”<sup>79</sup> Note 4 does not  
 23

24 <sup>70</sup> Debtor’s Ex. DG; Pl.’s Exs. 24, 35 & 46; Trial Tr., Vol. 2 at 406:15-408:13.

<sup>71</sup> Trial Tr., Vol. 2 at 406:23-407:7.

25 <sup>72</sup> Debtor’s Ex. DG; Pl.’s Ex. 46; Trial Tr., Vol. 2 at 407:19-408:10.

<sup>73</sup> Pl.’s Exs. 35 & 46.

26 <sup>74</sup> Pl.’s Ex. 24.

<sup>75</sup> Pl.’s Ex. 34.

27 <sup>76</sup> Pl.’s Ex. 35.

<sup>77</sup> Pl.’s Ex. 46.

28 <sup>78</sup> Pl.’s Ex. 46-4.

<sup>79</sup> Pl.’s Ex. 46-5.

1 specify when that sale took place. But because the January 2008 Statement lists the KCM Lakeshore  
2 position as a 50% stake, the transaction must have occurred after January 28, 2008. And it defies  
3 belief, in the absence of a compelling explanation, to suggest that a \$625,000 investment increased  
4 more than 500% in value in less than six months.

5 This point is bolstered by Kahn's apparent sale of his remaining KCM Lakeshore stake in  
6 Lakeshore Crossing, LLC for \$450,000.<sup>80</sup> But, the fact that Kahn included Note 4 on the statement –  
7 thereby creating the internal inconsistency – mitigates the otherwise deceptive nature of the larger  
8 number and vitiates Kahn's fraudulent intent. Nevertheless, even without that detail, the July 2008  
9 \$3.9 million value was inaccurate. The contrast in these numbers is so stark that Kahn must have  
10 known the \$3.9 million figure was far removed from reality. And Kahn put forward this number in his  
11 effort to obtain a loan extension. On that basis, the court concludes that Kahn intended to mislead  
12 CBT with his July 2008 valuation of KCM Lakeshore – which had the effect of exaggerating his net  
13 worth at that time by over \$3.3 million.

14 In addition, at trial CBT presented evidence showing that Kahn used his 25% stake in KCM  
15 Lakeshore as collateral for a \$374,500 loan sometime in May 2008 or later.<sup>81</sup> But that loan does not  
16 appear as a liability against the KCM Lakeshore asset on the July 2008 Statement.<sup>82</sup> Nevertheless, the  
17 evidence is not clear whether and when Kahn obtained the loan. The court thus concludes that CBT  
18 has not borne its burden to prove that the July 2008 Statement is misleading for its omission of the  
19 alleged \$374,500 loan liability.

#### 20 4. All Star Apparel, Inc.

21 Kahn, through the DKT, owned 10% of All Star Apparel, Inc. ("All Star").<sup>83</sup> Kahn based its  
22 value, in part, on licenses to use the marks and names of various colleges, brands, and major league  
23 sport teams on the hats it manufactured.<sup>84</sup> The court finds that Kahn's representation of All Star's  
24 value on the July 2008 Statement was inaccurate and that Kahn intended to deceive CBT with it.

26 <sup>80</sup> Pl.'s Ex. 48; Trial Tr., Vol. 1 at 60:12-61:15.

27 <sup>81</sup> Pl.'s Ex. 144; Trial Tr., Vol. 3 at 159:7-160:17

<sup>82</sup> Pl.'s Ex. 46.

28 <sup>83</sup> Pl.'s Ex. 24, 35 & 46; Trial Tr., Vol. 1 at 76:24-77:4.

<sup>84</sup> Trial Tr., Vol. 3 at 92:2-21, 101:2-102:16.

1 The July 2007 Statement and the January 3, 2008 Statement to Torrey Pines Bank value Kahn's  
2 interest in All Star at \$500,000.<sup>85</sup> But the January 28, 2008 Statement lists the value as \$2 million.<sup>86</sup>  
3 This represents a 300% increase in less than a month. In his testimony, however, Kahn explained that  
4 significant licensing deals and recent factoring numbers for All Star's product supported that  
5 precipitous increase.<sup>87</sup> The court is persuaded by Kahn's explanation and concludes that the \$2 million  
6 valuation on January 28, 2008, though lacking the detailed accounting support to be a certainty, was  
7 not factually inaccurate.

8 But then six months later, in the July 2008 Statement, All Star's reported value doubles to  
9 \$4 million. This figure was based on the same licensing and factoring information that underlay the  
10 \$2 million valuation.<sup>88</sup> At trial, Kahn admitted that the \$4 million figure was wrong and should have  
11 been \$2 million.<sup>89</sup> He explained that his finance person, Robert Mitchell, had listed the \$4 million and  
12 Kahn had told him to reduce the number back down to \$2 million.<sup>90</sup> Kahn testified that he was  
13 "surprised" to see that the larger number ended up in the July 2008 Statement, which he signed.<sup>91</sup>

14 The court takes Kahn's trial testimony on these points as an admission that the \$4 million was  
15 factually inaccurate and that Kahn knew so. The court further concludes that the \$4 million figure's  
16 inclusion on the statement that Kahn signed was part and parcel of his intent to mislead CBT about All  
17 Star's value. That Kahn had an assistant in the process does not negate his own responsibility to  
18 provide accurate financial information to the lender. At best, Kahn was grossly negligent in allowing  
19 the \$4 million number to be published. And the interaction between Kahn and his staff shows a  
20 troubling lack of commitment to financial accuracy, with Kahn and his people cavalierly manipulating  
21 – apparently at will – the value of a reported investment by some \$2,000,000. The court thus finds that  
22 Kahn intended to deceive CBT with the inflated \$4 million value, which exaggerated his net worth on  
23 the July 2008 Statement by at least \$2 million.

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25 

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<sup>85</sup> Pl.'s Ex. 24.

26 <sup>86</sup> Pl.'s Ex. 35.

27 <sup>87</sup> Trial Tr., Vol. 3 at 92:25-96:7, 101:2-107:23.

28 <sup>88</sup> Trial Tr., Vol. 3 at 92:25-96:7, 101:2-107:23.

<sup>89</sup> Trial Tr., Vol. 3 at 107:6-23.

<sup>90</sup> Trial Tr., Vol. 3 at 107:6-23.

<sup>91</sup> Pl.'s Ex. 46; Trial Tr., Vol. 3 at 107:6-23.

1                   **5. Midway Resources, Inc.**

2           Through various entities, Kahn owned a 51% interest in Midway Resources, LLC  
3 (“Midway”).<sup>92</sup> Midway’s assets totaled \$5.1 million based on: 1) a \$3 million note receivable; and 2) a  
4 30% interest in Sunset View Properties, LLC, which in turn held a \$7 million note receivable.<sup>93</sup> Both  
5 of the notes were obligations of the DKT, the David Kahn Trust.<sup>94</sup> Thus, Kahn’s position in Midway  
6 had a book asset value of \$2.6 million (i.e., 51% of the \$5.1 million interest in notes receivable). Each  
7 of Kahn’s Consolidated Financial Statements listed both the asset value and the net value of his  
8 Midway investment as \$2.5 million, with liabilities stated as zero.<sup>95</sup>

9           The Consolidated Financial Statements represented the combined values of the assets and  
10 liabilities of all the Kahn entities.<sup>96</sup> The DKT’s \$10 million in note obligations should thus be included  
11 as well, but they are not. They are not listed as a liability in the Midway line item or anywhere else in  
12 any of the Consolidated Financial Statements.<sup>97</sup> That means, at the least, that the net Midway value  
13 should be zero, since the entire \$2.5 million listed is negated by the DKT’s corresponding obligation in  
14 the same amount. To that extent, the consolidated statements exaggerate Kahn’s net worth by at least  
15 \$2.5 million. The negative impact is even greater, however. While note obligations among the various  
16 Kahn entities would effectively cancel each other out, the same is not true for the Kahn entities’ note  
17 obligations to others whose finances are not incorporated in the consolidated reports. Put another way,  
18 those portions of the note that were payable to entities other than the Kahn entities are liabilities.  
19 Therefore, rather than representing \$2.5 million in *net value*, the various note obligations constituted a  
20 liability in an amount not established at trial.

21           The court concludes that Kahn knowingly misrepresented the net value of his Midway position.  
22 The court also finds that Kahn thereby intended to mislead CBT by deliberately exaggerating his net  
23 worth on all four of the consolidated statements by at least \$2.5 million.

24  
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26 <sup>92</sup> Pl.’s Ex. 24, 35 & 46; Trial Tr., Vol. 2 at 437:24-439:14.

<sup>93</sup> Trial Tr., Vol. 2 at 437:24-438:16.

27 <sup>94</sup> Pl.’s Ex. 106; Trial Tr., Vol. 3 at 119:8-119:17, 120:17-121:17.

<sup>95</sup> Pl.’s Ex. 24, 35 & 46.

28 <sup>96</sup> Trial Tr., Vol. 1 at 80:4-81:3, Vol. 3 at 29:15-22.

<sup>97</sup> Pl.’s Ex. 24, 35 & 46.

1                   **6. Jewelry**

2           The court finds that Kahn falsely and misleadingly asserted in each of the consolidated  
3 financial statements that he owned valuable jewelry. The July 2007 and both January 2008 Statements  
4 all list jewelry as an asset worth \$200,000.<sup>98</sup> In the July 2008 Statement, the jewelry value increases to  
5 \$500,000.<sup>99</sup> All of these entries were factually inaccurate, and Kahn knew so – the jewelry in fact  
6 belonged to his wife.<sup>100</sup> Its inclusion in Kahn’s own consolidated statements, under the category  
7 “PERSONAL PROPERTY”, was misleading.<sup>101</sup> The statements did not otherwise include his wife’s  
8 separate property.<sup>102</sup> At trial, Kahn testified that he had his wife’s permission to tell others that the  
9 jewelry was his and to offer it as collateral, though it would remain her separate property.<sup>103</sup> But that  
10 does not remedy the fundamentally deceptive nature of Kahn’s representations that the jewelry was *his*  
11 personal property. Moreover, his wife ostensibly reserved the right to withdraw her permission at any  
12 time.<sup>104</sup> That assertion only adds to the overall deceptiveness of holding the jewelry out as his own –  
13 especially since there is no evidence that Kahn ever disclosed his wife’s purported cancellation and  
14 reverter rights to CBT.

15           In addition, the \$500,000 July 2008 statement of value is also objectionable because it increases  
16 the previously stated \$200,000 for the same jewelry by 250% without basis.<sup>105</sup> Kahn admitted as much  
17 in his trial testimony.<sup>106</sup> As with the All Star Apparel asset, Kahn approved and published financial  
18 statements with representations he knew to be inaccurate in exaggerating his net worth. The court  
19 finds that in so doing, Kahn intended to mislead CBT.

20                   **C. Kahn’s Financial Demise and Bankruptcy Filing**

21           Plaintiff further alleges that Kahn is liable under §§ 727(a)(2), 727(a)(4) and 727(a)(5) for:  
22 (1) transferring or concealing property with the intent to delay, hinder, or defraud creditors; (2) making  
23

24 <sup>98</sup> Pl.’s Ex. 24 & 35.

25 <sup>99</sup> Pl.’s Ex. 46.

26 <sup>100</sup> Trial Tr., Vol. 1 at 89:24-91:6, Vol. 3 at 50:22-51:4.

27 <sup>101</sup> Pl.’s Ex. 24, 35 & 46.

28 <sup>102</sup> Trial Tr., Vol. 1 at 80:4-81:3, Vol. 3 at 29:15-22.

<sup>103</sup> Trial Tr., Vol. 1 at 89:24-91:6, Vol. 3 at 50:22-51:4.

<sup>104</sup> Trial Tr., Vol. 3 at 50:22-53:21.

<sup>105</sup> Pl.’s Ex. 46.

<sup>106</sup> Trial Tr., Vol. 3 at 54:12-21.

1 false oaths on his bankruptcy schedules and Statement of Financial Affairs (“SOFA”); and (3) failing  
2 to satisfactorily explain the loss of particular assets.<sup>107</sup>

3 **1. Transfers to Delay, Hinder, or Defraud Creditors**

4 CBT failed to present evidence or argument about certain transfers described in the pretrial  
5 order. These transfers include: Debtor’s cash withdrawals from his various bank accounts; the transfer  
6 of a car to his niece; and the sale of a limousine for a \$59,000 loss. The court concludes as to each of  
7 them that CBT has not proven liability under § 727(a)(2).

8 The record is clear that, after 2008, the financial markets and Kahn’s financial condition were  
9 worsening. The DKT owned real property located at 2003 Olite Court, San Diego, California (the  
10 “Olite Property”) and 5550 Warbler Way, La Jolla, California (the “Warbler Property”).<sup>108</sup> But on  
11 August 31, 2009, the DKT sold the Olite Property to third parties, earning \$373,000 in net proceeds.<sup>109</sup>  
12 Kahn then caused the DKT to transfer the majority of these proceeds to and between his personal  
13 accounts and related entities – including a \$95,000 transfer from his Torrey Pines Bank account to  
14 another related entity, Kahn Capital.<sup>110</sup> The pretrial order alleges he did this in the ordinary course of  
15 his business, and because he needed cash.<sup>111</sup> Two and a half months later, on November 13, 2009, the  
16 DKT quitclaimed the Warbler Property to Sunset View Properties.<sup>112</sup> The DKT apparently received no  
17 consideration for this transfer.<sup>113</sup> Kahn states, however, that he did this to refinance the Warbler  
18 Property in the ordinary course of business: The refinancing bank imposed it as a requirement, and his  
19 tax provider advised him to do it.<sup>114</sup>

20 The DKT also owned Bennelong USA, LLC (“Bennelong”), which held a significant amount  
21 of Media Cart stock.<sup>115</sup> In January 2009, Kahn sold the DKT’s interest in Bennelong to his mother,  
22  
23

24 <sup>107</sup> Pretrial Order at 69:15-22.

25 <sup>108</sup> Pl.’s Ex. 70; Trial Tr., Vol. 1 at 98:18-99:2, 221:8-13, Vol. 3 at 145:15-146:4.

26 <sup>109</sup> Pl.’s Ex. 71; Trial Tr., Vol. 1 at 98:18-99:19.

27 <sup>110</sup> Pl.’s Ex. 75; Trial Tr., Vol. 1 at 100:12-103:7.

28 <sup>111</sup> Pretrial Order at 39:22-40:3.

<sup>112</sup> Pl.’s Ex. 73; Trial Tr., Vol. 1 at 103:8-104:19.

<sup>113</sup> Trial Tr., Vol. 1 at 144:15-145:19.

<sup>114</sup> Trial Tr., Vol. 1 at 108:25-109:10.

<sup>115</sup> Trial Tr., Vol. 1 at 40:9-12.

1 sister, and wife for \$1.8 million.<sup>116</sup> At the time, he believed the stock could be worth less than this  
 2 amount.<sup>117</sup> He alleges he sold it because needed cash for his real estate projects.<sup>118</sup> Kahn later  
 3 obtained an option to purchase Bennelong back from his family for \$2.5 million.<sup>119</sup> He learned that  
 4 Media Cart's fortunes had improved after it brought in additional investors.<sup>120</sup> And CBT argues that  
 5 Kahn must have exercised his option to buy back Bennelong.<sup>121</sup>

6 Finally, Kahn held an 80% ownership interest in Sunset Centers II ("SCII") through the DKT  
 7 and another entity, Sunset Escondido Properties, LLC.<sup>122</sup> On March 19, 2010, Kahn sold his 80%  
 8 interest in SCII to its insiders for \$15,000.<sup>123</sup> A year later, SCII sold its assets to earn net proceeds of  
 9 \$5.2 million.<sup>124</sup> But Kahn convincingly testified that he sold his position in SCII to avoid a profit  
 10 guarantee he owed to SCII's lender, Providence Fund.<sup>125</sup>

11 The court finds Debtor's testimony and his explanations credible. His demeanor and  
 12 expositions remained consistent throughout long stretches of questioning, including when he was  
 13 obviously fatigued. And, given the circumstances of Kahn's individual projects, their complexity, and  
 14 the interdependence of his related entities, it is readily plausible that he made these transfers in the  
 15 ordinary course of his business – and not with the intent to delay, hinder, or defraud creditors.

## 16 2. False Oaths

17 Again, CBT fails to present evidence or argument as to certain undisclosed assets and transfers  
 18 described in the pretrial order. These assets and transfers include: deposits into Kahn's personal bank  
 19

20 <sup>116</sup> Trial Tr., Vol. 1 at 44:9-19, 50:20-51:8. The pretrial order does not address this transaction. But Debtor's  
 21 counsel did not object to its presentation, and instead proceeded to try the issue. Accordingly, the court  
 22 considers the pretrial order amended to include the issue of this Bennelong transfer. *See Sauers v. Alaska*  
 23 *Barge*, 600 F.2d 238, 244 (9th Cir. 1979). The court notes that Plaintiff, in its closing arguments, also raised the  
 24 issue of an apparent debt-to-equity conversion between the DKT and another related entity, Kahn Capital. But  
 25 Plaintiff never addressed this during its case-in-chief. Accordingly, the parties never tried the issue. The court  
 26 therefore excludes it from Plaintiff's cause of action. *See Fed. R. Civ. P. 16(d); Eagle v. American Tel. and Tel.*  
 27 *Co.*, 769 F.2d 541, 548 (9th Cir. 1985).

28 <sup>117</sup> Trial Tr., Vol. 1 at 50:20-51:8.

<sup>118</sup> Trial Tr., Vol. 2 at 307:18-308:2.

<sup>119</sup> Trial Tr., Vol. 1 at 225:25-226:18, Vol. 3 at 180:8-15.

<sup>120</sup> Trial Tr., Vol. 3 at 180:4-7.

<sup>121</sup> Pl.'s Ex. 70; Trial Tr., Vol. 5 at 25:16-25.

<sup>122</sup> Pl.'s Ex. 24, 35, 46, 70 & 93.

<sup>123</sup> Pl.'s Ex. 93; Trial Tr. at 105:6-107:10.

<sup>124</sup> Pl.'s Ex. 115.

<sup>125</sup> Trial Tr., Vol. 3 at 63:16-66:18.

1 account from his related entities, including Bennelong and Sunset View Properties; receivables of  
 2 \$2 million described in a financial statement to Torrey Pines Bank; a \$1.7 million account due from  
 3 one of his related entities, Ocean Front Development, LLC; and a \$16,900 cash transfer to the DKT.  
 4 The court concludes as to each of them that CBT has not proven liability under § 727(a)(4).

5 Kahn filed his voluntary Chapter 7 petition on July 13, 2010.<sup>126</sup> The schedules accompanying  
 6 his petition included Debtor's liabilities, and some of the DKT's liabilities.<sup>127</sup> But they primarily  
 7 included only Debtor's assets, and not the assets of the DKT.<sup>128</sup> Notably, Kahn's schedules failed to  
 8 list: any interest in Sunset View Properties or KC MC Holdings, LLC; household goods and  
 9 furnishings; antiques; apparel; jewelry; and accounts receivable – all of which were assets of  
 10 considerable value in Kahn's Consolidated Financial Statements.<sup>129</sup>

11 Further, question 10 of Debtor's SOFA failed to list all property transfers that the DKT made in  
 12 the year before Kahn's bankruptcy filing.<sup>130</sup> In particular, Debtor's SOFA omits: the transfer of an  
 13 80% interest in KC MC Holdings, LLC from the DKT to "Friends and Family" investors;<sup>131</sup> the  
 14 transfer of the Olite Property and its corresponding sale proceeds; the Warbler Property transfer; and  
 15 the SCII transfer.<sup>132</sup> The SOFA did include, however, the DKT's transfer of its interest in All Star,<sup>133</sup>  
 16 and payments the DKT made on Kahn's mother's mortgage as gifts.<sup>134</sup>

17 At trial, Kahn testified that: (1) he did not disclose the majority of the DKT's assets and  
 18 transfers because his bankruptcy counsel, Bernard M. Hansen, Esq., specifically advised him not to;<sup>135</sup>  
 19 (2) he relied on Mr. Hansen's advice in listing transfers to close family members;<sup>136</sup> and (3) he relied  
 20 on Mr. Hansen's advice in listing potential alter ego liabilities.<sup>137</sup> Kahn further testified that many of  
 21  
 22

126 Pl.'s Ex. 106.

127 Pl.'s Ex. 106; Trial Tr., Vol. 3 at 119:5-123:20.

128 Pl.'s Ex. 106.

129 Pl.'s Exs. 24, 35, 46 & 106.

130 Pl.'s Ex. 106.

131 Pl.'s Ex. 106; Trial Tr., Vol. 2 at 302:3-9, Vol. 3 at 116:12-117:17.

132 Pl.'s Ex. 106.

133 Pl.'s Ex. 106; Trial Tr., Vol. 3 at 115:20-116:11.

134 Pl.'s Ex. 106; Trial Tr., Vol. 3 at 117:23-119:4.

135 Trial Tr., Vol. 2 at 384:9-385:13, Vol. 3 at 36:11-24, 113:24-115:14

136 Trial Tr., Vol. 3 at 174:18-177:14.

137 Trial Tr., Vol. 3 at 177:15-178:3.

1 the DKT's liabilities were also his personal liabilities.<sup>138</sup> The Chapter 7 Trustee's counsel in this case,  
2 Gary B. Rudolph, Esq., gave testimony that he investigated Debtor's assets.<sup>139</sup> He testified that Debtor  
3 fully cooperated with him.<sup>140</sup> Specifically, Mr. Rudolph stated that Debtor satisfactorily answered all  
4 of his questions, including questions about asset valuation.<sup>141</sup> And he saw no evidence that Kahn was  
5 concealing assets.<sup>142</sup> The court finds this testimony credible.

6 And the court again finds Debtor's testimony and explanations credible. Kahn, at his  
7 deposition, alleged that he relied on his counsel's advice in completing his bankruptcy schedules and  
8 SOFA.<sup>143</sup> And Debtor's counsel has maintained the position throughout this adversary proceeding that  
9 Kahn and the DKT are separate entities for the purposes of filing schedules and SOFAs. Indeed, this  
10 issue was not resolved until the court entered an order on Plaintiff's motion for summary adjudication,  
11 finding that a transfer by a debtor's self-settled, revocable trust is a transfer by the debtor for purposes  
12 of § 727(a)(2) and SOFA question 10.<sup>144</sup>

### 13 3. Failure to Explain Assets

14 The pretrial order preserved a number of allegations regarding the unexplained loss of  
15 particular assets Kahn held. But, at trial, Plaintiff only presented evidence and argument on the Olite  
16 Property sale proceeds. With respect to the allegations for which Plaintiff presented no evidence or  
17 argument, the court concludes that CBT has not proven liability under § 727(a)(5).

18 As to the Olite Property sale, Kahn's accountant, Gretchen Matheson, testified that the  
19 distribution of the proceeds are recorded in the voluminous ledgers that Kahn provided.<sup>145</sup> And again,  
20 the Chapter 7 Trustee's counsel testified that: (1) he investigated Kahn's assets; (2) Kahn satisfactorily  
21 answered all his questions; and (3) he saw no indication that Kahn was concealing assets.<sup>146</sup> The court  
22 finds the testimony of both Ms. Matheson and Mr. Rudolph to be credible.

23  
24 <sup>138</sup> Trial Tr., Vol. 3 at 119:5-123:20, 178:19-179:12

25 <sup>139</sup> Trial Tr., Vol. 1 at 161:8-167:4.

26 <sup>140</sup> Trial Tr., Vol. 1 at 163:10-12.

27 <sup>141</sup> Trial Tr., Vol. 1 at 161:8-163:12, 166:15-167:4.

28 <sup>142</sup> Trial Tr., Vol. 1 at 164:21-165:6.

<sup>143</sup> See ECF Nos. 181 & 186; Trial Tr., Vol. 3 at 10:4-12:8;

<sup>144</sup> See ECF No. 106.

<sup>145</sup> Trial Tr., Vol. 1 at 149:10-150:12.

<sup>146</sup> Trial Tr., Vol. 1 at 161:8-167:4.

### III. CONCLUSIONS OF LAW

The Ninth Circuit has stated,

The bankruptcy statutes have a two-fold purpose – first, to secure the equitable distribution of the bankrupt’s estate among his creditors [citations omitted] and, second, “to relieve the honest debtor from the weight of oppressive indebtedness and permit him to start afresh from the obligations and responsibilities consequent upon business misfortune.” *Matter of Esgro, Inc.*, 645 F.2d 794, 798 (9th Cir. 1981) (quoting *Williams v. United States Fidelity & Guaranty Co.*, 236 U.S. 549, 554-55, 35 S.Ct. 289, 290 (1915)).

*In re Devers*, 759 F.2d 751, 754-55 (9th Cir. 1985). “In keeping with the ‘fresh start’ purposes behind the Bankruptcy Code, courts should construe § 727 liberally in favor of debtors and strictly against parties objecting to discharge.” *In re Bernard*, 96 F.3d 1279, 1281 (9th Cir. 1996) (citing *In re Devers*, 759 F.2d at 754). And “[t]he burden of proof in an adversary proceeding objecting to discharge under § 727 is preponderance of evidence.” *In re Searles*, 317 B.R. 368, 376 (B.A.P. 9th Cir. 2004) (citing *Grogan v. Garner*, 498 U.S. 279, 289 (1991)).

#### A. Section 727(a)(2)(A)

Plaintiff has failed to meet its burden under § 727(a)(2)(A).<sup>147</sup>

Section 727 of the United States Bankruptcy Code directs courts to grant a debtor a discharge unless [] the debtor, with intent to hinder, delay, or defraud a creditor . . . has . . . [inter alia, transferred or concealed] property of the debtor, within one year before the date of the filing of the petition. 11 U.S.C. § 727(a)(2)(A). Thus, two elements comprise an objection to discharge under § 727(a)(2)(A): 1) a disposition of property, such as transfer or concealment, and 2) a subjective intent on the debtor’s part to hinder, delay or defraud a creditor through the act disposing of the property. Both elements must take place within the one-year pre-filing period; acts and intentions occurring prior to this period will be forgiven. *See Rosen v. Bezner*, 996 F.2d 1527, 1531 (3d Cir. 1993).

*In re Lawson*, 122 F.3d 1237, 1240 (9th Cir. 1997). The debtor’s intent to hinder, delay, or defraud creditors must be actual, not constructive. *In re Adeeb*, 787 F.2d 1139, 1342-43 (9th Cir. 1986). And the debtor’s subjective intent must be present at the time he transferred or concealed the property. *In re Lawson*, 122 F.3d at 1240.

<sup>147</sup> Because Plaintiff relies solely on Debtor’s pre-petition actions, it has not stated a claim under § 727(a)(2)(B).

1 A plaintiff may establish this intent by circumstantial evidence or inferences drawn from a  
2 course of conduct. *In re Adeeb*, 787 F.2d at 1343; *In re Beverly*, 374 B.R. 221, 235 (B.A.P. 9th Cir.  
3 2007).

4 Certain “badges of fraud” strongly suggest a transaction's purpose is to defraud creditors  
5 unless some other convincing explanation appears. These factors, not all of which need  
6 be present, include 1) a close relationship between the transferor and the transferee; 2)  
7 that the transfer was in anticipation of a pending suit; 3) that the transferor Debtor was  
8 insolvent or in poor financial condition at the time; 4) that all or substantially all of the  
9 Debtor’s property was transferred; 5) that the transfer so completely depleted the  
10 Debtor’s assets that the creditor has been hindered or delayed in recovering any part of  
11 the judgment; and 6) that the Debtor received inadequate consideration for the transfer.

10 *In re Woodfield*, 978 F.2d 516, 518 (9th Cir. 1992).

11 Some badges of fraud are present here. Many of the transfers occurred between Kahn’s related  
12 entities. CBT had initiated a state court action against Kahn. It is likely that Kahn was in relatively  
13 poor financial condition at the time. And considerations he received for some of his transfers are – on  
14 their face – suspect. But Kahn has given convincing explanations for the transfers, and these  
15 explanations significantly attenuate the detrimental implications of the badges of fraud. Kahn’s  
16 business involves many interrelated entities and large transactions.<sup>148</sup> It is not uncommon for banks to  
17 require technical transfers of real property for refinancing purposes. And a profit guarantee can  
18 impose substantial liability on the guarantor.

19 The court further notes that CBT’s argument with respect to Bennelong is unclear. Debtor’s  
20 transfer of Bennelong to his family occurred more than a year before his bankruptcy filing. And even  
21 if – in the year before his filing – he exercised the option to repurchase Bennelong and took on an  
22 additional liability, that additional liability does not constitute a transfer *of property* of the debtor.  
23 Additionally, there is no evidence that Debtor intentionally concealed the Bennelong asset to delay,  
24 hinder, or defraud creditors. It is altogether unclear from the trial record whether: (1) the option  
25 belonged to Kahn personally, or to the DKT; (2) whether Kahn exercised the option; and (3) what  
26 Kahn did with Bennelong if he did exercise it.

27  
28 \_\_\_\_\_  
<sup>148</sup> Debtor’s ledgers corroborate this. See Def.’s Exs. EE through FG.

1 Plaintiff has therefore failed to meet its burden under § 727(a)(2)(A) to show that Debtor  
2 transferred or concealed property with the subjective intent to hinder, delay or defraud creditors.

3 **B. Section 727(a)(4)(A)**

4 Plaintiff has also failed to meet its burden under § 727(a)(4)(A).<sup>149</sup> Section 727(a)(4)(A)  
5 provides that the court will not grant a debtor discharge if:

6 [T]he debtor knowingly and fraudulently, in or in connection with the case . . . made a  
7 false oath or account . . . .

8 “The fundamental purpose of § 727(a)(4)(A) is to insure that the trustee and creditors have accurate  
9 information without having to conduct costly investigations.” *In re Wills*, 243 B.R. 58, 63 (B.A.P. 9th  
10 Cir. 1999), (citing *In re Aubrey*, 111 B.R. 268, 274 (B.A.P. 9th Cir. 1990)).

11 To succeed on its § 727(a)(4)(A) cause of action, Plaintiff must establish by a preponderance of  
12 the evidence that “(1) the debtor made a false oath in connection with the case; (2) the oath related to a  
13 material fact; (3) the oath was made knowingly; and (4) the oath was made fraudulently.” *Retz v.*  
14 *Samson (In re Retz)*, 606 F.3d 1189, 1197 (9th Cir. 2010) (quoting *Roberts v. Erhard (In re Roberts)*,  
15 331 B.R. 876, 882 (B.A.P. 9th Cir. 2005)). Omissions from a debtor’s schedules and SOFA may  
16 qualify as false oaths. *In re Retz*, 606 F.3d at 1197.

17 Again, the debtor’s fraudulent intent in making the oath must be actual, not constructive. *In re*  
18 *Wills*, 243 B.R. at 64. This intent may also be established by circumstantial evidence. *Id.*

19 Generally, [however], a debtor who acts in reliance on the advice of his attorney lacks  
20 the intent required to deny him a discharge of his debts. *In re Adeeb*, 787 F.2d at 1343.  
21 However, the debtor’s reliance must be in good faith. *Id.* The advice of counsel is not a  
22 defense when the erroneous information should have been evident to the debtor. *Boroff*  
*v. Tully (In re Tully)*, 818 F.2d 106, 111 (1st Cir. 1987).

23 *In re Retz*, 606 F.3d at 1199 (quotation marks omitted).

24 Debtor’s omissions are significant. In particular, the DKT conducted many transfers that  
25 constitute useful information for creditors. And Debtor explicitly knew he was omitting this  
26 information when he submitted his schedules and SOFA. The court therefore finds that the omissions

27  
28 <sup>149</sup> Because Plaintiff relies solely on Debtor’s false oaths, it has not stated a claim under any other subsection of  
§ 727(a)(4).

1 in Debtor's schedules and SOFA constitute material, false oaths knowingly made in connection with  
2 his bankruptcy case. But, as the court previously stated, Debtor's omissions lacked the fraudulent  
3 intent required to deny him a discharge.

4 The advice Mr. Hansen imparted to Debtor is both astonishing and deeply troubling, coming as  
5 it did from an accomplished bankruptcy practitioner who has handled hundreds of cases in this court.  
6 Indeed, it raises the specter of malpractice. But the assertion that Mr. Hansen, in fact, gave this advice  
7 is a credible one. And, although Debtor is a sophisticated businessperson with extensive experience,  
8 he is not an attorney. He was accustomed to soliciting and following the guidance of professionals –  
9 including attorneys and accountants – in his various financial affairs.<sup>150</sup> There is no obvious reason  
10 that the error in the advice he received, and in his consequent omissions, should have been evident to  
11 him. Accordingly, the court finds that Debtor relied on his counsel's advice in good faith.

12 Further, the court finds Mr. Rudolph's testimony that Debtor fully cooperated with the Trustee  
13 to be highly probative. It cuts strongly against the implication that Debtor was intentionally trying to  
14 hide information, and resonates with § 727(a)(4)(A)'s purpose in diminishing the need for costly  
15 investigations. Thus, because Debtor relied on Mr. Hansen's advice in good faith, and because he fully  
16 cooperated with the Trustee, the court finds that Kahn lacked the fraudulent intent necessary to deny  
17 him discharge under § 727(a)(4).<sup>151</sup>

### 18 C. Section 727(a)(5)

19 Plaintiff has likewise failed to meet its burden under § 727(a)(5). The court may deny a  
20 debtor's discharge under § 727(a)(5) if:

21 [T]he debtor has failed to explain satisfactorily . . . any loss of assets or deficiency of  
22 assets to meet the debtor's liabilities . . . .

23  
24  
25  
26 <sup>150</sup> See, e.g., Matheson Decl. at ECF No. 145; Trial Tr. Vol. 1 at 86:19-87:16, 122:21-123:9, 134:15-135:3,  
136:23-137:18, 225:8-24, Vol 2. at 254:3-21, 443:17-21, Vol. 3 at 20:12-21:14, 30:8-22.

27 <sup>151</sup> Additionally, to the extent Plaintiff argues that Debtor's omission of the Bennelong option from his schedules  
28 constitutes a false oath, the court again finds no evidence of fraudulent intent. As the court previously stated, it  
is altogether unclear: (1) whether the option belonged to Kahn personally or to the DKT; (2) whether Kahn  
exercised the option; and (3) what Kahn did with Bennelong if he did exercise it.

1 To succeed under § 727(a)(5), a plaintiff must first make a *prima facie* showing that an asset existed,  
2 but that neither it nor its proceeds can be located. See *In re Hong Minh Tran*, 464 B.R. 885, 593  
3 (Bankr. S.D. Cal. 2012).

4 It is clear that either Kahn or the DKT held an interest in the Olite Property sale proceeds. But  
5 the proceeds' disposition is described in Debtor's ledgers. Thus, after reviewing the ledgers and  
6 considering the testimony at trial, the court finds that CBT has failed to meet its burden under  
7 § 727(a)(5) to show that Debtor's assets cannot be located.

8 **D. Section 523(a)(2)(B)**

9 Finally, Plaintiff has failed to meet its burden under § 523(a)(2)(B), as well.<sup>152</sup> Section  
10 523(a)(2)(B) provides:

11 A discharge under section 727 . . . of this title does not discharge an individual debtor  
12 from any debt . . . for money . . . or an extension, renewal, or refinancing of credit, to  
13 the extent obtained by . . . use of a statement in writing —

- 14 (i) that is materially false;
- 15 (ii) respecting the debtor's or an insider's financial condition;
- 16 (iii) on which the creditor to whom the debtor is liable for such money, property,  
services, or credit reasonably relied; and
- 17 (iv) that the debtor caused to be made or publish with intent to deceive . . .

18 The Ninth Circuit has restated the elements so that Plaintiff must show by a preponderance of the  
19 evidence:

- 20 (1) a representation of fact by the debtor,
- 21 (2) that was material,
- 22 (3) that the debtor knew at the time to be false,
- 23 (4) that the debtor made with the intention of deceiving the creditor,
- (5) upon which the creditor relied,
- (6) that the creditor's reliance was reasonable, and
- (7) that damage proximately resulted from the representation.

24 *Candland v. Ins. Co. of N. Am. (In re Candland)*, 90 F.3d 1466, 1469 (9th Cir. 1996) (citing *In re*  
25 *Siriani*, 967 F.2d 302, 304 (9th Cir. 1992).

26  
27  
28 <sup>152</sup> Because Plaintiff relies solely on Debtor's financial statements for its § 523(a)(2) argument, is has not stated  
a claim under § 523(a)(2)(A).

1 Debtor argues that, to demonstrate that he falsely represented a particular asset's value, CBT  
2 had an affirmative duty to provide its own valuations of that asset. The court disagrees. To prove  
3 falsity, a plaintiff need only show that the information a debtor provided is "substantially inaccurate,"  
4 and it may do this through a variety of probative methods. *See, e.g., In re Candland*, 90 F.3d at 1469  
5 (finding that an asset's value was inaccurate because the debtor had not discounted the asset to present  
6 value). Additionally, a false representation is material if it would affect a creditor's decision making  
7 process. *In re Candland*, 90 F.3d at 1470 (citing *In re Greene*, 96 B.R. 279, 283 (B.A.P. 9th Cir.  
8 1989)). Further, where a debtor intentionally misled a creditor through false statements, the court  
9 requires little investigation on the creditor's part to find that it reasonably relied on the statements. *In*  
10 *re Candland*, 90 F.3d at 1471; *In re Lansford*, 822 F.2d 902, 904 (9th Cir. 1987). Finally, where a  
11 financial statement leads to the extension or renewal of credit, damage proximately results where a  
12 plaintiff: (1) relies on the financial statements; (2) had valuable collection remedies at the time of  
13 renewal; and (3) such remedies lost value during the renewal period. *In re Siriani*, 967 F.2d at 305-06.

14 The court has found that Debtor, in his 2007 and 2008 Financial Statements, knowingly made  
15 false representations with the subjective intent to deceive Vineyard. These representations inflated his  
16 assets and diminished his liabilities by millions of dollars, and affected CBT's decision making  
17 process. Accordingly, the court also finds the misrepresentations to be material. *See In re Candland*,  
18 90 F.3d at 1470. And, given Mr. Kasner's reviews and recommendations to Vineyard, the court finds  
19 that Vineyard reasonably relied on the representations. But Plaintiff fails to show an essential element  
20 of its § 523(a)(2)(B) cause of action: damages proximately resulting from Debtor's misrepresentations.

21 In *In re Pagnini*, the debtor Pagnini borrowed funds from plaintiff Antioch to acquire vintage  
22 cars. *In re Pagnini*, BAP No. NC-12-1085-PaMkH, 2012 WL 5489032, \*1 (B.A.P. 9th Cir. Nov. 13,  
23 2012). Pagnini granted Antioch security interests in the cars. *Id.* When Pagnini refinanced two of his  
24 loans with Antioch, he offered a 1950 Ford as security. *Id.* In his application to refinance the loans,  
25 Pagnini submitted an appraisal report of the Ford. *Id.* at \*2. This appraisal falsely represented that the  
26 Ford was worth \$38,200. *Id.* The Ford was actually worth significantly less, because it had been  
27 disassembled and was missing the engine, radiator, and transmission, which Pagnini had sold. *Id.* at  
28

1 \*1. Pagnini entered bankruptcy, and Antioch brought a § 523(a)(2)(A) action.<sup>153</sup> *Id.* at \*2. The  
2 bankruptcy court ruled for the debtor, reasoning that Antioch had presented no evidence that its  
3 remedy – the right to repossess and sell the prior loans’ collateral – had lost value. *Id.* On appeal, the  
4 Ninth Circuit Bankruptcy Appellate Panel affirmed the bankruptcy court’s decision. *Id.* at \*7.

5 The origination of both Vineyard’s loan agreement with Tres Hombres and Tres Hombres’s  
6 note relates to Debtor’s guarantee and its accompanying June 2006 Statement. Plaintiff, however,  
7 provides no evidence or argument to show that Debtor’s June 2006 Consolidated Statement was false  
8 or inaccurate in some way. The inquiry thus becomes: What damage did Plaintiff suffer in extending  
9 the note’s maturity date? CBT had valuable remedies at the times it extended the maturity dates on  
10 Tres Hombres’ note. Specifically, CBT had the rights to foreclose on the Project and sue Kahn. CBT  
11 in fact exercised these remedies after the maturity date ran. But, like the plaintiff in *Pagnini*, CBT has  
12 presented no evidence that these remedies lost value during the extension periods. Accordingly,  
13 Plaintiff has failed to demonstrate that damage proximately resulted from Kahn’s  
14 misrepresentations.<sup>154</sup> Because Plaintiff has not proven this essential element, it fails to meet its  
15 burden under § 523(a)(2)(B). *See In re Siriani*, 967 F.2d at 306.

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23 <sup>153</sup> Although Antioch brought an action against Pagnini under § 523(a)(2)(A), the bankruptcy court nonetheless  
24 applied the standard *In re Siriani* articulated for § 523(a)(2)(B) actions.

25 <sup>154</sup> In closing arguments, Plaintiff relied on *In re Cossu*, 410 F.3d 591 (9th Cir. 2005). But that case is  
26 distinguishable from the facts at bar. There, the debtor misrepresented his outside business activities to his  
27 employer. *In re Cossu*, 410 F.3d at 593. These activities resulted in claims against both the debtor and his  
28 employer for losses the debtor’s outside clients suffered. *Id.* at 594. The bankruptcy court found that debtor  
proximately caused the employer’s damages because his misrepresentation led the employer to remain in a  
contractual relationship with Debtor, which resulted in lawsuits by, and potential liabilities to, the debtor’s  
outside customers. *Id.* at 597. Here, CBT has presented no evidence that Debtor’s misrepresentation has  
occasioned any additional liabilities or actual damages.

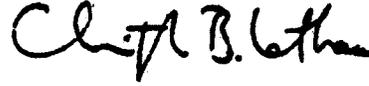
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IV. CONCLUSION

For the foregoing reasons, Plaintiff has failed to meet its burdens under §§ 727(a)(2)(A), 727(a)(4)(A), 727(a)(5) and 523(a)(2)(B). The court therefore grants Debtor a discharge under § 727, and finds CBT's debt dischargeable.

IT IS SO ORDERED.

Dated: September 30, 2013



CHRISTOPHER B. LATHAM, JUDGE  
United States Bankruptcy Court

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF CALIFORNIA  
325 West "F" Street, San Diego, California 92101-6991

In re David Kahn, Bk. No. 10-12306-CL7  
California Bank & Trust vs David Kahn, Adv. No. 10-90636-CL

**CERTIFICATE OF MAILING**

The undersigned, a regularly appointed and qualified clerk in the office of the United States Bankruptcy Court for the Southern District of California, at San Diego, hereby certifies that a true copy of the attached document, to wit:

**MEMORANDUM DECISION AND ORDER  
GRANTING DISCHARGE AND DENYING NONDISCHARGEABILITY**

was enclosed in a sealed envelope bearing the lawful frank of the bankruptcy judges and mailed via first class mail to the parties at their respective addresses listed below:

David Kahn  
1804 Garnet Ave. #398  
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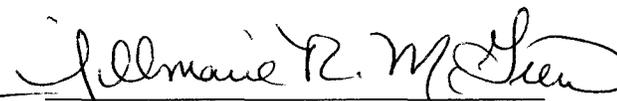
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Said envelope(s) containing such document was deposited by me in the City of San Diego, in said District on September 30, 2013.

  
Jillmarie R. McGrew, Deputy Clerk