

1 MEMORANDUM DECISION AND ORDER FINDING
2 NONDISCHARGEABILITY AND AWARDED DAMAGES

3 In September 2009, plaintiff Prem M. Sharma filed a complaint in San Diego Superior Court
4 against defendants Cain Baljian, Lucy Baljian and Keshant, Incorporated (“Keshant”). Her complaint
5 asserted claims for: (1) corporate dissolution; (2) breach of fiduciary duty; and (3) common law fraud
6 arising from a business venture between herself, her husband – Sukhdev R. Sharma – and the Baljians.
7 The Superior Court set the matter for trial twice. And twice, on the eve of trial, Mrs. Baljian filed for
8 bankruptcy – thereby invoking the automatic stay. The Superior Court then set trial a third time for
9 February 24, 2012. And on February 23, both Mr. and Mrs. Baljian filed a voluntary joint Chapter 7
10 petition in the instant bankruptcy case; Case No. 12-02357-CL7.

11 Approximately three months later, on May 15, Mrs. Sharma initiated the above-captioned
12 adversary proceeding. She seeks damages, costs, attorney’s fees and a finding of nondischargeability
13 under 11 U.S.C. § 523(a)(2). On July 9, the Baljians answered the complaint and filed a counterclaim
14 against Mrs. Sharma. The court tried the matter over three days. At the trial, the Baljians effectively
15 abandoned their counterclaim.¹ And the Sharmas testified that they incurred approximately \$57,800 in
16 attorney’s fees and costs to prosecute this action. At the trial’s conclusion, the court took the matter
17 under submission. For the following reasons, the court: (1) awards Mrs. Sharma damages, attorney’s
18 fees and costs; and (2) finds this award nondischargeable under 11 U.S.C. § 523(a)(2)(A).

19
20 **I. JURISDICTION AND VENUE**

21 The court has jurisdiction over this adversary proceeding under 28 U.S.C. §§ 1334(b) and
22 157(b)(2)(I). Venue is proper under 28 U.S.C § 1409(a).

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26 ¹ The court further notes that, at the trial, Mrs. Sharma’s counsel stated that Mr. Yusuf Arnitah – a witness –
27 could not be located, and was thus unavailable to testify. As such, he proposed to read portions of Mr. Arnitah’s
28 deposition into the record. Counsel for the Baljians objected. But the court overruled the objection. It allowed
the deposition into the record under Rule 7032 of the Federal Rules of Bankruptcy Procedure and Rules
804(a)(5) and 804(b)(1) of the Federal Rules of Evidence. And the Baljians’ counsel interposed no further
objections to any specific portion of the deposition read into the record.

1 possibility that Mr. Arnitah might make additional capital contributions that could, eventually, make
2 him a “partner.” Nevertheless, the Baljians allowed Mr. Arnitah to function as SDSC’s on-site
3 manager, even permitting him to live on the premises. And the evidence shows that Mr. Arnitah’s role
4 in the business – and the Baljians’ treatment of him – was far from that of an ordinary employee.

5 Mr. Arnitah was a signatory to the lease of SDSC’s business premises. He opened SDSC’s
6 bank account with Mrs. Baljian, and thus had unfettered access to it. He was the named contact for
7 SDSC’s Merchant Card Processing Statements. And testimony revealed that he did not take orders or
8 direction from Mrs. Baljian. In fact, it appears that the Baljians were quite dissatisfied with
9 Mr. Arnitah; they tried several times to fire him. But Mr. Arnitah nevertheless kept working, and the
10 Baljians allowed it. Indeed, this was easy for the Baljians because they did not pay Mr. Arnitah for his
11 work. They did, however, let him take cash and in-kind merchandise from the store. This
12 dysfunctional relationship between the Baljians and Mr. Arnitah continued into 2008, when the
13 Sharmas became investors in SDSC.

14 **B. The Baljian-Sharma Business Deal**

15 The Baljians and the Sharmas formalized their business venture through three writings: a
16 shareholder agreement and shareholder resolution – both dated March 1, 2008 – as well as a term sheet
17 dated March 15, 2008. At that time, SDSC had net profits of \$10,000 to \$12,000 on monthly revenues
18 of about \$30,000. Approximately half of these profits came from the USPS contract. The Sharmas
19 questioned the Baljians about Mr. Arnitah’s role at SDSC. And the Baljians represented that
20 Mr. Arnitah was simply an employee. They did not inform the Sharmas about Mr. Arnitah’s history
21 with the store, the extent of his role there or his relationship to the business.²

22 The term sheet specified that California law would govern the agreement. It further provided
23 that,

24 In the event that it becomes necessary to initiate legal proceedings by either party to
25 interpret or enforce any of the terms or provisions of this Agreement, to recover damages,
26 or to obtain any relief, at law or in equity, the prevailing party shall be entitled to recover

27 _____
28 ² But the court need not determine, for purposes of this action, whether Mr. Arnitah was their employee or their
business partner. It is enough to find – as the court does, below – the Baljians had a duty to disclose this
information to the Sharmas, and they failed to do so.

1 . . . reasonable attorneys' fees and costs as well as any court costs incurred by such party
2 in connection with any such action(s).

3 Both the shareholder agreement and the term sheet called for the transfer of all of SDSC's
4 assets to a new company, Keshant, created for this purpose. These assets included SDSC's fictitious
5 business name, the premises lease, the USPS contract and the permits authorizing check cashing,
6 alcohol and tobacco sales. And the court finds that the parties orally agreed to conduct SDSC's
7 business through a new bank account in Keshant's name.

8 The shareholder resolution designated Mr. Baljian as Keshant's Chief Operating Officer.
9 Mr. Baljian's responsibilities as Chief Operating Officer included managing SDSC's day-to-day
10 affairs, its resources and its employees. The resolution named Mr. Sharma Keshant's Chief Financial
11 Officer. As Chief Financial Officer, Mr. Sharma would manage SDSC's banking services, accounts
12 receivables and accounts payables. To fulfill his duties, the parties orally agreed that Mr. Sharma
13 would be given full access to all of SDSC's books and financial records. For their services, Keshant
14 was to pay both Mr. Baljian and Mr. Sharma \$4,000 per month. And, finally, for their stake in SDSC,
15 the Sharmas promised to make a \$225,000 capital contribution.

16 **1. The Sharmas' Payments**

17 The Sharmas made their first payment through a \$50,000 cashier's check dated February 29,
18 2008. Trusting the Baljians, they paid this sum directly to USPS on SDSC's behalf; the parties
19 intended that it would be part and parcel of the Sharma's capital investment. Thus, the Sharmas paid
20 \$50,000 to the Baljians' benefit before they even signed the writings. Thereafter, they made the
21 following payments:

- 22 • One \$10,000 personal check of Sukhdev Sharma, dated March 7, 2008,
23 payable to Keshant, Inc. [Ex. 6].
 - 24 • Two \$50,000 personal checks of Sukhdev Sharma, both dated March 21,
25 2008, payable to Lucy Baljian [Exs. 8 & 9];
 - 26 • One \$50,000 cashiers check, dated March 24, 2008, payable to Lucy
27 Baljian [Ex. 10];
- 28

1 And Mr. Sharma asserts that he paid an additional \$6,000 in capital, for a total of \$216,000 paid
2 towards the contractual amount. The Baljians did not dispute this.

3 **2. The Bank Accounts**

4 The parties agreed orally that SDSC's merchant account with Neighborhood National Bank
5 would be closed and a new account in Keshant's name at the same bank be thenceforth used for
6 SDSC's business banking. To that end, the parties caused a merchant account for Keshant to be
7 opened at Neighborhood National Bank, with a \$100 initial balance. [Exs. 44 & 45]. All four Baljians
8 and Sharmas signed the account signature card. [Ex. 44]. But the Baljians steadfastly resisted using
9 the new account. Mr. Sharma repeatedly asked the Baljians to use it. The trial evidence, however,
10 showed effectively no activity in the Keshant account from April to December 2008. [Exs. 45-54].

11 Instead, the Baljians and Mr. Armitah continued to do SDSC's banking through the old account.
12 And, by continuing to use the old account, the Baljians were able to conceal numerous transactions
13 from the Sharmas' view. Notable among these is some \$373,000 in cash withdrawals or checks
14 written out to: Mrs. Baljian; the Baljians' auto business (Euro 1 Kar); or their mortgages with
15 Countrywide and IndyMac. Additionally, the Baljians issued several checks to Keshant. But these
16 funds never reached Keshant's bank account. The evidence presented at trial, and largely admitted by
17 Mr. Baljian, shows the following payments from SDSC's bank account to the Baljians or in their
18 interest during the time period relevant to this case:

19

<u>No. of Checks</u>	<u>Recipient</u>	<u>\$</u>	<u>Total</u>
21 55	Cash Withdrawal / Mrs. Baljian	\$ 225,336.84	
22 16	Euro 1 Kar	\$ 45,102.22	
23 14	Countrywide / IndyMac	\$ 42,047.45	
24 4	Keshant, Incorporated	\$ 61,200.00	

25

26 [Exs. 140-148].

27 This state of affairs continued until the Baljians had to abandon SDSC's old account. The
28 Baljians argue that they could not use the Keshant account due to technical issues; they asserted that

1 using it required more paperwork. But the record is clear that Mrs. Baljian began using the Keshant
2 account in December 2008, after they closed SDSC's old account. [Exs. 45-55]. And she provided no
3 explanation for why the required paperwork – or any other prerequisite to using the Keshant account –
4 could not be completed before December 2008.

5 On the stand, Mr. Baljian alleged that he instructed Mr. Arnitah to use the new Keshant
6 account, but that Mr. Arnitah failed to do so. Yet: (1) it was Mr. Baljian's responsibility as Chief
7 Operating Officer to run SDSC's day-to-day affairs and manage its "employees;" (2) they knew
8 Mr. Arnitah's history of not following their directions; and (3) Mrs. Baljian could have just as easily
9 used the Keshant account. The court therefore finds that, when the Baljians promised to use the new
10 Keshant bank account to conduct SDSC's business, they never intended to follow through on that
11 promise. The court further finds that: (1) the Baljians treated SDSC's old account with Neighborhood
12 National Bank as a personal bank account; and (2) they failed to disclose this to the Sharmas.

13 3. The Name, the Lease and the Licenses

14 Under the term sheet, all of SDSC's assets were to be transferred to Keshant. This implicitly
15 included transferring SDSC's fictitious business name to Keshant's control. It called for the premises
16 lease and the various business licenses to be put in Keshant's name. And the Baljians explicitly
17 represented, in the term sheet, that they would "perform such additional acts as may be necessary or
18 appropriate to effectuate, carry out and perform all of the terms, provisions, and conditions of this
19 Agreement and the transactions contemplated hereby." [Ex. 7, ¶ 6]. They failed to perform these acts,
20 however, and Keshant never took the business name, the lease or the licenses.

21 There was no indication that the Baljians – or Mr. Arnitah – approached SDSC's landlord to
22 transfer the lease. Nor was there any evidence that the Baljians took any steps to get the licenses in
23 Keshant's name. The reason they gave for this at trial was that the Sharmas were responsible for
24 transferring the lease and the licenses. But that argument is neither reasonable nor persuasive.
25 Obviously, the holder of a lease or license is the natural party to ask the issuer to formalize the transfer.
26 Why would an issuer make the change on the mere word of an apparent stranger to the document? The
27 court therefore finds that, when the Baljians represented that they would act as necessary to effectuate
28 the transfers described in the term sheet, they did not in fact intend to do so.

1 **4. The Business Records**

2 The court finds that the Baljians also agreed orally to make SDSC's financial records available
3 to the Sharmas – particularly Mr. Sharma, Keshant's Chief Financial Officer. Mr. Sharma asked
4 Mr. Baljian and Mr. Amitah repeatedly for the records, but they never gave meaningful access to them.
5 Moreover, the trial evidence showed that SDSC kept hardly any records. The Baljians did not prepare
6 a regular payroll. Instead, Mr. Amitah – if employee he was – got his cash directly from the till and
7 helped himself to merchandise. Further, the trial testimony of all the witnesses consistently showed
8 SDSC's cash controls were very weak. The physical inventory was not well accounted for. There was
9 no running tally of it or its cost. And the merchandise bore no price tags.

10 These irregularities in the company's internal controls concerned Mr. Sharma. He desired and
11 attempted to regularize them. But he was met with intransigence on the Baljians' and Mr. Amitah's
12 part. The Baljians kept what few records they had of SDSC's transactions in a box, on shelves behind
13 the store's counter. They assert that Mr. Sharma could have taken them at any time. But there's no
14 indication that they ever disclosed the existence or location of this box to Mr. Sharma. And Mr. Amitah
15 was always at the store, preventing Mr. Sharma's access. Indeed, Mr. Sharma's repeated requests to
16 see the business records occasioned several confrontations with Mr. Amitah. At first, Mr. Amitah
17 agreed to give Mr. Sharma the business records at the end of each month. But every time Mr. Sharma
18 returned to the store, Mr. Amitah rebuffed him. And Mr. Amitah quickly grew abrasive and
19 belligerent. According to Mr. Sharma, Mr. Amitah would claim to own the store, and he would tell
20 Mr. Sharma to get out.

21 Eventually, Mr. Sharma insisted that the inventory be evaluated. The Baljians engaged a third
22 party company to conduct this evaluation. But, due to SDSC's poor controls, the company generated a
23 highly unreliable number. The combination of SDSC's poor controls, the inability to obtain an
24 accurate inventory evaluation, as well as Mr. Amitah's insubordination and cash skimming, caused
25 Mr. Sharma to believe that SDSC might be violating the law. And, in fact, SDSC's substandard
26 controls lead to the loss of both its USPS contract and its Moneygram account. Fearful of the liability
27 SDSC might incur, on July 31, 2008, Mr. Sharma wrote Mr. Baljian a letter detailing his concerns and
28 resigning his position as Chief Financial Officer. [Ex. 12].

1 Like before, Mr. Baljian alleged that he instructed Mr. Amitah to provide the business records
2 to Mr. Sharma, but that Mr. Amitah failed to do so. Yet, again: (1) it was Mr. Baljian's responsibility
3 to manage Mr. Amitah and run SDSC's day-to-day affairs; (2) Mr. Baljian knew of Mr. Amitah's
4 history of insubordination; and (3) Mr. Baljian could have simply given Mr. Sharma the box, or at least
5 disclosed its location. The Baljians also argued that it was Mr. Sharma's responsibility as Chief
6 Financial Officer to deal with SDSC's finances on a daily basis. But Mr. Sharma already had a busy
7 job as a government engineer, and the Baljians knew this. They knew that Mr. Sharma could not be at
8 the store every day, and they knew that they would have to provide Mr. Sharma with SDSC's financial
9 records if he was to be effective as Chief Financial Officer. The court therefore finds that, when the
10 Baljians agreed to make SDSC's financial records available to Mr. Sharma, they did not in fact intend
11 to make that happen.

12 C. The Settlement Agreement

13 The Sharmas testified that if they had known any of the above-described facts, they would
14 never have entered this business deal with the Baljians. And, after Mr. Sharma resigned his position as
15 Chief Financial Officer, he attempted to get his capital investment back. He told Mr. Baljian that he
16 would file a lawsuit if the parties could not reach a resolution. As a result, on October 1, 2008,
17 Mrs. Sharma and Mr. Baljian entered into a settlement agreement on Keshant's behalf. [Ex. 14]. The
18 agreement called for Keshant to pay Mrs. Sharma a \$4,500 "Owner's Draw" every month. The trial
19 testimony showed that the parties intended this draw to be a return of the Sharmas' capital
20 contribution. The settlement further provided that, if Keshant failed to pay the Owner's Draw,
21 Mr. Baljian personally guaranteed to buy out Mrs. Sharma's interest in Keshant – and thus SDSC – for
22 \$235,000 cash.

23 Keshant paid Mrs. Sharma for just two months; she received only \$9,000. It then defaulted on
24 the settlement agreement. And when the Sharmas called upon Mr. Baljian to make good his guarantee,
25 he failed to do so. Instead, he tried to offer Mr. Sharma a rare car in partial satisfaction of the amount
26 owed. But when Mr. Sharma asked Mr. Baljian to produce the car's title, Mr. Baljian prevaricated.
27 Mr. Baljian first claimed that he did not have the title on his person. He then claimed that Mr. Dennis
28 Calkins – a man with whom he was negotiating the purchase and sale of SDSC – might have the car's

1 title. Ultimately, Mr. Baljian was unable to produce the title, and he otherwise failed to satisfy his
2 obligation under the settlement agreement.

3 In September 2009, Mrs. Sharma filed an action against the Baljians and Keshant in San Diego
4 Superior Court. In March 2010, they entered default against Keshant. The Superior Court set trial for
5 January 21, 2011. On the eve of trial, Mrs. Baljian filed a voluntary bankruptcy petition in Case
6 No. 11-00883-LT13. In March 2011, the bankruptcy court dismissed Mrs. Baljian's case for failure to
7 appear at the 341(a) meeting of creditors. And the Superior Court reset trial for September 23, 2011.
8 But again, on the eve of trial, Mrs. Baljian filed bankruptcy in Case No. 11-15707-LT13. The
9 following month, the bankruptcy court dismissed this second case for failure to file a certificate of
10 credit counseling. The Superior Court then set a third trial date for February 24, 2012. And on
11 February 23, the Baljians filed their instant bankruptcy case.

12 Mr. Baljian testified that, when he personally guaranteed the settlement, he intended to follow
13 through. He asserted that he was trying to make things right with the Sharmas, and he earnestly
14 wanted to get them their money back. But the court does not find Mr. Baljian's testimony credible.
15 On the stand, he was frequently evasive, unclear and inconsistent. It is more likely that Mr. Baljian's
16 personal guarantee, his offer of the rare car and the successive bankruptcy filings were all tactics meant
17 to forestall the Sharmas' lawsuit. The court therefore finds that, when Mr. Baljian personally
18 guaranteed the settlement agreement, he had no intention to follow through with it.

19
20 **III. LEGAL ANALYSIS AND CONCLUSIONS**

21 The court finds Mrs. Sharma's debt nondischargeable under § 523(a)(2)(A).³ Section
22 523(a)(2)(A) provides that debts are nondischargeable if they are obtained by: "false pretenses, a false
23 representation, or actual fraud" To except her debt from discharge under § 523(a)(2)(A),
24 Mrs. Sharma must show by a preponderance of the evidence that:

25
26 _____
27 ³ Unless otherwise noted, all sections referred to in this memorandum decision relate to the Bankruptcy Code,
28 Title 11 of the United States Code. Mrs. Sharma's complaint asserted nondischargeability under § 523(a)(2),
but did not specify whether she was invoking §§ 523(a)(2)(A), 523(a)(2)(B), or both. The pretrial order,
however, made clear that Mrs. Sharma is moving under the elements of § 523(a)(2)(A). And Mrs. Sharma
presented no arguments at trial with respect to § 523(a)(2)(B).

- 1 (1) The Baljians made representations;
- 2 (2) The Baljians knew at the time that the representations were false;
- 3 (3) The Baljians made those representations with the intention and purpose of deceiving the
- 4 plaintiff;
- 5 (4) Mrs. Sharma justifiably relied on the representations; and
- 6 (5) Mrs. Sharma sustained losses as a proximate result of Debtors' representations.

7 *In re Sabban*, 600 F.3d 1219, 1222 (9th Cir. 2010); *In re Galindo*, 467 B.R. 201, 208 (Bankr. S.D. Cal.

8 2012).

9 **A. False Representations and Omissions**

10 “[A] promise made with a positive intent not to perform or without a present intent to perform

11 satisfies [the false representation requirements of] § 523(a)(2)(A).” *Rubin v. West (In re Rubin)*, 875

12 F.2d 755, 759 (9th Cir. 1989). “A debtor’s failure to disclose material facts [also] constitutes a

13 fraudulent omission under § 523(a)(2)(A) if the debtor was under a duty to disclose and the debtor’s

14 omission was motivated by an intent to deceive.” *In re Harmon*, 250 F.3d 1240, 1246 n.4 (9th Cir.

15 2001) (citing *In re Eashai*, 87 F.3d at 1089-90). And a party to a business transaction has a duty to

16 disclose:

17 (b) matters known to him that he knows to be necessary to prevent his partial or

18 ambiguous statement of the facts from being misleading; and . . . (e) facts basic to the

19 transaction, if he knows that the other is about to enter into it under a mistake as to them,

20 and that the other, because of the relationship between them, the customs of the trade or

other objective circumstances, would reasonably expect a disclosure of those facts.

21 RESTATEMENT (SECOND) OF TORTS § 551.⁴

22 In *In re Rubin*, debtor Rubin was a real estate broker. *In re Rubin*, 875 F.2d at 757. The Wests

23 were a married couple facing the foreclosure of their home. *Id.* at 756-57. Rubin approached the

24 Wests and convinced them to sell him their home for \$4,000. *Id.* at 757. And he promised to help

25 them obtain financing so that they could repurchase their home back from him. *Id.* Subsequent events

26 allowed the inference that he never intended to fulfill this promise; he, *inter alia*, borrowed money

27 _____

28 ⁴ The Restatement also provides, “[a] representation stating the truth so far as it goes but which the maker knows or believes to be materially misleading because of his failure to state additional or qualifying matter is a fraudulent misrepresentation.” RESTATEMENT (SECOND) OF TORTS § 529.

1 against the property and tried to evict the Wests. *Id.* The Wests then sued Rubin for fraud. *Id.* The
2 parties eventually settled for \$125,000. *Id.* And Rubin promptly filed bankruptcy. *Id.* When the
3 Wests brought an action under § 523(a)(2)(A), the bankruptcy court held the settlement
4 nondischargeable. *Id.* at 758. On appeal, the Ninth Circuit Court of Appeals affirmed, finding that
5 Rubin's lack of intent to fulfill his promise satisfied § 523(a)(2)(A)'s false representation requirement.
6 *Id.* at 759-760.

7 In *In re Lopez*, debtor Lopez borrowed \$60,000 from creditor Pagliero to pay for living
8 expenses so she could quit her job and pursue a career in art. *In re Lopez*, No. 09-1277-A, 2011 WL
9 10642952, at *2 (Bankr. E.D. Cal. May 18, 2011). She represented to Pagliero that, if she could not
10 sell enough artwork to repay the loan, she would either go back to work or sell her house. *Id.* But she
11 failed to disclose to Pagliero that: (1) her employer was ready to lay her off because it was
12 discontinuing her department; (2) she possessed a retirement account that she could cash out; (3) she
13 had recently borrowed \$50,000 against the equity in her house; (4) she held a large amount of credit
14 card debt; (5) she had previously filed bankruptcy; and (5) she had no intent to make enough money to
15 pay back her loan to Pagliero. *Id.* at *3. The bankruptcy court found that these omissions satisfied
16 § 523(a)(2)(A)'s false representation requirement.

17 Like Rubin's promise to help the Wests repurchase their home, the Baljians promised that they
18 would: (1) use Keshant's bank account to conduct SDSC's business; (2) perform all acts necessary to
19 effectuate the transfer of SDSC's assets to Keshant – including SDSC's fictitious business name, its
20 premises lease and its various licenses; and (3) make SDSC's financial records available to the
21 Sharmas. Mr. Baljian further represented that he would buy out Mrs. Sharma's interest in Keshant for
22 \$235,000. And, like *In re Rubin*, subsequent events made clear that the Baljians never intended to do
23 any of these things.

24 The Baljians were using SDSC's bank account as their own personal account. They therefore
25 had ample incentive to deny Mr. Sharma access to the business records. Further, their testimony
26 shows that they unreasonably intended to shunt the work of transferring SDSC's assets onto the
27 Sharmas – they had no intention of doing it themselves. Finally, Mr. Sharma's threat of litigation,
28 Mr. Baljian's evasiveness about the vehicle title, and the Baljians' successive bankruptcy filings are all

1 indicia that Mr. Baljian executed the settlement guarantee solely to delay the Sharmas' collection
2 efforts. Because the Baljians did not intend to follow through on their promises at the time they made
3 them, the court finds that the promises constitute false representations under § 523(a)(2)(A).

4 Like Lopez's partial representations about her employment and her home equity, the Baljians
5 only partially represented the extent of Mr. Arnitah's involvement and interest in SDSC. They told the
6 Sharmas that Mr. Arnitah was merely an employee. But the entire truth was that: (1) Mr. Arnitah
7 was – at the very least – vying for some ownership interest in SDSC; (2) Mr. Arnitah had made a
8 \$30,000 capital contribution to the business; (3) the Baljians did not pay Mr. Arnitah for his work at
9 the store; (4) Mr. Arnitah did not take directions from the Baljians; and (5) Mr. Arnitah helped himself
10 to the store's money and merchandise. And, like Lopez, the Baljians did not disclose this truth.
11 Further, like Lopez's failure to disclose her financial condition and her lack of intent to repay the loan,
12 the Baljians failed to disclose their treatment of SDSC's bank account and their lack of intent to fulfill
13 their promises.

14 The essence of the Baljian-Sharma business deal was to create joint ownership of SDSC
15 between the Baljians' and the Sharmas' through Keshant. The Baljians and the Sharmas were
16 Keshant's directors. The wives owned Keshant's shares, and the husbands were Keshant's officers.
17 The transaction contemplated that they would, together, operate the store for their mutual gain. The
18 transaction did not contemplate any ownership interest or executive level involvement from other
19 parties. Nor did it contemplate the use of SDSC for the Baljians' sole benefit. Thus, the facts above
20 were all fundamental to the Baljian-Sharma transaction. Moreover, their partial representation about
21 Mr. Arnitah was misleading. The Baljians therefore had a duty to disclose these facts to the Sharmas.
22 Because the Baljians failed to disclose these facts, and because the court finds below that the Baljians
23 intended to deceive the Sharmas by their omissions, the court finds that the Baljian's omissions and
24 half-truths constitute false representations under § 523(a)(2)(A).

25 **B. Intent to Deceive**

26 To find nondischargeability under § 523(a)(2)(A), the debtors must have had the subjective
27 intent to deceive at the time of the transaction. The court may infer this intent from the surrounding
28 circumstances. *In re Kennedy*, 108 F.3d 1015, 1018 (9th Cir. 1997). Additionally, "intent to deceive

1 may be inferred if a debtor takes no steps to perform under a contract.” *In re Sharma*, Nos. CC-12-
2 1302-MkTaMo, CC-12-1520-MkTaMo, 2013 WL 1987351, at *11 (B.A.P. 9th Cir., May 14, 2013)
3 (citing *Merchs. Nat’l Bank & Trust Co. of Indianapolis v. Pappas (In re Pappas)*, 661 F.2d 82, 86 (7th
4 Cir. 1981)).

5 The trial record made clear that, although SDSC was generating revenue, its operations were a
6 disaster waiting to happen. The Baljian-Sharma transaction was to provide \$225,000 in capital
7 contributions and the assistance of Mr. Sharma, who had some experience operating small businesses.
8 The Baljians must have known that had they presented the whole truth about their circumstances with
9 Mr. Amitah and SDSC, the Sharmas would likely not have consummated the transaction. Moreover,
10 the Baljians took almost no steps to perform under the subject agreements. The court therefore finds
11 that – for purposes of § 523(a)(2)(A) – the Baljians made the representations and omissions described
12 above with the intent to deceive the Sharmas and induce them into entering the business deal.

13 C. Justifiable Reliance

14 Reliance on the representation need not reach the level of “reasonableness;” it need only be
15 justifiable. *Field v. Mans*, 516 U.S. 59, 73-76 (1995); *In re Eashai*, 87 F.3d 1082, 1090 (9th Cir.
16 1996). This is a subjective standard that considers the relationship between the parties. *In re Tallant*,
17 218 B.R. 58, 67 (B.A.P. 9th Cir. 1998).

18 [A] person is justified in relying on a representation of fact “although he might have
19 ascertained the falsity of the representation had he made an investigation. . . .
20 Justification is a matter of the qualities and characteristics of the particular plaintiff, and
21 the circumstances of the particular case, rather than of the application of a community
22 standard of conduct to all cases.”

22 *Field v. Mans*, 516 U.S. at 70-71 (quoting RESTATEMENT (SECOND) OF TORTS §§ 540, 545A,
23 Comment b). “Although one cannot close his eyes and blindly rely, mere negligence in failing to
24 discover an intentional misrepresentation is no defense to fraud.” *In re Apte*, 96 F.3d 1319, 1322 (9th
25 Cir. 1996). Further, in cases involving fraudulent omissions,

26 [P]ositive proof of reliance is not a prerequisite to recovery. All that is necessary is that
27 the facts withheld be material in the sense that a reasonable [person] might have
28 considered them important in the making of this decision. This obligation to disclose and
this withholding of a material fact establish the requisite element of causation in fact.

1 *Id.* at 1323 (quoting *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 153-54 (1972)).

2 The Sharmas had known the Baljians for approximately thirteen years at the time they entered
3 into the business deal at issue here. They were steady acquaintances – if not friends – and it appears
4 that they had developed a dependable relationship as customer and proprietor of the auto shop. Thus,
5 when the Baljians made their affirmative representations regarding the business deal, there was no
6 reason for the Sharmas to suspect the Baljians had no intention of following through. Moreover, even
7 if the Sharmas had suspected it, a reasonable investigation is unlikely to have uncovered the Baljians’
8 fraudulent intent. And when Mr. Baljian personally guaranteed the settlement agreement, there’s no
9 indication that the Sharmas were privy to his personal finances. As such, they had no reason to suspect
10 that he wouldn’t eventually pay to settle the Sharmas’ potential lawsuit.

11 Counsel for the Baljians emphasizes Mr. Sharma’s business experience, and argues that
12 Mr. Amitah’s signature on the premises lease was a red flag with respect to his involvement and
13 interest in SDSC, and that the Sharmas should have investigated it. The court agrees that the Sharmas
14 could have been more discerning about the transaction as a whole. Had the Sharmas probed the
15 Baljians’ history with Mr. Amitah, they might have discovered that he was something more than an
16 employee. And had the Sharmas reviewed SDSC’s bank records, they would likely have discovered
17 that the Baljians used SDSC’s account as their own personal account.

18 However, Mr. Sharma’s limited business experience did not necessarily make him business
19 savvy. He is not a business person; he is an engineer by vocation. The court therefore finds that his
20 failure to investigate did not rise above the level of mere negligence. Moreover, the court finds that a
21 reasonable person would have considered these undisclosed facts important in deciding whether to
22 enter the Baljian-Sharma business deal. These facts are therefore material, and accordingly, the
23 Sharmas justifiably relied on both the Baljians affirmative misrepresentations and fraudulent omissions
24 for purposes of § 523(a)(2)(A).

25 **D. Proximate Cause**

26 The Restatement (Second) of Torts (1976) explains that proximate cause entails (1)
27 causation in fact, which requires a defendant’s misrepresentations to be a substantial
28 factor in determining the course of conduct that results in loss, § 546; and (2) legal

1 causation, which requires a creditor's loss to "reasonably be expected to result from the
2 reliance." § 548A.

3 *In re Brown*, 217 B.R. 857, 862 (Bankr. S.D. Cal. 1998). And, again: a debtor's failure to satisfy his or
4 her obligation to disclose a material fact establishes causation in fact. *In re Apte*, 96 F.3d at 1323.

5 The court found above that the Baljians' affirmative misrepresentations and material omissions
6 induced the Sharmas to enter both the business deal and the settlement agreement. And, in the end, the
7 Sharmas lost the capital they contributed in the business deal, they delayed filing their lawsuit without
8 receiving the benefit of Mr. Baljian's settlement guarantee, and they incurred attorney's fees and court
9 costs to pursue their damages. It is reasonable to expect that the Sharmas' reliance on the Baljian's
10 false representations and omissions would result in these losses. The court therefore finds that the
11 Baljians' false representations and omissions proximately caused the Sharmas' losses. Mrs. Sharma
12 has accordingly shown all the elements necessary to find nondischargeability under § 523(a)(2)(A).

13 **E. Damages**

14 Mrs. Sharma's complaint sought compensatory damages of at least \$216,000; punitive
15 damages; attorney's fees; and costs. The pretrial order sought damages "proximately caused" by the
16 Baljians. At trial, Mrs. Sharma's counsel did not raise any arguments with respect to punitive
17 damages. And neither party raised the issue of prejudgment interest. Even so, Rule 54(c) of the
18 Federal Rules of Civil Procedure⁵ provides: "[a non-default judgment] should grant the relief to which
19 each party is entitled, even if the party has not demanded that relief in its pleadings."

20 The Restatement describes the measure of damages for fraud:

21 [In addition to] the pecuniary loss . . . which the misrepresentation is a legal cause . . .
22 (2) [t]he recipient of a fraudulent misrepresentation in a business transaction is also
23 entitled to recover [] damages sufficient to give him the benefit of his contract with the
24 maker, if these damages are proved with reasonable certainty.

25 RESTATEMENT (SECOND) OF TORTS § 549. Indeed, the damages in a nondischargeability action are not
26 limited to the amount of money Debtors obtained by fraud. They extend to the creditor's loss resulting

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28 ⁵ Rule 7054 of the Federal Rules of Bankruptcy Procedure incorporates by reference Rule 54 of the Federal
Rules of Civil Procedure.

1 from the fraud, even if this exceeds the value Debtors received. And this may include attorney's fees,
2 costs, and treble damages. *Cohen v. de la Cruz*, 523 U.S. 213, 214-18 (1998); *Muegler v. Bening*, 413
3 F.3d 980, 983 (9th Cir. 2005).

4 Mrs. Sharma argues that her damages include: (1) their \$216,000 capital contribution; (2) the
5 value of their one-half interest in Keshant and SDSC, which the Sharmas assert to be approximately
6 \$350,000 based on a state court complaint Mr. Baljian filed; (3) Mr. Sharma's salary had he continued
7 working for Keshant; and (4) Mrs. Sharma's attorney's fees and costs in prosecuting this action. For
8 the following reasons, the court awards Mrs. Sharma damages of \$278,000 plus prejudgment interest at
9 the federal rate.

10 **1. Benefit of the Bargain**

11 With respect to the \$350,000 valuation of Mrs. Sharma's one-half interest in Keshant and
12 SDSC: the court finds that Mrs. Sharma has not proved this amount with reasonable certainty. Nor has
13 she demonstrated a causal nexus between the Baljians' misrepresentations and damages based on this
14 valuation. At best, she implies that the Baljian-Sharma business deal entitled her to sell her one-half
15 interest in Keshant for \$350,000. But none of the business documents provides for this. And it's not
16 clear that Mrs. Baljian could have sold her one-half interest for *any* amount, let alone \$350,000.

17 With respect to Mr. Sharma's salary damages: the court finds no basis to award them here. It is
18 true that Keshant was to pay Mr. Sharma a salary of \$4,000 per month. And, as a benefit of this
19 bargain, Mr. Sharma would have been entitled to damages for this salary. But Mr. Sharma is not a
20 plaintiff to this action. The Sharmas made the strategic decision not to include Mr. Sharma as a
21 plaintiff. And, because Mr. Sharma is the one entitled to the salary damages, the court cannot award
22 them to Mrs. Sharma.

23 Nevertheless, as the court found above, the Baljians' false representations and omissions did
24 proximately cause the Sharmas' loss of \$216,000 in capital contributions. Moreover, the Baljians and
25 the Sharmas struck two bargains: (1) the business deal regarding Keshant and SDSC; and (2) the
26 subsequent settlement agreement. The settlement agreement provided that Mr. Baljian would purchase
27 Mrs. Sharma's equity interest in Keshant for \$235,000. Mrs. Sharma, however, had already received
28 \$9,000 in Owner's Draws under this settlement. And the parties understood the Owner's Draws to be

1 a return of the Sharmas' equity. Consequently, the Sharmas' capital contributions totaled \$207,000
2 out-of-pocket. And Mr. Baljian owed Mrs. Sharma \$226,000 total under his guarantee. The court
3 therefore finds the Baljians jointly and severally liable to Mrs. Sharma for \$207,000. It further finds
4 Mr. Baljian separately liable to Mrs. Sharma for an additional additional \$19,000 under his guarantee.

5 **2. Attorney's Fees and Costs**

6 "[T]he determinative question for awarding attorney's fees is whether the creditor should be
7 able to recover the fee outside of bankruptcy under state or federal law." *Fry v. Dinan (In re Dinan)*,
8 448 B.R. 775, 785 (B.A.P. 9th Cir. 2011). Under the term sheet, California law governs. And,

9
10 The California courts have repeatedly interpreted clauses that authorize attorney's fees to
11 "enforce" or "interpret" a contract to not include tort claims for fraud. [Citations
12 omitted]. On the other hand, California courts have held that certain broadly-worded
13 clauses do cover fraud claims. [Citations omitted].

14 *In re Sharma*, 2013 WL 1987351, at *18. *Miske v. Bisno* involved an action for fraud in the
15 inducement of a contract. *Miske v. Bisno*, 204 Cal. App. 4th 1249, 1252 (Cal. Ct. App. 2012). This
16 contract provided that: "[i]f any dispute arises between the [parties], whether or not resulting in
17 litigation, the prevailing party shall be entitled to recover from the other party all reasonable costs,
18 including, without limitations, reasonable attorneys' fees." *Id.* at 1259. The California Appellate
19 Court concluded that the broad language of this attorney's fees provision encompassed any conflict
20 concerning the agreement's effect, including a tort claim. *Id.*

21 Counsel for the Baljians argued that, because this action sounds in fraud instead of contract, the
22 parties' attorney's fees provision does not apply. But the term sheet entitles a prevailing party to
23 reasonable attorney's fees and costs in an action "to interpret or enforce . . . this Agreement, to recover
24 damages, or to obtain any relief, at law or in equity" Like the attorney's fees provision in *Miske*,
25 the one in the term sheet also uses broad language. The court therefore finds that – under California
26 law – this provision encompasses any conflict concerning the agreement's effect, including
27 Mrs. Sharma's present nondischargeability action.

28 The Sharmas testified that they incurred approximately \$57,800 in attorney's fees and costs to
prosecute this action. But the settlement agreement between the Baljians and the Sharmas did not

1 provide for attorney’s fees. And the court finds that the Sharmas devoted approximately ten percent of
2 their case to issues related solely to this settlement agreement. Accordingly, the Sharmas incurred
3 approximately \$52,000 in recoverable attorney’s fees and costs under the term sheet. The court
4 therefore finds the Baljians jointly and severally liable for this additional \$52,000.

5 **3. Prejudgment Interest**

6 “The federal prejudgment interest rate applies to actions brought under federal statute, such as
7 bankruptcy proceedings, unless the equities of the case require a different rate.” *Banks v. Gill*
8 *Distribution Centers, Inc. (In re Banks)*, 263 F.3d 862, 871 (9th Cir. 2001) (citing *Nelson v. EG & G*
9 *Energy Measurements Group, Inc.*, 37 F.3d 1384, 1392 (9th Cir. 1994)). And, in particular, an action
10 under § 523(a)(2)(A) is a product of federal law engendering federal prejudgment interest. *In re*
11 *Eberts*, No. CV 11-08827-MWF, 2013 WL 1248637, at *10-11 (C.D. Cal., March 27, 2013). The
12 parties provided no arguments with respect to prejudgment interest. The court therefore awards Mrs.
13 Sharma prejudgment interest at the federal rate from the date she first filed her state court complaint,
14 namely September 4, 2009.

15 **IV. CONCLUSION**

16
17 For the foregoing reasons, the court finds that: (1) the Baljians made representations that at the
18 time they knew to be false; (2) they failed to disclose information they had a duty to disclose; (3) they
19 made these representations and omissions with the intent to deceive the Sharmas; (4) the Sharmas
20 justifiably relied on these representations and omissions; and (5) these representations and omissions
21 proximately caused Mrs. Sharma \$278,000 in damages, attorney’s fees and costs.

22 The court does not find punitive damages appropriate under the facts at bar. It therefore awards
23 Mrs. Sharma **\$278,000** plus interest as follows: the Baljians are jointly and severally liable to
24 Mrs. Sharma for **\$259,000**; and Mr. Baljian is separately liable to Mrs. Sharma for an additional
25 **\$19,000**. Prejudgment interest at the federal rate is awarded from September 4, 2009. This award is

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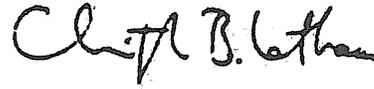
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1 **nondischargeable** under § 523(a)(2)(A), and accrues postjudgment interest at the federal rate. A
2 separate judgment in favor of Mrs. Sharma against the Baljians shall issue.

3 IT IS SO ORDERED.

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5 Dated: March 26, 2014



6 CHRISTOPHER B. LATHAM, JUDGE
7 United States Bankruptcy Court
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In re Cain Baljian & Lucy Baljian, Bk. No. 12-02357-CL7
Prem M. Sharma v. Cain Baljian & Lucy Baljian, Adv. No. 12-90166-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
FINDING NONDISCHARGEABILITY AND AWARDED DAMAGES**

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:

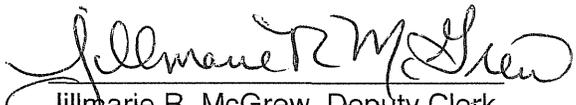
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Said envelope(s) containing such document was deposited by me in the City of San Diego, in said District on March 26, 2014.


Jillmarie R. McGrew, Deputy Clerk