

FEB 28 2011

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U.S. BKCY. APP. PANEL  
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

In re:	)	BAP No. WW-10-1314-JuMkH
	)	BAP No. WW-10-1315-JuMkH*
	)	
MARK NICHOLAS DAQUILA and	)	Bk. No. 09-15514
LATIA BETH DAQUILA,	)	Bk. No. 09-13710
	)	
Debtors.	)	Adv. No. 09-01397
	)	Adv. No. 09-01305

In re:

ANTHONY RICHARD BRISTOL and  
KRISTEN SUZANNE BRISTOL,

Debtors.

CARL HAGLUND,

Appellant,

v.

M E M O R A N D U M \*\*

MARK NICHOLAS DAQUILA;  
ANTHONY RICHARD BRISTOL,

Appellees.

Argued and Submitted on January 21, 2011  
at Seattle, Washington

Filed - February 28, 2011

Appeal from the United States Bankruptcy Court  
for the Western District of Washington

Honorable Samuel J. Steiner, Bankruptcy Judge, Presiding

\* The Panel denied the parties' request for consolidation of the appeals, but authorized them to file a single brief for both appeals.

\*\* This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9th Cir. BAP Rule 8013-1.

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Appearances: John Flowers, Esq. argued for Appellant Carl Haglund  
Martin E. Snodgrass, Esq., Snodgrass & Warren, Inc. PS argued for Appellees Mark L. Daquila and Anthony R. Bristol

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Before: JURY, MARKELL, and HOLLOWELL, Bankruptcy Judges.

Appellant Carl Haglund ("Haglund") filed an identical complaint against chapter 7 debtors, Mark N. Daquila and Anthony R. Bristol (collectively, "Debtors"), alleging that debt arising from Haglund's business investment was nondischargeable under § 523(a)(2)(A).<sup>1</sup> After a trial, the bankruptcy court entered judgment for Debtors, concluding that the debt, if there was one, was dischargeable. Haglund timely appealed.

We AFFIRM.

**I. FACTS**

Haglund's fraud claims against Debtors arose out of a speculative investment that went bad. Haglund purchased the assets of an insolvent company named Optidisc Solutions, Inc. ("Optidisc") in December 2004, and invested funds in the company. The company failed in December 2006, and Haglund essentially lost his entire investment.

More than three years later, Bristol and Daquila filed their chapter 7 petitions on April 17 and June 5, 2009, respectively. Haglund filed identical complaints against

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<sup>1</sup> Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

1 Debtors, alleging that the funds he invested in Optidisc were  
2 nondischargeable based on Debtors' fraud. His theories of fraud  
3 evolved over time, but eventually were based on fraudulent  
4 concealment and affirmative misrepresentations.

5 In February 2010, the bankruptcy court held a three-day  
6 trial and took the matter under advisement. On March 11, 2010,  
7 the bankruptcy court orally made findings of fact and  
8 conclusions of law, ruling that the debt, if there was one, was  
9 dischargeable. On August 10, 2010, a single judgment was  
10 entered in favor of Debtors.

11 On appeal, Haglund assigns multiple errors to the  
12 bankruptcy court's factual findings. Before reaching the  
13 merits, we briefly summarize the pertinent facts and testimony  
14 believed necessary to an understanding of our rulings on this  
15 appeal.

16 Haglund learned about Optidisc through Patrick Mazzuca  
17 ("Mazzuca") who was Debtors' partner in 3 Dagos, LLC  
18 ("3 Dagos"), a limited liability company formed for the purpose  
19 of providing investment opportunities for its members. 3 Dagos  
20 was interested in acquiring the assets of Optidisc because it  
21 was in the CD/DVD duplication business, the same business as  
22 Marcan, a company which 3 Dagos had purchased in August 2004.

23 Optidisc was going out of business and 3 Dagos did not have  
24 the money to purchase its assets. Mazzuca approached Haglund,  
25 who was a seasoned real estate professional and turnaround  
26 expert with distressed properties, about the investment in  
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1 November 2004.<sup>2</sup> Haglund testified that Mazzuca called him with  
2 an investment opportunity in a failing company. Mazzuca stated  
3 that Optidisc had two plants, one in Kent, Washington and  
4 another in Salt Lake City, Utah. Mazzuca further stated that  
5 Optidisc failed because it built a new plant in Salt Lake City.

6 When Haglund became interested, the parties orally agreed  
7 to a 50/50 ownership in Optidisc, with Debtors and Mazzuca  
8 contributing their knowledge of the CD/DVD industry and business  
9 expertise for their share and Haglund contributing the capital  
10 necessary to purchase the assets and continue operations for his  
11 share. The agreement did not cover any further details and was  
12 never reduced to writing. Debtors characterized it as a  
13 "handshake deal" in their brief. Haglund further testified that  
14 "there was no going over roles."<sup>3</sup>

15 The record shows that the group had to act quickly and make  
16 a decision about purchasing the assets because Optidisc's  
17 secured lender, BFI Business Financial ("BFI"), was in  
18 possession or control of Optidisc's equipment and receivables  
19 and was in the process of shutting down the company's  
20 operations. Therefore, Haglund and Mazzuca went to visit  
21 Optidisc's plant in Kent, Washington and met with management and  
22 other key employees. Haglund testified that the management or

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24 <sup>2</sup> Haglund testified that he had structured a lot of  
25 workouts in the real estate business and, as a result, was  
familiar with how the banks worked when they took back assets.

26 <sup>3</sup> Later Haglund testified that the role delegated to  
27 Bristol was to look over the books, including the accounts  
receivable, and that Daquila was supposed to go over the  
28 financial projections.

1 employees of Optidisc communicated the "same scenario" that  
2 Mazzuca had communicated to him; i.e., that "Kent was a great  
3 plant" and that the company had lost their working capital by  
4 purchasing another plant in Salt Lake City. Haglund also  
5 testified that Optidisc's management provided him with the  
6 historical financial data for the company prior to his purchase.  
7 Finally, Haglund testified that he looked at the financial  
8 records before he made his investment.

9 On November 19, 2004, Haglund prepared a letter of intent  
10 to purchase the assets and receivables of Optidisc. On  
11 November 24, 2004, Haglund formed a new limited liability  
12 company, Optical Disc Technology, LLC, ("ODT") with himself as  
13 the only member. He also applied for an Employer Identification  
14 Number for ODT on the same day.

15 In the same time frame, Haglund requested his real estate  
16 attorney to form a new LLC, with Haglund owning 50% and 3 Dagos  
17 the other 50%. The new LLC would purchase the assets and  
18 receivables of Optidisc. Haglund later wrote another note to  
19 his attorney on the same day stating that he wanted an  
20 additional clause in the LLC agreement that would allow for the  
21 three members of 3 Dagos to each have an equal vote in matters  
22 regarding the new company. That agreement was later prepared,  
23 along with a buy/sell agreement governing the disposition of the  
24 members' ownership rights. It is undisputed that none of the  
25 agreements were ever signed.

26 On December 1, 2004, Haglund purchased the assets of  
27 Optidisc through a liquidation sale conducted by BFI. As a  
28 separate transaction, Haglund purchased the account receivables,

1 the major advantage being that BFI would lend up to 80% of the  
2 value of the receivables.

3 In mid-December, Haglund changed the name of ODT to Arrow  
4 Disc, LLC ("Arrow Disc").

5 After the purchase, Haglund and Mazzuca prepared an  
6 "Executive Summary" for Arrow Disc. The undated document states  
7 that Haglund was 100% owner of Arrow Disc but within 60 days he  
8 would sell a portion of the company to three other partners.

9 The summary went on to provide a "general strategy" for  
10 controlling costs and increasing immediate profitability. The  
11 purpose of the summary was to persuade a company that had  
12 repossessed one of Optidisc's machines to bring it back to the  
13 Kent plant and make it possible for Arrow Disc to repurchase it.

14 Haglund also worked on shutting down the plant in Salt Lake  
15 City and making Arrow Disc operational. Mazzuca worked part  
16 time at the Kent plant for a salary. By January 2005, the  
17 purchase of the receivables turned out to be a bad deal, as over  
18 a half-million was written off as bad debt.

19 In mid-January 2005, approximately forty-five days after  
20 the purchase, Haglund entered into a forty-one month lease with  
21 Ranch Associates who owned both the land and building used by  
22 Optidisc in Kent, Washington. Haglund signed a personal  
23 guaranty on the lease, as did Debtors and Mazzuca, even though  
24 no formal agreement regarding their ownership interests was in  
25 place.

26 By mid-February 2005, there still was no definite agreement  
27 between the parties. Haglund called a meeting to finalize the  
28 partnership and discuss future plans given that the company had

1 taken huge write offs on the receivables. It was during that  
2 meeting that Haglund proposed that Marcan combine with Arrow  
3 Disc and that he would own 84% and Debtors and Mazzuca would  
4 hold 16%. Debtors and Mazzuca communicated to Haglund that they  
5 did not wish to negotiate any further about their ownership  
6 interests and left the meeting.

7 Arrow Disc continued operating with heavy losses. The  
8 company eventually defaulted on payments to BFI to which it owed  
9 over \$2.3 million. BFI held a private sale in December 2006, of  
10 all equipment, inventory and general intangibles of Arrow Disc.  
11 After Arrow Disc's operations ceased, Haglund continued with  
12 payments to the landlord who had sued him for rent due in  
13 November 2008, in the Superior Court of Washington for King  
14 County.

15 In early 2009, Marcan's business failed. A few months  
16 later, Debtors filed their chapter 7 petitions which included  
17 debts associated with Marcan.

18 **A. Haglund's Fraudulent Concealment Claim**

19 In support of his fraudulent concealment claim, Haglund  
20 devoted a significant portion of the trial to exploring Marcan's  
21 business and its eventual downfall. Haglund's theory was that  
22 Debtors knew the CD/DVD industry was "imploding" because shortly  
23 after they purchased Marcan, it lost one of its largest  
24 customers, Boeing, which decided to purchase its own CD/DVD  
25 duplication machine. As a result of the lost revenue which  
26 Haglund maintains was significant, Marcan started selling and  
27 servicing the duplication machines and also expanded their  
28 business to include digital printing. In other words, Marcan

1 knew the landscape for CD/DVD duplication services was changing  
2 and, therefore, Debtors and Mazzuca took steps to move away from  
3 that business – the very business Optidisc was in.

4 The bankruptcy judge questioned the witnesses from time to  
5 time to bring out the facts of the case. The bankruptcy judge  
6 asked Daquila why Marcan went out of business in 2009. Daquila  
7 testified that it was because of the economy and the market.  
8 Daquila also testified that Marcan's downfall did not have  
9 anything to do with their largest customer, Boeing, producing  
10 its own CDs because Marcan pursued a different business model by  
11 selling duplication machines and servicing them. Finally,  
12 Daquila testified that the CD/DVD duplication business was  
13 always profitable when 3 Dagos owned Marcan.

14 Bristol's testimony was in accord. He too blamed the  
15 economy and tightening of credit for Marcan's downfall.

16 **B. Haglund's Affirmative Misrepresentation Claims**

17 The record shows that Haglund's alleged misrepresentation  
18 claims were also difficult to pin down. When questioned by the  
19 bankruptcy judge, Haglund articulated two misrepresentations:  
20 Debtors' promise to contribute their "sweat equity" in exchange  
21 for 50% equity ownership in Optidisc and Debtors' promise or  
22 obligation to perform the necessary due diligence of the  
23 Optidisc assets, customer base, receivables, and equipment.  
24 According to Haglund, Debtors contributed nothing and failed to  
25 perform the necessary due diligence.

26 Besides Haglund, Debtors testified about the roles of the  
27 parties before and after the acquisition. Daquila testified  
28 that he had no "formal agreement or arrangement" with Haglund.



1 He further testified that Haglund "never asked me to do any due  
2 diligence through email or phone or any other face to face. I  
3 was never asked to do any kind of due diligence." Bristol  
4 testified that he was not assigned particular tasks with the  
5 acquisition of Optidisc. Bristol further testified that he  
6 reviewed the financials and learned what they all knew; i.e.,  
7 that Optidisc had a failing business and was not profitable.

### 8 **C. The Bankruptcy Court's Ruling**

9 Based on the documentary evidence and testimony, the  
10 bankruptcy court found that Haglund failed to prove fraud by way  
11 of affirmative misrepresentation or by omission. The court  
12 concluded there was no evidence that showed either debtor had  
13 any intention of deceiving Haglund nor did they receive anything  
14 directly or indirectly from Haglund as a result of what  
15 happened. Finally, the bankruptcy court rejected outright the  
16 notion that Debtors had talked Haglund into the investment at a  
17 time when they knew the industry was failing. "It would seem  
18 obvious that . . . had they had such knowledge, they never would  
19 have guaranteed the lease on the Kent plant."

20 With this background, we discuss Haglund's fraud claims and  
21 factual assignments of error below.

### 22 **II. JURISDICTION**

23 The bankruptcy court had jurisdiction over this proceeding  
24 under 28 U.S.C. §§ 1334 and 157(b)(2)(I). We have jurisdiction  
25 under 28 U.S.C. § 158.

### 26 **III. ISSUE**

27 Whether the bankruptcy court erred in finding that the  
28 debt, if there was one, was dischargeable because Haglund failed

1 to prove the elements for fraud by a preponderance of the  
2 evidence under § 523(a)(2)(A).

3 **IV. STANDARDS OF REVIEW**

4 Whether a claim is dischargeable presents mixed issues of  
5 law and fact, which we review de novo. Peklar v. Ikerd (In re  
6 Peklar), 260 F.3d 1035, 1037 (9th Cir. 2001). The bankruptcy  
7 court's findings made in the context of the dischargeability  
8 analysis, including the court's finding with respect to intent  
9 to defraud, are factual findings reviewed under the clearly  
10 erroneous standard. Candland v. Ins. Co. of N. Am. (In re  
11 Candland), 90 F.3d 1466, 1469 (9th Cir. 1996); Advanta Nat'l  
12 Bank v. Kong (In re Kong), 239 B.R. 815 (9th Cir. BAP 1999).

13 "A court's factual determination is clearly erroneous if it  
14 is illogical, implausible, or without support in the record."  
15 Retz v. Samson (In re Retz), 606 F.3d 1189, 1196 (9th Cir. 2010)  
16 (citing United States v. Hinkson, 585 F.3d 1247, 1261-62 & n.21  
17 (9th Cir. 2009) (en banc)).

18 The clearly erroneous standard does not "entitle a  
19 reviewing court to reverse the finding of the trier of fact  
20 simply because it is convinced that it would have decided the  
21 case differently." Anderson v. City of Bessemer City, N.C.,  
22 470 U.S. 564, 573 (1985). Moreover, when factual findings are  
23 based on determinations regarding the credibility of witnesses,  
24 we give great deference to the bankruptcy court's findings,  
25 because the bankruptcy court, as the trier of fact, had the  
26 opportunity to note "variations in demeanor and tone of voice  
27 that bear so heavily on the listener's understanding of and  
28 belief in what is said." Id. at 575.

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**V. DISCUSSION**

Section 523(a)(2)(A) excepts from discharge debts incurred through "false pretenses, a false representation, or actual fraud." To establish that a debt is nondischargeable under § 523(a)(2)(A), a creditor must establish by the preponderance of the evidence the following: (1) a misrepresentation, fraudulent omission or deceptive conduct by the debtor; (2) knowledge of the falsity or deceptiveness of his statement or conduct; (3) an intent to deceive; (4) justifiable reliance by the creditor on the debtor's statement or conduct; and (5) damage to the creditor proximately caused by its reliance on the debtor's statement or conduct. Turtle Rock Meadows Homeowners Ass'n v. Slyman (In re Slyman), 234 F.3d 1081, 1085 (9th Cir. 2000).

We construe the Code's limited exceptions to the general policy of discharge narrowly. Snoke v. Riso (In re Riso), 978 F.2d 1151, 1154 (9th Cir. 1992). On the other hand, the very purposes of § 523(a)(2)(A) "are to prevent a debtor from retaining the benefits of property obtained by fraudulent means and to ensure that the relief intended for honest debtors does not go to dishonest debtors.'" Slyman, 234 F.3d at 1085.

**A. The Bankruptcy Court Did Not Err In Concluding That Haglund Failed To Prove His Fraudulent Concealment Claim**

A debtor's failure to disclose material facts constitutes a fraudulent omission under § 523(a)(2)(A) if the debtor was under a duty to disclose and possessed an intent to deceive. Apte v. Japra (In re Apte), 96 F.3d 1319, 1322 (9th Cir. 1996). To determine whether there was a duty to disclose, we look to the

1 traditional common law rule stated in the Restatement (Second)  
2 of Torts § 551 (1976) which provides in relevant part:

3 (1) One who fails to disclose to another a fact that  
4 he knows may justifiably induce the other to act or  
5 refrain from acting in a business transaction is  
6 subject to the same liability to the other as though  
7 he had represented the nonexistence of the matter that  
8 he has failed to disclose, if, but only if, he is  
9 under a duty to the other to exercise reasonable care  
10 to disclose the matter in question.

11 (2) One party to a business transaction is under a  
12 duty to exercise reasonable care to disclose to the  
13 other before the transaction is consummated,

14 . . . .

15 (e) facts basic to the transaction, if he knows that  
16 the other is about to enter into it under a mistake as  
17 to them, and that the other, because of the  
18 relationship between them, the customs of the trade or  
19 other objective circumstances, would reasonably expect  
20 a disclosure of those facts.

21 Apte, 96 F.3d at 1324.

22 Haglund argues in conclusory fashion that Debtors had a  
23 duty to disclose, presumably because the parties were involved  
24 in a "business transaction." Haglund contends that the  
25 bankruptcy court erred by not discussing this issue in its oral  
26 ruling – an error subject to our de novo review. We need not  
27 address this issue, however, because the record shows that even  
28 if there was a duty, Haglund failed to carry his burden with  
respect to other essential elements of his fraudulent  
concealment claim. Namely, that Debtors had knowledge of the  
omitted fact he complains of (the "imploding" of the CD/DVD  
industry)<sup>4</sup> and that they had the required intent to deceive.

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<sup>4</sup> Haglund often refers to the "fact" that the industry was "imploding." This concept is hardly a fact. It is an opinion, conclusion, or speculation, none of which are a "fact" to be concealed or misrepresented.

1 Both elements involve factual determinations subject to the  
2 clearly erroneous standard of review.

3 Our review of the entire record convinces us that the  
4 bankruptcy court's account of the evidence was plausible and  
5 supported by inferences that may be drawn from the facts in the  
6 record. For example, Debtors' personal guaranty of a forty-one  
7 month lease signed in mid-January 2005 after Haglund's asset  
8 purchase was objective evidence from which the bankruptcy court  
9 could reasonably infer that Debtors had no knowledge that the  
10 CD/DVD duplication industry was "imploding." Moreover, the  
11 bankruptcy court heard exhaustive testimony regarding Marcan's  
12 business. Debtors testified that the CD/DVD duplication  
13 business was profitable for Marcan, they explained their  
14 decision to pursue a different business model, and further  
15 testified as to their belief that Marcan failed due to the  
16 economy. From this testimony, the bankruptcy court could also  
17 reasonably infer that Debtors had no knowledge that the CD/DVD  
18 industry was "imploding."

19 Haglund, who has the burden of proof, does not point to any  
20 inconsistencies or contradictions in Debtors' testimony that  
21 would support his concealment claim. Instead, Haglund points to  
22 the Executive Summary as persuasive evidence that Debtors  
23 portrayed Optidisc as a "very positive investment opportunity  
24 indeed." However, the record shows that Mazzuca and Haglund -  
25 not Debtors - prepared the summary and that its purpose was to  
26 convince a secured lender to return a repossessed machine to the  
27 company. Thus, this evidence does not support the inference  
28 that Haglund suggests.

1 Further, Haglund's recitation of the evidence as it relates  
2 to Marcan and Marcan's alleged troubles is nothing more than an  
3 invitation for us to reweigh the evidence – something we do not  
4 do on appeal. Anderson, 470 U.S. at 573-74 ("If the [trial]  
5 court's account of the evidence is plausible in light of the  
6 record viewed in its entirety, [we] may not reverse it even  
7 though convinced that had [we] been sitting as the trier of  
8 fact, we would have weighed the evidence differently.").

9 In sum, the inference that Debtors had no knowledge that  
10 the CD/DVD industry was imploding is supported by facts in the  
11 record. It follows that if Debtors had no knowledge of the  
12 "fact" Haglund complains of, they could not have possessed the  
13 required intent to deceive him. Accordingly, we conclude the  
14 bankruptcy court's legal conclusion that Haglund failed to prove  
15 his fraudulent concealment claim is manifestly correct.

16 **B. The Bankruptcy Court Did Not Err In Concluding That Haglund**  
17 **Failed To Prove His Affirmative Misrepresentation Claims**

18 Haglund relies solely on the initial oral agreement between  
19 the parties for his affirmative misrepresentation claims. He  
20 argues that, prior to his purchase, Debtors promised to  
21 contribute their "sweat equity" in exchange for 50% equity  
22 ownership in what later became Arrow Disc and to perform the  
23 necessary due diligence of the Optidisc assets, customer base,  
24 receivables, and equipment prior to the purchase.

25 A promise of future performance or intention is generally  
26 not actionable as fraud at common law unless at the time the  
27 promise was made debtor had no intention of carrying through.  
28 Restatement (Second) of Torts § 530 (1976) ("A representation of

1 the maker's own intention to do or not to do a particular thing  
2 is fraudulent if he does not have that intention."); see also  
3 Stiley v. Block, 925 P.2d 194, 204 (Wash. 1996) (same).

4 On appeal, Haglund "disagrees" with the bankruptcy court's  
5 factual finding that neither debtor made misrepresentations with  
6 an intent to deceive Haglund. Haglund rehashes many of his  
7 arguments with conclusory statements, such as that Debtors never  
8 intended to make the efforts necessary to cause Arrow Disc to  
9 reverse its adverse, and serious problems and that they  
10 intentionally covered up the difficulties they had with their  
11 own company, Marcan. Haglund relies on his own testimony to  
12 refute the bankruptcy court's findings of fact regarding  
13 Debtors' alleged intent to deceive. However, while Haglund's  
14 testimony may have been consistent with his theories behind  
15 Debtors alleged fraud, it was not necessarily probative, and  
16 certainly not dispositive, on the issue of Debtors' alleged  
17 intent.

18 The "intent to deceive under § 523(a)(2)(A), can be  
19 inferred and established from the surrounding circumstances."  
20 Alexander & Alexander of Wash., Inc. v. Hultquist (In re  
21 Hultquist), 101 B.R. 180, 183 (9th Cir. BAP 1989). We do not  
22 find any evidence in the record that shows Debtors made promises  
23 to Haglund or, if there were, that those promises were made  
24 without an intention to perform. Rather, the factual  
25 circumstances revealed in the record, coupled with the testimony  
26 of the parties, at most supports an inference that if Debtors  
27 made any promises to Haglund at all, it was to do something in  
28 the future, i.e., contribute their skill and knowledge in

1 exchange for 50% ownership in the new company, Arrow Disc.

2       However, the undisputed trial testimony was that the  
3 initial "agreement" between the parties was never formalized or  
4 reduced to writing before or after the asset purchase.

5 Moreover, the record shows that the parties' alleged "agreement"  
6 regarding ownership kept changing. Bristol testified that after  
7 the asset purchase, Haglund wanted to change the deal to a two-  
8 thirds, one-third split, with Haglund getting two-thirds because  
9 he put more capital into Optidisc than he originally planned.

10 At another point, Bristol testified about the February 2005  
11 meeting where Haglund proposed Debtors take less and throw  
12 Marcan into the deal. Haglund does not dispute these facts.

13       Moreover, the parties' testimony regarding their roles was  
14 not drastically different. Daquila testified that he had no  
15 formal agreement or arrangement with Haglund and that he was  
16 never asked to do any due diligence. Likewise, Bristol  
17 testified that he was not assigned particular tasks with the  
18 acquisition of Optidisc. Bristol further testified that he  
19 reviewed the financials and learned what they all knew: that  
20 Optidisc was a failing business and was not profitable. Haglund  
21 also testified that there was no "going over" roles, but he  
22 later assigned roles to Debtors in his testimony.

23       Based on the undisputed testimony that the structure of  
24 Debtors' ownership interests kept changing, the bankruptcy court  
25 could reasonably infer that Debtors did not make any promises to  
26 Haglund with an intent to deceive. Further, although the  
27 bankruptcy court did not make any credibility determinations in  
28 its findings, it is implicit that such determinations



1 necessarily were made given that there is rarely direct evidence  
2 of fraudulent intent. Mindful of our deferential standard of  
3 review and the knowledge that the bankruptcy court, unlike us,  
4 had the opportunity to observe the witnesses' testimony, we  
5 cannot say the bankruptcy court clearly erred in finding that  
6 Haglund failed to prove that Debtors made the alleged promises,  
7 or, if they did, that they made the promises with the intent to  
8 deceive Haglund. Haglund's failure to establish elements  
9 essential to his misrepresentation claim makes all other  
10 elements immaterial.

11 **C. The Bankruptcy Court's Finding That Debtors Did Not Benefit**  
12 **From Haglund's Investment Was Harmless Error**

13 Haglund "strongly disagrees" with the bankruptcy court's  
14 finding that "it is very important to note that neither  
15 defendant received anything directly or indirectly from Haglund  
16 as a result of what happened." However, § 523(a)(2)(A) does not  
17 require a finding of receipt of a benefit through the fraudulent  
18 conduct. Lee v. Tcast Comm'n, Inc., 335 B.R. 130, 136 (9th  
19 Cir. BAP 2005) (citing Muegler v. Bening, 413 F.3d 980, 983-84  
20 (9th Cir. 2005)). Although the bankruptcy court's finding  
21 regarding benefit was in error, it does not warrant reversal  
22 because it was harmless. The court's finding of no benefit was  
23 unnecessary to its primary conclusion that Haglund failed to  
24 prove fraud either by way of affirmative misrepresentation or by  
25 omission. See Litton Loan Serv'g, LP v. Garvida (In re  
26 Garvida), 347 B.R. 697, 704 (9th Cir. BAP 2006); See also Rule  
27 9005 ("Harmless Error")(incorporating into bankruptcy rules Fed.  
28 R. Civ. P. 61, which provides: "[a]t every stage of the

1 proceeding, the court must disregard all errors and defects that  
2 do not affect any party's substantial rights." ).

3 **VI. CONCLUSION**

4 For the reasons stated above, we AFFIRM.  
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