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NOT FOR PUBLICATION

SUSAN M. SPRAUL, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

5	In re:)	BAP No. CC-14-1065-SpDTa
)	
6	JOHN SHART and)	Bk. No. 2:10-bk-29973-B.R.
	ELKE GORDON-SCHARDT,)	
7)	Adv. No. 2:10-ap-02555-B.R.
	Debtors.)	
8)	
)	
9	WENDY HAIG; GREG SADLER;)	
	SHOWCASE 81, LLC,)	
10)	MEMORANDUM¹
	Appellants,)	
11)	
	v.)	
12)	
	JOHN SHART;)	
13	ELKE GORDON-SCHARDT,)	
)	
14	Appellees.)	
)	

Argued and Submitted on September 18, 2014
at Pasadena, California

Filed - November 19, 2014

Appeal from the United States Bankruptcy Court
for the Central District of California

Honorable Barry Russell, Bankruptcy Judge, Presiding

Appearances: Jesse Sequoia Finlayson of Finlayson Toffer
Roosevelt & Lilly LLP argued for Appellants Wendy
Haig, Greg Sadler, and Showcase 81, LLC; Appellee
Elke Gordon-Schardt argued pro se.

¹ 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.

1 Before: SPRAKER², DUNN and TAYLOR, Bankruptcy Judges.
2

3 **INTRODUCTION**

4 This is Appellants' second appeal to this court on the issue
5 of whether Elke Gordon Schardt ("Ms. Schardt") is liable for her
6 husband, and co-debtor, John Shart's previously established
7 fraud. In the first appeal, this Panel upheld the bankruptcy
8 court's determination that Ms. Schardt was not directly liable
9 for fraud. However, based on Tsurukawa v. Nikon Precision, Inc.
10 (In re Tsurukawa), 287 B.R. 515 (9th Cir. BAP 2002)
11 ("Tsurukawa II"), the Panel remanded the case for factual
12 findings as to whether Ms. Schardt was a partner with, or agent
13 of, her husband such that she would be vicariously liable for his
14 fraudulent behavior for the purpose of excepting that debt from
15 discharge under § 523(a)(2)(A).³

16 Appellants argued that Ms. Schardt's involvement in her
17 husband's business warranted imputing his fraud to her. The
18 bankruptcy court disagreed, and concluded that she was simply
19 acting as a wife who also happened to be an attorney. In
20 addition to finding that no partnership existed, the bankruptcy
21 court held that there was no basis for imputing Mr. Shart's fraud
22 to his wife for purposes of nondischargeability under
23 § 523(a)(2)(A). Although Appellants argue otherwise, these
24 findings are well supported by the record. For these reasons, we
25

26 ² Hon. Gary A. Spraker, Chief Bankruptcy Judge for the
27 District of Alaska, sitting by designation.

28 ³ Unless otherwise indicated, all chapter and section
references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532.

1 AFFIRM.

2 **I. FACTUAL BACKGROUND**

3 **A. The Parties.**

4 Appellants Wendy Haig and Greg Sadler are married and live
5 in Santa Fe, New Mexico. Both had previously worked as certified
6 public accountants. With their six children, they were involved
7 in riding, training, and showing high-end horses around the
8 United States. Ms. Haig, Mr. Sadler, and their children are the
9 owners of Appellant Showcase 81, LLC, a New Mexico limited
10 liability company that was formed in 2005 to hold title to the
11 family's horses.

12 Debtors, John Shart and Elke Gordon Schardt, are a married
13 couple. Mr. Shart was in the business of buying, selling,
14 trading, training, and boarding horses for more than 30 years.
15 He is the 100% owner of Malibu Equestrian Estates, Inc.
16 ("Malibu"). Malibu, doing business as Greystone Equestrian
17 Center ("Greystone"), operated a horse-related business on an
18 85-acre parcel of real property located in Lynville, Tennessee,
19 which is owned jointly by Mr. Shart and Ms. Schardt. The
20 Tennessee property (sometimes referred to herein as "the Farm")
21 was purchased by the couple in 2004, and Mr. Shart moved his
22 business there from Acton, California, in 2005. Ms. Schardt, an
23 attorney, continued to reside in California, where she has an
24 active legal practice. She would travel to the Farm
25 infrequently, perhaps two to three times per year, to visit her
26 husband.

27 **B. The Evolution of the Haig/Shart Business Relationship.**

28 Between 2001 and 2003, Appellants operated their equestrian

1 activities out of four locations in New Mexico, including an
2 equestrian center at Las Campanas, Santa Fe. Ms. Haig learned of
3 Mr. Shart through the director at Las Campanas' equestrian
4 center, and Mr. Shart facilitated Ms. Haig's purchase of several
5 high quality horses. Because those horses were successful, in
6 that they won several ribbons and championships, she purchased
7 additional horses directly from Mr. Shart starting in 2004.

8 Ms. Haig continued to purchase horses from Mr. Shart, or
9 Malibu, through 2008. Until early 2007, all of the purchased
10 horses were boarded at facilities in New Mexico not affiliated
11 with Mr. Shart or his business. A friendship developed between
12 Ms. Haig and Mr. Shart, and she came to rely on him for advice
13 regarding her horses and their training. They met socially, with
14 Ms. Haig and her children occasionally staying at Greystone's
15 facilities in Tennessee.

16 In 2006, Ms. Haig sent substantial sums of money to
17 Mr. Shart for the purchase of horses, horse care fees, show fees,
18 and other purposes. Because she had not received any bills from
19 Mr. Shart up to this point, on or about November 22, 2006,
20 Ms. Haig sent him a letter asking for clarification as to the
21 purpose of payments she had made between May 2005 and September
22 2006. Her letter identified \$1,849,000.00 in payments.

23 Ms. Haig received no response to this letter. In spite of
24 this, she continued her business relationship with Mr. Shart.
25 Sometime in February 2007, she and Mr. Shart attended a horse
26 show in Gulfport, Mississippi. While there, Ms. Haig agreed to
27 move the majority of her horses from New Mexico to Greystone in
28 Tennessee, for boarding and training. Between March 2007 and

1 December 2008, Ms. Haig boarded on average twenty to twenty-five
2 horses with Greystone. Unfortunately, the additional business
3 only created further confusion regarding Ms. Haig's bills. She
4 understood that her horses would be boarded for a flat fee of
5 \$50,000.00 per month, regardless of the actual number of horses
6 boarded. This fee was to include board, feeding of all horses,
7 and routine veterinary and farrier charges. Mr. Shart recalled
8 that the arrangement was \$2,000.00 monthly for board and
9 training, per horse, plus veterinary and farrier charges.
10 Charges for horse shows would be separate, and charged at the
11 customary rates. The terms were never memorialized in a writing,
12 and Ms. Haig would not receive a written bill until July 2008.

13 Despite the confusion surrounding the billings, Ms. Haig
14 became increasingly more involved with Mr. Shart and Greystone.
15 In 2007, she financed significant purchases for Greystone's use,
16 again without providing written instructions or executing any
17 written agreements with Mr. Shart.

18 **1. The Motor Homes.**

19 On or about January 23, 2007, Ms. Haig purchased two motor
20 homes, paying \$245,495.00 for the first ("Motor Home 1") and
21 \$240,973.00 for the second ("Motor Home 2"). Mr. Shart
22 negotiated the purchases with the dealer. Title to Motor Home 1
23 was placed in Ms. Haig's name, but title to Motor Home 2 was
24 placed in Mr. Shart's name. Ms. Haig explained that Mr. Shart
25 had told her his existing motor home had mechanical problems and
26 he needed a replacement to use while he was attending horse
27 shows. She agreed to purchase the two motor homes for horse show
28 use, "enabling everyone to stay on the show grounds during shows

1 - one for use by my family and one for [Mr. Shart] to use." Haig
2 Decl. 12:6-8, Feb. 8, 2012, ECF No. 33. Ms. Haig would later
3 claim that she instructed Mr. Shart to place title to both motor
4 homes in her name. However, prior to making payment on Motor
5 Home 2, Ms. Haig was provided with a copy of the Purchase
6 Agreement for that vehicle, which identified the buyer as "John
7 Shart." Mr. Shart contended this motor home was a gift to him
8 from Ms. Haig.

9 **2. The Barn and the Flowers Land.**

10 Also in 2007, Mr. Shart constructed a barn on the Tennessee
11 property to house some of Ms. Haig's horses ("the Barn"). The
12 Barn is a bit of a misnomer as it included living quarters for
13 Ms. Haig during her visits and four suites for grooms. The
14 parties disputed who provided the funds for the Barn's
15 construction. Ms. Haig also contended that Mr. Shart promised to
16 construct the Barn as an incentive for her agreement to board
17 horses with Greystone. She said Mr. Shart agreed that she could
18 have a personal residence and her own barn at the Farm, which
19 would belong to her and her family.

20 On May 10, 2007, Jerry and Beverly Flowers recorded a deed
21 transferring a fourteen-acre parcel adjacent to the Tennessee
22 property to Mr. Shart (the "Flowers Land"). Title was vested in
23 Mr. Shart, but, again, the parties disputed who provided the
24 funds for the purchase of the Flowers Land, and whether title
25 should have been vested in Mr. Shart or Ms. Haig. Ms. Haig said
26 Mr. Shart induced her to purchase this property because it would
27 be valuable as additional pastureland for her horses. She wired
28 \$85,000.00 to Mr. Shart in May 2007 to cover the purchase price

1 of this property, plus closing costs. The bankruptcy court found
2 this evidence to be the "smoking gun" with respect to Mr. Shart's
3 fraud in this transaction. Trial Tr. 104:10-14, July 25, 2012.

4 **3. The Kenworth Truck.**

5 On September 14, 2007, Ms. Haig paid \$162,250.43 for the
6 purchase of a Kenworth truck. She explained that this purchase
7 was necessary because Mr. Shart's health issues prevented him
8 from driving the truck that he had been using to transport her
9 horses to shows. She again relied on Mr. Shart to negotiate the
10 purchase. She contends she instructed him to put title to the
11 truck in the name of her husband, Mr. Sadler, but title to the
12 truck was placed in the name of Greystone. Ms. Haig said she did
13 not discover this until late 2008 or early 2009.

14 **C. Ms. Haig First Receives Billing Information in July 2008.**

15 On July 10, 2008, Ms. Haig received a Federal Express
16 ("FedEx") package containing three pages ("the 2005-2007
17 accounting"). The first page, titled "Accounting for Wendy Haig
18 2205[sic]-2007," was a summary that showed a lump sum total of
19 \$3,698,000.00 for monies wired from Ms. Haig, listed categories
20 of expenses totaling \$3,942,793.46, and reflected a balance owing
21 of \$244,793.47. The second and third pages simply listed "Wendy
22 Haig's Horse Purchases" by date, price, and horse's name, between
23 2005 and 2007.

24 No other correspondence was included, but the handwritten
25 airbill on the package listed Ms. Schardt as the sender, and
26 included her California address. At trial, however, Ms. Schardt
27 testified that she didn't recognize the handwriting on the
28 airbill; it was not hers. She also testified that she did not

1 recall sending Ms. Haig the FedEx package.

2 Ms. Haig vehemently disagreed with this accounting. She
3 believed Mr. Shart had been overcharging her on numerous matters,
4 and was shocked to see any balance owing to Greystone. In July
5 2008, Ms. Haig also received detailed monthly bills covering
6 January through June of 2008, in a separate mailing from
7 Greystone's new bookkeeper, Susan Rhea. These bills, prepared by
8 Ms. Rhea, reflected Mr. Shart's understanding that Greystone
9 would bill Ms. Haig \$2,000.00 monthly per horse, with veterinary
10 and farrier expenses charged separately. Ms. Haig challenged the
11 2008 monthly billing statements as well, although she conceded
12 corrections were ultimately made, "with argument and difficulty."

13 **D. The Relationship Deteriorates and Ms. Schardt's Involvement.**

14 Throughout the remainder of 2008, Ms. Haig received monthly
15 bills from Greystone. She contested many of them, and continued
16 to press for a detailed accounting and reconciliation of the
17 total amounts she had paid to Greystone. In turn, Mr. Shart
18 demanded payment of the balance owed under the July 10, 2008
19 "accounting," and threatened to start selling Ms. Haig's horses
20 to cover the balance.

21 The dispute reached its climax in December 2008, spilling
22 over into early January 2009. During this period, Ms. Haig and
23 Mr. Shart exchanged several letters regarding their dispute. In
24 a letter dated December 4, 2008, Ms. Haig wrote "I . . .
25 relinquish title to all horses at Greystone Equestrian Center,
26 except Cincinnati," but declared that all other personal
27 property, including the trucks and trailers, remained hers.
28 Mr. Shart asserted that, on December 6, 2008, he left a letter in

1 Ms. Haig's room at the Barn accepting her offer, although he
2 stated he would not return the truck and other personal property
3 Ms. Haig mentioned in her offer. Ms. Haig denied ever receiving
4 his response. On December 18, 2008, Mr. Shart sold two of
5 Ms. Haig's horses over her objections.

6 The next day, Ms. Schardt arrived at the Farm for the
7 holidays. Ms. Haig's attorney sent a letter to Mr. Shart that
8 same day, requesting a comprehensive accounting, and directing
9 him not to sell any more of Ms. Haig's horses. A week later, on
10 December 26, 2008, Ms. Haig wrote a letter to Mr. Shart that
11 itemized ten billing adjustments to be made in her favor. Her
12 letter included a detailed spreadsheet listing Greystone's 2008
13 billings and credits, together with her proposed adjustments.
14 According to her calculations, Ms. Haig had a credit balance of
15 \$137,508.90.

16 Ms. Schardt testified that "we were getting all these calls"
17 during this time period. Trial Tr. 87:24-88:1, May 3, 2012. She
18 asked both her husband and Greystone's bookkeeper, Ms. Rhea,
19 about the correspondence and what was going on. Ms. Rhea had
20 been working on an accounting of Ms. Haig's transactions for some
21 time when Ms. Schardt arrived. With the bookkeeper, Ms. Schardt
22 reviewed all the wire transfers referenced in Ms. Haig's letter
23 of December 26, 2008, and wrote notes on her copy of the letter.
24 In the course of this review, they discovered one wire transfer
25 that had not been credited to Ms. Haig.

26 Ms. Schardt also testified that Ms. Rhea complained to her
27 that Ms. Haig was constantly disputing and requesting changes to
28 Greystone's bills. The bookkeeper told her that Ms. Haig had

1 asked for so many changes it had gotten to the point where she
2 was confused and did not know what was right anymore.
3 Ms. Schardt reminded her that Ms. Haig was a client, and
4 recommended that she just complete the accounting. If Ms. Haig
5 responded that a credit was due, then the bookkeeper could
6 compare and, if needed, make corrections to the account. This
7 recommendation was based on how Ms. Schardt handled her own
8 business accounts.

9 Mr. Shart sent four letters to Ms. Haig in early January
10 2009.⁴ The first, dated January 1, 2009, responded to Ms. Haig's
11 December 26, 2008 correspondence. Mr. Shart acknowledged that
12 one wire transfer, for \$25,000.00, had been missed and would be
13 credited to Ms. Haig's account. The letter also provided
14 Mr. Shart's explanation as to other disputed items. On
15 January 5, 2009, Ms. Haig received a revised accounting, titled
16 "Wendy Haig Accounting" (the "2008 accounting"). The spreadsheet
17 showed a beginning balance due of \$244,793.47, and detailed the
18 monthly billings, payments, sales of horses, and miscellaneous
19 credits in 2008. This accounting showed a final balance of
20 \$134,737.56 as of the end of December 2008. Ms. Haig responded
21 that same day, and again on January 6, 2009, by faxing additional
22 information to Mr. Shart in an attempt to establish further
23 credits in her favor that were not reflected in the 2008
24 accounting.

25 The same day that her initial response to the 2008
26

27
28 ⁴ The copies of the letters dated January 2 and 4, 2009, are
virtually illegible.

1 accounting was sent, on January 6, 2009, Mr. Shart wrote another
2 letter to Ms. Haig in which he stated that she was already "in
3 possession of our accounting up to December 31, 2008, and may
4 present [her] own accounting for comparison." The letter also
5 complained about Ms. Haig's "continuous and completely uncalled
6 for telephone harassment" during the past couple of days.

7 Ms. Schardt was still visiting the Farm when these letters
8 were sent. She testified that she reviewed her husband's
9 letters for grammatical and typographical errors because his
10 English wasn't "exactly stellar" and he often dictated half in
11 German and half in English. Trial Tr. 99:13-18, May 3, 2012. As
12 a result, someone always proof-read Mr. Shart's letters.
13 Nonetheless, Ms. Schardt was adamant that she did not make
14 substantive changes to any of the letters.

15 Given the parties' escalating disagreements, on January 7-9,
16 2009, Ms. Haig, Mr. Sadler, and Mr. Sharp, an assistant of
17 Ms. Haig's, traveled to Tennessee to pick up the remaining
18 horses. Mr. Shart demanded payment for the outstanding balances
19 before he would agree to release the horses. Ms. Haig contends
20 Mr. Shart "specifically told her," during this visit, that
21 Ms. Schardt had advised him to demand payment of \$250,000.00 from
22 her before releasing the horses. Haig Decl. 31:20-21. However,
23 Mr. Sadler stated that Ms. Haig was so upset during this visit
24 that she did not even speak to Mr. Shart. Sadler Decl. 4:21-23,
25 Feb. 8, 2012, ECF No. 35.

26 Mr. Sadler and Mr. Sharp met Mr. Shart at the Farm on
27 January 8, 2009. Mr. Sharp recalled that Mr. Shart told him he
28 would release the horses if Ms. Haig paid her debt to him, which

1 he claimed was in excess of \$200,000.00. He did not say that
2 this demand was suggested by Ms. Schardt. Mr. Sadler and
3 Mr. Sharp both stated, however, that during this visit Mr. Shart
4 told them that Ms. Schardt had been involved in reviewing the
5 billings or accountings. Unable to resolve the matter, Mr. Shart
6 refused to allow Ms. Haig to recover her horses.

7 These events left Ms. Schardt with a "gut feeling" that
8 litigation might be around the corner. Trial Tr. 90:21-23,
9 May 3, 2012. Sometime in late December 2008 or early January
10 2009, she may have suggested to her husband that he consult with
11 an attorney, and may have looked into finding an attorney with
12 expertise in the equine area. Ms. Schardt also spoke to the
13 attorney that Mr. Shart retained with respect to Appellants'
14 dispute, although it is not clear from the record whether this
15 occurred before or after the attorney's retention by Mr. Shart.
16 This same attorney would also initially represent Ms. Schardt in
17 the civil action that Appellants filed against both Debtors and
18 Mr. Shart's business, Malibu.

19 **E. The State Court Litigation.**

20 On February 9, 2009, Appellants sued Mr. Shart, Ms. Schardt,
21 and Malibu in state court. Haig v. Shart, dkt. no. 4394
22 (Chancery Ct., Giles Cnty., Tennessee, February 9, 2009). The
23 complaint alleged that Mr. Shart and Malibu had made multiple
24 misrepresentations to Ms. Haig regarding the acquisition and sale
25 of horses and that there were disputed expenses charged for trade
26 shows, construction costs, real estate, personal property
27 acquisitions, and other matters. Notably, the complaint focused
28 on the actions of Mr. Shart, and only sought recovery against

1 Ms. Schardt for "unjust enrichment."

2 A month later, on March 2, 2009, the Tennessee Chancery
3 Court entered an Agreed Temporary Injunction that prohibited
4 Mr. Shart and Ms. Schardt from selling any additional horses or
5 personal property owned by Appellants, including the Kenworth
6 truck. It also required Appellants to grant Mr. Shart and
7 Mrs. Schardt a security interest in one of the horses to secure
8 the claims for outstanding boarding and training services.

9 At the time this injunction was drafted, Mr. Shart and
10 Ms. Schardt were both represented by the same attorney.
11 Ms. Schardt testified that she was personally involved in the
12 negotiations regarding the injunction. She explained that, as a
13 practicing attorney, she knew about injunctions, and she
14 discussed with their counsel her specific ideas as to what kind
15 of language should be in it.

16 Ms. Haig's representatives returned to the Farm on March 5,
17 2009, to remove Appellants' remaining horses and personal
18 property. They were permitted to remove eleven horses and some
19 other items of property. Ms. Schardt was present at the Farm on
20 this date, but there is no evidence that she was involved in the
21 return of assets to Ms. Haig or interacted with Ms. Haig's
22 representatives during this visit. Roughly two weeks later, on
23 March 23, 2009, Mr. Shart and Ms. Schardt's counsel substituted
24 out of the state court action and Mr. Shart and Ms. Schardt each
25 retained independent counsel.

26 By April 2009, Appellants had determined that at least five
27 of their horses were still stabled with Greystone. The state
28 court entered an order granting Appellants possession of the

1 horses, their request for injunctive relief, and authorization to
2 inspect Greystone's premises. The bankruptcy court ultimately
3 found that Appellants never recovered seven of their horses.

4 On May 22, 2009, Appellants amended their complaint in the
5 Tennessee Chancery Court and also sent letters to individuals who
6 had purchased some of Appellants' horses from Mr. Shart. In
7 response, Ms. Schardt mailed a letter dated June 2, 2009, to four
8 individuals, including a Ms. Filipovitch, concerning the ongoing
9 litigation.⁵ Ms. Schardt testified that she sent these letters
10 because people were calling and asking about the litigation.
11 Although written on Greystone's letterhead, Ms. Schardt
12 identified herself in the letter as Mr. Shart's wife, and signed
13 it individually. She also clarified that "I own the farm
14 together with [Mr. Shart], but have no involvement in the horse
15 business; yet am being sued for unjust enrichment." She
16 described Appellants' suit as a "personal vendetta" against her
17 husband, and enclosed a copy of Mr. Shart's amended answer and
18 counterclaim, which sought damages against Appellants for breach
19 of contract, pasturage and livery stable liens, a declaratory
20 judgment, libel, slander, intentional interference with business
21 relationships, and other counts.

22 In November 2009, Mr. Shart sold the Kenworth truck to
23 MHC Kenworth for \$80,000. Ms. Haig's counsel obtained
24 information about the sale in February 2010, and contacted
25 Mr. Shart's counsel for details. Mr. Shart's counsel sent an

26
27 ⁵ Only the letter to Ms. Filipovitch is included in the
28 record, suggesting that the same letter was sent to each of the
four recipients.

1 email to Ms. Schardt inquiring about the truck. When Ms. Schardt
2 received this email, she was aware that her husband was attending
3 a horse show in Gulfport, where cell phone reception was very
4 poor. She replied by email to Mr. Shart's attorney that:

5 Hans owns more than one Kenworth. I note
6 with curiosity the claim that W bought the
7 truck and it is titled in Hans [sic] name.
8 You may recall she gave it to him, and there
9 is a dispute. I cannot reach Hans, therefore
10 no answer. Stall her, and find out what
11 truck, who said it was sold and where is it?
12 In my humble opinion the injunction is not
13 worth the paper it is written on. The judge
14 basically said so himself last time we tried
15 to enforce its terms. All I am asking is
16 that as Hans [sic] counsel you cover his back
17 until he is back from the horseshow. He has
18 to make a living.

13 Ms. Schardt testified that, after sending this response, she
14 did nothing further with respect to the truck. She was in
15 California and assumed Mr. Shart's attorney in Tennessee would
16 follow up on the matter. She also testified that she was not
17 involved in the drafting of a subsequent letter Mr. Shart's
18 counsel sent to Ms. Haig's counsel about the truck. This letter
19 threatened sanctions and stated that Mr. Shart had not sold the
20 truck.

21 II. PROCEDURAL HISTORY

22 A. The Bankruptcy and the Original Adversary Action.

23 Mr. Shart and Ms. Schardt filed a chapter 11 petition in the
24 Central District of California on May 18, 2010. On their
25 Schedule A, they indicated that they owned the Barn and the
26
27
28

1 Flowers Land.⁶ Their Schedule F listed a disputed, contingent,
2 and unliquidated debt to Appellants for \$1 million. On
3 September 21, 2010, the bankruptcy court converted Debtors' case
4 to chapter 7, and a trustee was appointed.

5 Appellants filed a proof of claim in the bankruptcy case on
6 January 21, 2011, in the amount of \$2,600,000.00. Debtors
7 objected to the claim, arguing that they did not owe the money.
8 On August 23, 2010, Appellants filed the underlying adversary
9 proceeding against Debtors. As amended, Appellants' complaint
10 alleged that Debtors made misrepresentations with the intent of
11 deceiving them into paying \$1.1 million to construct the Barn and
12 purchase the Flowers Land, among other things, and that this debt
13 should be excepted from discharge under § 523(a)(2)(A). The
14 complaint further alleged that Debtors had engaged in fraud or
15 defalcation as fiduciaries related to the \$1.1 million, and that
16 the debt should be excepted from discharge under § 523(a)(4).
17 Finally, the complaint asserted that Debtors willfully,
18 maliciously, and intentionally injured Appellants and converted
19 their property, and the resulting debt should be excepted from
20 discharge under § 523(a)(6). In an answer filed on April 6,
21 2011, Debtors generally denied these allegations.

22 The adversary trial was consolidated with Debtors' claim
23 objection and tried over five days in April, May, and July 2012.
24 The bankruptcy court issued an oral ruling on July 25, 2012. It
25 held that Mr. Shart had engaged in fraud and that his credibility

26
27 ⁶ Appellants assert Debtors also scheduled Motor Home 2 as
28 one of their assets. The Schedules themselves are not in the
record.

1 was "quite frankly, zero." Trial Tr. 101:14-15, Jul. 25, 2012.
2 Appellants' claim was allowed in the sum of \$1,817,104.19, as a
3 community claim under § 524(a)(3). However, the bankruptcy court
4 did not except the entire claim from discharge. Damages for an
5 initial group of 11 horses and costs allegedly incurred by
6 Appellants for the construction of the Barn were allowed as part
7 of Appellants' claim but not excepted from discharge. The
8 following four components of Appellants' allowed claim, totaling
9 \$860,726.43, were found to be nondischargeable as against

10 Mr. Shart:

- 11 a) \$372,503.00 attributable to "the second group of
12 horses,"
- 13 b) \$85,000.00 for the Flowers Land,
- 14 c) \$162,250.43 for the Kenworth truck, and
- 15 d) \$240,973.00 for Motor Home 2 that had been titled in
16 Mr. Shart's name.⁷

17 As to Ms. Schardt, the court found that none of Appellants'
18 claims would be excepted from discharge. It noted that her
19 involvement was limited to "helping with emails and things," and
20 "cleanup at the end," rather than assisting with the actual
21 transactions that were the basis for Appellants' claims.
22 Focusing on the issue of imputation of fraud, the court noted its
23 disagreement with Tsurukawa II stating, "I think even the BAP got
24 it wrong." Trial Tr. 100:4-8, Jul. 25, 2012. The court found
25 that any involvement Ms. Schardt had in the parties' dispute was
26 as a spouse and refused to impute liability for her husband's

27 ⁷ The parties do not dispute the calculation of damages on
28 appeal.

1 fraud.

2 In September 2012, the bankruptcy court entered a judgment
3 in favor of Appellants, and against Mr. Shart, for \$860,726.43,
4 with this sum being excepted from discharge under § 523.⁸ The
5 judgment further stated that Appellants' claims against
6 Ms. Schardt were discharged. Appellants appealed the discharge
7 of their claims against Ms. Schardt, but only as to the
8 \$860,726.43 excepted from discharge as against Mr. Shart.

9 **B. The First Appeal to the BAP ("Shart I").**

10 In the first appeal (Haig v. Shart (In re Shart), 2013 WL
11 1397401 (9th Cir. BAP Apr. 2, 2013) ("Shart I")), the Panel
12 affirmed the bankruptcy court's determination that Ms. Schardt
13 was not directly liable for fraud. It specifically referenced
14 Ms. Haig's testimony that Ms. Schardt had never made a false
15 representation to her about the financial issues in question.
16 Id. at *5. Based on this evidence, the Panel upheld the
17 bankruptcy court's determination that Ms. Schardt did not have
18 any involvement with the actual transactions that were the basis
19 for Appellants' claims. Id. at *5-6.

20 Although the Panel affirmed the denial of Ms. Schardt's
21 direct liability for fraud, it vacated the lower court's ruling
22 as to "imputed liability." Though it noted that marriage alone
23 was an insufficient basis to impute fraud, under Tsurukawa II,
24 "imputation of liability was possible in a § 523(a) (2) (A)

25
26 ⁸ As the Panel noted in the first appeal, the judgment does
27 not identify the applicable subsections of § 523(a). Haig v.
28 Shart (In re Shart), 2013 WL 1397401 at *4 (9th Cir. BAP Apr. 2,
2013). On appeal, Appellants have exclusively relied upon
§ 523(a) (2) (A).

1 proceeding where the court finds a partnership or agency
2 relationship existed between the spouses." Id. at *6. The Panel
3 vacated and remanded the case because the bankruptcy court's
4 findings on these issues were inadequate for review. It directed
5 the bankruptcy court to consider certain items culled from the
6 record, that might support the existence of a partnership or
7 agency relationship between Debtors; specifically, that
8 Ms. Schardt may have: (1) prepared and mailed allegedly
9 fraudulent accounting statements to Ms. Haig; (2) maintained
10 one bank account and check register for Mr. Shart's business
11 and assisted in preparation of tax returns; (3) made
12 handwritten notes on billing disputes with Appellants and
13 forwarded them to Mr. Shart; (4) reviewed and edited
14 Mr. Shart's responses to the billing disputes; (5) directed
15 her bookkeeper to ignore Ms. Haig's complaints about her
16 bills; (6) provided advice to Mr. Shart in his negotiations
17 with Ms. Haig; (7) prepared some of the bills sent to
18 Ms. Haig; and (8) signed letters on Greystone letterhead
19 relating to Greystone business matters. Shart I, 2013 WL
20 1397401 at *8.

21 The Panel recognized that the bankruptcy court may have
22 considered this evidence, but it could not know based on the
23 record. It remanded the action for more specific findings on
24 "whether [Ms. Schardt] was involved in a partnership or agency
25 relationship with Mr. Shart such that his fraudulent behavior
26 should be imputed to Ms. Schardt for the purposes of exception to
27 discharge under § 523(a)(2)(A) as set forth in [Tsurukawa v.
28 Nikon Precision, Inc. (In re Tsurukawa)], 258 B.R. 192 (9th Cir.

1 BAP: 2001) ('] Tsurukawa I[')] and Tsurukawa II." Id. at *9.

2 **C. The Bankruptcy Court's Decision on Remand.**

3 On remand, the bankruptcy court incorporated the Panel's
4 statement of facts from the first appeal. Haig v. Shart
5 (In re Shart), 505 B.R. 13, 21-24 (Bankr. C.D. Cal. 2014).

6 Neither party disputes those underlying facts, and, specifically,
7 Mr. Shart's liability for fraud. The court held that, even if
8 Ms. Schardt "magically became the partner of her husband in 2009,
9 she was clearly not his partner when the fraud occurred in 2007."

10 Id. at 28. It found that Mr. Shart's fraudulent conduct occurred
11 in 2007, and Ms. Schardt's involvement with her husband's
12 activities did not begin until 2009, well after the fraudulent
13 activities had occurred. The bankruptcy court also addressed the
14 eight items noted by the Panel, but found the evidence to be
15 insufficient to establish the existence of a partnership or an
16 agency relationship. Id. at 26-27. After such review, the court
17 again concluded that "Ms. Schardt simply acted as a spouse who
18 happened to be an attorney and helped out her husband." Id.
19 at 26. Based upon this conclusion, the bankruptcy court held
20 that the fraud of Mr. Shart could not be imputed to Ms. Schardt
21 under § 523(a)(2)(A). Shart, 505 B.R. at 27.

22 Appellants filed the instant appeal on February 12, 2014.

23 **D. The Panel's Subsequent Decision in Huh.**

24 Shortly after the instant appeal was filed, the Panel issued
25 its en banc decision in Sachan v. Huh (In re Huh), 506 B.R. 257
26 (9th Cir. BAP 2014). There, a creditor sought to impute the
27 fraud of a real estate agent to his principal for purposes of
28 excepting the debt from discharge under § 523(a)(2)(A). In a

1 **IV. ISSUES**

2 1. Did the bankruptcy court err in finding that no
3 partnership or agency relationship existed between Debtors, such
4 that there was no basis to establish Ms. Schardt's liability for
5 Mr. Shart's fraudulent conduct.

6 2. Did the bankruptcy court err in failing to impute
7 Mr. Shart's fraud to Ms. Schardt for purposes of § 523(a)(2)(A).

8 **V. STANDARDS OF REVIEW**

9 Whether a claim is excepted from discharge under
10 § 523(a)(2)(A) presents mixed issues of law and fact which we
11 review de novo. Diamond v. Kolcum (In re Diamond), 285 F.3d 822,
12 826 (9th Cir. 2002). "De novo means review is independent, with
13 no deference given to the trial court's conclusion." Mwangi v.
14 Wells Fargo Bank, N.A. (In re Mwangi), 432 B.R. 812, 818 (9th
15 Cir. BAP 2010); see also First Ave. W. Bldg., LLC v. James
16 (In re OneCast Media, Inc.), 439 F.3d 558, 561 (9th Cir. 2006).

17 We review the bankruptcy court's findings of fact for clear
18 error. Honkanen v. Hopper (In re Honkanen), 446 B.R. 373, 378
19 (9th Cir. BAP 2011). "The clear error standard is significantly
20 deferential and is not met unless the reviewing court is left
21 with a 'definite and firm conviction that a mistake has been
22 committed.'" Fisher v. Tucson Unified School Dist., 652 F.3d
23 1131, 1135 (9th Cir. 2011) (citation omitted). There is no clear
24 error unless the findings of fact are "(1) illogical,
25 (2) 'implausible,' or (3) without 'support in inferences that may
26 be drawn from the facts in the record.'" United States v.
27 Hinkson, 585 F.3d 1247, 1262 (9th Cir. 2009) (en banc) (quoting
28 Anderson v. City of Bessemer City, N.C., 470 U.S. 564, 577

1 (1985)). "Where there are two permissible views of the evidence,
2 the factfinder's choice between them cannot be clearly
3 erroneous." Lewis v. Ayers, 681 F.3d 992, 999 (9th Cir. 2012)

4 The bankruptcy court's credibility determinations are
5 entitled to special deference. Leon v. IDX Systems Corp.,
6 464 F.3d 951, 958 (9th Cir. 2006) (citation omitted). Deference
7 is given to the trial judge in this area, "for only the trial
8 judge can be aware of the variations in demeanor and tone of
9 voice that bear so heavily on the listener's understanding of and
10 belief in what is said." Anderson v. City of Bessemer City,
11 N.C., 470 U.S. at 575.

12 This court may affirm on any ground supported by the record.
13 Shanks v. Dressel, 540 F.3d 1082, 1086 (9th Cir. 2008) (citing
14 Atel Fin. Corp. v. Quaker Coal Co., 321 F.3d 924, 926 (9th Cir.
15 2003) (per curiam)).

16 VI. DISCUSSION

17 In a nondischargeability action under § 523(a), the creditor
18 has the burden of proving all the elements of its claim by a
19 preponderance of the evidence. Grogan v. Garner, 498 U.S. 279,
20 291 (1991). Exceptions to discharge are strictly construed
21 against an objecting creditor and in favor of the debtor to
22 effectuate the fresh start policies under the Bankruptcy Code.
23 Snoke v. Riso (In re Riso), 978 F.2d 1151, 1154 (9th Cir. 1992).

24 Debts for money or property are excepted from discharge "to
25 the extent obtained by false pretenses, a false representation,
26 or actual fraud." 11 U.S.C. § 523(a)(2)(A). In Shart I, the
27 Panel affirmed the bankruptcy court's ruling that Ms. Schardt had
28 not made false representations or engaged in actual fraud with

1 respect to Appellants. In this second appeal, Appellants seek to
2 impute Mr. Shart's fraud to Ms. Schardt. They must establish,
3 first, that Ms. Schardt was a partner in her husband's horse
4 business, so that she is vicariously liable for her husband's
5 fraud.⁹ Tsurukawa II, 287 B.R. at 527. If a partnership is
6 found to exist, Ms. Schardt's culpability with respect to the
7 fraudulent transactions would then be evaluated under the "knew
8 or should have known" standard of Huh.¹⁰

9 Appellants contend Ms. Schardt became her husband's business
10 partner through her active involvement in his business. Given
11 her involvement in the business, they argue that she knew, or
12 should have known, of his fraudulent activities, and must be
13 charged with his fraud for purposes of excepting her partnership
14 liability to Appellants from discharge under § 523(a)(2)(A).

15 **A. To Establish a Partnership, California Law Requires Evidence**
16 **that Ms. Schardt was a Co-Owner with a Right to Participate**
in the Management of Her Husband's Business.

17 The existence of a partnership is a question of fact
18 governed by state law. Tsurukawa II, 287 B.R. at 521. In this
19 instance, California law applies. Shart I, 2013 WL 1397401

21 ⁹ This case was specifically remanded for factual findings
22 as to whether Ms. Schardt was either a partner in her husband's
23 business or an agent. On remand, the parties' focus, and the
24 court's examination, was directed to whether Ms. Schardt had
25 entered into a business partnership with her husband, to the
26 exclusion of any argument that an agency relationship existed.
Appellants do not argue on appeal that an agency relationship
existed. As such, this Panel limits its examination to whether a
business partnership existed between the spouses.

27 ¹⁰ This two-step analysis was unnecessary in Huh because the
28 debtor/broker had previously been found vicariously liable for
the acts of his agent. Huh, 506 B.R. at 261.

1 at *8. California law defines a partnership as “the association
2 of two or more persons to carry on as co-owners a business for
3 profit.” Cal. Corp. Code § 16202(a) (2014). “In California, the
4 burden of proving a partnership is on the party alleging it.”
5 In re Lona, 393 B.R. 1, 11 (Bankr. N.D. Cal. 2008) (citing Mercaco
6 v. Hoefler, 190 Cal.App.2d 12, 16 (Cal. Dist. Ct. App. 1961)).
7 Appellants seize upon statements made in Tsurukawa II, and
8 repeated in Shart I, that “[a] business partnership between a
9 debtor and spouse for denial of discharge purposes exists where
10 ‘the debtor assumed an active role in the [spouse’s business]
11 that goes beyond merely holding a community property interest in
12 [the spouse’s] business and performing minor services in that
13 business.’” Shart I, 2013 WL 1397401 at *8 (citing Tsurukawa II,
14 287 B.R. at 521). However, both cases recognized that more than
15 mere involvement in a spouse’s business is required to establish
16 a partnership.

17 Whether parties have created a partnership “depends on
18 whether they intended to share in the profits, losses and the
19 management and control of the enterprise.” Shart I, 2013 WL
20 1397401 at *8 (citing Bank of Cal. v. Connolly, 36 Cal.App.3d
21 350, 364 (Cal. Ct. App. 1973); Nelson v. Abraham, 29 Cal.2d 745,
22 749-50 (Cal. 1947)). Co-ownership and profit-sharing are strong
23 evidence of a partnership. Tsurukawa II, 287 B.R. at 521 (citing
24 Holmes v. Lerner, 74 Cal.App.4th 442, 453-54 (Cal. Ct. App.
25 1999)). But, “profit sharing is not considered the most
26 important indicia of a partnership under California law.”
27 Utnehmer v. Crull (In re Utnehmer), 499 B.R. 705, 716 (9th Cir.
28 BAP 2013). Additionally, “[j]oint tenancy, tenancy in common,

1 tenancy by the entirety, [or] joint property . . . does not by
2 itself establish a partnership, even if the co-owners share
3 profits made by the use of the property." Cal. Corp. Code
4 § 16202(c)(1). Rather, it is essential that there be a right of
5 joint participation in management and control of the business.
6 Bank of Cal. v. Connolly, 36 Cal.App.3d at 364; Utnehmer,
7 499 B.R. at 716 (participation in management of the business is a
8 primary element of partnership, and essential to the
9 determination of whether a partnership exists). The right to
10 participate in management, rather than the actual exercise of
11 such right, is determinative of the relationship. Tsurukawa II,
12 287 B.R. at 522 (citing Singleton v. Fuller, 118 Cal.App.2d 733,
13 740-41 (Cal. Dist. Ct. App. 1953)).

14 Both the parties, and the court in Shart I, rely upon
15 Tsurukawa II for guidance as to the quantum of evidence necessary
16 to establish a business partnership between husband and wife.
17 The Tsurukawa II Panel applied the same body of California law to
18 affirm the bankruptcy court's conclusion that a business
19 partnership existed. In Tsurukawa II, the husband funneled
20 repairs required by his employer, Nikon Precision, Inc., to a
21 company set up in his wife's name. Rather than do the work, the
22 husband would have third parties repair the equipment, then have
23 his wife's company overbill his employer. The debtor,
24 Mrs. Tsurukawa, was involved in this business from the beginning.
25 She contributed the initial capital for the business, signed and
26 filed a fictitious business name statement as sole owner of the
27 business, opened a business bank account as sole signatory,
28 applied for and used a corporate credit card, identified herself

1 as sole owner on the business tax returns, signed the lease for
2 business space, and arranged for utility service and repairs to
3 the business premises. Tsurukawa II, 287 B.R. at 523-24.
4 Additionally, Mrs. Tsurukawa signed "hundreds of checks,"
5 including checks to herself exceeding \$100,000. Id. at 523. She
6 also used the proceeds from the business "to dramatically improve
7 [her] standard of living, including the purchase of two
8 additional houses, for approximately \$870,000, and three cars."
9 Id. at 524. Despite these facts, Mrs. Tsurukawa was found to
10 have no actual intent to defraud the creditor. Id. at 520.

11 In examining whether a partnership existed between the
12 spouses, the Tsurukawa II Panel reiterated the bankruptcy court's
13 admonition that "[t]he assumption of [business functions] by a
14 spouse may not carry the weight that such conduct on the part of
15 a stranger would imply." Tsurukawa II, 287 B.R. at 522 (internal
16 citation omitted). Yet, the evidence of a partnership was
17 "overwhelming." Id. at 524. The court rejected Mrs. Tsurukawa's
18 argument that no partnership existed because she did not control
19 the business or participate in its day to day operations. As the
20 owner of the company, she held the right to its management and
21 control, whether she exercised that right or not. Id. at 522.

22 **B. The Bankruptcy Court Correctly Found No Partnership Existed.**

23 On remand in this case, the bankruptcy court examined each
24 of the items identified in Shart I as possibly probative of a
25 partnership between Ms. Schardt and her husband. Taken
26 individually or together, the bankruptcy court found them
27 insufficient to establish a partnership.

28 Appellants contend the bankruptcy court clearly erred

1 because it: (1) failed to properly account for each of the eight
2 items identified in Shart I, (2) inaccurately found that
3 Ms. Schardt's involvement in Greystone did not begin until 2009,
4 and (3) ignored Ms. Schardt's "pre-litigation" declaration.
5 Ms. Schardt responds that any involvement she had with her
6 husband's business never rose to the level necessary to create a
7 partnership and that Appellants' disagreement with the bankruptcy
8 court's factual findings does not make them clearly erroneous as
9 they are supported by the record. We agree.

10 **1. The Bankruptcy Court's Findings as to the Items**
11 **Identified in Shart I.**¹¹

12 **a) Ms. Schardt's Involvement in the Preparation of**
13 **Accountings and Billings.**

14 In Shart I, the Panel noted that there was some evidence
15 Ms. Schardt prepared and mailed allegedly fraudulent accounting
16 statements, as well as some bills, to Ms. Haig. Shart I, 2013 WL
17 1397401 at *8. On remand, the bankruptcy court recognized that
18 Ms. Schardt had sent the FedEx package containing the 2005-2007
19 accounting to Ms. Haig in July 2008, but found that there was no
20 evidence she prepared the enclosed documents. Shart, 505 B.R.
21 at 26. Similarly, it concluded that "there was simply no
22 evidence that proves that Ms. Schardt prepared some of the
23 bills." Id. In neither instance did the bankruptcy court
24 address the testimony of Mr. Sharp, or Mr. Sadler, regarding

25 ¹¹ Although the Panel listed eight items that might be
26 probative of a partnership, and the bankruptcy court specifically
27 addressed each one, the same underlying evidence overlaps several
28 of these items. For this reason, we have combined the discussion
of those items, where appropriate, in light of the evidence in
the record.

1 Mr. Shart's statement to them, on January 8, 2009, that his wife
2 had worked on Greystone's billings or accountings. Appellants
3 contend that this testimony, taken together with the FedEx
4 package, establishes Ms. Schardt's active, ongoing involvement in
5 Greystone's business. They also argue that her preparation of
6 these accountings and billings demonstrates knowledge of her
7 husband's fraudulent activities.

8 Appellants improperly conflate these separate events - a
9 FedEx package sent in July 2008 and hearsay testimony regarding a
10 conversation in January 2009 - to support their arguments. But,
11 Mr. Sharp's and Mr. Sadler's testimony is vague as to what type
12 of document Mr. Shart said his wife prepared. In his trial
13 declaration, Mr. Sharp recalled "a lengthy discourse [by
14 Mr. Shart] about the bills sent to Wendy and all the work it had
15 taken his wife, Elke Gordon Schardt, to prepare them (somewhere
16 between days to months)." Sharp Decl. 4:21-23, Feb. 8, 2012
17 (ECF No. 35) (emphasis added). At trial, Mr. Sharp essentially
18 reiterated this point, although he added that Mr. Shart had told
19 him his "secretary, Marie" had also worked on them. Trial
20 Tr. 151:7-10, April 26, 2012. Mr. Sadler's testimony was even
21 more vague; he stated that Mr. Shart had told them "that Elke and
22 his bookkeeper Marie had spent a long time working up the
23 accountings." Sadler Decl. 4:4-5, Feb. 8, 2012 (ECF No. 36)
24 (emphasis added).

25 It is clear that this hearsay testimony reflects slightly
26 differing versions of the same conversation with Mr. Shart on
27 January 8, 2009, but it is so vague and contradictory as to be
28 unhelpful. One witness recalled Mr. Shart saying that his wife

1 had been involved with billings, while the other remembered
2 Mr. Shart saying she had worked on accountings, a significant
3 difference in this case. Both mentioned that "Marie" was also
4 involved, although Mr. Sadler identified her as Mr. Shart's
5 secretary, while Mr. Sharp believed she was his bookkeeper. The
6 record reflects that Ms. Schardt employed a women named Marie as
7 her assistant in California, but there is no evidence that Marie
8 had any involvement in these matters between July 2008 and
9 January 2009.

10 Further, there is other evidence regarding who prepared the
11 billings, as opposed to accountings, that squarely contradicts
12 Mr. Sharp's and Mr. Sadler's testimony. Ms. Haig did not begin
13 to receive monthly billings from Greystone until July 2008.
14 Those billings came from Susan Rhea, who was Greystone's
15 bookkeeper throughout this period. Ms. Haig testified to having
16 numerous discussions with Ms. Rhea in 2008 about them. Indeed,
17 in her December 26, 2008 letter, Ms. Haig wrote to Mr. Shart
18 that, "I looked through my files and the only details of billings
19 that I have received have been for the current year 2008, which
20 Susan prepared." Ms. Haig's trial declaration is consistent with
21 this statement; all the billings that she received came from
22 Greystone's bookkeeper. The record below supports a conclusion
23 that Ms. Schardt did not prepare any billings.

24 As to Greystone's accountings, two are in evidence. One was
25 the 2005-2007 accounting, enclosed in the FedEx package sent to
26 Ms. Haig in July 2008, and the other was the 2008 accounting,
27 sent to Ms. Haig six months later, on January 5, 2009. The
28 bankruptcy court correctly noted the absence of any evidence that

1 Ms. Schardt prepared the accounting sent in the FedEx package.
2 Appellants infer that she must have prepared the documents
3 because the airbill identified her as the sender. Yet,
4 Ms. Schardt provided the only direct testimony on the topic. She
5 testified that she did not remember sending any accountings to
6 Ms. Haig, and did not think anyone in her office did, either.
7 Trial Tr. 168:13-17, May 3, 2012. Moreover, the handwriting on
8 the FedEx label was not hers, and she did not recognize it. Id.
9 at 168:18-24. Ms. Schardt suggested that her husband, or someone
10 else at Greystone, could have sent the package. Mr. Shart
11 confirmed that he had previously used his wife's FedEx account
12 because he did not have one for Greystone. Trial Tr. 170:23-24,
13 Apr. 27, 2012. He also testified that Ms. Schardt was not
14 involved in the accounting.

15 At trial Ms. Schardt denied ever working on any bills, or
16 preparing any accounting. She did review Ms. Haig's December 26,
17 2008 letter and the proposed billing adjustments with Ms. Rhea,
18 Greystone's bookkeeper, during her holiday visit. She also
19 testified that she advised Ms. Rhea to complete the accounting
20 she was working on, and to transmit it to Ms. Haig. It is wholly
21 consistent with the record below that Ms. Haig received
22 Ms. Rhea's accounting on January 5, 2009, which was later
23 discussed between Mr. Shart, Mr. Sadler, and Mr. Sharp on
24 January 8, 2009. Regardless, Ms. Schardt's review of Ms. Haig's
25 letter, and her general advice to Ms. Rhea, the bookkeeper, did
26 not equate to preparation of an accounting. More importantly,
27 these actions do not evidence co-ownership or any right to
28 participate in the management of her husband's horse business as

1 is necessary to establish a partnership. Because the bankruptcy
2 court chose from two permissible views of the evidence, and its
3 findings are plausible in light of the record, there was no
4 error. Lewis, 681 F.3d at 999.

5 **b) Ms. Schardt may have maintained one bank account
6 and check register for Mr. Shart's business and
7 assisted in preparation of tax returns.**

8 The bankruptcy court found that, prior to 2005, Ms. Schardt
9 and her assistant would enter some information in a check
10 register for Mr. Shart's company, Malibu. Additionally,
11 Ms. Schardt was a signatory on a joint account for Malibu prior
12 to Mr. Shart's move to Tennessee, from which she would wire funds
13 to him while he was buying horses overseas. Ms. Schardt would
14 also act as a messenger by occasionally taking documents to
15 Mr. Shart's California accountants. The court concluded that
16 these actions were "simply evidence of a married couple and [do]
17 not in any way give rise to a partnership." Shart, 505 B.R. at
18 26.

19 As to this finding, Appellants simply disagree with the
20 inferences drawn by the bankruptcy court. They argue that this
21 evidence establishes that Ms. Schardt "maintained" the check
22 register for Malibu, was a co-signer on Mr. Shart's business
23 account, and "provided information" to his business accountant.
24 The record does not support these assertions. Ms. Schardt
25 testified that before Mr. Shart moved his business and bank
26 accounts to Tennessee in 2005, both of them used the services of
27 the same individual to review their separate bills and write
28 checks. This arrangement ended once Mr. Shart moved his business
to Tennessee in 2005. Similarly, Ms. Schardt testified that the

1 joint bank account existed before Mr. Shart moved to Tennessee,
2 and was an accommodation to his need for funds while traveling
3 overseas. Again, this arrangement stopped after Mr. Shart moved
4 to Tennessee in 2005. Ms. Schardt also testified that she still
5 occasionally took documents for her husband to his California
6 accountant, but that she did not prepare those documents.
7 Appellants offered no evidence to contradict Ms. Schardt's
8 testimony.

9 Co-ownership of a bank account, by itself, would not
10 establish a partnership. Cal. Corp. Code § 16202(c)(1).
11 Moreover, no inference as to management or control of Mr. Shart's
12 business can be made from these facts. The evidence only
13 establishes that Ms. Schardt, or her assistant, entered
14 information in a check register; it does not require the
15 conclusion that Ms. Schardt wrote checks on Mr. Shart's business
16 account. While Ms. Schardt may have wired funds to her husband
17 in the early 2000's as an accommodation when he traveled
18 overseas, this is in stark contrast to the situation in
19 Tsurukawa II where the debtor deposited, wrote, and signed
20 "hundreds of checks," including payments to herself. It is also
21 unclear how, or why, a wife's delivery of documents to her
22 husband's out of state accountant advances Appellants' claims
23 that Ms. Schardt was in a partnership with her husband. We agree
24 with the bankruptcy court that this is simply evidence of
25 transactions typical in a marriage rather than an indication of
26 Ms. Schardt's co-ownership or control of her husband's business,
27 especially given that these events occurred well before the
28 events pertinent to the fraud in 2007.

1 **c) Ms. Schardt's activities in December 2008 and**
2 **January 2009.**

3 The cornerstone of Appellants' challenge rests on
4 Ms. Schardt's actions during her visit to the Farm for Christmas,
5 2008. She arrived for the holidays on December 19, 2008, to find
6 a quickly escalating business dispute between her husband and a
7 primary client. The day before, her husband had sold two horses
8 over Ms. Haig's objections, prompting a written demand for an
9 accounting from Ms. Haig's attorney the same day Ms. Schardt
10 arrived. Ms. Haig subsequently made numerous calls to the house
11 during Ms. Schardt's visit. On December 26, 2008, Ms. Haig sent
12 the letter to Mr. Shart detailing 10 errors in Greystone's
13 billings.

14 Aware that something was going on, Ms. Schardt spoke with
15 Greystone's bookkeeper, Ms. Rhea, about the ongoing dispute. The
16 bookkeeper complained about numerous calls and complaints from
17 Ms. Haig challenging her accounting. Ms. Schardt gave her some
18 advice as to how to handle the situation. She also reviewed the
19 matters raised in Ms. Haig's December 26, 2008 letter with her
20 husband and Ms. Rhea. She made handwritten notes based on what
21 she discovered on a copy of the letter. There is no evidence
22 that these notes were provided to anyone.

23 In early January 2009, Ms. Schardt also reviewed two of her
24 husband's letters, including his response to Ms. Haig's
25 December 26, 2008 letter. She examined them for grammatical
26 errors because he would dictate half in German, half in English
27 and his letters were always proof-read by someone. Still,
28 Ms. Schardt was adamant that she did not change the substance of

1 the letters. She acknowledged, however, that she suggested he
2 retain counsel and made inquiries on his behalf.

3 Finally, in Shart I, the Panel noted that Ms. Schardt may
4 have provided negotiating advice to Mr. Shart, based on
5 Ms. Haig's declaration. The only evidence of advice is
6 Ms. Haig's testimony that Mr. Shart "specifically told her" that
7 Ms. Schardt had advised him to demand payment of \$250,000.00
8 before releasing the horses. However, Ms. Haig's declaration was
9 controverted by her husband's statement that she was so upset
10 that she did not speak to Mr. Shart during their January 7-9,
11 2009 visit to Greystone.

12 The bankruptcy court separately addressed Ms. Schardt's
13 handwritten notes, her review and editing of her husband's
14 correspondence, her discussions with the bookkeeper, and the
15 prospect that she may have provided negotiating advice. In sum,
16 it discounted these items as evidence of a partnership, and
17 considered them merely assistance from a spouse who happened to
18 be an attorney. We perceive no clear error in that analysis.

19 Appellants view these same acts as evidence that Ms. Schardt
20 took an active role in her husband's business. They find it
21 implausible that a lawyer, such as Ms. Schardt, would not have
22 done more, or would not have actually advised her husband on his
23 business negotiations. Given the evidence presented, however,
24 the bankruptcy court's findings are entirely plausible. They
25 point to a wife assisting her husband with a business dispute.
26 These acts fail to show any control or management of Mr. Shart's
27 underlying business. Nor did Ms. Schardt hold herself out as a
28 co-owner to Appellants or anyone else. Her involvement was

1 limited to aiding her husband in his dispute with Ms. Haig,
2 rather than running the business, and later as a co-defendant in
3 the state court litigation brought by Appellants. We agree with
4 the bankruptcy court's findings as to these actions.

5 **d) Ms. Schardt signed letters on Greystone letterhead**
6 **relating to Greystone's business matters.**

7 On June 2, 2009, Ms. Schardt sent a letter to four of her
8 husband's customers regarding the state court litigation. It was
9 written on Greystone letterhead, but Ms. Schardt signed the
10 letter in her individual capacity. In the letter, she explained
11 that, although she co-owned the Farm with Mr. Shart, she had no
12 interest in his horse business. The letter accused Ms. Haig of
13 pursuing a personal vendetta against her husband. Enclosed with
14 the letter was a copy of Mr. Shart's answer and counterclaim,
15 which sought damages against Ms Haig. Ms. Schardt explained that
16 she sent the letters after Appellants published ads and posted
17 fliers at horse shows about their missing horses, and Mr. Shart's
18 customers began making phone inquiries about the missing horses.

19 The bankruptcy court remarked that "the fact that the letter
20 may have been hate-filled is irrelevant to the issue of
21 [Ms. Schardt] being a partner." Shart, 505 B.R. at 26. While
22 her use of Greystone letterhead is some evidence of a connection
23 between Ms. Schardt and her husband's business, she makes no
24 representations in the letter as to holding any position with
25 that business. To the contrary, she disclaims any ownership in
26 the business and clearly identifies herself as the owner's wife.
27 The letter discusses her personal opinion of a pending state
28 court lawsuit, in which she was a named defendant, and how that

1 suit has affected her personally. The bankruptcy court's finding
2 that the letter did not establish a partnership between
3 Ms. Schardt and her husband is not clearly erroneous.

4 **2. The Pre-Litigation Declaration.**

5 Before Appellants filed the instant adversary action,
6 Ms. Schardt executed a declaration dated July 20, 2010, which was
7 filed in the bankruptcy case. The record does not reflect the
8 context in which she made the declaration, although footers on
9 that document, and the appended certificate of service, indicate
10 that the declaration was filed in connection with a motion for
11 protective order regarding a Rule 2004 examination of
12 Ms. Schardt. In the declaration, Ms. Schardt gives an overview
13 of the history of the dispute. With respect to Ms. Haig and
14 Greystone, she wrote that "we afforded her service above and
15 beyond the call." She also stated that the "second barn at
16 Malibu" was built "entirely from the funds of Malibu, my husband
17 and I." Additionally, she referenced "Debtors" collectively,
18 rather than her husband, individually, when describing efforts to
19 recover past due boarding fees and the sale of horses.
20 Appellants view these statements as an admission from Ms. Schardt
21 that she was heavily involved in, and knew of, her husband's
22 business. They contend the bankruptcy court, which does not
23 mention the declaration in its opinion, erred by failing to give
24 it the conclusive weight it deserves.

25 At trial, Ms. Schardt was extensively examined about the
26 declaration. With regard to her statement that "we afforded
27 [Ms. Haig] service above and beyond the call," she explained that
28 she was referring to the fact that Ms. Haig's children had lived

1 at Greystone, and been taken care of there. She was not
2 referring to horse-related services, of which she lacked personal
3 knowledge, but to extra, "personal things." Trial Tr. 154:3-12,
4 May 3, 2012. One of Ms. Haig's teenage daughters lived at
5 Greystone permanently in 2007 and 2008. Ms. Schardt also
6 testified that she opted not to go to Greystone for Christmas in
7 2007 because Ms. Haig's teenage son would be staying there for
8 the month, and she felt this would interfere with family time.

9 Similarly, when questioned about the Barn, Ms. Schardt
10 testified that she believed some of the funds from the sale of
11 property she and Mr. Shart owned in California were used "for the
12 building of barns and rings and whatever" at Greystone, although
13 she didn't know what was actually being built. Id. at 158:8-
14 159:3. Ms. Schardt was asked why she would say this in light of
15 other inconsistent evidence at trial that indicated Ms. Haig had
16 paid \$396,000.00 for the barn construction. She responded that
17 the pre-litigation declaration was based on her beliefs at the
18 time, and that she had learned a lot since then, over the course
19 of the litigation.

20 "'Clear error is not demonstrated by pointing to conflicting
21 evidence in the record.'" Nat'l Wildlife Fed'n v. Nat'l Marine
22 Fisheries Serv., 422 F.3d 782, 795 (9th Cir. 2005) (quoting United
23 States v. Frank, 956 F.2d 872, 875 (9th Cir. 1991)). Rather, it
24 exists if the bankruptcy court's findings of fact are illogical,
25 implausible, or without support in the record. Hinkson, 585 F.3d
26 at 1262. The bankruptcy court sifted through the voluminous
27 evidence and testimony submitted in this case, and evaluated the
28 credibility of all witnesses. Its determination that no

1 partnership existed between the spouses is clearly predicated
2 upon crediting Ms. Schardt's testimony that she had no interest,
3 or right to participate, in Mr. Shart's underlying business. We
4 must defer to the trial judge's determinations as to
5 Ms. Schardt's credibility. Anderson v. City of Bessemer City,
6 N.C., 470 U.S. at 574. Moreover, the court's findings are amply
7 supported by the evidence in the record, and, therefore, are not
8 clearly erroneous. It was unnecessary for the court to comment
9 on every piece of evidence presented at trial. See
10 In re Braithwaite, 197 B.R. 834, 835 (Bankr. N.D. Ohio 1996)
11 (quoting Erickson Tool Co. v. Balas Collet Co., 227 F. Supp 226,
12 234-35 (N.D. Ohio 1967), aff'd 404 F.2d 35 (6th Cir. 1968)) ("The
13 Court need not fragmentize the evidence and make extensive
14 findings to negative every offer of proof which has failed to
15 persuade it").

16 **3. The Timing of Ms. Schardt's Involvement.**

17 The bankruptcy court repeatedly noted that Ms. Schardt's
18 involvement occurred predominantly in 2009, whereas the
19 fraudulent actions of Mr. Shart that gave rise to his
20 nondischargeable liabilities occurred in 2007. Appellants argue
21 that this finding was clearly erroneous because of the evidence
22 that Ms. Schardt sent the FedEx package in July 2008, and they
23 believe that she was involved much earlier. They also contend
24 Mr. Shart's fraud was not limited to actions taken in 2007, but
25 continued until sometime in 2010.

26 The timing of Mr. Shart's fraud is significant only if
27 vicarious liability exists, as to Ms. Schardt, by virtue of a
28 partnership. In that instance, it would be necessary to

1 establish the date the partnership was created, because a new
2 partner is generally not liable for the debts of an existing
3 firm. See 48 Cal. Jur. 3d Partnership § 89 (2014); Cal. Corp.
4 Code § 16306(b) (“[a] person admitted as a partner into an
5 existing partnership is not personally liable for any partnership
6 obligation incurred before the person’s admission as
7 partner.”).¹² Because no partnership ever existed, Ms. Schardt
8 is not vicariously liable for any partnership debts. Therefore,
9 the timing of Mr. Shart’s fraud is immaterial and need not be
10 addressed further.

11 **C. Tsurukawa II Does Not Compel a Different Result as to the**
12 **Existence of a Partnership.**

13 Appellants also contend that the bankruptcy court clearly
14 erred in its finding that no partnership existed because
15 Ms. Schardt was more extensively involved in her husband’s
16 business than the debtor/wife in Tsurukawa II, where a
17 partnership was found to exist. The comparison is ill founded.
18 Unlike Ms. Schardt, Mrs. Tsurukawa was the owner of the business
19 and repeatedly held herself out as such. Tsurukawa II, 287 B.R.
20 at 522. As owner, she held the legal right to control the
21 management of the business, even though she chose not to exercise

22
23 ¹² This would preclude vicarious liability for Mr. Shart’s
24 fraudulent procurement of the Kenworth truck, Motor Home 2, or
25 the Flowers Land, all of which he obtained in 2007, well before
26 the earliest possible date of the partnership advanced by
27 Appellants. Mr. Shart’s liability for the second set of horses,
28 however, arose in 2009. While the failure to establish a
partnership moots the issue, it appears that his liability for
the horses may have been founded on conversion rather than fraud.
The only issue preserved on appeal, however, is the
nondischargeability of damages for fraud under § 523(a)(2)(A).

1 such right. Id. Moreover, Mrs. Tsurukawa contributed the
2 initial capital for the business, signed the lease for the
3 company, opened the company bank account, wrote and deposited
4 checks, and applied for business credit cards. Id. She also
5 participated in the "profits" of the business by taking almost
6 \$1 million in income and benefits from the business. Id. at
7 522-24.

8 In contrast, there is no evidence that Ms. Schardt ever held
9 herself out as having an interest in her husband's underlying
10 business. The only public manifestation of any relationship
11 between her and her husband's business remains the letter written
12 on Greystone stationery to her husband's clients discussing the
13 state court lawsuit. Even then, she disclaimed any interest in
14 the business, identified herself as Mr. Shart's wife, and signed
15 the letter in her individual capacity. Whereas Mrs. Tsurukawa
16 had a legal right to control the business as its named owner,
17 Ms. Schardt had no ownership interest in Greystone. Nor is there
18 evidence that she had the right to participate, or actually
19 participated, in the management of her husband's business.
20 Unlike Mrs. Tsurukawa, there is also no evidence that she shared
21 in the profits of her husband's business. Rather, she assisted
22 her husband in one discrete business dispute. Once sued, she
23 also participated in the state court litigation. These actions
24 did not establish a partnership.

25 **D. Imputation of Fraudulent Intent.**

26 Under California law, partners are jointly and severally
27 liable for partnership debts, Cal. Corp. Code § 16306(a),
28 including damages for fraud. Tsurukawa II, 287 B.R. at 521.

1 Under Huh, however, more is needed to except a partner's
2 vicarious liability from discharge under § 523(a). The creditor
3 must establish the debtor's individual culpability rather than
4 relying exclusively on the co-debtor or nondebtor partner's bad
5 acts. Huh, 506 B.R. at 271. The debtor/partner need not have
6 actively participated in the fraud. Id. at 271. Instead, a
7 creditor seeking to impute another partner's fraud for purposes
8 of § 523(a)(2)(A) need only show the debtor "knew or should have
9 known" of the other partner's fraudulent activities. Id. at 271-
10 72.

11 Here, the bankruptcy court found that no partnership existed
12 between Ms. Schardt and her husband. It did not clearly err in
13 that determination. In the absence of a partnership, Ms. Schardt
14 is not vicariously liable for her husband's fraud and the
15 question of what she knew or should have known, under the Huh
16 analysis, becomes immaterial. No further examination as to her
17 culpability is required.

18 **CONCLUSION**

19 To prevail on their nondischargeability claims under
20 § 523(a)(2)(A) against Ms. Schardt, Appellants were required to
21 prove on remand that she: (1) was vicariously liable for her
22 husband's fraud as his business partner, and (2) knew or should
23 have known of his fraudulent conduct. The bankruptcy court's
24 decision that Ms. Schardt was not a partner and, therefore, not
25 vicariously liable for the damages caused by her husband's fraud,
26 is supported by considerable evidence. The lower court's
27 findings are plausible in light of the entire record, which
28 establishes Ms. Schardt's limited involvement in a business

1 dispute, rather than a right to control her husband's business.
2 Appellants' disagreement with those findings, based on
3 unpersuasive or conflicting evidence, does not render them
4 clearly erroneous.

5 Having reviewed the totality of the record, we perceive no
6 clear error in the bankruptcy court's decision on remand. It is,
7 therefore, AFFIRMED.

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