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NOT FOR PUBLICATION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

In re:	)	BAP No. NC-14-1154-JuTaPa
	)	
DEBRA A. HART,	)	Bk. No. 11-42424
	)	
Debtor.	)	Adv. No. 11-04177
	)	
DEBRA A. HART,	)	
	)	
Appellant,	)	
v.	)	M E M O R A N D U M *
	)	
BEVERLY KARAEFF,	)	
	)	
Appellee.	)	

Argued and Submitted on February 19, 2015  
at San Francisco, California

Filed - February 26, 2015

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

Honorable William J. Lafferty, Bankruptcy Judge, Presiding

Appearances: David Ashley Smyth argued for appellant Debra A. Hart; Steven J. Hassing argued for appellee Beverly Karaeff.

Before: JURY, TAYLOR, and PAPPAS Bankruptcy Judges.

\* 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 8024-1.

1 Chapter 7<sup>1</sup> debtor Debra A. Hart appeals from the bankruptcy  
2 court's judgment in favor of appellee-creditor, Beverly Karaeff,  
3 finding the amount of \$450,000 (plus prejudgment interest of  
4 \$222,904.11 for a total of \$672,904.11) nondischargeable under  
5 § 523(a)(2)(A).

6 We AFFIRM the bankruptcy court's decision finding that the  
7 debts associated with the August 15, 2007 transaction  
8 (\$200,000), the August 27, 2007 transaction (\$100,000), and the  
9 May 20, 2008 transaction (\$100,000) are nondischargeable in the  
10 total amount of \$400,000. The bankruptcy court found the  
11 \$50,000 debt associated with the December 10, 2007 transaction  
12 was discharged: "Debtor was not sufficiently involved in the  
13 . . . \$50,000 in a manner that would support non-  
14 dischargeability as to her." Because the \$50,000 amount was  
15 included in the judgment (\$450,000), we REMAND this matter to  
16 the bankruptcy court for the limited purpose of entering a  
17 corrected judgment in the amount of \$400,000 plus prejudgment  
18 interest.

### 19 I. FACTS

20 The bankruptcy court wrote an extensive Memorandum Decision  
21 following an eight-day trial on the underlying adversary  
22 proceeding in this case. We borrow heavily from the bankruptcy  
23 court's recitation of the facts but do so in a summary fashion  
24 for purposes of this appeal.

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

1 **A. Prepetition Events**

2 Debra is a licensed real estate agent and her husband,  
3 Clyde Hart (referred to as Toby throughout these proceedings) is  
4 a real estate broker and real estate developer. Their son Lance  
5 held a contractor's license. Debra, Toby and Lance owned  
6 various real estate-related businesses.

7 **1. New Horizon Investments, Inc.**

8 In September 2002, Debra formed New Horizon Investments,  
9 Inc. (NHII), now a suspended California corporation, as a  
10 vehicle through which to receive her real estate sales  
11 commissions to minimize her tax liability. In June 2004, Debra  
12 and Toby jointly owned a sixty percent equity interest in NHII  
13 and Lance owned the remaining forty percent equity. Debra was  
14 the President and Toby was the Secretary of the company, at  
15 least initially. Lance served as Chief Financial Officer and  
16 Vice-President of NHII during the period of formation of GTP  
17 Properties Ltd. (GTP).

18 **2. GTP Properties Ltd.**

19 GTP was a limited partnership formed in 2004, with NHII as  
20 the sole general partner. The Harts used GTP from time to time  
21 in efforts to develop the Shady Glen property (further described  
22 below). To that end, with the assistance of counsel, they  
23 drafted a Private Placement Memorandum (PPM), Subscription  
24 Agreement (SA) and Limited Partnership Agreement (LPA) for GTP.

25 The PPM was intended as an aid to those considering  
26 investing in GTP. The PPM identifies GTP as a limited  
27 partnership created for the sole purpose of acquiring and  
28 developing Shady Glen and states that the general partner of

1 GTP, NHII, is under contract to purchase the property from a  
2 third party. The goal of the "Shady Glen Real Estate Project"  
3 was to build, and ultimately sell to "third party buyers," two  
4 homes on two lots. The PPM also states that, through the  
5 efforts of NHII, the property has been approved for a lot split  
6 and that design plans for two 5000 square foot houses are being  
7 considered. The PPM goes on to state that NHII is under  
8 contract to purchase Shady Glen, that as part of the project  
9 NHII will sell its entire interest in the property to GTP for  
10 \$2,000,000 (the "Purchase Price") and that upon payment of the  
11 Purchase Price, GTP would hold title to Shady Glen "free and  
12 clear."

13 The PPM states that NHII shall raise the capital necessary  
14 to develop the Shady Glen property by sale of 120 partnership  
15 units at \$30,000 each. Thus, the entire capitalization of the  
16 partnership was to be raised by equity investments from  
17 partners. The PPM expressly states:

18 [In] the event that there remains an  
19 undersubscription of the Partnership Units,  
20 the General Partner would reject all  
21 investor subscriptions, promptly notify the  
22 subscribed investors of such rejection, and  
23 promptly return to the subscribed investors,  
24 in full, any subscription monies paid by  
25 them.

26 The PPM describes NHII as a California corporation whose  
27 shareholders are Toby and Debra Hart, as husband and wife, as to  
28 a sixty percent interest, and Lance, as to a forty percent  
interest. Toby, Debra and Lance were identified as the  
directors of the corporation; Toby was President of the  
corporation, Debra was Secretary-Treasurer and Lance was

1 Vice-President.

2 The SA changed the financial arrangements described in the  
3 PPM slightly, by decreasing the purchase price for each  
4 Partnership unit to \$25,000 (for a total of 144 Units), but  
5 retained the overall capital to be raised, solely via equity  
6 investments, at \$3,600,000. The language quoted above from the  
7 PPM concerning the effect of an undersubscription of the  
8 Partnership was repeated verbatim in the second paragraph of the  
9 SA.

10 Consistent with the provisions of the PPM and the SA, the  
11 LPA states that the sole purpose of the Partnership is to  
12 acquire and develop Shady Glen and that the funds necessary for  
13 the project, the sum of \$3,600,000, will be raised via the sale  
14 of equity investments to limited partners. The LPA identifies  
15 NHII as the General Partner and gives the General Partner fairly  
16 standard powers of control and management of Partnership  
17 operations and assets.

18 The Harts first used GTP to raise capital in June 2004.  
19 Four partners, including Gary and Janette Drew, invested a total  
20 of \$800,000. The Harts gave the Drews the PPM, SA and LPA which  
21 pertained to two homes on two lots. The Drews eventually  
22 invested a total of \$200,000 in the project.

23 **3. Shady Glen**

24 Shady Glen was a 2.21 acre parcel of undeveloped land on a  
25 hillside in Walnut Creek, California. NHII acquired Shady Glen  
26 from Eugene Wolsky via a "Vacant Land Purchase Agreement," dated  
27 September 2, 2003, that called for the property to be  
28 transferred to NHII for a total price of \$1,200,000, with a

1 closing to occur on January 9, 2004. Although Wolsky gave NHII  
2 a grant deed dated January 23, 2004, in fact the escrow for the  
3 transaction did not close, and the deed was not recorded, until  
4 July 2, 2004, when NHII provided Wolsky the proceeds of a loan  
5 in the amount of \$800,000 from Sequoia Mortgage Capital  
6 ("Sequoia"). Thereafter, NHII effected a lot split into what  
7 would be known as "Lot A" and "Lot B," each slightly larger than  
8 one acre.

9 In 2006, Toby and Debra, through their roles in NHII,  
10 transferred both lots to Debra, personally, as her sole and  
11 separate property. Lot B was deeded to Debra on August 1, 2006.  
12 Lot A was deeded to Debra on September 7, 2006. Each deed was  
13 recorded shortly after its execution.

#### 14 **4. The Transactions Between Karaeff And The Harts**

15 Debra met Karaeff at an open house that Debra hosted in  
16 2004. Debra listed and sold Karaeff's Oakland home in 2004 and  
17 was Karaeff's agent when she purchased a home in the Harts'  
18 Diablo neighborhood that year. Toby and Lance remodeled that  
19 home for a total cost of approximately \$300,000. During this  
20 time, Karaeff became a close friend of Debra, Toby and the Hart  
21 family generally.

22 When Karaeff entered the scene as a lender and/or an  
23 investor in the Shady Glen project, Debra owned the entire  
24 property. The house on Lot A was under construction, financed  
25 through a construction loan from Washington Mutual Bank ("WAMU")  
26 in the total amount of \$1,837,500 which was secured by a deed of  
27 trust on Lot A. Lot B was undeveloped at that time and was  
28 security for obligations to Sequoia. Sequoia held deeds of

1 trust on Lot B securing a \$400,000 loan obtained on August 1,  
2 2006, and a \$200,000 loan obtained on October 19, 2006.

3 In 2007, Karaeff obtained an equity line of credit on her  
4 home and began investing, or loaning, various sums of money with  
5 the Harts. Four transactions are relevant in this appeal.

6 On August 15, 2007, Karaeff advanced \$200,000 (it is  
7 disputed whether it was a loan or an investment). In connection  
8 with this transaction Debra gave her the PPM, SA and LPA, but  
9 this time the documents pertained to the development of one home  
10 on Lot B. The bankruptcy court refers to these documents signed  
11 by Karaeff as relating to "GTP II." Referring to this version  
12 of documents, the bankruptcy court found Debra had primarily  
13 prepared the PPM.

14 Karaeff loaned another \$100,000 on August 27, 2007, and  
15 \$50,000 on December 10, 2007.

16 On May 20, 2008, she made a short-term loan of \$100,000  
17 through Toby, ostensibly to one of his associates,  
18 Mr. Mendleson.

19 The Harts did not pay Karaeff back any portion of the  
20 \$200,000 she advanced nor did she receive payment on her other  
21 loans. Eventually, Karaeff learned that Lot A and Lot B had  
22 been lost to foreclosure.

### 23 **B. Bankruptcy Events**

24 On March 4, 2011, Debra filed her chapter 7 petition.

25 On June 4, 2011, the Drews filed an adversary proceeding  
26 against Debra, Toby and others seeking to have their debt in the  
27 amount of \$200,000 found nondischargeable under § 523(a)(2)(A)  
28 and (a)(4).

1 Two days later, Karaeff filed an adversary proceeding  
2 against Debra, Toby, Lance, Two Harts, Inc.,<sup>2</sup> Two Harts  
3 Construction & Development Incorporated and NHII, seeking to  
4 have \$450,000 found nondischargeable under § 523(a)(2)(A) and  
5 (a)(4).

6 Lance, Toby and Two Harts, Inc. filed motions to dismiss in  
7 both adversary proceedings on the grounds that the bankruptcy  
8 court did not have jurisdiction to enter a judgment against them  
9 and a judgment could not be rendered nondischargeable against  
10 them because they were not debtors in the related bankruptcy  
11 case. The bankruptcy court granted both motions and dismissed  
12 the adversary proceedings as to these non-debtor defendants.  
13 Karaeff later sued Toby for fraud in state court.

14 Subsequently, the bankruptcy court entered an order  
15 granting Karaeff's Civil Rule 42<sup>3</sup> motion to consolidate her  
16 adversary proceeding with the Drews' adversary proceeding for  
17 all purposes. Debra did not appeal that order. Karaeff's and  
18 the Drews' adversary proceedings were jointly tried on  
19 April 1-4, May 6-7, and August 5, 6, 8 and 9, 2013. Following  
20

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21 <sup>2</sup> Lance owned Two Harts, Inc.

22 <sup>3</sup> Civil Rule 42(a), made applicable to bankruptcy  
23 proceedings by Rule 7042, provides:

24 (a) Consolidation. If actions before the court involve  
25 a common question of law or fact, the court may:

- 26 (1) join for hearing or trial any or all matters at  
27 issue in the actions;  
28 (2) consolidate the actions; or  
(3) issue any other orders to avoid unnecessary cost or  
delay.

1 the trial, the bankruptcy court issued separate memoranda of  
2 decision for the respective cases of Karaeff and the Drews.

3 The bankruptcy court found in favor of Debra and against  
4 the Drews based upon the statute of limitations.

5 In this case, the bankruptcy court noted that Karaeff's  
6 financial involvement with the Harts and their entities was  
7 contested. During the trial, Debra denied any involvement in  
8 the various transactions. The bankruptcy court stated that it  
9 was "struck by the Harts' consistent failure to offer rational,  
10 sensible, candid explanations regarding the transactions giving  
11 rise to these disputes." The court further stated that "the  
12 'story' to which the Harts testified, as regarding most disputed  
13 facts, ranged from implausible, to logically inconsistent, to  
14 entirely self-serving." Therefore, the bankruptcy court based  
15 its conclusions of law in large part on the facts it found and  
16 determined through the credible testimony of Karaeff.

17 The court determined that Debra made false  
18 misrepresentations in connection with the \$200,000  
19 loan/investment and that the other elements of § 523(a)(2)(A)  
20 were met. With respect to the August 27, 2007, and May 20,  
21 2008, loans, both in the amount of \$100,000, the bankruptcy  
22 court found that Debra's involvement in the transactions rose to  
23 a level sufficient to find nondischargeability. The bankruptcy  
24 court entered the nondischargeability judgment in favor of  
25 Karaeff on March 14, 2014. Debra timely appealed.

## 26 **II. JURISDICTION**

27 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.  
28 §§ 1334 and 157(b)(2)(I). We have jurisdiction under 28 U.S.C.

1 § 158.

2 **III. ISSUES**

3 A. Whether the bankruptcy court erred by finding the  
4 \$200,000 debt nondischargeable; and

5 B. Whether the bankruptcy court applied an incorrect  
6 legal standard regarding Debra's state of mind for a finding of  
7 fraud in connection with the August 27, 2007 \$100,000  
8 transaction and May 20, 2008 \$100,000 transaction.<sup>4</sup>

9 **IV. STANDARDS OF REVIEW**

10 The question of whether a particular debt is dischargeable  
11 is a mixed question of fact and law that we review de novo.  
12 See Honkanen v. Hopper (In re Honkanen), 446 B.R. 373, 382 (9th  
13 Cir. BAP 2011); see also Searles v. Riley (In re Searles),  
14 317 B.R. 368, 373 (9th Cir. BAP 2004) (stating that mixed  
15 questions are reviewed de novo when they require the court "to  
16 consider legal concepts and exercise judgment about values  
17 animating legal principles.").

18 To the extent an issue within the mixed question can be  
19 identified as solely a question of fact, it is subject to a  
20 clearly erroneous standard of review. See Rose v. United  
21

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22 <sup>4</sup> Debra listed five issues in her opening brief which we  
23 distilled into the two claims of error as set forth above.  
24 Karaeff contends that Debra waived some of her listed issues  
25 because they were not included in Debra's Statement of Issues  
26 (SOI) on Appeal (which originally stated twenty-two issues). We  
27 disagree there is any waiver on this basis. See Office of the  
28 U.S. Tr. v. Hayes (In re Bishop, Baldwin, Rewald, Dillingham &  
Wong, Inc.), 104 F.3d 1147, 1148 (9th Cir. 1997) (arguments not  
specifically listed in an SOI are not waived) and Wages v. J.P.  
Morgan Chase Bank, N.A., (In re Wages), 508 B.R. 161, 164 (9th  
Cir. BAP 2014).

1 States, 905 F.2d 1257, 1259 (9th Cir. 1990). Moreover, the  
2 clearly erroneous standard does not permit us to conduct a  
3 de novo review of the evidence, but it does allow this Panel to  
4 consider whether there was enough evidence in the record to  
5 support the factual findings of the bankruptcy court. See  
6 Civil Rule 52(a) (made applicable to bankruptcy proceedings by  
7 Rule 7052(a)).

8 A finding of whether a requisite element of a  
9 § 523(a)(2)(A) claim is present is a factual determination that  
10 we review for clear error. See Anastas v. Am. Sav. Bank  
11 (In re Anastas), 94 F.3d 1280, 1283 (9th Cir. 1996); Candland v.  
12 Ins. Co. Of N. Am. (In re Candland), 90 F.3d 1466, 1469 (9th  
13 Cir. 1987) (whether there has been a misrepresentation is a  
14 finding of fact reviewed for clear error); Cowen v. Kennedy  
15 (In re Kennedy), 108 F.3d 1015, 1018 (9th Cir. 1997) (intent to  
16 deceive under § 523(a)(2)(A) is a question of fact). A  
17 bankruptcy court's factual findings are clearly erroneous if  
18 they are illogical, implausible, or without support from  
19 inferences that may be drawn from the record. United States v.  
20 Hinkson, 585 F.3d 1247, 1259-61 (9th Cir. 2009) (en banc).

## 21 V. DISCUSSION

### 22 A. Legal Standards: § 523(a)(2)(A)

23 Under § 523(a)(2)(A), a debtor is not discharged in  
24 bankruptcy from any debt obtained by "false pretenses, a false  
25 representation, or actual fraud." The creditor bears the  
26 burden, under the preponderance of the evidence standard, of  
27 demonstrating each of the following five elements:

28 (1) misrepresentation, fraudulent omission or deceptive conduct

1 by the debtor; (2) knowledge of the falsity or deceptiveness of  
2 the representation or omission; (3) an intent to deceive;  
3 (4) the creditor's justifiable reliance on the representation or  
4 conduct; and (5) damage to the creditor proximately caused by  
5 reliance on the debtor's representations or conduct. Ghomeshi  
6 v. Sabban (In re Sabban), 600 F.3d 1219, 1222 (9th Cir. 2010);  
7 Citibank v. Eashai (In re Eashai), 87 F.3d 1082, 1086 (9th Cir.  
8 1996).

9 "The burden of showing something by a 'preponderance of the  
10 evidence,' . . . 'simply requires the trier of fact to believe  
11 that the existence of a fact is more probable than its  
12 nonexistence before [he] may find in favor of the party who has  
13 the burden to persuade the [judge] of the fact's existence.'" Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension  
14 Trust for S. Cal., 508 U.S. 602, 622 (1993) (citation omitted).

15 Because direct evidence of intent to deceive (the scienter  
16 element) is rarely available, "the intent to deceive can be  
17 inferred from the totality of the circumstances, including  
18 reckless disregard for the truth." Gertsch v. Johnson &  
19 Johnson, Fin. Corp. (In re Gertsch), 237 B.R. 160, 167-68  
20 (9th Cir. BAP 1999); Household Credit Servs., Inc. v. Ettell  
21 (In re Ettell), 188 F.3d 1141, 1145 n.4 (9th Cir. 1999)  
22 ("reckless conduct could be sufficient to establish fraudulent  
23 intent"); Houtman v. Mann (In re Houtman), 568 F.2d 651, 656  
24 (9th Cir. 1978) ("Reckless indifference to the actual facts,  
25 without examining the available source of knowledge which lay at  
26 hand, and with no reasonable ground to believe that it was in  
27 fact correct is sufficient to establish the knowledge  
28

1 element." ). Accordingly, a bankruptcy court may find the  
2 requisite intent "where there has been a pattern of falsity or  
3 from a debtor's reckless indifference to or disregard of the  
4 truth." Khalil v. Developers Sur. & Indem. Co. (In re Khalil),  
5 379 B.R. 163, 174-75 (9th Cir. BAP 2007) (discussing intent to  
6 deceive in the context of § 727(a)).

7 Finally, we are mindful that "exceptions to discharge  
8 should be strictly construed against an objecting creditor and  
9 in favor of the debtor." Snoke v. Riso (In re Riso), 978 F.2d  
10 1151, 1154 (9th Cir. 1992); Mele v. Mele (In re Mele), 771 F.3d  
11 1119, 1125 (9th Cir. 2014).

12 **B. The bankruptcy court did not err in finding that the**  
13 **\$200,000 debt was nondischargeable.**

14 After a multi-day trial, the bankruptcy court determined  
15 that all the elements for finding the \$200,000 nondischargeable  
16 were met based on the following:

17 Misrepresentations: Debra was aware of Karaeff's  
18 significant home equity. Debra told Karaeff that Karaeff  
19 "needed to get her money working for her" which evidences  
20 Debra's involvement in soliciting money from Karaeff and also  
21 goes to her role in inducing Karaeff's reliance.

22 The court found that Debra made the following statements to  
23 Karaeff with regard to the \$200,000 transferred August 15, 2007,  
24 for the development of Lot B through what Debra and Toby  
25 represented to be a limited partnership: (1) Debra told Karaeff  
26 that \$200,000 was needed immediately to begin construction on  
27 Lot B; (2) Debra gave Karaeff the SA, which included the  
28 statement that, in the event of under-subscription, all

1 subscription monies would be returned to the limited partners;  
2 (3) Debra gave Karaeff the LPA, the stated primary purpose of  
3 which was the development of Lot B; and, (4) Debra told Karaeff  
4 that the property was free and clear of liens. All of these  
5 statements were false.

6 Knowledge That The Statements Were False: Debra admitted  
7 that she had no intention to develop Lot B at the time she  
8 convinced Karaeff to invest as a limited partner for Lot B's  
9 development. She stated that she wanted to live in the home on  
10 Lot A, without the inconvenience of a neighboring residence on  
11 Lot B. None of the \$200,000 was used for the development of  
12 Lot B. The Harts had no plans to build a house on Lot B, but  
13 nonetheless represented to Karaeff that such a home would be  
14 sold with profits distributed to partners within a year. Even  
15 with a substantial underscription, Debra never attempted to  
16 return Karaeff's investment. Finally, the property was not free  
17 and clear at the time that Karaeff committed her \$200,000.

18 Intent to Deceive: Debra intended to deceive Karaeff and  
19 induce her reliance on those statements. Debra supplied  
20 partnership documents for GTP II, a sham "partnership" which was  
21 never formed and was never intended to be formed. Debra also  
22 convinced Karaeff to commit \$200,000 after Karaeff expressed  
23 that she was initially inclined to invest \$100,000.

24 Justifiable Reliance: The court determined that Karaeff's  
25 reliance on Debra's statements was justifiable. Debra and  
26 Karaeff were close friends. Karaeff had no prior experience in  
27 real estate development through a partnership. Karaeff trusted  
28 the expertise of her friend, Debra, who convinced her that the

1 investment was a good idea through any number of statements both  
2 oral and contained within the partnership documents Debra had  
3 supplied to Karaeff.

4 Damages: Karaeff was damaged in the initial amount of  
5 \$200,000 as a result of her reliance on Debra's false  
6 statements.

7 On appeal, Debra challenges the bankruptcy court's findings  
8 on several grounds. First, Debra argues that the court erred in  
9 finding that (1) she told Karaeff that \$200,000 was needed  
10 immediately to begin construction on Lot B and (2) she gave  
11 Karaeff the LPA, the stated primary purpose of which was the  
12 development of Lot B. Debra maintains that the bankruptcy court  
13 erroneously based these findings on the premise that she knew  
14 that Lot B could never be developed because she had decided  
15 irrevocably that she wanted someday to live in the house on  
16 Lot A and never have a neighbor on Lot B. According to Debra,  
17 "this was not [her] testimony on the issue." She also stated  
18 that Toby wanted to build on Lot B and ". . . well if that is  
19 what he wishes that is where - what we're going to do."

20 Whether there has been a misrepresentation is a finding of  
21 fact reviewed for clear error. In re Candland, 90 F.3d at 1469.  
22 The record shows that at another point during the trial Debra  
23 testified: "I had no intention of having another home built on  
24 Lot B ever." Further, Toby testified that from the time Karaeff  
25 paid the \$200,000 until the date Lot B was lost to foreclosure  
26 there was no construction done on Lot B. He also testified that  
27 he had no idea where the money was actually used.

28 The bankruptcy court did not find the Harts' testimony

1 credible. Based on the court's credibility determination, a  
2 rational factfinder could find that Debra's contradicting  
3 statements regarding the development of Lot B were not worthy of  
4 belief and could reasonably infer that neither Debra nor the  
5 Harts ever intended to construct a home on Lot B. Where there  
6 are two permissible views of the evidence, the factfinder's  
7 choice between them is not clearly erroneous; this applies to  
8 credibility-based findings and to findings based on inferences  
9 from other facts. Lewis v. Ayers, 681 F.3d 992, 999 (9th Cir.  
10 2012); Leon v. IDX Sys. Corp., 464 F.3d 951, 958 (9th Cir.  
11 2006); Anderson v. City of Bessemer City, N.C., 470 U.S. 564,  
12 574 (1985). In short, we discern no clear error.

13       Next, Debra argues the bankruptcy court erred in finding  
14 that she made a false statement when she gave Karaeff the SA,  
15 which included the statement that, in the event of  
16 undersubscription, all subscription monies would be returned to  
17 the limited partners. Debra submits that there is no evidence  
18 in the record to show that at the time Karaeff transferred the  
19 \$200,000, she intended that it would not be returned should the  
20 remaining investment money not be raised.

21       Again, there is no merit to this argument. Whether there  
22 is an intent to deceive is a question of fact subject to the  
23 clearly erroneous standard. In re Kennedy, 108 F.3d at 1018.  
24 Likewise, we review the sufficiency of the evidence to support a  
25 factual finding under the clearly erroneous standard. See  
26 Civil Rule 52(a). Because Debra asserts there is **no** evidence  
27 regarding her intent to deceive, our review under the clearly  
28 erroneous standard requires a complete set of the trial

1 transcripts and other relevant evidence considered by the  
2 bankruptcy court. See Friedman v. Shelia Plotsky Brokers, Inc.  
3 (In re Friedman), 126 B.R. 63, 68 (9th Cir. BAP 1991) (citing  
4 Fed. R. App. P. 10(b)(2) which provides that “[i]f the appellant  
5 intends to urge on appeal that a finding or conclusion is  
6 unsupported by the evidence or is contrary to the evidence, the  
7 appellant shall include in the record a transcript of all  
8 evidence relevant to such finding or conclusion.”). Debra  
9 failed to include a complete set of the trial transcripts in the  
10 record and has included the direct testimony by declaration of  
11 only Karaeff and herself. Therefore, we are unable to address  
12 Debra’s “no evidence” argument. See Ehrenberg v. Cal. State  
13 Univ., Fullerton Found. (In re Beachport Entm’t), 396 F.3d 1083,  
14 1087 (9th Cir. 2005) (failure to provide essential transcripts  
15 or portions thereof can result in an adverse decision on the  
16 merits).

17       Moreover, whether Debra had the intent to deceive is a  
18 question of fact that can be inferred from the totality of the  
19 circumstances, so Debra’s credibility is an important factor.  
20 Here, the bankruptcy court properly considered the totality of  
21 the circumstances and did not find the Harts’ testimony  
22 credible. The court found Debra’s intent to deceive was  
23 “readily” apparent:

24       Debtor supplied Karaeff with partnership documents for  
25 GTP II, a sham ‘partnership’ which was never formed,  
26 and was never intended to be formed. Debtor made  
27 other false statements regarding the development of  
28 Lot B, which she admitted was never going to happen on  
her watch and she also convinced Karaeff to commit  
\$200,000 after Karaeff expressed that she was  
initially inclined to invest \$100,000.

1 These findings, which turned on credibility determinations, are  
2 not clearly erroneous.

3 Debra also challenges the bankruptcy court's finding that  
4 her statement to Karaeff that the property was free and clear of  
5 liens amounts to a false misrepresentation. According to Debra,  
6 the bankruptcy court's finding was based upon Karaeff's  
7 statement in her direct written testimony referring to a  
8 statement allegedly made orally by Debra when they first visited  
9 the Shady Glen site:

10 Debi told me that she had found the property one day  
11 and wrote a check for it on the spot without even  
12 telling her husband. She said the property was free  
and clear.

13 Debra argues that this statement by the bankruptcy court is not  
14 quoted but paraphrased, and it does not specify whether  
15 Karaeff's claim was that the property was free and clear when  
16 purchased or free and clear at the time that the statement was  
17 made. Debra also maintains that the investment documents and  
18 the alleged description of the investment say nothing about the  
19 property being free and clear of liens until it is purchased by  
20 the limited partners, at which time the owner (and presumably  
21 his mortgages) would be paid off. Debra opines that it is  
22 irrelevant to the buyer whether the seller owns the property  
23 free and clear of liens since whatever liens are on the property  
24 will be paid off in escrow. In the end, Debra asserts there is  
25 not enough information as to what was said or heard or  
26 understood by either Debra or Karaeff regarding the casual "no  
27 lien" statement during that first visit to Shady Glen to  
28 constitute evidence of dishonesty on Debra's part.

1           These arguments are not only unclear but also unconvincing.  
2 Even assuming there was error, it was harmless when the  
3 bankruptcy court identified numerous other misrepresentations  
4 made by Debra to Karaeff. Any one of these statements would be  
5 sufficient to support the nondischargeability of the \$200,000  
6 debt without the "no lien" statement. Moreover, in considering  
7 the totality of the circumstances to determine whether Debra had  
8 the intent to deceive, the bankruptcy court could properly  
9 consider whether Debra's "no lien" statement to Karaeff during  
10 the first visit to the Shady Glen property was part of a pattern  
11 of falsity. In sum, Debra has offered no basis for us to  
12 overturn the bankruptcy court's conclusion that the \$200,000  
13 debt was nondischargeable based on Debra's fraud.

14           Debra also makes a number of arguments in her reply brief  
15 about the bankruptcy court's findings on the \$200,000 debt. We  
16 do not consider them because arguments raised for the first time  
17 in a reply brief are waived. Coleman v. Quaker Oats Co.,  
18 232 F.3d 1271, 1289 n.4 (9th Cir. 2000).

19 **C.    The bankruptcy court did not err in finding that the**  
20 **August 27, 2007 debt in the amount of \$100,000 was**  
21 **nondischargeable.**

22           With respect to this debt, the bankruptcy court noted that  
23 Karaeff conceded that Debra was not present when Karaeff and  
24 Toby entered into the August 27, 2007 loan for \$100,000.

25           The bankruptcy court's Memorandum Decision reflects that  
26 after eight days of trial, Debra brought an oral motion under  
27 Civil Rule 52 for judgment on partial findings with respect to  
28 the August 27, 2007 \$100,000 loan. After discussion concerning  
the motion, the court determined that Karaeff was not alleging

1 any direct involvement by Debra and must prove this aspect of  
2 her case, if at all, by resort to imputation of Toby's  
3 fraudulent statements on a partnership theory. After trial, in  
4 its written findings of fact and conclusions of law, the  
5 bankruptcy court sua sponte reconsidered that aspect of its  
6 decision. Upon reconsideration, the court found that Debra was  
7 "directly involved" in the August 27, 2007 \$100,000 transaction  
8 such that the debt was nondischargeable in her bankruptcy.

9 In her original SOI, Debra listed as an issue: Whether the  
10 bankruptcy court committed an error of law or an abuse of  
11 discretion that during the trial, the judge stated that out of  
12 the four loans involved in the trial, the middle two loans  
13 involving \$150,000 were out. No defense was given on those two  
14 loans. In his decision he stated he revisited "those loans" and  
15 included them in the judgment. In her opening brief, Debra does  
16 not raise, challenge, or otherwise analyze whether the  
17 bankruptcy court's decision to sua sponte reconsider its earlier  
18 ruling had any impact on her. Therefore, any arguments relating  
19 to this issue are waived. Indep. Towers of Wash. v. Wash.,  
20 350 F.3d 925, 929 (9th Cir. 2003) ("[W]e cannot 'manufacture  
21 arguments for an appellant' and therefore we will not consider  
22 any claims that were not actually argued in appellant's opening  
23 brief.").

24 The bankruptcy court found that Debra was directly involved  
25 in the August 27 transaction in the following ways:

- 26 (1) Approximately one month earlier, in July 2007,  
27 Debra told Karaeff on two occasions that she needed to  
28 get her money working for her; the Court has already  
found that Debra was aware of Karaeff's equity in her  
home and instrumental in helping Karaeff obtain the

1 line of credit that would finance the \$100,000  
2 advanced on August 27, 2007; (2) Debra made false and  
3 misleading statements to Karaeff regarding Lot A—the  
4 development project that would purportedly benefit  
5 from the \$100,000 loan. Debra took Karaeff to Shady  
6 Glen, showed her the house on Lot A and said that it  
7 would be completed within 30 to 45 days. Whether this  
8 statement was false when made or an overly optimistic  
9 projection could be argued. But Debra also said that  
10 the property was free and clear of liens, which was  
11 clearly a false statement; (3) Karaeff's relationship  
12 with Debra was such that statements by Debra carried  
13 significant weight on a personal level, given their  
14 friendship, and on a professional level, given Debra's  
15 presentation as an individual with knowledge and  
16 expertise in real estate development. **The Court  
17 believes that Toby, on his own, could not have  
18 obtained this \$100,000. Debra's conduct, through  
19 these false and misleading statements, was essential  
20 to Karaeff's decision to advance funds** (emphasis  
21 added).

22 The bankruptcy court further found:

23 Toby then came to Karaeff on the date in question and  
24 said that he needed \$100,000 to finish the house on  
25 Lot A. This statement was false when made. The money  
26 that Karaeff loaned was never used to develop Lot A.  
27 In his trial testimony, Toby said he could not recall  
28 whether any amount of that sum was used in the  
construction on Lot A. But during his deposition,  
Toby admitted that none of the proceeds of that loan  
was used for Shady Glen. Toby intended to deceive  
Karaeff by inducing her reliance on the false  
statement. He did so, and Karaeff justifiably relied  
on Toby's statement. Damages resulted when the money,  
loaned for the completion of Lot A, was not used in  
any part for that purpose and was not returned to  
Karaeff.

21 The bankruptcy court noted that the Ninth Circuit ruled,  
22 under similar facts, that an individual in Debra's position may  
23 be held directly responsible for her role in a fraudulent  
24 scheme. La Trattoria, Inc. v. Lansford (In re Lansford),  
25 822 F.2d 902, 904-05 (9th Cir. 1987). In In re Lansford, the  
26 Ninth Circuit concluded that, by virtue of her participation and  
27 involvement in a fraudulent transaction, a wife could be held  
28 culpable for that transaction, even where her husband actually

1 prepared the fraudulent statement. The debtor husband made a  
2 false financial statement in connection with a purchase of a  
3 restaurant from plaintiff. After debtor husband and debtor wife  
4 jointly filed bankruptcy, plaintiff brought an action under  
5 § 523(a)(2)(B) against both husband and wife.

6 Instead of relying on imputation on a partnership theory  
7 through agency principles, the Ninth Circuit cited evidence  
8 which connected debtor wife to the financial statement and the  
9 deception. Evidence establishing the debtor wife's direct role  
10 in the fraud included findings that: (1) debtor wife was  
11 involved in initiating discussions with La Trattoria, even if  
12 through her husband; (2) debtor wife discovered the potential  
13 restaurant venture; and, (3) debtor wife signed the purchase  
14 documents transferring the restaurant which repeated a  
15 misrepresentation contained within the false financial  
16 statement. Id. at 904. The Ninth Circuit found debtor wife  
17 "culpably responsible" for the fraud. Id. It reversed the  
18 ruling of this Panel that had declined to impose liability on  
19 debtor wife due to lack of "knowledge or connivance" on her  
20 part. Id. at 903.

21 After considering the facts and holding in In re Lansford,  
22 the bankruptcy court concluded:

23 Although Debra was not physically present when Karaeff  
24 loaned \$100,000 at a meeting with Toby, this event  
25 occurred approximately one month after Debra and  
26 Karaeff visited Shady Glen, and approximately two  
27 weeks after Debra made other false statements about  
28 Shady Glen in connection with the 'partnership  
development of Lot B. In the middle weeks of August,  
Debra was instrumental in the process by which Karaeff  
obtained the line of credit through which Karaeff  
would fund advances to Hart entity projects. The  
Court finds Debra's role in the fraud to be direct and

1 essential to its success. Her false statements  
2 regarding Lot A in July and early August of 2007 are  
3 properly carried forward to the August 27, 2007  
4 transaction date. . . . Based on the foregoing, all  
5 elements of [§] 523(a)(2)(A) are established . . . .

6 On appeal, Debra argues that there is **no** evidence that  
7 Karaeff's August 27, 2007 loan was made with her knowledge or  
8 participation. Again, we cannot address Debra's "no evidence"  
9 argument without the complete trial transcript and other  
10 evidence considered by the bankruptcy court.

11 Next, citing Bullock v. BankChampaign, N.A., 133 S.Ct. 1754  
12 (2013) and Sachan v. Huh (In re Huh), 506 B.R. 257 (9th Cir. BAP  
13 2014) (en banc), Debra maintains there must be some evidence  
14 that she knew Toby was asking Karaeff for additional loans and  
15 that he was intending to defraud her and that she, Debra, had  
16 participated directly in these fraudulent loans. Debra fails to  
17 provides any analysis as to how the holdings in Bullock and  
18 In re Huh help her case. Her challenge seems to be that the  
19 bankruptcy court applied an incorrect legal standard regarding  
20 her state of mind for a finding of fraud when she was neither  
21 present when the loan was made to Toby nor did she have  
22 knowledge of the loan.

23 The Supreme Court in Bullock held that the term  
24 "defalcation" is treated similarly to "fraud" for purposes of  
25 § 523(a)(4). 133 S.Ct. at 1756. The court ruled that  
26 defalcation "includes a culpable state of mind requirement akin  
27 to that which accompanies application of the other terms in the  
28 same statutory phrase. We describe that state of mind as one  
involving knowledge of, or gross recklessness in respect to, the  
improper nature of the relevant fiduciary behavior." Id. at

1 1757. Where actual knowledge is lacking, intent can still be  
2 shown for purposes of § 523(a)(4) if the “fiduciary ‘consciously  
3 disregards’ (or is willfully blind to) ‘a substantial and  
4 unjustifiable risk’ that his conduct will turn out to violate a  
5 fiduciary duty.” Id. at 1759-60.

6 The Panel in In re Huh considered the mental state for  
7 fraud set forth in Bullock in connection with the imputation of  
8 fraud under § 523(a)(2)(A) when a partnership or agent-principal  
9 relationship was found. The Panel, sitting en banc, held that  
10 before an agent’s fraud may be imputed to the debtor-principal,  
11 for purposes of the discharge exception for debts obtained by  
12 actual fraud, proof is required that the debtor is culpable,  
13 that is, that the debtor “knew or should have known” of the  
14 agent’s fraud, though the debtor need not have participated  
15 actively in the fraud. 506 B.R. at 272.

16 Neither Bullock nor In re Huh help Debra on appeal. There  
17 is no indication that the holding in Bullock heightens the state  
18 of mind required for fraud under § 523(a)(2)(A) as already  
19 required in this Circuit. Further, the bankruptcy court found  
20 it unnecessary to find a “de facto partnership”<sup>5</sup> through which  
21 to impute Toby’s fraud to Debra under agency and partnership  
22 principles because the court found “direct, culpable, conduct by  
23 Debra and involvement by her in the fraud such that it is her  
24 own.” Therefore, the standards for the imputation of fraud set  
25 forth in In re Huh are not applicable.

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26  
27 <sup>5</sup> Karaeff had alleged in her first amended complaint that  
28 Debra, Lance and Toby were “defacto partners” with each being the  
agent of each of the others.

1 In addition, Debra never argues that the bankruptcy court's  
2 reliance on In re Lansford was improper or otherwise misplaced.  
3 Even in the absence of "knowledge or connivance," the holding in  
4 In re Lansford allows the imposition of liability when there is  
5 evidence showing Debra's direct role in the fraud. Here, the  
6 bankruptcy court considered Debra's conduct and misleading  
7 statements made to Karaeff one month prior to this transaction,  
8 Debra's close personal relationship with Karaeff, and Debra's  
9 role in helping Karaeff obtain the substantial line of credit on  
10 her property. The bankruptcy court found that Debra's conduct  
11 and misleading statements were essential to Karaeff's decision  
12 to advance the funds. Accordingly, the bankruptcy court found  
13 sufficient circumstantial evidence from which to infer Debra's  
14 direct role in the fraud.

15 Debra does not challenge any of these findings on appeal  
16 nor does she contend that these facts do not support an  
17 inference of her direct involvement in the fraud. In any event,  
18 insofar as the bankruptcy court's findings were based mostly on  
19 its credibility determinations, such determinations are entitled  
20 to special deference. Leon v. IDX Systems Corp., 464 F.3d at  
21 958. In sum, Debra has offered no basis for us to overturn the  
22 bankruptcy court's conclusion that the \$100,000 debt was  
23 nondischargeable based on Debra's direct involvement in the  
24 fraud.

25 **D. The bankruptcy court did not err in finding that the**  
26 **May 20, 2008 debt in the amount of \$100,000 was**  
**nondischargeable.**

27 In connection with this loan, Karaeff's account is that she  
28 was having dinner and watching television with Toby and Debra on

1 May 20, 2008. Toby was on the phone, stopped his conversation,  
2 and asked Karaeff if she would like to make a quick \$6,000  
3 through loaning his associate \$100,000 that would be paid back  
4 in thirty days at six percent interest. It was later revealed  
5 to Karaeff, by Toby, that this associate was Mendelson. Karaeff  
6 stated that Debra was present, the two looked at each other, and  
7 Debra smiled saying "it will be okay." The bankruptcy court  
8 found Karaeff's testimony credible on the Mendelson transaction,  
9 in contrast to the Harts' testimony which was evasive and relied  
10 on facts not proven at trial. The court further found that:

11 Debra and Toby jointly participated in this fraud,  
12 each making statements to solicit the Mendelson  
13 \$100,000 from Karaeff. Toby made the false statement  
14 that he would loan, on Karaeff's behalf, \$100,000 to  
15 his friend. Debra's statement "it will be okay"  
16 appears, at a minimum, to be sufficiently reckless to  
17 be a false statement under 523(a)(2)(A). Even without  
18 finding that this statement on its own supports a  
19 claim for non-dischargeability, Debra's role in  
20 inducing Karaeff's reliance on a false statement made  
21 by Toby is sufficient direct involvement in the fraud  
22 such that fraudulent intent by Debra is found and she,  
23 under Lansford, is responsible for any  
24 non-dischargeable debt.

19 The court next assessed Debra's statement, "it will be  
20 okay," to determine whether it was so recklessly indifferent to  
21 the truth as to be fraudulent. The bankruptcy court found:

22 Debra was, at best, recklessly indifferent to the  
23 truth of her comforting assertion that Karaeff's money  
24 was safe with Mendelson, via Toby. Furthermore, the  
25 context of the transaction suggests that Debra knew  
26 Toby's motives and that the money was not going to  
27 Mendelson.

26 Debra added her statement to bolster Toby's false  
27 statement and to induce Karaeff's reliance. The Court  
28 need not find this statement false in itself. It is  
the most significant evidence of Debra's involvement  
in the fraud, which was as follows: (1) Karaeff was  
Debra's friend, who was socializing with Debra and

1 Toby on the night the transaction occurred; their  
2 relationship was such that Karaeff would rely on  
3 Debra's advice and opinion; (2) Were the money to go  
4 to Shady Glen (and it appears that it was never  
5 transferred to Mendelson out of the Two Harts  
6 account), Debra would directly benefit from the  
7 Karaeff loan as it would go toward the construction of  
8 her home in an otherwise economically challenged  
9 project; (3) Debra, knowing that the money was not  
10 going to Mendelson, offered her assurance through  
11 smiling and saying "it will be okay." This statement  
12 was intended to induce Karaeff's reliance on Toby's  
13 false statement. Finding Debra directly involved with  
14 the fraud, this Court concludes that this debt may be  
15 determined non-dischargeable in Debra's bankruptcy.

16 On appeal, Debra again complains there is no evidence in  
17 the record to support the bankruptcy court's decision. She  
18 further claims, without citation to any authority, that the  
19 bankruptcy court's finding of reckless indifference to the truth  
20 without a finding of dishonesty is not enough.

21 We summarily dispose of Debra's argument in relation to  
22 this transaction. To the extent Debra is relying on Bullock and  
23 In re Huh, those cases do not help her case as explained above.  
24 Here, applying the principles set forth in In re Lansford, the  
25 bankruptcy court found that Debra directly participated in the  
26 fraud. In so finding, the court properly considered Debra's  
27 reckless disregard for the truth when she stated "it will be  
28 okay." Under § 523(a)(2)(A), "the intent to deceive can be  
inferred from the totality of the circumstances, including  
reckless disregard for the truth." In re Gertsch, 237 B.R. at  
167-68. And, again, witness credibility played an important  
role in the trial court's determination. In sum, Debra has  
offered no basis for us to overturn the bankruptcy court's  
conclusion that the \$100,000 debt was nondischargeable based on  
Debra's direct involvement in the fraud.

1 **E. Remaining Issues**

2 Debra contends that the bankruptcy court's findings and  
3 evidence in the Drews' adversary proceeding cannot be considered  
4 in this appeal. Debra further asserts that Karaeff cannot  
5 allege for the first time on appeal that the findings or the  
6 evidence in Drew are relevant to Debra's mens rea in Karaeff.  
7 Finally, she maintains that the Drews were strangers and Karaeff  
8 was a personal friend so statements in the Drew case should not  
9 be considered here.

10 Debra fails to point out what evidence is in the record  
11 before us regarding the Drews' case that has any bearing on the  
12 issues raised in this appeal. The bankruptcy court granted  
13 Karaeff's Civil Rule 42 motion to consolidate her adversary  
14 proceeding with that of the Drews for all purposes, including  
15 trial. We found nothing in the record to show that she appealed  
16 this order. Instead she now complains about the effect of the  
17 consolidation for the first time in this appeal which we do not  
18 consider. See Smith v. Marsh, 194 F.3d 1045, 1052 (9th Cir.  
19 1999) ("[W]e will not consider arguments that are raised for the  
20 first time on appeal.").

21 **VI. CONCLUSION**

22 For the reasons stated, we AFFIRM the bankruptcy court's  
23 decision regarding the nondischargeability of the August 15,  
24 2007 \$200,000 debt, the August 27, 2007 \$100,000 debt, and the  
25 May 20, 2008 \$100,000 debt for a total of \$400,000. Because the  
26 bankruptcy court found the December 2007 debt dischargeable, but  
27 also included this amount in the judgment for \$450,000 (plus  
28 prejudgment interest), we REMAND this matter to the bankruptcy

1 court for the limited purpose of correcting the judgment.

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