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

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:)	BAP No.	EC-14-1155-KuPaJu
)		
KENNETH ROBERT THORNE,)	Bk. No.	12-35545
)		
Debtor.)	Adv. No.	13-02001
)		
_____)		
KENNETH ROBERT THORNE,)		
)		
Appellant,)		
)		
v.)	MEMORANDUM*	
)		
SHIRLEY ANDRE; JOSEPH ANDRE,)		
)		
Appellees.)		
_____)		

Argued and Submitted on May 14, 2015
at Sacramento, California

Filed - July 2, 2015

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

Honorable Christopher M. Klein, Chief Bankruptcy Judge, Presiding

Appearances: Kenrick Young argued for appellant Kenneth Robert Thorne; Summer D. Haro of Goodman & Associates argued for appellees Shirley Andre and Joseph Andre.

Before: KURTZ, PAPPAS and JURY, Bankruptcy Judges.

Memorandum by Judge Kurtz
Concurrence by Judge Jury

*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 **INTRODUCTION**

2 Kenneth Robert Thorne appeals from a judgment excepting from
3 discharge under 11 U.S.C. § 523(a)(2)(A) and (a)(4)¹ roughly \$1.2
4 million in debt he owes to Shirley Andre and her son Joseph.²
5 The bankruptcy court correctly determined that most of Thorne's
6 debt flowed from his fraudulent conduct. However, on this
7 record, the bankruptcy court did not correctly except from
8 discharge certain loan payments Thorne allegedly misappropriated.
9 The court also erred when it ordered disgorgement of, and
10 declared nondischargeable, all of the loan origination fees that
11 Thorne received for the three loans the Andres partially funded.
12 Instead, the court should have pro-rated the disgorgement. The
13 Andres had no entitlement to the origination fees beyond their
14 share based on the proportion of the loans they funded.

15 Accordingly, we AFFIRM the bankruptcy court's
16 nondischargeability judgment, except for the following: (1) the
17 portion of the judgment related to \$94,903.67 in allegedly
18 misappropriated loan payments; and (2) the portion of the
19 judgment related to \$14,343.08 in loan origination fees, which
20 were beyond the Andres' proportional share. As to those limited
21 portions of the judgment, we REVERSE.

22
23
24 _____
25 ¹Unless specified otherwise, all chapter and section
26 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
27 all "Rule" references are to the Federal Rules of Bankruptcy
28 Procedure, Rules 1001-9037. All "Civil Rule" references are to
the Federal Rules of Bankruptcy Procedure.

²For the sake of clarity, we refer to Shirley and Joseph by
their first names. No disrespect is intended.

1 **FACTS**

2 For the most part, Thorne has not challenged on appeal the
3 bankruptcy court's findings of fact, so we have drawn much of our
4 factual recitation from the bankruptcy court's oral ruling
5 rendered on March 21, 2014. The court's findings also are
6 consistent with the joint statement of undisputed facts the
7 parties submitted to the court at the time of their pretrial
8 conference.

9 Shirley met Thorne in 1995, while she was renovating a
10 residence she owned so that she could rent it. After Shirley and
11 Thorne became acquainted, Thorne, a licensed real estate broker,
12 ended up managing the rental property on Shirley's behalf. Over
13 the next several years, with the assistance of Thorne, Shirley
14 purchased and sold a number of properties - perhaps as many as
15 thirty transactions in total. Once Shirley added a property to
16 her real estate portfolio, Thorne typically served as her
17 property manager.

18 In this way, between 1995 and 2009, Thorne became a close
19 business confidant of Shirley's, on whom Shirley relied for both
20 real estate and general financial advice. Shirley trusted Thorne
21 completely. In 2006, Joseph also began engaging in real estate
22 transactions with Thorne's assistance. Around the same time, the
23 real estate market began to deteriorate. In fact, the market
24 deteriorated to such an extent that many of Shirley's real estate
25 investments were overencumbered and were not producing sufficient
26 revenue to carry their debt burden. As a result, Shirley began
27 losing the properties, either surrendering them, selling them or
28 losing them to foreclosure.

1 This gravely concerned Shirley because she was counting on
2 her real estate investments to fund her retirement. She
3 approached Thorne, expressed her concerns regarding her real
4 estate investments and expressed a desire to liquidate her
5 investment portfolio in an attempt to stem the tide of losses.
6 In response, Thorne suggested that, instead of liquidating her
7 portfolio, Shirley could address what he perceived as a cash flow
8 problem by becoming a hard money lender - making short term loans
9 at higher interest rates than those charged by banks and other
10 lending institutions.³

11 With Thorne's assistance, both Shirley and Joseph became
12 hard money lenders. Thorne acted as a loan broker and identified
13 a prospective borrower named George Popescu, whom he recommended
14 to Shirley and Joseph. In total, Shirley funded four loans for
15 Popescu, with Joseph participating as an additional lender in one
16 of these four loan transactions.⁴ Before Shirley and Joseph
17 funded these loans, Thorne represented that the loans would be
18 fully secured - secured by real estate collateral that had

19
20 ³Whereas Shirley and the bankruptcy court characterized
21 Thorne's suggestions as advice given to a client by a licensed
22 real estate professional, Thorne characterized his suggestions as
23 if they were merely brainstorming between sophisticated
24 colleagues both engaged in their own separate real estate
25 investment endeavors. Both the history of services Thorne
26 provided to the Andres and the compensation he earned from
27 providing those services - particularly the loan origination fees
28 he collected upon the closing of the hard money loans - support
the court's characterization.

26 ⁴Popescu fully repaid one of these four loans. While the
27 specifics of the three loans not repaid are material to our
28 analysis, the specifics of the fourth loan are not further
discussed in this decision.

1 sufficient equity to cover the full amount of the loan. Thorne
2 further expressed certainty that Popescu could and would repay
3 these loans.

4 With respect to most of Popescu's real property collateral,
5 Thorne did not disclose to Shirley or Joseph the existence or
6 amount of the senior deeds of trust held against the property,
7 which secured millions of dollars in senior debt, even though he
8 was aware of the senior debt from preliminary title reports he
9 received. Nor did Thorne disclose the extent of his own loans to
10 Popescu. Shirley passed on to Joseph whatever information she
11 received from Thorne regarding Popescu and the collateral.

12 The first loan Shirley funded was secured by real property
13 located on Fair Oaks Boulevard in Carmichael, California. Joseph
14 also participated in this transaction. The money that Shirley
15 and Joseph lent against the Fair Oaks property was part of a loan
16 modification. Thorne and another woman named Victoria Neutra
17 already had lent Popescu \$450,000, which loan was modified by way
18 of Shirley and Joseph's additional advances. In exchange for a
19 pro-rata interest in a modified note and deed of trust on the
20 Fair Oaks property, Shirley lent Popescu \$125,000 and Joseph lent
21 Popescu \$55,000. The principal amount of the modified note was
22 \$630,000, with each lender receiving a proportional ownership
23 interest in the modified note based on the amount of money they
24 lent.⁵ Thorne received out of escrow \$7,200 as an origination
25 fee for brokering the modified Fair Oaks loan.

26
27 ⁵The lenders' respective proportional interests in the
28 modified Fair Oaks note were as follows: Thorne (43.65%); Neutra
(27.78%); Shirley (19.84%); Joseph (8.73%).

1 The second loan Shirley funded was secured by real property
2 located on Patton Avenue in Citrus Heights, California.
3 Shirley's loan secured by the Patton property was part of an
4 original loan transaction pursuant to which Shirley lent Popescu
5 \$75,000 and Thorne lent Popescu \$55,000. Shirley and Thorne each
6 received a proportional ownership interest in the note based on
7 the amount of money they lent.⁶ Thorne received out of escrow
8 \$5,200 as an origination fee for brokering the Patton loan.

9 The third loan Shirley funded was secured by real property
10 located on Eschinger Road in Elk Grove, California. Shirley's
11 loan secured by the Eschinger property was part of an original
12 loan transaction pursuant to which Thorne lent Popescu \$125,000,
13 Shirley lent Popescu \$25,000 and a woman by the name of Olga
14 Chiang lent Popescu \$50,000. The principal amount of the
15 Eschinger note was \$200,000, with each lender receiving a
16 proportional ownership interest in the Eschinger note based on
17 the amount of money they lent.⁷ Thorne received out of escrow
18 \$8,000 as an origination fee for the Eschinger loan.

19 When Popescu fell behind on his loan payments, Thorne at
20 first told Shirley that Popescu likely was just busy and forgot
21 to pay. At some later point, in 2008, it became clear that
22 Popescu was struggling to timely make his loan payments, but
23 Thorne remained optimistic regarding repayment of the Popescu
24

25 ⁶The lenders' respective proportional interests in the
26 Patton note were as follows: Shirley (57.69%); Thorne (42.31%).

27 ⁷The lenders' respective proportional interests in the
28 Eschinger note were as follows: Thorne (62.5%); Chiang (25%);
Shirley (12.5%).

1 loans, and Thorne expressed his optimism to Shirley. In reality,
2 in 2009 and 2010, Popescu lost many of his properties to
3 foreclosure, including the collateral for the loans Shirley and
4 Joseph had participated in. Even though Thorne recorded requests
5 entitling him to notice in the event notices of default were
6 recorded against the collateral by senior lienholders, Thorne
7 never advised either Shirley or Joseph that the senior
8 lienholders had commenced foreclosure proceedings against the
9 collateral. Shirley did not learn of the foreclosures until
10 January 2011, when she went to the county recorder's office in an
11 attempt to ascertain the status of the collateral securing her
12 loans to Popescu. At that time, she learned the full extent of
13 senior debt that had encumbered the collateral as well as the
14 fact that the senior lenders had foreclosed on each of the
15 parcels of real property collateral, thereby extinguishing her
16 and Joseph's rights as junior lienholders.

17 In September 2011, the Andres commenced a state court action
18 against Thorne and Popescu for, among other things, fraud and
19 breach of fiduciary duty. In 2012, Thorne commenced a chapter 13
20 bankruptcy case, which was converted to chapter 7 later that same
21 year. In January 2013, the Andres filed their
22 nondischargeability action against Thorne. After holding a
23 trial, the bankruptcy court found in favor of the Andres on their
24 claims for relief under § 523(a)(2)(A) and (a)(4). Thorne timely
25 appealed.

26 **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 **ISSUE**

3 Did the bankruptcy court correctly determine that Thorne's
4 indebtedness to Shirley and Joseph was nondischargeable under
5 § 523(a)(2)(A) and (a)(4)?

6 **STANDARDS OF REVIEW**

7 We review de novo the bankruptcy court's legal conclusions,
8 and we review for clear error its factual findings as to whether
9 the requisite nondischargeability elements are present. Tallant
10 v. Kaufman (In re Tallant), 218 B.R. 58, 63 (9th Cir. BAP 1998).
11 Findings of fact are clearly erroneous only if they are
12 illogical, implausible, or without support in the record. Retz
13 v. Samson (In re Retz), 606 F.3d 1189, 1196 (9th Cir.2010).

14 **DISCUSSION**

15 To except a debt from discharge under § 523(a)(2)(A), a
16 creditor must prove by a preponderance of the evidence the
17 following elements:

- 18 (1) the debtor made [false] representations;
19 (2) that at the time he knew they were false;
20 (3) that he made them with the intention and purpose of
deceiving the creditor;
21 (4) that the creditor relied on such representations;
[and]
22 (5) that the creditor sustained the alleged loss and
damage as the proximate result of the
misrepresentations having been made.

23 Gomeshi v. Sabban (In re Sabban), 600 F.3d 1219, 1222 (9th Cir.
24 2010) (quoting Am. Express Travel Related Servs. Co. v. Hashemi
25 (In re Hashemi), 104 F.3d 1122, 1125 (9th Cir. 1996)). At one
26 time, the Ninth Circuit also required the creditor to prove that
27 the debtor benefitted from the fraud. In re Sabban, 600 F.3d at
28 1222. However, in light of the Supreme Court's decision in

1 Cohen v. de la Cruz, 523 U.S. 213, 223 (1998), the Ninth Circuit
2 now only requires that the liability arise or flow from the
3 fraud. No direct or indirect benefit is required. Id.; Gomeshi
4 v. Sabban (In re Sabban), 384 B.R. 1, 7-8 (9th Cir. BAP 2008)
5 aff'd, 600 F.3d 1219 ("Because [the debtor's liability] did not
6 arise or flow from Debtor's fraudulent conduct, the bankruptcy
7 court correctly held that section 523(a)(2)(A) did not apply to
8 that debt.").

9 Whether the debtor's liability arose or flowed from the
10 fraud is, in essence, an inquiry into proximate cause. See
11 In re Sabban, 600 F.3d at 1223. Proximate cause is a question of
12 fact reviewed under the clearly erroneous standard. See
13 In re Tallant, 218 B.R. at 63.

14 Thorne on appeal has not disputed that the Andres suffered
15 losses as a result of their lending money to Popescu, but Thorne
16 in essence claims that these losses were not proximately caused
17 by any fraudulent conduct on his part. In part, Thorne contends
18 that the bankruptcy court wrongly faulted him for not
19 anticipating in 2006, and warning the Andres regarding, the 2007
20 world financial markets collapse. Thorne further contends that
21 the Andres admitted at trial that they did not consider material
22 whether senior liens existed on the property. Thorne also
23 contends that any statements he made (or any failure to disclose)
24 regarding Popescu's financial health constituted oral
25 representations regarding the borrower's financial condition,
26 which are not covered by either § 523(a)(2)(A) or (B).

27 Even if we were to rule in favor of Thorne on each of these
28 contentions, this would not establish that the bankruptcy court

1 committed reversible error in its § 523(a)(2)(A) ruling.
2 Thorne's contentions largely ignore the key misrepresentation on
3 which the court's § 523(a)(2)(A) ruling was based: that there was
4 sufficient equity in the real property collateral such that the
5 Andres' loans would be fully secured. The bankruptcy court's
6 ruling repeatedly referenced Thorne's statements that there was
7 sufficient equity in the real property collateral, thereby
8 emphasizing the critical role Thorne's representations regarding
9 equity played. See Tr. Trans. (March 21, 2014) at 10:22-11:11,
10 13:15-17, 14:6-10, 15:22-16:6, 17:7-11.

11 In its § 523(a)(2)(A) ruling, the bankruptcy court found
12 that Thorne knew that his representations regarding equity were
13 false, that he knowingly made these misrepresentations to the
14 Andres, that he thereby induced the Andres to lend money to
15 Popescu, that the Andres' reliance on these representations was
16 justifiable and that the Andres suffered damages as a proximate
17 result thereof. For the most part, Thorne does not challenge
18 these findings. We typically accept as correct findings the
19 appellant has not challenged on appeal. See Sachan v. Huh
20 (In re Huh), 506 B.R. 257, 272 (9th Cir. BAP 2014) (en banc); see
21 also Affordable Housing Dev. Corp. v. Fresno, 433 F.3d 1182, 1193
22 (9th Cir. 2006) (stating that appellate court ordinarily will not
23 consider matters "not specifically and distinctly argued in
24 appellant's opening brief.").

25 The closest Thorne comes to challenging these findings is by
26 arguing that his representations regarding there being equity in
27 the collateral were mere opinions regarding the value of the real
28 property. In support of this argument, Thorne relies on a

1 statement taken out of context from Loomas v. Evans
2 (In re Evans), 181 B.R. 508, 512 (Bankr. S.D. Cal. 1995), which
3 provides as follows: "A representation of value generally is
4 merely a statement of opinion and, as such, it 'does not support
5 a fraud claim either under common law or under the Bankruptcy
6 Code.'" Id. (quoting Mortg. Guar. Ins. Corp. v. Pascucci
7 (In re Pascucci), 90 B.R. 438, 444 (Bankr. C.D. Cal. 1988)).
8 However, In re Evans does not support Thorne's argument.
9 In re Evans went on to hold that Evans' false statements
10 regarding the value of certain real property were sufficient to
11 support a claim for nondischargeability under § 523(a)(2)(A).
12 Id. at 512-13. In so holding, In re Evans explained that
13 valuation opinions are actionable fraud under California law and
14 under § 523(a)(2)(A) when the debtor makes such statements of
15 value knowing them to be false, or with reckless indifference to
16 the truth of those statements, for the purpose of inducing the
17 creditor to act in reliance upon those statements. Id.; see also
18 Rubin v. West (In re Rubin), 875 F.2d 755, 759 (9th Cir. 1989).
19 This is precisely what the bankruptcy court found happened here.
20 Consequently, we reject Thorne's argument that his statements
21 regarding equity in the collateral were non-actionable opinions
22 regarding value.

23 Thorne's more general argument regarding the bankruptcy
24 court's fraud findings - that the damages the Andres suffered
25 cannot be attributed to any fraud on his part - at bottom calls
26 into question the bankruptcy court's proximate cause findings.
27 Accordingly, we will look at the bankruptcy court's damages award
28 to consider whether those damages arose or flowed from Thorne's

1 fraud. In re Sabban, 384 B.R. at 7-8.

2 The bankruptcy court awarded the Andres \$487,796.23 in
3 compensatory damages, which consisted of all of the principal
4 owed and interest accrued on the Popescu loans (based on the
5 agreed-upon interest rate specified in the notes), minus a credit
6 for interest payments the Andres received.⁸ Permitting the
7 Andres to recover their contracted-for rate of interest is an
8 appropriate measure of their fraud damages under California law.
9 See Ambassador Hotel Co., Ltd. v. Wei-Chuan Inv., 189 F.3d 1017,
10 1032-33 (9th Cir. 1999) (stating that fraud plaintiff is entitled
11 under California law to recover benefit-of-the-bargain damages
12 based on defendant-fiduciary's fraud), partially overruled on
13 other grounds by, Dura Pharms., Inc. v. Broudo, 544 U.S. 336,
14 342-45 (2005); Roussos v. Michaelides (In re Roussos), 251 B.R.
15 86, 93 (9th Cir. BAP 2000) aff'd, 33 F. App'x 365 (9th Cir. 2002)
16 (same).

17 The bankruptcy court also awarded the Andres \$178,396.23,
18 which was a doubling of Shirley's damages from the Patton and
19 Eschinger loans pursuant to Cal. Welf. & Inst. Code § 15610.30
20
21
22

23 ⁸These damages included: (1) principal and interest on the
24 Fair Oaks loan in the amount of \$309,400 (\$180,000 principal,
25 plus 12% interest in the amount of \$156,600, less aggregate
26 interest payments received of \$27,200); (2) principal and
27 interest on the Patton loan in the amount of \$132,688 (\$75,000
28 principal, plus 13% interest in the amount of \$67,437.50, less
aggregate interest payments received of 9,749.60); and
(3) principal and interest on the Eschinger loan in the amount of
\$45,708 (\$25,000 principal, plus 14% interest in the amount of
\$23,625.03, less aggregate interest payments of \$2,916.70).

1 and Cal. Prob. Code § 859.⁹ The Welfare and Institutions Code
2 statute provides in relevant part:

3 (a) "Financial abuse" of an elder or dependent adult
4 occurs when a person or entity does any of the
5 following:

6 (1) Takes, secretes, appropriates, **obtains**, or retains
7 real or **personal property of an elder** or dependent
8 adult for a wrongful use or **with intent to defraud**, or
9 both.

10 Cal. Welf. & Inst. Code § 15610.30(a)(1) (emphasis added). In
11 turn, the Probate Code statute provides:

12 If a court finds that a person has in bad faith
13 wrongfully taken, concealed, or disposed of property
14 belonging to a conservatee, a minor, an elder, a
15 dependent adult, a trust, or the estate of a decedent,
16 or has **taken**, concealed, or disposed of the **property** by
17 the use of undue influence in bad faith or **through the**
18 **commission of elder or dependent adult financial abuse,**
19 **as defined in Section 15610.30 of the Welfare and**
20 **Institutions Code, the person shall be liable for twice**
21 **the value of the property recovered by an action under**
22 **this part.**

23 Cal. Prob. Code § 859 (emphasis added).

24 The bankruptcy court also awarded \$400,000 in punitive
25 damages based on California's exemplary damages statute, which
26 provides in relevant part:

27 (a) In an action for the breach of an obligation not
28 arising from contract, **where** it is proven by clear and
convincing evidence that **the defendant has been guilty**
of oppression, **fraud**, or malice, the plaintiff, in
addition to the actual damages, may recover damages for
the sake of example and by way of punishing the
defendant.

* * *

⁹The \$178,396.23 is the sum of \$132,688 in principal and
interest lost in connection with the Patton loan and the \$45,708
in principal and interest lost in connection with the Eschinger
loan.

1 c) As used in this section, the following definitions
2 shall apply:

3 * * *

4 (3) **"Fraud" means an intentional misrepresentation,**
5 **deceit, or concealment of a material fact known to the**
6 **defendant with the intention on the part of the**
7 **defendant of thereby depriving a person of property or**
8 **legal rights or otherwise causing injury.**

9 Cal. Civ. Code § 3294(a) & (c)(3) (emphasis added).

10 In light of the bankruptcy court's fraud findings and the
11 applicable California statutes, the above referenced types of
12 damages patently arose or flowed from Thorne's fraud. See
13 In re Sabban, 600 F.3d at 1223; see also Cohen, 523 U.S. at 216
14 (affirming bankruptcy court judgment excepting from discharge
15 punitive damages premised on fraud). More to the point, as to
16 each of these types of damages, we cannot say that the bankruptcy
17 court's proximate cause findings were illogical, implausible or
18 without support in the record. See In re Retz, 606 F.3d at 1196.

19 The remaining damages that the bankruptcy court awarded
20 consisted of two distinct sums of money that the court ordered
21 Thorne to disgorge on two distinct grounds. The bankruptcy
22 court's disgorgement awards necessitate a closer examination in
23 order to ascertain whether they were premised on Thorne's fraud.
24 We will separately consider each sum the court ordered disgorged.

25 The first sum the court ordered Thorne to disgorge consisted
26 of loan origination fees in the aggregate amount of \$20,400,
27 which Thorne received for brokering the Fair Oaks, Patton and
28 Eschinger loans. While the court did not explicitly state the
basis for ordering disgorgement of the loan origination fees, our
review of the record convinces us that the bankruptcy court

1 adopted the grounds for disgorgement posited by the Andres in
2 their trial brief, which was premised on Thorne's fraud. As the
3 Andres stated in their trial brief:

4 Thorne only received those fees because he convinced
5 Shirley and Joseph to provide the loans. If Shirley
6 and Joseph had known all the material facts about those
7 loans, as Thorne was obligated to tell them, e.g. that
the properties' liens exceeded their value, and that
their value had not been verified, then they would not
have provided those loans.

8 Plf. Tr. Brf. (Feb. 4, 2014) at 27:14-18.

9 The legal authority cited by the Andres also implicates
10 Thorne's fraud. Of particular note is the Andres' citation to
11 Ward v. Taggart, 51 Cal. 2d 736 (1959). In Ward, a real estate
12 broker named Taggart defrauded the plaintiffs during the course
13 of a real estate sales transaction and thereby obtained roughly
14 \$72,000 in profit. Id. at 739-40. On appeal from a judgment in
15 favor of the plaintiffs, the California Supreme Court affirmed
16 the \$72,000 award against Taggart. In so ruling, the Ward court
17 noted that Taggart did not have any fiduciary or even agency
18 relationship with the plaintiffs. Id. at 741. Nonetheless,
19 based on Taggart's fraud, the Ward court held that Taggart's
20 disgorgement of the \$72,000 in profit could be affirmed under
21 unjust enrichment principles. Id. at 741-42. In so holding,
22 Ward stated:

23 Even though Taggart [sic] was not plaintiff's agent,
24 the public policy of this state does not permit one to
25 "take advantage of his own wrong." [A]nd the law
26 provides a quasi-contractual remedy to prevent one from
27 being unjustly enriched at the expense of another.
28 Section 2224 of the Civil Code provides that one "who
gains a thing by fraud * * * or other wrongful act, is
unless he has some other and better right thereto, an
involuntary trustee of the thing gained, for the
benefit of the person **who would otherwise have had it.**"
As a real estate broker, Taggart had the duty to be

1 honest and truthful in his dealings. The evidence is
2 clearly sufficient to support a finding that Taggart
3 violated this duty. Through fraudulent
4 misrepresentations he received money that plaintiffs
5 would otherwise have had. Thus, Taggart is an
6 involuntary trustee for the benefit of plaintiffs on
7 the secret profit of \$1,000 per acre that he made from
8 his dealings with them.

9 Id. at 741. (footnote and citations omitted) (emphasis added).

10 On the one hand, Ward establishes that at least some of the
11 loan origination fees flowed from Thorne's fraud and could be
12 ordered disgorged under California law. On the other hand, the
13 emphasized portions of the quote from Ward also establish an
14 inherent limitation on that disgorgement. To the extent the
15 Andres had no entitlement or claim to the origination fees, there
16 was no basis for the bankruptcy court to award the fees to the
17 Andres. In the parlance of Ward, Thorne in that instance would
18 have had "an other and better right thereto" and the Andres would
19 not "otherwise have had [the fees]."

20 There is nothing in the record suggesting any grounds for
21 awarding the Andres the full amount of the loan originations fees
22 for all three loans, which the Andres only partially funded.
23 Instead, the Andres' entitlement to the fees necessarily was
24 limited to a pro-rata share based on the proportion of their
25 funding of the loans in relation to the total amount loaned by
26 all of the loan participants. The Andres' pro-rata share of the
27 fees should have been \$6,056.92.¹⁰ Consequently, the bankruptcy
28

¹⁰ Shirley and Joseph's pro-rata share of the origination
fees from the Fair Oaks loan (\$2,057.04), plus Shirley's pro-rata
share of the origination fees from the Patton loan (\$2,999.88),
plus Shirley's pro-rata share of the origination fees from the

(continued...)

1 court erred to the extent of \$14,343.08 - the extent to which its
2 judgment included an award based on the origination fees in
3 excess of \$6,056.92.¹¹

4 The bankruptcy court also ordered Thorne to disgorge
5 \$95,417 in loan payments he received from Popescu. However, the
6 basis for disgorgement of the \$95,417 was completely different
7 than the basis for disgorgement of the loan origination fees.
8 The Andres asserted that Thorne did not adequately account for
9 these loan payments. According to the Andres, he should have
10 paid the full \$95,417 to them, or at least adequately explained
11 what happened to the rest of these payments. The Andres
12 calculated the loan payments to be disgorged as follows:

13 [Popescu's payments to Thorne
14 for] Fair Oaks Loan: \$94,500
15 Paid to Shirley: \$18,850
16 Paid to Joseph: \$7,800
17 Unaccounted for: \$67,850

18 [Popescu's payments to Thorne
19 for] Patton Avenue Loan: \$16,900
20 Paid to Shirley: \$9,749.60
21 Unaccounted for: \$7,150.40

22 [Popescu's payments to Thorne
23 for] Eschinger Loan: \$23,333.30
24 Paid to Shirley: \$2,916.70
25 Unaccounted for: \$20,416.60
26 **Total Unaccounted For Funds: \$95,417**

27 Plf. Tr. Brf. (Feb. 4, 2014) at 26:22-27:6. The evidence at
28

25 ¹⁰ (...continued)
26 Eschinger loan (\$1,000).

27 ¹¹Aggregate origination fees from the three loan
28 transactions (\$20,400), less the aggregate amount of Shirley and
Joseph's pro-rata share (\$6,056.92).

1 trial supported the Andres calculations.¹²

2 According to the bankruptcy court, disgorgement of the
3 \$95,417 was appropriate because Thorne failed to provide
4 contemporaneous regular accountings to the Andres, commingled
5 funds, and never adequately explained the disposition of the
6 \$95,417. In short, the record establishes that the court based
7 the disgorgement of the \$95,417 on Thorne's alleged
8 misappropriation or failure to adequately account for Popescu's
9 loan payments, rather than on Thorne's fraud. Indeed, on this
10 record, we don't see any evidence that would have enabled the
11 court to correctly find that Thorne's liability for the \$95,417
12 flowed from Thorne's fraud.

13 As a result, § 523(a)(2)(A) was not appropriate grounds for
14 the nondischargeability of the \$95,417 in disgorged loan payments
15 because Thorne's fraud did not proximately cause that liability.
16 Thus, we must consider whether the nondischargeability of the
17 \$95,417 was correctly founded on § 523(a)(4), which was the only
18 other grounds for nondischargeability the court relied upon.¹³

19 Under § 523(a)(4), debts for fraud or defalcation while
20

21 ¹²Thorne offered a summary of loan payments as an exhibit at
22 trial, and the summary was admitted into evidence without
23 objection. With one minor exception - a \$513 payment to Joseph -
24 the summary is consistent with the Andres' calculations, at least
25 with respect to the amount of payments Thorne received from
26 Popsecu and the amount of payments Thorne disbursed to the
27 Andres.

26 ¹³Because the other aspects of the bankruptcy court's
27 nondischargeability judgment were adequately supported by the
28 court's § 523(a)(2)(A) ruling, we decline to consider § 523(a)(4)
except as necessary to determine whether there were adequate
nondischargeability grounds for the \$95,417.

1 acting in a fiduciary capacity are nondischargeable. While the
2 terms "defalcation" and "fiduciary capacity" might have broader
3 meanings under nonbankruptcy law, these terms are defined
4 narrowly for nondischargeability purposes. See Bullock v.
5 BankChampaign, N.A., 133 S.Ct. 1754, 1759 (2013) (holding that
6 defalcation as used in § 523(a)(4) requires a showing of bad
7 faith, moral turpitude, or other immoral conduct, or a culpable
8 state of mind equivalent to intentional wrongdoing or criminally
9 reckless misconduct); Cal-Micro, Inc. v. Cantrell
10 (In re Cantrell), 329 F.3d 1119, 1125 (9th Cir. 2003) (holding
11 that the broad definition of a fiduciary - anyone in whom a
12 special trust and confidence has been reposed - does not apply to
13 § 523(a)(4)). The narrow construction of these terms is
14 consistent with the dictate that exceptions to discharge should
15 be narrowly construed. Snoke v. Riso (In re Riso), 978 F.2d
16 1151, 1154 (9th Cir. 1992); see also Bullock, 133 S. Ct. at
17 1760-61 (stating that exceptions to discharge "should be confined
18 to those plainly expressed.").

19 The applicable, narrow definition of the term "fiduciary
20 capacity" requires the creditor to demonstrate the existence of
21 an express or technical trust that was created before and without
22 reference to the wrongdoing from which the liability arose.
23 In re Cantrell, 329 F.3d at 1125. Additionally, when the
24 § 523(a)(4) claim rests on a trust imposed by statute, the
25 statute must clearly identify both the fiduciary's duties and the
26 trust's property. Honkanen v. Hopper (In re Honkanen), 446 B.R.
27 373, 379 (9th Cir. BAP 2011); Evans v. Pollard (In re Evans),
28 161 B.R. 474, 477-78 (9th Cir. BAP 1993).

1 The \$95,417 in loan payments that the bankruptcy court here
2 ordered Thorne to disgorge were subject to a statutory trust
3 pursuant to Cal. Bus. & Prof. Code § 10145, before and without
4 reference to Thorne's alleged misappropriation and/or failure to
5 account for these funds. Generally speaking, Cal. Bus. & Prof.
6 Code § 10145 requires real estate brokers, when they accept funds
7 belonging to others in connection with a real estate loan
8 transaction, to immediately do one of the following: (1) place
9 them in escrow, (2) place them in the hands of their principal,
10 or (3) place them in a trust fund account maintained by the
11 broker. Cal. Bus. & Prof. Code § 10145; see also Cal. Bus. &
12 Prof. Code § 10131.

13 In addition, the statute describes other duties of the
14 fiduciary that arise when he or she accepts such funds. For
15 instance, subsection (g) of the statute requires the broker to
16 "maintain a separate record of the receipt and disposition" of
17 such funds. Cal. Bus. & Prof. Code § 10145(g). Both the Ninth
18 Circuit Court of Appeals and this panel have opined that this
19 statute creates a statutory trust and imposes fiduciary
20 obligations on real estate brokers of the type covered by
21 § 523(a)(4). See Otto v. Niles (In re Niles), 106 F.3d 1456,
22 1459 (9th Cir. 1997); In re Evans, 161 B.R. at 478.

23 Here, the bankruptcy court faulted Thorne for failing to
24 provide the Andres with routine periodic accountings, commingling
25 Popescu's loan payments with other funds, and never adequately
26 explaining the ultimate disposition of the \$95,417. We have no
27 issue with the first two findings, but we are perplexed by the
28 third finding, on which the nondischargeability of Thorne's

1 disgorgement liability necessarily hinges. Unless there was some
2 amount of the \$95,417 that Thorne either misappropriated or never
3 adequately explained how it was disposed of, we cannot agree with
4 the bankruptcy court that Thorne's disgorgement liability was
5 nondischargeable under § 523(a)(4). See Blyler, et al. v.
6 Hemmeter (In re Hemmeter), 242 F.3d 1186, 1190-91 (9th Cir.
7 2001).

8 While not on all fours, In re Hemmeter is instructive. In
9 In re Hemmeter, pension plan participants commenced a
10 nondischargeability action against the debtor, alleging that
11 losses suffered by the plans were nondischargeable under
12 § 523(a)(4). Id. at 1189. The employee plan participants
13 further alleged that the plan losses resulted from the debtor's
14 investment of plan funds in the stock of the employer company
15 that had established the pension plans. Id. at 1191. In
16 affirming the bankruptcy court's Civil Rule 12(b)(6) dismissal,
17 In re Hemmeter explained that the plans specifically authorized
18 plan fiduciaries to invest plan funds in the employer company's
19 stock. Id. Thus, In re Hemmeter stands for the proposition that
20 § 523(a)(4) is not implicated when the fiduciary uses trust funds
21 in a manner the trust explicitly authorized. Id.; see also
22 Restatement (Third) of Trusts § 78, comments c(2) and c(3) (2007)
23 (permitting trustee to engage in self-dealing transactions or
24 other prohibited transactions when the trust terms authorize such
25 transactions or the trust beneficiaries consent to such

1 transactions).¹⁴

2 In this appeal, there is evidence in the record that the
3 Andres consented to the disposition of the \$95,417 in the manner
4 Thorne actually disbursed those funds. The notes themselves
5 (which the Andres approved as to form) stated that the Andres
6 held only partial ownership interests in the notes and thereby
7 indicated that the Andres held only a pro rata right to loan
8 payments equal to the percentage of their partial ownership
9 interests. In turn, the escrow instructions for the Patton loan
10 transaction and the Eschinger loan transaction explicitly
11 referenced pro rata distribution of loan/interest payments.¹⁵ As
12 for the Fair Oaks loan, in a fax letter to the escrow company
13 dated May 7, 2007, (roughly five months after the closing of the
14 Fair Oaks loan transaction) Shirley expressed her general
15 satisfaction with the manner in which Thorne had been

17 ¹⁴In interpreting California trust law, California courts
18 generally follow the Restatement (Third) of Trusts. In re Estate
19 of Giralдин, 55 Cal. 4th 1058, 1072 (2012); see also Uzyel v.
20 Kadisha, 188 Cal. App. 4th 866, 905 (2010) (following § 78 of the
restatement).

21 ¹⁵At trial, Shirley's counsel offered the Patton escrow
22 instructions into evidence as plaintiffs' exhibit 23, and the
23 bankruptcy court admitted those instructions into evidence
24 without objection and for all purposes. Nonetheless, Shirley
25 later claimed during her testimony that, even though her
26 signature on the escrow instructions looks like her signature,
27 she did not recall seeing or signing the Patton escrow
28 instructions, and she suspected that her signature on that
document was a forgery. Even if we assume the truth of Shirley's
forgery claim, the Patton escrow instructions are cumulative of
the other evidence referenced above establishing that Shirley
knew that she held only a partial ownership interest in the Fair
Oaks, Patton and Eschinger loans and that she only expected a pro
rata share of interest payments made on those loans.

1 distributing the Fair Oaks loan payments. Indeed, in this
2 letter, Shirley indicates that she and Joseph expected (and were
3 receiving) a specific amount - \$1,250 for her and \$550 for Joseph
4 - as their respective shares of the monthly Fair Oaks loan
5 payments.

6 Moreover, we have found no evidence in the record indicating
7 that, before litigation between the parties commenced, either
8 Shirley or Joseph were entitled to or claimed a right to monthly
9 loan payments in excess of the pro rata amounts. We understand
10 that the Andres are now arguing that, in light of Thorne's
11 fiduciary status, he had a duty to give the Andres' interests
12 complete and absolute priority over his own self-interest and,
13 hence, he should have paid to them the entire \$95,417 -- the
14 entire amount of Popescu's payments on these three loans.
15 However, we reject this argument as meritless because, as set
16 forth above, the evidence in the record establishes that the
17 Andres consented to the pro rata distribution of these loan
18 payments, and there is no contrary evidence.

19 We also understand the Andres' alternate argument: that
20 Thorne "must have received" additional payments from Popescu for
21 the Fair Oaks, Patton and Eschinger loans, and because Thorne (in
22 breach of his fiduciary duties) never disclosed any loan payments
23 beyond the \$95,417, the Andres at a minimum should be entitled to
24 recover the entire \$95,417. However, there is a fatal defect in
25 this argument. It presumes, without any supporting evidence,
26 that Thorne actually received additional payments from Popescu
27 for the Fair Oaks, Patton and Eschinger loans. The evidence in
28 the record only supports the existence of the \$95,417 in payments

1 on those loans. There is no evidence in the record of any
2 additional payments on those specific loans above and beyond the
3 \$95,417. Consequently, the Andres' argument regarding additional
4 loan payments (in the absence of any evidence of such payments)
5 runs afoul of In re Niles, 106 F.3d at 1462, which in relevant
6 part held that a creditor asserting a claim under § 523(a)(4) for
7 misappropriation or failure to account for trust funds has the
8 burden of proof to establish in the first instance that such
9 funds were entrusted to the debtor. As stated in In re Niles:

10 We conclude that Otto satisfied her burden of proof by
11 establishing that Niles was a fiduciary to whom funds
12 had been entrusted. The burden then shifted to Niles
13 to account fully for all funds received by her for
14 Otto's benefit, by persuading the trier of fact that
15 she complied with her fiduciary duties with respect to
16 all questioned transactions.

17 Id.

18 In sum, neither the law nor the evidence in the record
19 supports the bankruptcy court's ruling that Thorne's disgorgement
20 liability for the \$95,417 should be excepted from discharge under
21 § 523(a)(4). We therefore must REVERSE the bankruptcy court's
22 nondischargeability ruling with respect to most of the \$95,417
23 because neither § 523(a)(2)(A) nor § 523(a)(4) adequately support
24 that ruling. We say "most of the \$95,417" because there is one
25 minor exception to this reversal. Thorne admitted in his summary
26 of payments that he was attempting to give himself credit for
27 \$513.33 paid to Joseph by the escrow company rather than by him.
28 Thorne has not offered any reason why he should receive credit
for a payment from escrow when the proper subject of the
accounting was amounts **he** received and amounts **he** disbursed for
the Fair Oaks, Patton and Eschinger loans. Therefore, in the

1 final analysis, our partial reversal effectively reduces the
2 amount of the bankruptcy court's nondischargeability judgment by
3 \$94,903.67 (\$95,417, less \$513.33).

4 There is another \$5,000 that Thorne received from Popescu in
5 or around September 2008. The way Thorne received and disbursed
6 the \$5,000 is problematic. By that point in time, Popescu
7 apparently was in default on most or all of his loans. According
8 to Thorne's testimony and a letter Thorne wrote to a group of
9 between eight and ten "investors" dated September 22, 2008,
10 Popescu paid Thorne the \$5,000 as "a sign of good faith" to his
11 lenders that he was not going to walk away from his debt
12 obligations. Thorne in turn parceled out the \$5,000 between
13 himself and Popescu's other lenders supposedly based on how much
14 in aggregate each lender lent, rather than attributing the \$5,000
15 to any particular loan. Thorne himself retained a little less
16 than half of the \$5,000 and the Andres received \$100 each.

17 If Thorne had disbursed the \$95,417 in this manner, our
18 holding regarding the \$95,417 very well might have been
19 different. However, there is no indication that the Andres
20 included the \$5,000 in their calculation of the \$95,417 Popescu
21 paid on the Fair Oaks, Patton and Eshinger loans. Nor is there
22 any such indication in the documentary evidence the parties
23 submitted. More importantly, there is no indication that the
24 bankruptcy court made any rulings regarding the \$5,000. The
25 bankruptcy court's ruling applied only to the \$95,417, as
26 calculated by the Andres. If the Andres desired additional or
27 amended findings, or an increase in the nondischargeability
28 judgment by \$5,000, they could have requested those items from

1 the bankruptcy court or could have filed their own appeal.
2 Because they did not do so, the bankruptcy court's treatment (or
3 non-treatment) of the \$5,000 is beyond the scope of this appeal.

4 The only other argument we must address concerns Thorne's
5 statute of limitations defense. Thorne claimed in both the
6 bankruptcy court and in his opening appeal brief that the Andres
7 had knowledge of the facts underlying Thorne's fraud in 2007, so
8 the applicable three-year limitations period for fraud actions
9 ran before the Andres filed either their 2011 state court action
10 or their 2013 nondischargeability action.

11 Thorne relies upon the three year limitations period for
12 fraud set forth in Cal. Civ. Proc. Code § 338(d), but this
13 statute also provides that a fraud cause of action does not
14 accrue until the aggrieved party discovers the facts constituting
15 the fraud. Thorne claims that, in 2007, the Andres had actual
16 knowledge of sufficient facts for the fraud cause of action to
17 accrue at that time. However, the bankruptcy court disagreed
18 with Thorne on this point. The court specifically found that the
19 Andres did not discover the facts constituting the fraud until
20 sometime in 2011, after Shirley visited the county recorder's
21 office and learned that some or all of her real property
22 collateral had been lost to foreclosure.

23 Thorne simply has not persuaded us that the bankruptcy
24 court's findings regarding the Andres' discovery of the fraud
25 were illogical, implausible or without support in the record.
26 Accordingly, Thorne's statute of limitations argument fails
27 because we have no grounds to overturn the bankruptcy court's
28 discovery-related findings.

1 **CONCLUSION**

2 For the reasons set forth above, we AFFIRM the bankruptcy
3 court's nondischargeability judgment, except for the following:
4 (1) the portion of the judgment related to \$94,903.67 in
5 allegedly misappropriated loan payments; and (2) the portion of
6 the judgment related to \$14,343.08 in loan origination fees,
7 which were beyond the Andres' proportional share. As to those
8 limited portions of the judgment, we REVERSE.

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12 Concurrence begins on next page.
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1 JURY, Bankruptcy Judge, concurring:

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3 I concur with the result reached by the majority of the
4 Panel in affirming the liability for most of the awarded damages
5 under § 523(a) (2) (A). I join in their decision that all the
6 damages awarded by the bankruptcy judge except for the sum of
7 \$95,417 are proper. I also agree that the \$95,417 sum may not be
8 awarded as damages under either § 523(a) (2) (A) or (a) (4).
9 However, the bankruptcy court awarded all the other damages under
10 both § 523(a) (2) (A) and (a) (4). My colleagues have chosen to
11 affirm under § 523(a) (2) (A) and therefore not address the
12 § 523(a) (4) conclusions at all (see footnote 13). Because I
13 disagree with the analysis by which the bankruptcy court reached
14 § 523(a) (4) liability, I write separately on that issue.

15 Our case law is clear that a mere breach of fiduciary duty,
16 even if the breach is tortious and intentional as now required by
17 Bullock v. BankChampaign, N.A., 133 S. Ct. 1754, 1759 (2013), is
18 insufficient to establish liability under § 523(a) (4). "In
19 general, a statutory fiduciary is considered a fiduciary for the
20 purposes of § 523(a) (4) if the statute: (1) defines the trust res;
21 (2) identifies the fiduciary's fund management duties; and
22 (3) imposes obligations on the fiduciary prior to the alleged
23 wrongdoing." Blyer v. Hemmeter (In re Hemmeter), 242 F.3d 1186,
24 1190 (9th Cir. 2001). Moreover, to fit within § 523(a) (4), the
25 fiduciary relationship must be one arising from an express or
26 technical trust that was imposed before the wrongdoing occurred.
27 Honkanen v. Hopper (In re Honkanen), 446 B.R. 373, 379 (9th Cir.
28 BAP 2011). Under California law, an express trust requires five

1 elements: (1) present intent to create a trust, (2) trustee,
2 (3) trust property, (4) a proper legal purpose, and (5) a
3 beneficiary. Id. at n. 6. A technical trust under California
4 law is one "arising from the relation of attorney, executor, or
5 guardian, and not to debts due by a bankrupt in the character of
6 an agent, factor, commission merchant, and the like." Id. at n.7
7 (citing Royal Indemn. Co. v. Sherman, 124 Cal.App.2d 512, 269
8 P.2d 123, 125 (Cal. Ct. App. (1954))).

9 In order for the bankruptcy court here to find liability for
10 the loans made by the Andres to Popescu based on § 523(a)(4), it
11 needed to not only find a breach of a fiduciary duty that met the
12 intentional wrongdoing standard established by Bullock, something
13 the court went at great lengths to do¹, but also to find an
14 express or technical trust with a res. This the court did not
15 do. Instead, it elevated the fiduciary duty of a licensed broker
16 to his clients to a level to create § 523(a)(4) liability, in
17 direct contradiction of the holding of Honkanen, where this Panel
18 held that the fiduciary relationship of a real estate licensee
19 was insufficient to create such liability because there was no
20 express or statutory trust and no trust res. In re Honkanen,
21 446 B.R. at 381.

22 At the conclusion of the hearing where the court announced
23

24 ¹"Under Section 523(a)(4), the fiduciary nature of the loan
25 broker that was created in 2006 and the hard money loans is a
26 palatable and important fiduciary relationship. It's a fiduciary
27 relationship of a professional. It's a fiduciary relationship
28 that was violated in far more dramatic and material manners than
the rather technical violation that a non-professional fiduciary
made in [Bullock] that caused intentional conduct." See Hr'g Tr.
27:25-28:7 (March 21, 2014).

1 its oral ruling, the court was asked by the attorney for Thorne
2 "what is the res under 523(a)(4)?" The court responded that the
3 res was all of the loan funds, "all funds involved in the entire
4 loan transactions."² The court made no finding of a trust
5 relationship. It identified no property entrusted to Thorne by
6 the Andres which were misused or not accounted for by Thorne. In
7 sum, it did not find a trust res.

8 Without a trust res, there is no § 523(a)(4) liability. The
9 record does not establish this alternative ground for
10 nondischargeable liability.

28 ²Hr'g Tr. 32:7-8 (March 21, 2014).