

OCT 13 2015

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

NOT FOR PUBLICATION

**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT**

5	In re:)	BAP No. CC-15-1059-DTaKu
)	
6	SEAN MICHAEL KANTER and)	Bk. No. 12-10689-PC
	KRISTA MARIANNE KANTER,)	
7)	Adv. Proc. No. 13-01114-PC
	Debtors.)	
8)	
9	SUZANNE MARTIN ETIHIRI,)	
)	
10	Appellant,)	
)	
11	v.)	M E M O R A N D U M¹
)	
12	SEAN MICHAEL KANTER;)	
	KRISTA MARIANNE KANTER,)	
13)	
	Appellees.)	
14)	

Argued and Submitted on September 24, 2015
at Malibu, California

Filed - October 13, 2015

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

Honorable Peter Carroll, Bankruptcy Judge, Presiding

Appearances: Andrew Edward Smyth appeared for Appellant Suzanne
Martin Etihiri; Larry Webb appeared for Appellees
Sean Michael Kanter and Krista Marianne Kanter.

¹ This disposition is not appropriate for publication.
Although it may be cited for whatever persuasive value it may have
(see Fed. R. App. P. 32.1), it has no precedential value. See 9th
Cir. BAP Rule 8024-1.

1 Before: DUNN, TAYLOR, and KURTZ, Bankruptcy Judges.

2 Following trial in an adversary proceeding which sought both
3 the revocation of chapter 7² debtors' discharge and a determination
4 that a debt owed by the debtors was nondischargeable, the bankruptcy
5 court ruled that the plaintiff had failed to meet her burden of
6 proof on each of four claims for relief. The bankruptcy court
7 entered judgment of dismissal in favor of the debtors. The
8 plaintiff appealed the bankruptcy court's judgment only as to the
9 claim for relief that the debt was excepted from discharge pursuant
10 to § 523(a)(2)(A).

11 For the reasons stated below, we AFFIRM the bankruptcy court's
12 judgment dismissing the adversary proceeding.

13 I. FACTUAL BACKGROUND

14 Sean Michael Kanter and Krista Marianne Kanter filed a
15 chapter 7 petition on February 21, 2012. After the chapter 7
16 trustee filed a report of no distribution, the Kanters' discharge
17 was entered and their bankruptcy case was closed on May 29, 2012.

18 On December 13, 2012, Suzanne Martin ("Ms. Martin"), fka
19 Suzanne Martin Etihiri, filed a complaint against the Kanters in the
20 Superior Court of Santa Barbara, California ("State Court"). In
21 January 2013, the Kanters reopened their bankruptcy case for the
22 purpose of amending their schedules to include Ms. Martin's claim,

23
24 ² Unless specified otherwise, all chapter and section
25 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
26 all "Rule" references are to the Federal Rules of Bankruptcy
Procedure, Rules 1001-9037. All "Civil Rule" references are to the
Federal Rules of Civil Procedure.

1 which had been omitted from the original bankruptcy documents. The
2 amended schedules were filed in February 2013, and the bankruptcy
3 case was reclosed.

4 On July 1, 2013, Ms. Martin filed an adversary proceeding
5 seeking a determination that the Kanters owed her a debt that was
6 nondischargeable pursuant to § 523(a)(2)(A).³ The underlying facts
7 of the dispute are as follow.

8 In the spring of 2007, the Kanters invested approximately
9 \$175,000 to capitalize a business named Bujeco Development
10 Corporation, S.A. ("Bujeco"), which was formed for the purpose of
11 developing Pacifica Village, a real estate condominium development
12 in Costa Rica. Part of the funds were used to purchase the land to
13 be developed. A loan was taken out to finance the balance of the
14 purchase price. Title to the property was placed in Krista Kanter's
15 name, as apparently was required under Costa Rican law.

16 Krista Kanter was president of Bujeco and a 40% shareholder.
17 Sean Kanter was neither an officer nor a shareholder of Bujeco.
18 Jonathan Glazer, who held a 20% interest in Bujeco through sweat
19 equity rather than a capital contribution, is the other shareholder
20 relevant to the litigation.⁴ Mr. Glazer also served as Bujeco's
21

22 ³ The complaint also alleged claims for relief under
23 § 727(d)(1) (seeking to revoke the discharge entered in the case on
24 the basis that it was obtained by fraud), and §§ 523(a)(4) and
25 (a)(6). Ms. Martin has appealed only the dismissal of the
26 § 523(a)(2)(A) claim.

⁴ The other shareholders were Tomer Vardi and Andreas
(continued...)

1 secretary.

2 Ms. Martin found information about the Pacifica Village
3 development online and, also online, requested additional
4 information about the project. Her questions were answered by a
5 person named Melissa, who invited Ms. Martin to visit the project in
6 person; and Ms. Martin did so.⁵

7 Ultimately, Ms. Martin decided to purchase a condominium unit
8 to be constructed in the Pacifica Village development. The purchase
9 and sale agreement ("Purchase Agreement") was signed April 19, 2008
10 by Ms. Martin as buyer and on June 9, 2008, by Ms. Kanter as seller.

11 The Purchase Agreement contained the schedule for Ms. Martin to
12 make deposits in connection with the purchase. Article Four of the
13 Purchase Agreement provided:

14 All and every deposit made by **Buyer**, according to the
15 description above, will be made to and held in an Escrow
16 Account. The Escrow Agent holding the money will be CTCA
17 Escrow, Limitada (CTCA), LandAmerica-Commonwealth Title of
18 Central America and COMMONWEALTH LAND TITLE INSURANCE
19 COMPANY. A copy of the escrow agreement is attached
20 hereto, and is part of the Exhibit C of this agreement.
21 The Exhibit C is signed and accepted by The Parties at The
22 Effective Date.⁶

19

20

⁴(...continued)

21

Marchevsky, who together held a 40% interest in Bujeco.

22

⁵ Ms. Martin testified she did not recall when during the
23 process of entering into the Purchase Agreement and making deposits
24 she visited the property.

24

25

⁶ The Land America escrow agreement was Ms. Martin's Exhibit 9
25 in the proceedings in the bankruptcy court. However, no exhibits to
26 the Purchase Agreement, including Exhibit C which is the escrow
agreement, are contained in the excerpts of record submitted by

1 (Emphasis in original.)

2 The Purchase Agreement required Ms. Martin to make her initial
3 deposit ("Initial Deposit") in the amount of \$5,000 by the Effective
4 Date, and subsequent deposits as follow: 30% of the purchase price
5 by the sixteenth business day after the Effective Date, 20% of the
6 purchase price within ten business days after the seller received
7 construction permits from the municipality, 30% of the purchase
8 price when the unit Ms. Martin was purchasing had its "roof up," and
9 the remaining 20% of the purchase price, presumably when the unit
10 had been completed.⁷

11 Ms. Martin made the Initial Deposit to the escrow account on a
12 date not specified in the record.⁸ Shortly thereafter, Ms. Martin
13 contacted Mr. Glazer for the purpose of obtaining a change to the
14 deposit schedule.⁹

15
16

⁶(...continued)
17 Ms. Martin.

18 ⁷ The Effective Date is a term defined in the first sentence
19 of the Purchase Agreement as the date the Purchase Agreement is
20 entered into. Notably, the Purchase Agreement form specifies the
21 year of the Effective Date as 2007, but the blanks for the month and
22 day were not filled in.

23 ⁸ Exhibit 2 in the proceedings in the bankruptcy court was
24 identified as "Confirmation of Domestic Wire Transfer-Proof of
25 Payment \$5,040." Again, this exhibit is not contained in the
26 excerpts of record submitted by Ms. Martin.

⁹ Article Twelve of the Purchase Agreement provided that
communications with respect to the Purchase Agreement were to be
made in writing and hand-delivered to the attention of either
Mr. Glazer or Mr. Marchevsky.

1 A revised purchase and sale agreement ("Revised Purchase
2 Agreement") was prepared with an Effective Date of July 17, 2008.
3 Neither Ms. Martin nor anyone on behalf of the seller signed the
4 Revised Purchase Agreement.

5 Under the Revised Purchase Agreement, the purchase price was
6 decreased slightly from \$149,000 to \$147,500. Ms. Martin was
7 required to deposit 30% of the revised purchase price on the
8 Effective Date of the Revised Purchase Agreement. The Revised
9 Purchase Agreement provided that "[a]ll and every deposit made by
10 Buyer, according to the description above, will be made to Bejuco
11 Development S.A. Payment can be done to the following bank
12 accounts. . . ." The Revised Purchase Agreement provided two
13 alternative bank accounts into which the deposits could be made.
14 The first was to an account in the name of Magma Software S.A.; the
15 second was to an account in Mr. Glazer's name.

16 Ms. Martin deposited \$44,700 ("Second Deposit") to Mr. Glazer's
17 account by wire transfer which posted on September 9, 2008.
18 Ms. Martin testified that she made the Second Deposit only after she
19 had received an assurance, in the form of an e-mail message dated
20 August 3, 2008, from Mr. Glazer stating that all deposits Ms. Martin
21 made toward the purchase of the condominium unit were fully
22 refundable if the developer did not complete the project.

23 The Kanters returned to the United States sometime in the fall
24 of 2009, and sometime in the spring of 2010, Ms. Kanter divested
25 herself of any interest in the Pacifica Village development by
26 selling her interest in Bejuco to Tomer Vardi for \$25,000.

1 Whether the bankruptcy court erred when it determined that
2 Ms. Martin had failed to carry her burden of proof on her claim for
3 relief under § 523(a)(2)(A).

4 IV. STANDARDS OF REVIEW

5 We review our own jurisdiction, including questions of
6 mootness, de novo. Silver Sage Partners, Ltd. v. City of Desert Hot
7 Springs (In re City of Desert Hot Springs), 339 F.3d 782, 787 (9th
8 Cir. 2003); Ellis v. Yu (In re Ellis), 523 B.R. 673, 677 (9th Cir.
9 BAP 2014).

10 Whether a claim is excepted from discharge presents mixed
11 issues of law and fact, which we review de novo. Diamond v. Kolcum
12 (In re Diamond), 285 F.3d 822, 826 (9th Cir. 2002) (citing Peklar v.
13 Ikerd (In re Peklar), 260 F.3d 1035, 1037 (9th Cir. 2001)). See
14 also Honkanen v. Hopper (In re Honkanen), 446 B.R. 373, 382 (9th
15 Cir. BAP 2011). Thus, in reviewing a bankruptcy court's
16 determination of an exception to discharge claim, we review its
17 findings of fact for clear error and its conclusions of law de novo.
18 Oney v. Weinberg (In re Weinberg), 410 B.R. 19, 28 (9th Cir. BAP
19 2009). As relevant in this appeal, whether there has been proof of
20 an essential element of § 523(a)(2)(A) is a factual determination
21 reviewed for clear error. Am. Express Travel Related Servs. Co.,
22 Inc. v. Vinhnee (In re Vee Vinhnee), 336 B.R. 437, 442-43 (9th Cir.
23 BAP 2005).

24 "Clearly erroneous review is significantly deferential,
25 requiring that the appellate court accept the [trial] court's
26 findings absent a definite and firm conviction that a mistake has

1 been made." United States v. Syrax, 235 F.3d 422, 427 (9th Cir.
2 2000). The bankruptcy court's choice among multiple plausible views
3 of the evidence cannot be clear error. United States v. Elliott,
4 322 F.3d 710, 714 (9th Cir. 2003). The deference owed to the
5 bankruptcy court is heightened where its choice is based on the
6 credibility of live witnesses. Rule 8013. A factual finding is
7 clearly erroneous, however, if, after examining the evidence, the
8 reviewing court "is left with the definite and firm conviction that
9 a mistake has been committed." Anderson v. City of Bessemer City,
10 NC, 470 U.S. 564, 573 (1985) (internal citation omitted).

11 We may affirm the bankruptcy court's orders on any basis
12 supported by the record. See ASARCO, LLC v. Union Pac. R. Co.,
13 765 F.3d 999, 1004 (9th Cir. 2014); Shanks v. Dressel, 540 F.3d
14 1082, 1086 (9th Cir. 2008).

15 V. DISCUSSION

16 A. Section 523(a)(3)(B).

17 Our review of this appeal begins with an evaluation as to
18 whether the bankruptcy court erred in determining that Ms. Martin's
19 § 523(a)(2)(A) claim for relief should be dismissed as untimely.

20 It is undisputed that the deadline for bringing a complaint to
21 determine if a debt owed by the Kanters was nondischargeable based
22 on alleged fraud generally was May 25, 2012. It also is undisputed
23 that the § 523(a)(2)(A) complaint was not filed until July 1, 2013.
24 Finally, it is undisputed that Ms. Martin was not included in the
25 Kanters' bankruptcy schedules until February 25, 2013.

26 Section 523(c)(1) provides:

1 Except as provided in subsection (a)(3)(B) of this
2 section, the debtor shall be discharged from a debt of a
3 kind specified in paragraph (2) . . . of subsection (a) of
4 this section, unless, on request of the creditor to whom
5 such debt is owed, and after notice and a hearing, the
6 court determines such debt to be excepted from discharge
7 under paragraph (2) . . . of subsection (a) of this
8 section.

9 Section 523(a)(3)(B) in turn provides:

10 A discharge under section 727 . . . of this title does not
11 discharge an individual debtor from any debt -

12 . . .
13 (3) neither listed nor scheduled under section 521(a)(1)
14 of this title, with the name, if known to the debtor, of
15 the creditor to whom such debt is owed, in time to permit
16 --

17 . . .
18 (B) if such debt is of a kind specified in paragraph
19 (2) . . . of this subsection, timely filing of a proof of
20 claim and timely request for a determination of
21 dischargeability of such debt under [such paragraph],
22 **unless such creditor had notice or actual knowledge of the
23 case in time for such timely filing and request[.]**

24 (Emphasis added.)

25 Taking these provisions into account, the bankruptcy court
26 determined that Ms. Martin did not meet the threshold requirement of
27 proof that would allow her to file the § 523(a)(2)(A) complaint
28 after the May 25, 2012, deadline; in particular, she presented no
29 evidence that she did not have actual knowledge of the Kanters'
30 bankruptcy case.

31 . . . I believe it's the Plaintiff's burden to put on
32 evidence that there was no knowledge of the bankruptcy
33 within which -- within a time in which to file, or the
34 deadline to file a complaint to determine the
35 dischargeability of a debt within the time to file a
36 timely complaint to fall within the scope of Section
37 523(a)(3)(B).

38 I reviewed the joint pretrial stipulation. I didn't see a

1 stipulation to that effect, and there was no evidence put
2 on by the plaintiff with regard to knowledge.

3 I believe that under the circumstances that fact alone
4 would be sufficient to find for the Defendants on the
claim under Section 523(a)(3)(B)

5 Hr'g Tr., October 9, 2014, at 121:1-13.

6 We note that Ms. Martin did not assert § 523(a)(3)(B) as a
7 claim for relief upon which she based her complaint. Nor did she
8 need to. "[Section] 523(a)(3) does not provide an independent basis
9 for a nondischargeability determination." 4 Collier on Bankruptcy
10 ¶ 523.09[1] (Alan N. Resnick & Henry J. Sommer eds., 16th ed. rev.).
11 "In effect, the penalty for failure to schedule such a debt is not
12 nondischargeability but is the loss of the 60-day limitations period
13 applicable in [§ 523(a)(2)] determination actions." Id.

14 We further note that the Kanters did not raise timeliness as an
15 affirmative defense against the complaint. The parties all appeared
16 to assume that Ms. Martin could file the complaint when she did
17 because she had not been scheduled as a creditor in the case prior
18 to the expiration of the deadline for filing the § 523(a)(2)(A)
19 complaint.

20 To the extent the bankruptcy court dismissed the complaint
21 based purely on the failure of evidence to support Ms. Martin's
22 entitlement to file a § 523(a)(2)(A) complaint after the May 25,
23 2012 deadline, the dismissal was error, because the bankruptcy court
24 misallocated the burden of proof with respect to timeliness. The
25 Kanters did not assert the missed deadline or laches as affirmative
26 defenses, and therefore waived any timeliness issue as to

1 § 523(a)(3)(B). Had they done so, the burden would have been on
2 them to prove both an unreasonable delay by the plaintiff and
3 prejudice to them. See Beaty v. Selinger (In re Beaty), 306 F.3d
4 914, 926-29 (9th Cir. 2002) (a party asserting laches as an
5 affirmative defense in § 523(a)(3)(B) cases must prove both lack of
6 diligence by the party against whom the defense is asserted and
7 prejudice to the party asserting the defense).

8 However, any error in conjunction with the bankruptcy court's
9 determination that dismissal was warranted based on § 523(a)(3)(B)
10 is harmless in and of itself, where the bankruptcy court properly
11 determined that to prevail on her complaint, Ms. Martin also was
12 required to establish a claim for relief under § 523(a)(2)(A).

13 B. Section 523(a)(2)(A).

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

21 Under § 523(a)(2)(A), a debtor is not discharged in bankruptcy
22 from any debt obtained by "false pretenses, a false representation,
23 or actual fraud." The creditor bears the burden under the
24 preponderance of the evidence standard of demonstrating each of the
25 following five elements: (1) misrepresentation, fraudulent omission
26 or deceptive conduct by the debtor; (2) knowledge of the falsity or

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

8 In the appeal before us, the bankruptcy court ruled that
9 Ms. Martin failed to meet her burden of proof that either of the
10 Kanters made any misrepresentation for the purpose of establishing
11 the first element of fraud.

12 1. There is no evidence of a direct misrepresentation.

13 It is undisputed in the record that Ms. Martin never spoke to
14 either of the Kanters in conjunction with the transaction. Thus,
15 neither made any representation to her upon which liability can be
16 based.

17 The limited direct involvement of Krista Kanter was in signing
18 the Purchase Agreement. To the extent this might in some possible
19 factual scenario constitute a representation, as suggested by
20 Ms. Martin in this appeal, it certainly was not one which in any
21 sense proximately caused Ms. Martin damage, where the only funds
22 paid by Ms. Martin in conjunction with the Purchase Agreement were
23 returned to her from the escrow account.

24 It is undisputed that Ms. Martin negotiated the Revised
25 Purchase Agreement only with Mr. Glazer. It further is undisputed
26 that the Revised Purchase Agreement never was signed by anyone, and

1 in particular, was not signed by either of the Kanters. We reject
2 Ms. Martin's argument on appeal that the mere presence at the end of
3 the Revised Purchase Agreement of a line with a place for Krista
4 Kanter's signature is sufficient to constitute a representation by
5 Krista Kanter. Neither the Revised Purchase Agreement, which
6 provided that deposits could be made to Mr. Glazer's personal
7 account, nor Mr. Glazer's express statements that amounts paid to
8 his account would be refunded if Ms. Martin did not receive her
9 condominium unit, can be said to have been a representation by
10 either Mr. Kanter or Ms. Kanter.

11 2. There was no partnership which might provide a basis to
12 impute Mr. Glazer's alleged fraud to the Kanters.

13 Recognizing the absence of a direct representation from the
14 Kanters to Ms. Martin, Ms. Martin asserted that because the Kanters
15 and Mr. Glazer were "partners," Mr. Glazer's fraud could be
16 attributed to them.

17 Ms. Martin contends that the Kanters stipulated in the Joint
18 Pre-Trial Stipulation ("Joint Stipulation") that they were partners
19 in the business. Indeed, the Kanters injected substantial confusion
20 into the record on the issue of whether they were "partners" with
21 Mr. Glazer. This is reflected in the Joint Stipulation:

22 The following facts are admitted and require no proof:

23 . . .
24 3. Defendants SEAN MICHAEL KANTER and KRISTA MARIANNE
25 KANTER were partners of the Bejuco Development company
26 which was a housing development company developing real
estate in Costa Rica.

17. . .
17. Mr. Glazer was a representative and business partner
of the Defendants.

1 Likewise, this is represented in the trial testimony, wherein both
2 the Kanters and their counsel repeatedly refer to the business as a
3 partnership.

4 To add to the confusion, Ms. Martin's counsel referred to the
5 business enterprise alternatively as the partnership or the company.
6 For instance, Ms. Martin's counsel asked Mr. Kanter: "So, did you
7 and your wife give Mr. Glazer authority to commit the partnership to
8 contracts?" Hr'g Tr., October 9, 2014, at 21:14-15. This question
9 was met by an objection with respect to foundation. After colloquy,
10 Ms. Martin's counsel restated the question and followed it with
11 other similar questions: "In your involvement with this project
12 were you aware of who had authority - authority to bind the company
13 in a contract?" Hr'g Tr., October 9, 2014, at 21:23-25. "Did your
14 wife have authority to bind this company in contracts?" Hr'g Tr.,
15 October 9, 2014, at 22:2-3. "Does her signature signify that the
16 company is bound to this presales - purchase and sales agreement?"
17 Hr'g Tr., October 9, 2014, at 22:19-20.

18 At the end of the day, the bankruptcy court found proof in the
19 documentary evidence that Bujeco was a corporation. "Exhibit 3
20 reveals that this is a corporation, not a partnership, and I cannot
21 find any authority for attributing a representation by one employee
22 of the corporation to another." Hr'g Tr., October 9, 2014, at
23 122:20-23.

24 The index of the trial transcript describes Exhibit 3 as "Share
25 Transfer Agreement - Transfer of Krista Kanter's Shares."
26 Ms. Martin asserts on appeal that Exhibit 3 shows that the Kanters

1 and Mr. Glazer were partners. Unfortunately, Ms. Martin did not
2 include Exhibit 3 in the record on appeal. We therefore cannot
3 review it to determine whether the bankruptcy court's interpretation
4 of it was error.

5 As we have stated many times, the burden of presenting a proper
6 record to the appellate court is on the appellant. Kritt v. Kritt
7 (In re Kritt), 190 B.R. 382, 387 (9th Cir. BAP 1995). The failure
8 to provide an adequate record may be grounds for affirmance, when,
9 as here, an appellant challenges a factual finding. Friedman v.
10 Sheila Plotsky Brokers, Inc. (In re Friedman), 126 B.R. 63, 68 (9th
11 Cir. BAP 1991).

12 3. The record does not support imputing Mr. Glazer's alleged
13 fraud to the Kanters even if Bujeco was a partnership.

14 However, even if Exhibit 3 would refute the bankruptcy court's
15 finding that Bejuco was a corporation, not a partnership, we still
16 would affirm the bankruptcy court's judgment of dismissal. We
17 explored at depth the issue of imputed fraud for purposes of
18 § 523(a)(2)(A) in Sachan v. Huh (In re Huh), 506 B.R. 257 (9th Cir.
19 BAP 2014) (en banc). The record and Ms. Martin's briefs on appeal
20 show that Ms. Martin was not aware of the Huh standard for imputing
21 fraud. Ms. Martin asserts she was required to prove only that
22 Mr. Glazer was the Kanters' partner and that Mr. Glazer committed
23 fraud. We need not reach the issue of whether she proved either of
24 these issues, because the record contains nothing that would support
25 a finding by the bankruptcy court that the Kanters' knew or should
26 have known of Mr. Glazer's fraud as is required under the Huh

1 standard.¹⁰

2 **VI. CONCLUSION**

3 Ms. Martin did not satisfy her burden to prove that the Kanters
4 made a fraudulent representation in connection with the Second
5 Deposit. Nor did she provide evidence upon which Mr. Glazer's
6 alleged fraud could be imputed to the Kanters under the Huh
7 standard. Accordingly, the bankruptcy court's dismissal of
8 Ms. Martin's complaint was not error, and we AFFIRM.

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25 ¹⁰ In addition, there is nothing in the record to establish
26 that Mr. Kanter was an officer or had any ownership interest in
Bejuco.