

19

UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF CALIFORNIA

In re: ) Case No. 14-30124-B-7  
STEVEN J. HORNE, ) Adversary No. 15-2002  
Debtor(s).

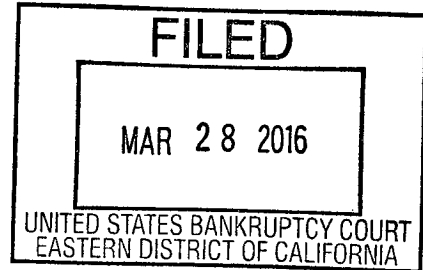
ESPLANADE ENTERPRISES, INC.,  
and JOSEPH MICELI,

Plaintiff(s),

v.

STEVEN J. HORNE,

Defendant(s).



MEMORANDUM DECISION AFTER TRIAL

Introduction

This is an adversary proceeding to liquidate alleged debts and, to the extent liquidated, except those debts from discharge. The plaintiffs are Esplanade Enterprises, Inc., and Joseph Miceli. The defendant is Steven J. Horne.

The complaint was filed on January 5, 2015. It alleges three claims for relief: (1) an embezzlement/larceny claim under 11 U.S.C. § 523(a)(4) in the First Claim for Relief; (2) a willful and malicious conversion claim under 11 U.S.C. § 523(a)(6) in the Second Claim for Relief; and (3) a fraudulent misrepresentation claim under 11 U.S.C. § 523(a)(2)(A) in the Third Claim for Relief. There is no proof of service of the summons and complaint filed on the docket. Nevertheless, Horne

1 answered the complaint on February 2, 2015.

2 A trial in this matter was held on February 22, 2016.  
3 Raymond L. Sandelman, Esq., appeared for Esplanade and Miceli.  
4 Horne appeared pro se.

5 The parties stipulated to undisputed facts in a Joint  
6 Pretrial Statement of Undisputed Facts filed on October 28, 2015,  
7 as docket no. 24. Those undisputed facts are all deemed admitted  
8 and they are incorporated by this reference. The court also  
9 takes judicial notice of the docket in this adversary proceeding  
10 and in the underlying chapter 7 case filed on October 9, 2014, as  
11 Case No. 14-30124.

12 Esplanade and Miceli submitted direct testimony declarations  
13 of the following witnesses who also testified at trial consistent  
14 with their declarations: (1) Linda Harrington; (2) Vicky  
15 Perryman; and (3) Joseph Miceli. Each witness testified without  
16 objection. Horne did not object to those witnesses' direct  
17 testimony declarations or the exhibits submitted with each  
18 witnesses' declaration. The exhibits were all admitted.

19 Horne also submitted his own direct testimony declaration  
20 and exhibits with the declaration. Esplanade and Miceli made  
21 numerous objections to both the direct testimony declaration and  
22 the exhibits. The court sustained and overruled those objections  
23 as stated on the record in open court. The court's rulings on  
24 those objections are incorporated by this reference.  
25

26 The court has considered the documents admitted into  
27 evidence. The court also heard and considered testimony of  
28 witnesses, including Horne on his own behalf. The court now

1 enters findings of fact and conclusions of law pursuant to  
2 Federal Rule of Civil Procedure 52(a) made applicable in this  
3 adversary proceeding by Federal Rule of Bankruptcy Procedure  
4 7052.

5  
6 **Jurisdiction and Venue**

7 Federal subject-matter jurisdiction is founded on 28 U.S.C.  
8 § 1334. This matter is a core proceeding that a bankruptcy judge  
9 may hear and determine. See 28 U.S.C. §§ 157(b)(2)(A), (I), and  
10 (O). To the extent it may ever be determined to be a matter that  
11 a bankruptcy judge may not hear and determine without consent,  
12 the parties nevertheless consent to such determination by a  
13 bankruptcy judge. See 28 U.S.C. § 157(c)(2). Venue is proper  
14 under 28 U.S.C. § 1409.  
15

16  
17 **Findings of Fact**

18 Esplanade is a California corporation. It was formed in  
19 2004. Under its fictitious business name Merit Medi-Trans,  
20 Esplanade operates vans that transport patients on a non-  
21 emergency basis. Miceli is the chief executive officer and  
22 director of Esplanade. He has held those titles since April 9,  
23 2004.

24 Horne is the debtor in the underlying chapter 7 case. Horne  
25 served as Esplanade's vice-president and secretary from April 9,  
26 2004, through April 12, 2013, when he resigned. Horne was  
27 responsible for Esplanade's financial matters, including its  
28 books and records. Horne had access to Esplanade's bank accounts

1 and he was authorized to sign checks on Esplanade's behalf.

2 From March of 2008 through approximately January 2013,  
3 Miceli relied on Horne to manage Esplanade's affairs, including  
4 its finances and financial affairs. Miceli and Horne had regular  
5 meetings and telephone conversations concerning Esplanade's  
6 financial condition and affairs. During these meetings and  
7 conversations, Horne told Miceli that all Esplanade's bills were  
8 being paid and there were no financial issues facing Esplanade  
9 that Miceli needed concern himself with. Horne made these  
10 statements and representations about Esplanade's financial  
11 condition to Miceli in his capacity as an officer and director of  
12 the corporation.

13 Horne's statements about Esplanade's financial condition to  
14 Miceli were not true and Horne knew they were not true when he  
15 made those statements to Miceli. Horne knew that Esplanade was  
16 insolvent. He also knew that Esplanade failed to retain  
17 deductions withheld from employee paychecks for corporate federal  
18 tax and state disability obligations in trust for the benefit of  
19 the IRS and California Employment Development Department. Horne  
20 knew that caused Esplanade to incur federal tax liability in the  
21 amount of \$93,668.05, which ultimately grew to \$1,269,989, and  
22 state disability liability of \$15,250.

24 Miceli relied on Horne's false representations about  
25 Esplanade's financial condition to retain Horne in a position of  
26 trust and in operational control of Esplanade, and to continue to  
27 provide Horne with access to Esplanade's finances and accounts.  
28 Horne knew this because during a meeting with Miceli on January

1 31, 2013, Horne told Miceli he (Horne) betrayed his (Miceli's)  
2 trust. Horne made this statement in the context of an admission  
3 to the unauthorized use of Esplanade's monies to pay personal  
4 creditors and expenses. During this meeting, Horne also gave  
5 Miceli a folder that contained a printout of Esplanade's  
6 Quickbooks accounts. The printout reflected total disbursements  
7 of \$294,614.32 Horne made to himself and his personal creditors.  
8 Horne told Miceli he did not realize how much he took from  
9 Esplanade and that the situation got out of control. Horne did  
10 not challenge or contravene this evidence, and he offered no  
11 explanation at all for his admissions to Miceli.

12       Stipulated facts submitted by the parties include Horne's  
13 admission that he disbursed \$284,340 of Esplanade's monies from  
14 the corporation's accounts to pay himself and his personal  
15 creditors. Of that amount, Miceli explained that \$40,250 was  
16 allocated to the repayment of debt, with interest, that Esplanade  
17 owed Horne in the form of an \$88,500 loan Horne made to Esplanade  
18 on or about August 31, 2004, leaving a subtotal balance of  
19 \$244,090. Miceli further explained that \$98,620 of that subtotal  
20 balance is attributable to salary Horne should have received from  
21 December 2009 through April 2013. Subtracting that \$98,620  
22 salary allocation from the \$244,090 subtotal balance leaves a net  
23 balance of distributions of Esplanade's funds that Horne made to  
24 himself and to his personal creditors of \$145,470.

26       The distributions that Horne made from Esplanade's funds to  
27 pay himself and his personal creditors were not authorized by  
28 Esplanade, its board, or its shareholders. The \$145,470 was not

1 a repayment of debt that Esplanade owed Horne because all debt  
2 that Esplanade owed Horne in the form of Horne's loan to  
3 Esplanade was repaid to Horne with interest by November 2009.  
4 And it was not salary or compensation in addition to salary.

5 The court is also not persuaded that the funds Horne took  
6 from Esplanade to pay his personal expenses were authorized  
7 "petty cash" distributions, as Horne suggested. While there was  
8 testimony that Esplanade kept petty cash available for purchases,  
9 purchases from petty cash were generally limited to hundreds of  
10 dollars and not hundreds of thousands of dollars.

11 The court also does not believe Horne's testimony that  
12 distributions to pay his personal expenses and his creditors were  
13 loans to him from Esplanade. Although there were undocumented  
14 loans to Esplanade by third-parties, there is no evidence or  
15 testimony that there were any undocumented loans from Esplanade  
16 to an officer or director of the corporation. Miceli did not  
17 approve any such loans. Moreover, any loans from Esplanade to  
18 Horne as an officer and director of the corporation without  
19 documentation and without shareholder approval would have been  
20 illegal under California law. Such loans also would have  
21 amounted to a violation of Horne's fiduciary duty as an officer  
22 and director of the corporation.

23 In addition to the \$145,470 of unauthorized distributions of  
24 Esplanade's monies from its accounts to pay personal expenses and  
25 creditors, the court is persuaded that Horne also misappropriated  
26 \$62,709 in cash proceeds that Esplanade received from patients  
27 who paid for services by cash. Linda Harrington testified that  
28

1 she received this cash, accounted for it according to long-  
2 standing company procedure, placed it in bags to be deposited in  
3 Esplanade's bank accounts, and gave the bags of cash to Horne for  
4 deposit into corporate bank accounts. She also testified that  
5 she knew of no impropriety by any employee of the bank where  
6 these cash deposits were to be made. The court believes Ms.  
7 Harrington and finds her testimony credible. There are no  
8 records of these cash deposits ever being made into Esplanade's  
9 bank accounts and Horne offered no explanation for the  
10 disappearance of the cash he was given to deposit. The court is  
11 persuaded that Horne misappropriated this cash for personal use  
12 in the amount of \$62,709.

13  
14 Horne is no longer present on the Esplanade premises and he  
15 no longer has any management or operational role or control in  
16 corporate operations. Despite this, Horne has retained two  
17 vehicles that belong to Esplanade and are corporate property.  
18 One is a 2009 Chrysler 300 valued at \$13,101. Horne purchased  
19 this vehicle with corporate funds and without the consent of the  
20 corporation's board or shareholders. He then had the vehicle  
21 titled in his name. The other vehicle is a 1998 Ford Expedition  
22 the corporation owned, and which Horne took possession of during  
23 his employment with Esplanade. The Ford Explorer is valued at  
24 \$1,700.

25 Finally, Miceli testified that Horne's false statements and  
26 misrepresentations regarding Esplanade's finances and financial  
27 conditions caused him damages personally in the amount of  
28 \$261,490 based on 50% reduction in the value of his stock. Horne

1 based this amount on a 50% allocation of the total damages of  
2 \$522,980 sought by Esplanade. That amount includes a \$300,000  
3 figure resulting from the non-payment of taxes and business  
4 decisions Miceli would have made had he known Horne's  
5 representations regarding Esplanade's finances and financial  
6 condition were false.

7  
8 **Conclusions of Law**

9 I. First Claim for Relief - § 523(a)(4)

10 The First Claim for Relief alleges an embezzlement claim by  
11 Esplanade against Horne under § 523(a)(4). Esplanade seeks  
12 damages on this claim in the amount of \$208,179 and a judgment  
13 that the debt arising from the judgment is excepted from  
14 discharge under § 523(a)(4).  
15

16 Section 523(a)(4) states as follows:

17 (a) A discharge under section 727 . . . of this title  
18 does not discharge an individual debtor from any debt -

19 . . . .

20 (4) for fraud or defalcation while acting in a  
21 fiduciary capacity, embezzlement, or larceny[.]

22 11 U.S.C. § 523(a)(4).

23 Embezzlement in the context of nondischargeability requires  
24 three elements: (1) property rightfully in the possession of a  
25 nonowner; (2) nonowner's appropriation of the property to a use  
26 other than that to which it was entrusted; and (3) circumstances  
27 indicating fraud. Transam. Comm'l Fin. Corp. v. Littleton (In re  
28 Littleton), 942 F.2d 551, 555 (9th Cir. 1991). Unlike the breach  
of fiduciary duty action, embezzlement under § 523(a)(4) does not



1 require the presence of a fiduciary relationship or an express  
2 trust relationship. Id. (citations omitted).

3 In his capacity as an officer and director of Esplanade,  
4 Horne was entrusted with responsibility for corporate finances  
5 and financial affairs. In that capacity, he had access to  
6 Esplanade's bank accounts and the corporate funds in those  
7 accounts. He also had the authority to sign checks and pay the  
8 expenses on behalf of the corporation.

9 Horne has admitted to the use of Esplanade's monies to pay  
10 personal expenses and creditors. Horne used a net total of  
11 \$145,470 for those purposes. The court is persuaded that Horne's  
12 use of corporate monies to pay personal expenses and creditors  
13 was not authorized or approved by Esplanade, its board, or its  
14 shareholders. The court is also persuaded that Horne was given  
15 \$62,709 in cash receipts to deposit into Esplanade's bank  
16 accounts which were never deposited. Horne offered no  
17 explanation for his failure to deposit these funds in corporate  
18 bank accounts or for their disappearance. Accordingly, Esplanade  
19 has established that Horne was entrusted with corporate funds  
20 totaling \$208,179 which he used for purposes other than which  
21 those funds were intended and without appropriate authorization.

22 Esplanade has also established circumstances indicating  
23 fraud. Horne made statements to Miceli that were false and which  
24 Horne knew were false when they were made. Horne told Miceli  
25 there were no issues with - and there was nothing to worry about  
26 concerning - Esplanade's finances and financial condition. Horne  
27 knew these statements were false because he knew the corporation  
28

1 was insolvent and had incurred significant liability to federal  
2 and state governmental authorities. He also knew that he was  
3 using corporate monies to pay personal expenses and creditors  
4 without authorization by Esplanade.

5 Miceli relied on Horne's false statements and  
6 misrepresentations about Esplanade's finances and financial  
7 condition, and the use of corporate funds, by entrusting Horne  
8 with corporate finances and operations. With Esplanade's  
9 financial condition concealed, Miceli's reliance on Horne's  
10 statements were justified. In fact, had Miceli known of  
11 Esplanade's true financial condition and the status of its  
12 finances, he would have restructured the business, terminated  
13 employees, or sold the company.

14 Horne also made the false statements and misrepresentations  
15 about Esplanade's finances and financial condition with the  
16 intent to deceive Miceli. Based on Horne's statement to Miceli  
17 on January 31, 2013, that Horne betrayed Miceli's trust by taking  
18 funds from Esplanade to pay his personal expenses and creditors,  
19 Horne knew that Miceli entrusted him with corporate operations  
20 and finances. The court is persuaded that in order to retain  
21 that trust, and thereby remain in control of Esplanade's  
22 finances, Horne knew he had to continue to deceive Miceli about  
23 Esplanade's true financial condition and liabilities. This is  
24 apparent from Horne's continued and repeated unauthorized use of  
25 Esplanade's monies to pay his personal expenses and creditors  
26 between 2008 and 2013.

27  
28 In short, the court is persuaded that Esplanade has

1 presented evidence sufficient to sustain an embezzlement claim  
2 against Horne under § 523(a)(4) and that Esplanade was damaged by  
3 that embezzlement. Therefore, judgment on the First Claim for  
4 Relief will be entered in favor Esplanade and against Horne in  
5 the amount of \$208,179 and that judgment will be excepted from  
6 discharge under § 523(a)(4).

7  
8 II. Second Claim for Relief - § 523(a)(6)

9 The Second Claim for Relief purports to allege a claim for  
10 willful conversion under § 523(a)(6). It is a claim by Esplanade  
11 against Horne for conversion of two vehicles - a 2009 Chrysler  
12 300 and a 1998 Ford Explorer. Esplanade seeks damages on this  
13 claim in the amount of \$14,801, as the total value of both  
14 vehicles, and a judgment that the debt arising from the judgment  
15 is excepted from discharge under § 523(a)(6).  
16

17 Section 523(a)(6) states as follows:

18 (a) A discharge under section 727 . . . of this title  
19 does not discharge an individual debtor from any debt -

20 . . . .

21 (6) for willful and malicious injury by the debtor to  
22 another entity or to the property of another entity[.]

23 11 U.S.C. § 523(a)(6).

24 Federal bankruptcy law governs the dischargeability of a  
25 claim under § 523(a)(6); however, state law determines whether an  
26 act falls within the tort of conversion. Lockerby v. Sierra, 535  
27 F.3d 1038, 1041-42 (9th Cir. 2008) (citations omitted); Del Bino  
28 v. Bailey (In re Bailey), 197 F.3d 997, 1000 (9th Cir. 1999).

Under California law, conversion is "any act of dominion

1 wrongfully asserted over another's personal property in denial of  
2 or inconsistent with his rights therein. It is not necessary  
3 that there be a manual taking of the property; it is only  
4 necessary to show an assumption of control or ownership over the  
5 property, or that the alleged converter has applied the property  
6 to his own use.'" Bailey, 197 F.3d at 1000 (quoting Igauye v.  
7 Howard, 114 Cal. App. 2d 122, 126 (1952)).

8         The Chrysler 300 and the Ford Explorer belong to Esplanade.  
9 Although Horne managed to obtain title to the Chrysler 300 in his  
10 name, he purchased that vehicle with corporate funds. That makes  
11 the Chrysler 300 a corporate asset. Horne also took possession  
12 of the Ford Explorer owned by Esplanade following his employment  
13 with Esplanade.

14         Horne resigned from Esplanade on April 12, 2013. Although  
15 Horne is no longer employed by Esplanade and he has no management  
16 of or operational control over the corporation, he has retained  
17 both vehicles which he has refused to return to Esplanade despite  
18 Esplanade's demand for return. Horne's actions amount to an  
19 unauthorized retention and use of corporate property and that  
20 constitutes conversion under California law. But that does not  
21 end the § 523(a)(6) inquiry.

22         The United States Supreme Court in Kawaauhau v. Geiger (In  
23 re Geiger), 523 U.S. 57 (1998), made clear that for § 523(a)(6)  
24 to apply the actor must intend the consequences of the act not  
25 simply the act itself. Id. at 60. Both willfulness and  
26 maliciousness must be proven to block discharge under section  
27 523(a)(6). Id. That applies equally to a debt based on  
28

1 conversion in order for a debt arising from conversion to be  
2 excepted from discharge under § 523(a)(6). Davis v. Aetna  
3 Acceptance Co., 293 U.S. 328, 331-32 (1934); Peklar v. Ikerd (In  
4 re Peklar), 260 F.3d 1035, 1039 (9th Cir. 2001); see also Thiara  
5 v. Spycher Bros. (In re Thiara), 285 B.R. 420, 429 (9th Cir. BAP  
6 2002). Indeed, as the bankruptcy appellate panel recently  
7 summarized in Zeeb v. Farrah (In re Zeeb), 2015 WL 6720934 (9th  
8 Cir. BAP 2015), conversion under California law does not  
9 encompass the willful and malicious elements required by  
10 § 523(a)(6):

11 Under California law, conversion is the wrongful  
12 exercise of dominion over the property of another[.]

13 The three elements of conversion under California law  
14 do not include the elements of the 'willful' and  
15 'malicious' prongs under § 523(a)(6). Conversion under  
16 California law does not require a showing that the  
17 defendant subjectively intended to injure the plaintiff  
18 or subjectively knew that the defendant's conduct was  
19 substantially certain to injure the plaintiff.

20 As we have previously held, conversion establishes the  
21 debtor's wrongful exercise of dominion over the  
22 personal property of another, but it does not  
23 necessarily decide the type of wrongful intent on the  
24 part of the debtor that is necessary for the damages to  
25 be a nondischargeable debt under § 523(a)(6).

26 Similarly, conversion under California law does not  
27 necessarily implicate 'maliciousness.' Maliciousness  
28 requires (1) a wrongful act, (2) done intentionally,  
(3) which necessarily causes injury, and (4) is done  
without just cause or excuse. While one of the  
elements of conversion encompasses a 'wrongful act,'  
the other elements do not satisfy the remaining  
maliciousness prongs. We thus conclude that the  
conversion, in and of itself, is not necessarily  
'malicious.'

Id. at \*5-6 (internal citations and quotations omitted).

1           i.    Willful Injury

2           In the Ninth Circuit, "§ 523(a)(6)'s willful injury  
3 requirement is met only when the debtor has a subjective motive  
4 to inflict injury or when the debtor believes that injury is  
5 substantially certain to result from his own conduct." Ormsby v.  
6 First Am. Title Co. (In re Ormsby), 591 F.3d 1199, 1206 (9th Cir.  
7 2010); Carrillo v. Su (In re Su), 290 F.3d 1140, 1142 (9th Cir.  
8 2002). A debtor is charged with the knowledge of the natural  
9 consequences of his actions. Cablevision Sys. Corp. v. Cohen (In  
10 re Cohen), 121 B.R. 267, 271 (Bankr. E.D. N.Y. 1990); see also  
11 Su, 290 F.3d at 1146 at n.6 ("In addition to what a debtor may  
12 admit to knowing, the bankruptcy court may consider  
13 circumstantial evidence that tends to establish what the debtor  
14 must have actually known when taking the injury-producing  
15 action.").

16           The court concludes that Horne willfully converted the  
17 Chrysler 300, but not the Ford Explorer. Esplanade has not  
18 carried its burden of proving that Horne subjectively intended to  
19 injure - or that he knew injury to the corporation was  
20 substantially certain to occur - by retention of the Ford  
21 Explorer. With respect to that vehicle, all that Esplanade has  
22 established is that Horne took possession of the vehicle while  
23 employed by the corporation and refused to return it when his  
24 employment ended. Without more, the court is not persuaded that  
25 Horne's conversion of the Ford Explorer is willful.  
26

27           On the other hand, the court is persuaded that conversion of  
28 the Chrysler 300 is willful. Horne knew that he used corporate

1 funds to purchase the Chrysler 300 and he knew that he titled  
2 that vehicle in his name rather than in the name of the  
3 corporation. Based on those acts and the unauthorized retention  
4 of the vehicle for personal use and without payment, the court  
5 concludes that Horne knew a financial loss to the corporation was  
6 substantially certain to occur. And that means with respect to  
7 the Chrysler 300, Horne's conversion of the vehicle inflicted  
8 injury on Esplanade intentionally.

9 ii. Malicious Injury

10 The court is also persuaded that Horne's conversion of the  
11 Chrysler 300 was malicious. "A malicious injury involves (1) a  
12 wrongful act, (2) done intentionally, (3) which necessarily  
13 causes injury, and (4) is done without just cause or excuse."  
14 Petralia v. Jercich (In re Jercich), 238 F.3d 1202, 1209 (9th  
15 Cir. 2001) (internal citations omitted). Malice may be inferred  
16 from the nature of the wrongful act. See Ormsby, 591 F.3d at  
17 1207 (citation omitted). However, to infer malice it must first  
18 be established that the conversion was willful. See Thiara, 285  
19 B.R. at 434. The court has determined that the conversion of the  
20 Chrysler 300 was willful.

21 The first three elements of the malicious inquiry have been  
22 established. The unauthorized use of corporate funds to purchase  
23 the Chrysler 300, titling that vehicle individually rather than  
24 in the name of the corporation, and the subsequent unauthorized  
25 retention and personal use of the vehicle without repayment to  
26 the corporation are wrongful acts done intentionally. Each of  
27 those caused Esplanade economic injury in the loss of funds used  
28

1 to purchase the vehicle, and the loss of the vehicle itself. And  
2 each were done without any explanation of just cause or excuse by  
3 Horne. Regarding the latter, the court acknowledges Horne's  
4 testimony that the corporation permitted purchases without prior  
5 authorization. However, as noted above, those purchases were  
6 limited to de minimus items from petty cash.

7 In short, the court concludes that, as to the Chrysler 300,  
8 Horne's conversion of the vehicle meets both the willful and  
9 malicious prongs of section § 523(a)(6). As to the Ford  
10 Explorer, it meets neither. Therefore, judgment on the Second  
11 Claim for Relief will be entered in favor Esplanade and against  
12 Horne in the amount of \$13,101 and that judgment will be excepted  
13 from discharge under § 523(a)(6).  
14

15  
16 III. Third Claim for Relief - § 523(a)(2)(A)

17 The Third Claim for Relief alleges a claim by Miceli against  
18 Horne under § 523(a)(2)(A). Miceli appears to seeks damages on  
19 this claim in the amount of \$300,000 for the non-payment of taxes  
20 which prevented Miceli from taking actions he claims would have  
21 avoided IRS tax liability and \$261,490 attributable to a 50%  
22 reduction in the value of his corporate stock. Both claims arise  
23 out of the false statements and misrepresentations that Horne  
24 made to Miceli regarding Esplanade's finances and financial  
25 condition. Regardless of the damages sought, Miceli has failed  
26 to prove an actionable  
27 § 523(a)(2)(A) claim.  
28



1 Section 523(a)(2)(A) states as follows:

2 (a) A discharge under section 727 . . . of this title  
3 does not discharge an individual debtor from any debt -

4 . . . .

5 (2) for money; property, services, or an extension,  
6 renewal, or refinancing of credit, to the extent  
7 obtained by - (A) false pretenses, a false  
8 representation, or actual fraud, **other than a statement  
9 respecting the debtor's or an insider's financial  
10 condition;**

11 U.S.C. § 523(a)(2)(A) (emphasis added).

12 The elements of fraud under § 523(a)(2)(A) are: (1) the  
13 debtor made a representation; (2) the debtor knew at the time the  
14 representation was made that it was false; (3) the debtor made  
15 the representation with the intention and purpose of deceiving  
16 the creditor; (4) the creditor relied on the representations; and  
17 (5) the creditor sustained damage as the proximate result of the  
18 representation. In re Ettel, 188 F.3d 1141, 1144 (9th Cir. 1999)  
19 (citation omitted); Apte v. Japra (In re Apte), 96 F.3d 1319 (9th  
20 Cir. 1996).

21 As discussed above, the court is persuaded that Esplanade  
22 has established fraud. Horne made false statements to Miceli  
23 about Esplanade's finances and financial condition that Horne  
24 knew were false, those false statements were made with the  
25 requisite intent to deceive, and Horne justifiably relied on  
26 those false statements. However, based on the evidence presented  
27 at trial, Horne's false statements were limited to the finances  
28 and financial condition of Esplanade. With nothing more, there  
can be no § 523(a)(2)(A) claim. See Barnes v. Belice (In re  
Belice), 461 B.R. 564, 577-78 (9th Cir. BAP 2011).

1 Horne was an officer and director of Esplanade and he made  
2 false statements about Esplanade's finances and financial  
3 condition to Miceli in that capacity. That makes the corporation  
4 an "insider," as that term is used in § 523(a)(2)(A) and defined  
5 in § 101(31)(A)(iv).<sup>1</sup> And because Horne's false statements and  
6 misrepresentations to Miceli were limited to Esplanade's  
7 financial condition, that means all that Miceli has proven are  
8 false statements and misrepresentations "respecting . . . an  
9 insider's financial condition." Stated another way, the content  
10 of Horne's false statements and misrepresentations do not support  
11 an actionable § 523(a)(2)(A) claim, which means any damages  
12 resulting from those false representations are dischargeable in  
13 Horne's chapter 7 case.

14  
15 Therefore, on the Third Claim for Relief, judgment will be  
16 entered in favor of Horne and against Miceli with Miceli taking  
17 nothing on this § 523(a)(2)(A) claim.

18  
19 **Conclusion**

20 Judgment shall be entered as stated hereinabove.

21 A separate judgment shall issue.

22 Dated: March 28, 2016.

23  
24   
25 UNITED STATES BANKRUPTCY JUDGE

26  
27  
28 <sup>1</sup>An "insider" is defined as follows: "The term 'insider'  
includes - if the debtor is an individual - corporation of which  
the debtor is a director, officer, or person in control[.]"  
11 U.S.C. § 101(31)(A)(iv).

**INSTRUCTIONS TO CLERK OF COURT  
SERVICE LIST**

1  
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The Clerk of Court is instructed to send the attached document, via the BNC, to the following parties:

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