

**UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF COLORADO  
Honorable Howard R. Tallman**

<b>In re:</b>	)	
	)	
<b>MARK ANTHONY ANDERSON,</b>	)	<b>Case No. 07-20304 HRT</b>
	)	<b>Chapter 7</b>
<b>Debtor.</b>	)	
_____	)	
	)	
<b>PAIGE COFRIN and NICHOLAS J.</b>	)	<b>Adversary No. 07-01796 HRT</b>
<b>AVALOS,</b>	)	
	)	
<b>Plaintiffs,</b>	)	
	)	
<b>v.</b>	)	
	)	
<b>MARK ANTHONY ANDERSON,</b>	)	
	)	
<b>Defendant.</b>	)	
_____	)	

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

This case came before the Court for trial on the Plaintiffs' complaint. The Court heard evidence on September 29, 2009, September 30, 2009, and October 7, 2009. Following the conclusion of the evidence, the parties submitted written closing arguments, responses, and replies (docket #70, 71, 72, 75, and 77). Having reviewed the evidence and argument of the parties, the Court is now prepared to rule, and hereby makes the following findings of fact and conclusions of law.

**Chronology of Events**

By the spring of 2005, the Defendant, Debtor Mark Anthony Anderson (the "Debtor"), had several years' experience working at NAPA stores and had successfully managed a NAPA store located in Aurora, Colorado. He decided to buy his own NAPA store. In June of 2005, he formed an S Corporation, Midway Auto Parts, Inc. ("MAP"), and opened a bank account. In July 2005, he began negotiations with Leland Janssen and Harp/Janssen of Colorado, Inc. ("Janssen"), owner of a poorly-performing NAPA store located in Littleton, Colorado (the "Store"), to purchase the assets of the Store. In August 2005, the Debtor (through MAP) and Janssen executed an Option to Purchase Agreement, and MAP paid Janssen an initial deposit of \$50,000.

The Debtor's initial plan was to obtain an SBA loan. In connection with financing sought from Peak National Bank, the Debtor obtained a Feasibility Study and Review from Gulf Coast Financial. But, the Debtor was unable to obtain that financing. Instead, he relied on private investments and loans from friends and family. Initially, the Debtor owned 70% of MAP, and his friend Mike Howe owned 30%. The Debtor subsequently transferred a 19% interest in MAP to his father, Robert Anderson, because of his father's increasing investment in the company.

In October 2005, Mike Howe wanted to purchase a Range Rover for his personal use. He had \$60,000 cash available for the purchase. At the same time, MAP needed additional cash to pay installment payments due to Janssen. The Debtor and Mr. Howe agreed that rather than purchasing the Range Rover himself, Mr. Howe would loan the \$60,000 to MAP. In return, the Debtor would buy or lease the Range Rover in his name, and MAP would repay Mr. Howe by making the payments on the Range Rover. Accordingly, Mr. Howe loaned MAP \$60,000 on October 8, 2005. The Debtor purchased the Range Rover for no money down, and MAP began making the monthly payments of \$1,777.40 in November 2005.

On November 14, 2005, Plaintiff Nicholas Avalos loaned the Debtor, individually, \$10,000. The evidence showed that the Debtor used Mr. Avalos's money for MAP expenses, to pay the next installment due to Janssen. In November 2005, MAP paid Janssen a total of \$100,000 toward the purchase price. In December 2005, MAP began operating the Store, under the Option to Purchase Agreement.

On January 21, 2006, Plaintiff Paige Cofrin loaned the Debtor, individually, \$75,000. Mr. Cofrin's check indicates that the purpose of the loan was for MAP, and the evidence showed that the loan proceeds were deposited into MAP's account and were used for MAP expenses, to operate the Store and to pay Janssen. Specifically, on January 24, 2006, the day after MAP booked Mr. Cofrin's loan, MAP made a \$57,899.99 payment to GPC-Warehouse for auto parts. On January 25, 2006, MAP spent \$3,406.92 on equipment and an additional \$6,000 in auto parts. On February 1, 2006, MAP made a \$9,540.00 payment to Janssen.

On January 31, 2006, MAP and Janssen executed a final version of the Option to Purchase Agreement (the "Agreement"). The Agreement provided for a purchase price of \$600,000, allocated as follows:

- a. Furniture and Fixtures are valued at \$10,000
- b. Inventory will be valued at \$320,000
- c. Intangibles will be valued at \$209,000
- d. Accounts Receivable will be valued at \$60,000
- e. Agreement not to compete will be valued at \$1,000

The purchase price was to be paid as follows:

- a. The first \$200,000 of the purchase price will be paid by the application of funds previously paid by buyer to seller. Seller acknowledges the receipt of these funds. Said funds are considered earnest money and are NON-REFUNDABLE under any circumstances.
- b. The next \$49,429.80 will be paid by buyer's assumption of seller's obligations under Great American Leasing contract 304427 and 279855.
- c. The next \$350,570.20 will be delivered in cash or certified funds on or before closing. Said closing must occur on or before 12/31/06.

The Agreement further provided that MAP would pay Janssen \$4,000 per month for twelve months, beginning January 1, 2006, in consideration for Janssen's allowing MAP to use Janssen's account with NAPA prior to the closing date. Finally, the Agreement provided that the option expired February 28, 2006, or when an Asset Purchase Agreement was signed by the MAP and Janssen, whichever occurred first, and if the option expired, Janssen would retain all earnest money and all other payments made.

While MAP operated the Store, substantial improvements were made. Inventory was increased, computer and telephone equipment were upgraded, new machines and equipment were installed, and new staff members were hired. MAP established relationships with new customers, including wholesale customers, and sales increased over prior months. During this time period, MAP timely paid suppliers, vendors, and operating expenses of the Store. MAP also made timely payments to Janssen and to MAP's investors, including payments to both Plaintiffs and payments on the Range Rover purchased for Mike Howe. But, MAP did not have sufficient cash flow to provide a regular salary to the Debtor. The Debtor paid himself when funds were available. In order to minimize his expenses, in March of 2006, the Debtor rented out his condo and moved in with his parents.

On June 26, 2006, a \$90,000 payment was due to the NAPA Distribution Center for inventory that MAP had purchased for the Store. At that time, the purchase contemplated by the Agreement had not closed, and MAP was still operating on Janssen's account with NAPA. MAP asked Janssen to request a one-day extension of the due date. Janssen did so, and NAPA Distribution Center agreed to the extension. On the next day, MAP was ready, willing, and able to pay the full \$90,000. But, Janssen declared that obtaining the one-day extension was a violation of the Agreement.

On June 27, 2006, Janssen seized the Store by changing the locks on the building and denying access to the Debtor and MAP's employees. Janssen took cash and checks received for sales made by MAP and deposited them into Janssen's own accounts. Janssen collected accounts receivable generated by MAP, which totaled \$116,000 at the time of the seizure. Janssen kept the increased inventory worth over \$92,000, the improved computers and telephone

system, and the equipment and machinery that MAP had purchased. Jansen further kept all payments that the Debtor and MAP had made to date, in excess of \$300,000.

On the date of Janssen's seizure, the Debtor met with counsel, who advised him not to file a lawsuit immediately. The Debtor subsequently retained a second attorney and paid him a retainer of \$50,000, which was funded by a loan from Mike Howe. The second attorney filed a lawsuit on MAP's behalf, case number 07cv571 in Arapahoe County, Colorado. Janssen retained counsel and filed a counterclaim. When the lawsuit proceeded to the discovery phase, MAP's attorney requested an additional \$100,000 retainer, which the Debtor was unable to raise. The Debtor therefore agreed to settle the lawsuit, with each party receiving nothing from the other.

Janssen's seizure of the Store left both MAP and the Debtor without any ability to pay their debts as they became due. In 2007, the Range Rover was repossessed, as was the Debtor's personal vehicle. The Debtor was sued by several creditors, including the Plaintiffs. The Plaintiffs' suit against the Debtor, filed in Boulder County District Court, alleged breach of contract, promissory estoppel, negligent misrepresentation, and unjust enrichment. The Plaintiffs did not allege fraud or breach of fiduciary duty. The suit sought damages of (1) \$78,750, the unpaid balance on the Debtor's promissory note to Mr. Cofrin; (2) \$2,728.30, attorney's fees incurred by Mr. Cofrin in bringing the suit; and (3) \$8,297.65, the unpaid balance on the Debtor's loan from Mr. Avalos. The Debtor did not answer the Plaintiffs' complaint, and the Plaintiffs obtained a default judgment against him.

The Debtor filed his Chapter 7 bankruptcy petition on September 7, 2007. At the Debtor's § 341 meeting of creditors, the Chapter 7 Trustee questioned the Debtor about the failure of MAP. The Chapter 7 Trustee was satisfied with the information she was provided at the meeting and in the Debtor's bankruptcy schedules.

The Plaintiffs brought the above-captioned adversary proceeding on December 17, 2007. Their complaint, as amended on April 30, 2008 (docket #20), contained five claims for relief: (1) a claim under 11 U.S.C. § 523(a)(2)(A), based on false representation, false pretenses, or actual fraud; (2) a claim under 11 U.S.C. § 523(a)(4), based on embezzlement; (3) a claim under 11 U.S.C. 727(a)(2), seeking a denial of the Debtor's discharge; (4) a claim under 11 U.S.C. § 727(a)(3), seeking a denial of the Debtor's discharge; and (5) a claim under 11 U.S.C. § 727(a)(5), seeking a denial of the Debtor's discharge. On September 30, 2009, following the close of the Plaintiffs' evidence, for the reasons stated on the record, the Court dismissed the following of the Plaintiffs' claims for relief:

- The Plaintiffs' first claim for relief, based on 11 U.S.C. § 523(a)(2)(A);
- The Plaintiffs' third claim for relief, based on 11 U.S.C. § 727(a)(2); and
- The Plaintiffs' fourth claim for relief, based on 11 U.S.C. § 727(a)(3).

The Plaintiffs' second and fifth claims for relief were allowed to go forward. Following the close of all the evidence, the Court directed the parties to submit written closing arguments. After the submission of the final written sur-reply, on December 10, 2009, the Court took the matter under advisement.

### **Testimony of the Witnesses**

The Court had an opportunity to observe the witnesses and evaluate their credibility. Of the Plaintiffs' witnesses, the Court found Plaintiff Paige Cofrin to be the most credible. The Court found him to be a sophisticated businessperson who was able to explain the facts of his investment and the efforts he made to collect the amounts due to him. The Court found Plaintiff Nicholas Avalos to be less credible. While Mr. Avalos accurately testified about the amount of his loan and the amount owed to him, he was argumentative, and his testimony about the circumstances of his investment appeared to be exaggerated. In particular, when he characterized the statements made to him by the Debtor or the Debtor's father as representations "that it was not possible for the business [MAP] to fail," he reduced his overall credibility.

Further, the Court was not persuaded by the testimony of the Plaintiffs' expert, William Knudson. The Court does not question Mr. Knudson's qualifications or abilities, but the Court did not find his opinions helpful, for two reasons. First, the scope of Mr. Knudson's work was very limited. He testified that he did not have time to fully examine the Debtor's or MAP's records. He did not undertake to provide anything like an audit, review, or compilation. Instead, he simply "scanned" the limited MAP business records that he was provided, which were the QuickBooks records included in Plaintiffs' Exhibit 5. Second, Mr. Knudson did not support his conclusions with additional documents, such as bank records or other business records of MAP, the Debtor, or Janssen, all of which were or should have been available to Mr. Knudson. The Plaintiffs blame the Debtor for the lack of records available to Mr. Knudson, but it appears that the Debtor provided more information to the Plaintiffs than the Plaintiffs provided to Mr. Knudson. The Plaintiffs' Exhibit 5 includes bank records that the Debtor produced to the Plaintiffs, but the Plaintiffs did not forward to Mr. Knudson. Counsel for the Debtor stated that the Debtor produced additional financial information that was not included in Plaintiffs' Exhibit 5. Some information that Mr. Knudson testified would have been helpful to him, such as an electronic version of MAP's QuickBooks files, was never requested by the Plaintiffs. Additionally, the Plaintiffs had the ability to obtain information from the banks themselves or from Janssen, and in fact it appears that the Plaintiffs served discovery on Janssen. The Court therefore concludes that the Plaintiffs, not the Debtor, are responsible for the lack of documentation supporting Mr. Knudson's conclusions.

The Court found the Debtor's witnesses to be credible, particularly the Debtor himself and Mike Howe. They offered logical explanations for their decisions, and their explanations were supported by other evidence, including MAP's records and the testimony of Janssen. The Court found no credible evidence that the Debtor acted in bad faith. The evidence showed that

the Debtor, through MAP, was operating the Store in good faith and with some business success, and that Janssen's seizure of the Store was the reason that MAP failed. Unfortunately, the Debtor was unable to raise sufficient funds to obtain legal redress for injuries Janssen caused to MAP and its creditors, and accordingly to the Debtor and his creditors.

### **MAP Business Records**

NAPA developed a proprietary Total Automotive Management System ("TAMS"), which NAPA stores use to manage sales, inventory, and accounts receivable. Once MAP began running the Store, MAP relied on the TAMS system to track daily sales, credit card payments, inventory orders, and accounts receivable. Janssen testified that the TAMS system entries made while MAP was operating the Store were accurate, and there was no evidence to the contrary. When Janssen seized the Store, the Debtor and MAP were denied access to the TAMS system. As a result, the Debtor was able to produce only limited TAMS reports.

MAP supplemented the TAMS system with QuickBooks, which MAP used to track investor loans and capital contributions as well as acquisition costs of the Store and payments to Janssen. QuickBooks reports made up most of Plaintiffs' Exhibit 5. Plaintiffs' expert witness, Mr. Knudson, questioned several of the entries on the QuickBooks system. After considering the testimony of Mr. Knudson, and the subsequent explanations by the Debtor and his sister, Kim Anderson, who served as MAP's accountant, the Court finds that the QuickBooks records were generally accurate, particularly as to amounts listed, although they were not as precise in their characterizations as one might expect from a larger company with a staff of legal, financial, and tax professionals. The Debtor could be considered an experienced auto parts store manager, but not an experienced store owner or a sophisticated businessman. The Court finds that the Debtor and his sister made a good faith attempt to categorize the QuickBooks entries in a manner that made sense at the time, expecting to be able to make any necessary corrections at a later point in time. That later point in time never came, because the Debtor and MAP were denied access to their records and computers when Janssen abruptly seized the Store.

The Plaintiffs have criticized the lack of documentation produced by the Debtor. As an initial observation, the Court notes that the Debtor did produce a significant amount of MAP's business records. Plaintiffs' Exhibit 5 consisted of approximately 375 pages of MAP's business records, including balance sheets and profit and loss statements; a 155-page balance sheet detail printout; a 92-page balance sheet detail printout; several vendor reports; several months of First Community Bank statement printouts, including copies of checks and deposit slips, along with bank reconciliation detail reports; and sales journals and customer summaries. Not satisfied with that information, the Plaintiffs allege that the Debtor failed to produce business records as a "trial strategy." The Court finds the Plaintiffs' allegations to be without merit. There is no evidence that the Debtor withheld any information from the Plaintiffs.

The Plaintiffs argue that the Debtor could have obtained additional records from Janssen. While Janssen testified that he would be willing to turn over records currently in his possession, Janssen's testimony was made over three years after the seizure of the Store. In June of 2006, at the time that Janssen seized the Store, the parties were much more adversarial. Both MAP and Janssen retained counsel to pursue litigation, which Janssen admitted was heated. Janssen further admitted that he did not know what requests the Debtor or MAP's counsel may have made to Janssen's counsel. The Debtor testified that he sought to obtain computers and business records from Janssen but was not able to do so, and the Court finds the Debtor's testimony credible. That the Debtor and MAP did not immediately obtain records from Janssen is not indicative of any bad faith. That the Debtor did not later obtain records from Janssen, years after the Store had been closed and the litigation with Janssen had ended, is also not indicative of any bad faith. Finally, for Janssen's records, Plaintiffs had more than sufficient time to obtain them from Janssen if they were essential to the Plaintiffs' case.

### **Elements of Plaintiffs' Claims for Relief**

#### **11 U.S.C. § 523(a)(4)**

Section 523(a)(4) provides that a discharge does not discharge an individual debtor from any debt "for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny." The Plaintiffs have admitted that the Debtor did not act as a fiduciary to them, but they allege that the Debtor committed embezzlement when he received funds from MAP.

Embezzlement is a "fraudulent appropriation of property by a person to whom such property has been entrusted, or into whose hands it has lawfully come, and it requires fraud in fact, involving moral turpitude or intentional wrong, rather than implied or constructive fraud." *Driggs v. Black (In re Black)*, 787 F.2d 503, 507 (10th Cir. 1986) (quoting *United States Life Title Ins. Co. v. Dohm (In re Dohm)*, 19 B.R. 134, 138 (N.D.Ill.1982) (further quotation omitted)), *overruled on other grounds by Grogan v. Garner*, 498 U.S. 279, 291 (1991). A creditor must establish by a preponderance of the evidence that the debt is nondischargeable. *Grogan v. Garner*, 498 U.S. at 291.

As an initial matter, the Court notes that both Plaintiffs made their loans to the Debtor individually, and not to MAP. The Plaintiffs loaned their funds to the Debtor to be used for MAP's business expenses. The evidence showed, and the Court finds, that the Plaintiffs' funds were deposited into MAP's accounts and used for MAP's business expenses. The Plaintiffs complain that the Debtor committed embezzlement when he improperly diverted funds from MAP. The Court questions whether a party who makes a personal loan to a debtor can be heard to complain that the debtor personally received the loan proceeds. It does not appear that the Plaintiffs had the necessary ownership interest in MAP's funds to be able to assert a claim that the Debtor embezzled from MAP. See *Bankers Trust Co. v. Hoover*, 301 B.R. 38, 53 (Bankr. S.D. Iowa 2003) ("This Court concurs with those decisions that have held or implied there is a

requirement that the embezzled property belonged to the adversary complaint plaintiff. To hold otherwise would widen the pool of creditors who could utilize the embezzlement prong of section 523(a)(4) beyond that contemplated by Congress.”); *see also IBA, Inc. v. Hoyt (In re Hoyt)*, 326 B.R. 13 (Bankr. W.D.N.Y. 2005) (declining to find debt nondischargeable as embezzlement or conversion when debtors converted corporation’s property, in which creditor-plaintiff had no ownership interest). But even assuming that the Plaintiffs have standing, the Court finds that in this case, the Plaintiffs have failed to sustain their burden of proving that the Debtor committed embezzlement.

Specifically, the Plaintiffs have failed to prove that the Debtor acted with “moral turpitude or intentional wrong, rather than implied or constructive fraud.” *Driggs v. Black*, 787 F.2d at 507. In support of their embezzlement argument, the Plaintiffs cite *Cadle Co. v. Stewart (In re Stewart)*, 263 B.R. 608, 611 (10th Cir. B.A.P. 2001), which quotes *In re Carey*, 938 F.2d 1073, 1077 (10th Cir. 1991). In *Carey*, the Tenth Circuit stated:

To infer fraudulent intent, courts look for specific indicia of fraud. Actions from which fraudulent intent may be inferred include situations in which a debtor conceals prebankruptcy conversions, converts assets immediately before the filing of the bankruptcy petition, gratuitously transfers property, continues to use transferred property, and transfers property to family members. Courts also consider the monetary value of the assets converted in determining whether the debtor acted with fraudulent intent.<sup>4</sup> The cases, however, are peculiarly fact specific, and the activity in each situation must be viewed individually.

<sup>4</sup>Other indicia of fraud include:

(1) that the debtor obtained credit in order to purchase exempt property; (2) that the conversion occurred after entry of a large judgment against the debtor; (3) that the debtor had engaged in a pattern of sharp dealing prior to bankruptcy; . . . and (4) that the conversion rendered the debtor insolvent.

*Carey*, 938 F.2d at 1077 & n. 4 (citations and quotations omitted). Here, the Debtor has not committed any such act. Instead, the Court finds that the Debtor acted in good faith in borrowing from the Plaintiffs and in operating the Store. The Plaintiffs’ arguments to the contrary are not persuasive, for the reasons discussed below.

- Checks designated as “inventory” but issued before MAP began operating the Store.

The Plaintiffs have identified nineteen checks designated as “inventory” on MAP’s QuickBooks records, totaling \$188,000 by the end of November 2005. MAP did not begin operating the Store until December 2005, and Janssen testified that MAP did not appear to have

purchased any inventory prior to December 2005. The Plaintiffs argue that the “inventory” payments were not used to purchase inventory, so they must have been funds embezzled by the Debtor. The Court disagrees.

The Court has discussed above the nature of MAP’s QuickBooks records. Here, the fact that certain payments were recorded as inventory purchases is not determinative. The Debtor testified that the payments were not purchases of inventory but were instead payments to Janssen, and Janssen testified that he received those payments. The testimony of the Debtor and Janssen was not contradicted by any bank record or other evidence that the Debtor, rather than Janssen, received the payments. Because the Agreement between MAP and Janssen designates a portion of the purchase price as inventory, it is not unreasonable that MAP’s QuickBooks records would have designated part of the purchase price as inventory. The Court concludes that the “inventory” payments do not show that the Debtor committed embezzlement.

- Range Rover payments

The Plaintiffs devoted much argument to MAP’s making monthly lease payments totaling \$13,240.75 on the Range Rover titled in Debtor’s name and used by Mike Howe. The first payment was made shortly after Mr. Cofrin made the loan to the Debtor. But, the Range Rover was actually purchased before Mr. Cofrin’s loan. That the first payment was due after Mr. Cofrin’s loan was made does not support a conclusion that the Debtor used Mr. Cofrin’s money to purchase the Range Rover. As discussed above, the Court finds that the Debtor used Mr. Cofrin’s funds to operate the Store and to pay Janssen. But even if the Debtor had used Mr. Cofrin’s funds to purchase the Range Rover, the Court finds that the payments were part of an agreement between MAP and Mike Howe. While the agreement may be considered somewhat unorthodox, in this case it was made in good faith for a valid business reason, and it provided more benefit to MAP (\$60,000 cash) than cost to MAP (\$13,240.75). The Court concludes that the Range Rover payments do not show embezzlement.

- The Debtor’s Salary/Loans from MAP

The Plaintiffs argue that in his discovery responses, the Debtor stated that he took no salary from MAP, but when testifying in Court, the Debtor stated that he took a salary of \$5,000 per month. The Plaintiffs note that the Debtor’s tax returns do not reflect salary payments of \$5,000 per month. Additionally, the Plaintiffs point to MAP’s QuickBooks records showing loans to the Debtor totaling \$99,000 from June 2005 through June 2006. The Plaintiffs question the characterization as loans, because no loans were claimed as a loss on the corporate tax returns, and MAP did not issue a 1099-C statement to the Debtor.

After considering all the evidence, the Court finds that the Debtor had originally planned to take a \$5,000 monthly salary payment, as he represented in the business plan he gave to his investors. Because MAP did not have sufficient cash flow to support a \$5,000 monthly salary

payment, the Debtor did not include himself on MAP's payroll. Instead, from time to time when MAP had sufficient funds, the Debtor withdrew funds to pay his living expenses. He also reimbursed himself for business expenses incurred. His salary payments did not exceed the \$5,000 per month the Debtor had estimated in his business plan. The Debtor was entitled to be paid for his work and reimbursed for his business expenses, and the payments he received were reasonably well-documented in MAP's QuickBooks records. The evidence showed that some of the payments characterized as loans to the Debtor were actually payments made to Janssen. The Court has discussed the condition of MAP's QuickBooks records above, finding that they were generally accurate as to amounts, although not necessarily correct as to characterizations, and were kept in good faith. Whether the payments were characterized as salary or loans on QuickBooks is not determinative. Further, whether the Debtor treated the payments as salary or loans for tax purposes is not determinative. The Debtor testified that he retained a tax professional and followed his advice, and the Court finds that testimony to be credible. The Court concludes that the Debtor's salary payments, loan payments reflected in MAP's QuickBooks records, and tax returns do not support a finding of embezzlement.

- Payments to cover investors' early withdrawals from retirement accounts

The Plaintiffs identified certain payments to the Debtor totaling \$18,739. The Debtor testified that those funds were not for his use, but were used to repay investors who had taken money out of their retirement accounts and loaned it to MAP. At the time the investors made the loans to MAP, the Debtor agreed that he would repay any amounts needed to avoid or cover any early withdrawal penalties the investors might incur, and the identified payments were for that purpose. The Debtor's testimony was supported by the testimony of his sister, Kimberly Lewis, MAP's accountant, and by the testimony of Robert Anderson and Mike Howe. The Court finds the Debtor's explanation to be credible. The \$18,739 payments that the Debtor used to avoid investors' early withdrawal penalties do not support a conclusion of embezzlement.

- Payments of the Debtor's credit cards

When the Debtor first formed MAP, he intended to obtain bank financing. At one point he was attempting to obtain a loan from Peak National Bank. As a condition of the loan, the bank required that the Debtor's credit cards be paid in full. The Debtor complied with the bank's request, using MAP's funds to pay off his credit card debts. When the bank loan fell through, the Debtor drew on his credit cards and Bellico Credit Union line of credit to make the next payment due to Janssen, \$93,500 on November 16, 2005.

The Plaintiffs focus on the payment of the Debtor's credit cards, but they ignore the full picture. Although MAP did pay the Debtor's credit cards, shortly thereafter, the Debtor drew on those same cards and his line of credit, in the same amount or more, for the benefit of MAP. As a result, there was no real loss to MAP. MAP's payment of the Debtor's credit cards does not support the Plaintiffs' claim of embezzlement.

- Other arguments

The Plaintiffs have made other arguments, which have changed over time from the filing of their Complaint, to the beginning of trial, and to their final closing argument. The Court has previously addressed many of their arguments in the context of its ruling on the Debtor's motion to dismiss. To the extent that the Court has not specifically addressed the Plaintiffs' remaining arguments, the Court rejects them as unsupported by the evidence. Particularly unsupported by the evidence is the Plaintiffs' suggestion in their Supplemental Reply to Defendant's Closing Argument that the Debtor was operating a Ponzi scheme. The Plaintiffs failed to make that argument before or during trial or during their initial closing argument, perhaps because there was no evidence to support such an allegation. To the contrary, all the evidence supported a conclusion that the Debtor raised funds to purchase and operate the Store, the failure of which was due to actions of Janssen that were beyond the Debtor's control.

For the reasons discussed above, the Court concludes that the Debtor is entitled to a judgment in his favor on the Plaintiffs' claim for relief under 11 U.S.C. § 523(a)(4).

#### **11 U.S.C. § 727(a)(5)**

Section 727(a)(5) provides that the Court shall grant a discharge, unless "the debtor has failed to explain satisfactorily, before determination of denial of discharge under this paragraph, any loss of assets or deficiency of assets to meet the debtor's liabilities."

The Plaintiffs claim that the Debtor has failed to explain the loss or dissipation of assets, including the funds invested by Plaintiffs. "A party objecting to a debtor's discharge under § 727(a)(5) has the burden of proving facts establishing that a loss or shrinkage of assets actually occurred." *Cadle Co. v. Stewart (In re Stewart)*, 263 B.R. 608, 618 (10th Cir. B.A.P. 2001). Here, the Plaintiffs have made no such showing. The Plaintiffs' expert, Mr. Knudson, opined that the Debtor received approximately \$152,000 from MAP. As discussed above, the evidence does not support Mr. Knudson's conclusion. Most of the payments characterized as payments to the Debtor were in fact payments to Janssen, made according to the parties' Agreement.

The Plaintiffs quote *McVay v. Phouminh (In re Phouminh)*, 339 B.R. 231 (Bankr. D. Colo. 2005), in which this Court held:

Under the provisions of § 727(a)(5), a debtor will not be granted a discharge where it appears to the court that the debtor should have had the resources available to deal fairly with creditors, but is unable to explain the disposition or loss of those assets. A lack of detailed information as to the debtor's affairs prejudices creditors by making it difficult for the trustee to administer the estate and recover assets that may otherwise be recoverable for the benefit of creditors. As well, a lack of transparency creates a cloud of doubt as to the true nature of the

debtor's pre-petition activities. Where the ability to maintain records and explain the loss of assets is fully within the debtor's control, it would be inequitable to grant a discharge to an individual who, by his or her own actions, with or without fraudulent intent, has made it impossible to administer the estate or determine where the debtor's assets have gone.

*Id.* at 247. The facts of this case are nothing like those in *Phouminh*. In this case, the Debtor has produced substantial records, including those of MAP (approximately 375 pages of which were included in Plaintiffs' Exhibit 5). The Debtor's estate has not been made impossible to administer. In fact, the Debtor's Chapter 7 Trustee was satisfied with the amount of records and information produced by the Debtor. It is easy to determine where the Debtor's assets have gone. The evidence showed that the Debtor, through MAP, was successfully operating the Store, upgrading the equipment, purchasing inventory, and generating accounts receivable, generally paying debts as they became due, until June 2006, when Janssen abruptly seized the Store. After Janssen's seizure, MAP was left without any ability to operate, and the Debtor was unable to raise sufficient funds to pursue litigation against Janssen. Both the failure of MAP and the Debtor's inability to recover further records of MAP were due to actions of Janssen that were not within the Debtor's control.

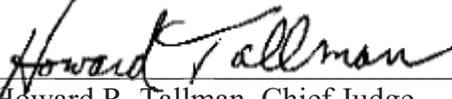
The Court concludes that the Debtor has satisfactorily explained the loss of his own and MAP's assets and the Debtor's inability to meet his liabilities. The Debtor is therefore entitled to a judgment in his favor on the Plaintiffs' claim for relief under 11 U.S.C. § 727(a)(5).

### Conclusion

For the reasons discussed above, the Court concludes that the Plaintiffs have failed to meet their burden of proving either (1) that the Debtor embezzled funds from them or from MAP, or (2) that the Debtor failed to explain satisfactorily any loss of assets to meet his liabilities. The Court will therefore enter Judgment for the Debtor on the Plaintiffs' remaining claims for relief.

Dated this 29<sup>th</sup> day of January, 2010.

BY THE COURT:

  
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Howard R. Tallman, Chief Judge  
United States Bankruptcy Court